EMPLOYMENT TRIBUNALS

Claimant: **Mr H Ahmed**

Respondent: **Barts Health NHS Trust**

Heard at: **East London Hearing Centre (in public)**

On: **23, 24, 25, 26 May 2023**

Before: **Employment Judge Moor**

Representation
Claimant: in person
Respondent: Ms M Tether, counsel

JUDGMENT

1. The complaints of unlawful deduction of wages are not well-founded and do not succeed:

a. The Claimant did not suffer any deduction of wages properly payable in relation to the London Living Wage;

b. The Claimant did not suffer any deduction of wages properly payable in relation to paid holiday/annual leave/bank holidays.

REASONS

1. The Respondent is a London NHS Trust providing healthcare across 5 hospitals ('the Trust'). The Claimant is employed in the Trust's non-emergency patient transport team.

2. The Claimant, along with 17 other claimants in the same role (see Schedule A attached), bring a number of complaints against the Trust. His claim was identified as a lead claim (along with 3 others, all of whom have since withdrawn their claims). This hearing determines his complaints about **unlawful deduction of wages**. All complaints under the Equality Act 2010 have been stayed until after this hearing.

3. The issues were clarified at a number of case management hearings, but primarily before AREJ Burgher on 10 October 2022 and on the first day of this hearing. The issues that remain to be determined at this hearing are as follows.

4. Was the non-payment of the London Living Wage ('LLW') from September 2017 onwards an unlawful deduction of wages? (AREJ Burgher's Issue 13) Specifically I must ask what wages were properly payable to the Claimant and when:

    4.1. the Claimant argues that he was entitled to be paid the LLW from 'as soon as possible' after its increase was announced in the autumn of each year. He accepts the Trust paid him the LLW from the 1 April following each annual announcement and claims the shortfall of wages between the autumn announcement and 31 March each year;

    4.2. the Trust argues the Claimant has no contractual or other right to receive the London Living Wage as soon as possible after the date increases in it were announced. It says in fact it paid him the LLW and that was increased on 1 April each year, which was the usual date for staff salary reviews.

5. The issues in respect of paid holiday are:

    5.1. whether the Claimant was contractually entitled to 'NHS leave' which he contends means the leave set out in the indicative measures letter: 27 days plus bank holidays (35 days in total) for the first 5 years' service; and 29 days plus bank holidays (37 days in total) until 10 year's service; after which it was 33 days plus bank holidays (41 days in total); and

    5.2. if so, whether he has suffered an unlawful deduction wages in respect of paid holiday in any year.

    The Trust accepts that, after a period of consultation post-transfer, the Claimant was contractually entitled to 'NHS leave' meaning the leave set out in the Agenda for Change ('AfC') contract in relation to paid holiday. But it contends this, on a proper interpretation of the AfC contract, entitled him to 20 days plus bank holidays for the first 5 years' service (28 days in total); and 21 days plus bank holidays until 10 year's service (29 days in total); after which it was 26 days plus bank holidays (32 days in total).

    The Trust contends, anyway, that I do not have the power to hear this claim because it is not a claim for wages. They say regardless of how much holiday he took each year, the Claimant was paid the same amount. His is a claim for lost holiday days rather than lost pay and is therefore a breach of contract claim which I do not have the power to hear.

6. In respect of both claims, was the claim brought in time (issue 24)?

    6.1. The Trust argues, relying on section 23(4A) of the Employment Rights Act 1996 (ERA), that I cannot award any wages due to be paid prior to 18 March 2020; and

    6.2. The Trust argues that I cannot award any wages due where the gap between the series of deductions claimed is longer than 3 months, relying on section 23 of the ERA, as currently interpreted by the higher courts. Effectively this means any of the alleged LLW shortfalls prior to 31 March 2021.

7. If either claim succeeds, should there be an 'ACAS uplift':

    7.1. Was the Trust in breach of the ACAS Code on Discipline and Grievance ('the ACAS Code');

    7.2. If so, was that breach unreasonable?

    7.3. If so, is it just and equitable to increase the award and, if so, by what percentage (up to 25%)

    The Claimant relies on an alleged delay and/or failure to respond to the various grievances.

    The Trust contends it dealt with the many collective and individual grievances reasonably promptly in the circumstances and that it responded to all of them.

8. The complaints about breaks (issue 16) and complaints about other Agenda for Change benefits (issues 20-22) were dismissed upon withdrawal at hearing before AREJ Burgher on 5 May 2023.

9. The bundle was not agreed by the Claimant. The Trust sought to include some further documents mostly from the Living Wage Foundation website. To further the overriding objective of dealing with matters proportionately to the issues and avoiding delay, I allowed the Trust to refer to those documents the Claimant had not agreed (the last section of the bundle). I explained to him that he could challenge the contents or origin of the documents if he wished to do so in his evidence. The Claimant maintained his objection to those documents; however, he ultimately sought to rely on some of them in his own submissions. Further the Claimant acknowledged in his evidence that he had looked at the Living Wage Foundation website when he raised his complaint about his wages. The added documents were therefore plainly relevant and necessary for a fair trial of the issues.

Findings of Fact

10. Having heard the evidence of the Claimant and Mrs P Moriarty, Head of People for Group Support Services at the Trust, and having read the

documents referred to me, I make the following findings of fact. I have applied the test of what was 'more likely' to have occurred.

11. Prior to 1 October 2017, ERS Medical ('ERS') provided non-emergency transport services to the Trust. The Claimant worked for ERS. He started continuous employment on 11 August 2014. Latterly he worked as an ambulance care assistant ('ACA').

12. The Claimant worked and works 9.5 hours a day, 5 days a week regularly.

13. From about the beginning of 2017 the Claimant was paid by ERS at the National Minimum Wage ('NMW') rate per hour. It was a term incorporated into his contract by statute, that he was entitled to receive this amount. The NMW increased to £7.50 an hour on 1 April 2017. The Claimant received this increase.

Proposed Transfer

14. The Trust decided to transfer non-emergency transport services in the house. This involved it 'inheriting', as Mrs Moriarty put it, 342 staff from ERS, including the Claimant.

15. The transfer came within the Transfer of Undertaking (Protection of Employment) Regulations ('TUPE').

16. The LLW is calculated by the Resolution Foundation and overseen by the Living Wage Foundation ('LWF'). It reflects the higher costs of living in London. There is no statutory right to be paid the LLW. It is a voluntary scheme that recognises the higher costs of living and working in London.

17. The Trust had entered into a new contract with many of its employees. This is known as the Agenda for Change ('AfC') contract. The terms are set out in the 'NHS Terms and Conditions of Service Handbook' (starting at p661). (Despite the term 'handbook' it is plainly a contractual document.)

18. On 26 July 2018 the Trust wrote to ERS with what it called the 'indicative measures' that it envisaged it would take following the transfer for the ACAs transferring. Nothing was said in this letter about rates of pay. The annual pay review date was stated as '1 April'. And on 'annual leave entitlement' the Trust wrote '*we plan to* ***consult*** *with staff on the introduction of agenda for change annual leave from 1 April 2018 as follows: less than five years of service 27 days; between 5 to 10 years of service 29 days; 10 years plus service 33 days. The above are exclusive of bank holidays and based on full-time hours. Part-time staff will receive pro rata entitlement.'* (my emphasis) This letter was not shown to the Claimant nor did ERS write to the Claimant to summarise it. He did not know about it at the time.

19. While the LLW rate is not referred to in the 'indicative measures' letter, Mrs Moriarty says, and I accept, that she had discussed with her management colleagues early on in the process their intention that transferring

employees should be paid at no less than the LWW year on year. This was because the Trust had required Serco to pay the LWW to their employees when working on a contract Serco had with the Trust and the Trust wanted to be 'equitable'.

20. Also, prior to the transfer Mrs Moriarty and her management colleagues had agreed between themselves that transferring employees would not receive a lower level of paid holiday entitlement than colleagues on NHS AfC terms and conditions. (I shall refer to these below).

21. On 29 September 2017, Ms Moriarty sent a final measures letter to ERS confirming the measures which the Trust envisaged taking after the transfer.

    21.1. The letter stated the Trust proposed to '*increase salary rates for anyone currently earning less than the London Living Wage (inclusive of London allowance), to the current LLW rate of £9.75 per hour from 1 October 2017*'. It repeated that the annual pay review date would be '*1 April, in line with a nationally agreed uplift for NHS employees'*.

    21.2. It stated that the Trust planned *'to consult with staff on the introduction of annual leave entitlements equivalent to Agenda for Change levels from 1 April 2019. As the WTE [whole time equivalent] for staff varies significantly, the proposed annual leave is confirmed below in hours for clarity: less than five years of service 202.5 hours between 5 to 10 years of service 217.5 hours 10 years plus service 247.5 hours. The above are exclusive of bank holidays and based on full-time hours.'*

22. The Claimant did not see the final measures letter and was not informed about its content. In the bundle is a copy of the template letter that ERS had prepared to send to the transferring employees. This is standard procedure – especially for a large group of employees who would have wanted to know the likely effect of the transfer upon them. It is unusual that the Claimant did not receive it. I question why the Claimant did not chase up information from ERS at the time, especially given that he contends his meeting with Mrs Moriarty about the transfer was quick and general. The denial of the receipt may be self-serving, given that the letter does not help the Claimant's case. Or he may have received it but it is so long ago that he has forgotten. On the other hand, I doubt if he had received it, that he would be bringing this claim, therefore I have decided that it is likely he did not receive the ERS letter summarising the measures the Trust intended to take.

Consultation with staff

23. In July 2017, prior to the 'indicative measures' letter' the Claimant met with Mrs Moriarty in one of many 'one to one' meetings she held about the transfer.

24. Understandably the Claimant has only a partial memory of that meeting, a memory that he acknowledges recalls the matters that benefited him more than other matters that may have been discussed. He recalls it being a relatively quick meeting prior to his shift one morning.

25. Mrs Moriarty does not remember the specific meeting with the Claimant, but she had many such meetings and does remember the points that she covered with all employees. She explained what TUPE meant; that their role would be transferring to the Trust; the protection to their terms and conditions that TUPE gave; and what measures the Trust envisaged taking. She also had to check with employees whether the information given by ERS to the Trust was correct. She gave all employees the opportunity to ask questions. There is no contemporary record of the meeting nor any follow-up letter. But there is a standard template that Mrs Moriarty says was prepared for the meeting and filled in at it p1323. This record states under 'Item' some phrases that it is obvious were to be said at the meeting. They show that TUPE was explained and states '*any future changes Barts Health wants to make if it does will be subject to consultation*'. The template for the meeting does not have a statement about holiday or pay rates or the annual pay review date.

26. What was likely said about pay at the meeting?

    26.1. The Claimant says that Mrs Moriarty told him there would be an increase in pay. He did not recall her being any more specific than that. He did not think she referred to a figure.

    26.2. In her oral evidence Mrs Moriarty recalled explaining to staff at the meetings that the Trust '*proposed to increase salary to the current level of LLW, £9.75'*.

    26.3. I find it is likely that Mrs Moriarty told the Claimant not only that his pay would increase but that it would increase to the level of the London Living Wage. I find it likely that by the time of the one to one meeting she and her colleagues had settled on this being the rate. And, because the future rate of pay was such a basic matter, I find it is likely she told the ERS employees including the Claimant the amount of the LLW as £9.75. I find she is likely to have done so in order to reassure them about the transfer and because this would have helped them to judge properly the benefits of transferring and would have shown the Trust in a generous light. The immediate increase for each of them was £2.25 an hour, in percentage terms a massive 30% increase. I find Mrs Moriarty is likely to have wanted to tell them such good news even if it was not written in the script she used for the meeting and even though the measures letters suggest these were proposals. In fact she and her colleagues had made a decision about it.

27. What was said about pay review dates?

27.1. The Claimant cannot recall Mrs Moriarty mentioning a pay review date. He does not think that she did.

27.2. Mrs Moriarty has not given any positive evidence that she remembers stating the pay review date. Ms Tether argues that it is likely she will have done so if I find she had told the Claimant about the level of pay as this was part of same detail. I disagree. It seems to me that a pay review date for a job is at a different level of detail than the intended rate of pay. The latter is the most important information about work – we all want to know what we'll be earning; but the date our earnings might increase is not so vital and a matter of fine detail. Further, unlike the new rate of pay, the pay review date was not something that would have changed for ERS employees like the Claimant on the NMW which had increased on 1 April. It would not therefore have been information they needed to know about as a change.

27.3. I have considered what inferences I can draw from the documents that existed at the time. The pay review date is referred to as 1 April in both the indicative measures letter and the final measures letter. However it is not referred to in the template script for the meeting.

27.4. On balance, because neither witness can remember review dates being discussed and it was not highlighted in Mrs Moriarty's one to one script, and because it was not at the level of basic information Mrs Moriarty likely wished to convey, I find it unlikely that she referred to the pay review date.

28. What was said about paid holiday entitlement?

28.1. The Claimant recalls that that Mrs Moriarty told him he would receive NHS annual leave, which she said would be better than his ERS entitlement.

28.2. Mrs Moriarty recalls that she said at the meetings that the Trust proposed to consult about moving to AfC paid holiday terms. She agreed in her evidence that they were better than the ERS entitlement which was the statutory entitlement, at least once the Claimant had gained 5 years' service. But there is her written evidence that she and her management colleagues had effectively decided this should happen.

28.3. Am I helped in making my decision by the documents? Both measures letters refer to the Trust planning to 'consult' on annual leave entitlements. The script for the meetings also emphasises that changes will be consulted upon. I find these documents support Mrs Moriarty's recollection. It is likely that Claimant recalled the point about increased holiday entitlement and has forgotten the statement about consultation because, on his own

admission, he has remembered in particular what Mrs Moriarty said that benefitted him rather than all of what she said.

28.4. On balance I find it is likely that Mrs Moriarty told the Claimant that the Trust planned to consult on a proposal to provide NHS paid holiday terms rather than that this was a certainty.

29. The Claimant did not receive any letter from the Trust after transfer confirming his terms and conditions.

London Living Wage Increases

30. The LLW is re-calculated annually. The increased rate is announced in the autumn on varying dates.

31. The Living Wage Foundation states on its website *'Living Wage Employers should implement the new rates as soon as possible and within six months of the annual announcement in the Autumn.'* Usually in October or November.

32. The Trust applied the increase in the LLW to the rate of pay of Claimant and transferring ERS colleagues on the 1 April following the previous autumn announcement. It did so because was the date of its pay review for other employees. The date aligned with its financial year and the term of its budgets.

33. Sometimes the increase was first applied in May payslips but backdated to 1 April. The Claimant acknowledges he became aware of the increase in about May or June 2018 and also he knew about the date of the increases in later years.

Holiday consultation

34. After the transfer, consultation commenced on the proposed annual leave entitlements. The Trust wrote to the Claimant they wished to consult with him about the proposed annual leave entitlement in a letter on 28 February 2018, 148.

35. First, it explained what the AfC terms and conditions on paid holiday were for those working more than 7.5 hours a day.

36. Under the AfC terms, a full time employee working **7.5 hours a week** obtains a more generous paid holiday entitlement than the statutory minimum as follows (709):

36.1. Up to 5 years' service: 27 days plus 8 days (reflecting the usual bank holidays) i.e. **35 days.**

36.2. Up to 10 years' service: 29 days plus 8 days i.e. 37 days.

36.3. After 10 years' service: 33 days plus 8 days i.e. 41 days.

If the Claimant and his colleagues had looked briefly at the AfC terms, they could have been forgiven for thinking that these were the terms they were likely to obtain after consultation. However that is not the case. Those terms are depend upon working a 7.5 hour day. This is made clear by clause 13.5 of the AfC terms and conditions. It states '*where staff work standard* ***shifts other than 7 ½ hours*** *excluding meal breaks, annual leave and general public holiday* ***entitlement should be calculated on an hourly basis to prevent staff on these shifts receiving greater or less leave than colleagues on standard shifts***.' (my emphasis)

37. The Trust has many employees working longer than 7.5 hour days. Mrs Moriarty explained in the consultation letter that to calculate their paid holiday entitlement under clause 13.5 of the AfC contract the above daily entitlement was first converted to hours. The letter set out the hours amounts, without showing all of the arithmetical working. It would have been better if it had done so.

    37.1. The letter explained NHS annual leave entitlement for 'full time employees' was: for than five years 202.5 hours; between 5 to 10 years 217.5 hours; over 10 years 247.5 hours plus bank holidays. Mrs Moriarty had taken the leave set out in AfC in days and multiplied it by 7.5. I accept this is what clause 13.5 required her to do. (Adopting the same approach, again which it would have been better to spell out in the letter, the total hours including bank holidays are: 262.5 hours; 277.5 hours and 307.5 hours respectively.)

    37.2. In the consultation letter she converted these figures back into days for the Claimant and his colleagues because their practice was to take their holidays in days rather than hours. She did this by dividing the hourly annual entitlement by the 9.5 hours they worked in the day. This showed their **total** leave including bank holidays was for up to 5 years' service **28 days**; for up to 10 years' service: 29 days; and for 10 years' service 32 days respectively.

    37.3. Thus, once the Claimant reached 5 continuous years of employment his annual leave entitlement would increase. She was correct therefore that this entitlement was better than his ERS entitlement.

38. I can understand that the ACAs when looking at these figures felt aggrieved. All they saw were the days' holiday that they were getting were less than the days employees on 7.5 hours received. This felt unfair to them. I can also see why the Trust reached this contractual agreement with its employees. This is because if employees who worked 7.5 hours worked more, for example through the bank, then they did not receive more holiday. It is very difficult to make paid holiday fair when an employer has a whole range of staff working different hours and different shift patterns.

39. The Claimant had transferred with only minimum statutory holiday entitlement. Any extra holiday was a matter for contractual agreement. Putting it bluntly the Trust had no obligation to offer any contractual terms above the statutory maximum and these were the terms for employees working over 7.5 hours that it was consulting on.

40. A number of meetings were held with staff and feedback obtained.

41. The Trust sent managers a letter to cascade to staff about the consultation outcome, p581. The Trust decided to move the Claimant and other transferring ACAs to AfC terms on paid holiday.

42. The Claimant states he did not receive this letter but I agree with Ms Tether that it is inconceivable he did not hear about the change given how many staff were involved in the consultation and certainly once he gained 5 years' service by August 2019, because it provided him with an extra days' leave. He and his colleagues are likely to have asked questions about how this leave was calculated as this was raised by Mr Purcell their TU representative, see below.

43. The Claimant's payslips show and Mrs Moriarty confirmed in her evidence that he receives the same amount of pay each month whether or not he has taken paid holidays in that month. This is because for each day of paid holiday he takes he receives the same daily rate as if he were working calculated at his hourly rate of pay multiplied by 9.5 hours. **This is not a case where the Trust has paid the Claimant less for each day of paid holiday than he would have earned if he had been at work.**

Grievances

44. The Claimant and his transferring colleagues made a number of written complaints and grievances about the terms of their employment.

45. In August 2019, the Trust proposed that the Claimant and other ACAs be moved onto full AfC conditions. This involved reduction in daily hours and changes in shift patterns along with enhancements. On 25 September 2019 he signed a petition (p163) against the Trust's contract proposal.

46. On 3 October 2019, the Claimant's TU representative, Mr Purcell put forward a *'counter proposal'* that centred on shift pattens. It also stated: '*there is much confusion over annual leave calculations, members are insisting this be fully explained in writing'*. Under the monetary options it included a line '*LLW backpay'* but this was not explained or elaborated upon at all in the proposal. I agree with Ms Tether that this was not a grievance or complaint but a proposal in the AfC consultation. No one reading it could have understood that it was the complaint now made. It might have just as easily about failure to uprate LLW promptly on 1 April.

First Collective Grievance February 2020

47. After the Trust wrote, on 7 February 2020, informing the Claimant and others that they would be transferred to the AfC terms, some of the staff affected raised a collective grievance about it on 17 February 2020. This was in detail and in writing. The Claimant was one of those identified as a representative so plainly fully involved in formulating this grievance. The grievance did not raise any complaint about LLW or annual leave but was about shift patterns, grading, flexible hours, take home vehicles and health and safety.

48. In the same month the Trust wrote on 27 February 2020 to the Claimant explaining a delay in the introduction of the AfC terms. It stated *'in the meantime those of you not on agenda for change terms and conditions will continue to receive LLW,* ***the rate of which will be uplifted from 1 April*** *2020 to £10.75 per hour*.'

49. Although I have already found that the Claimant likely knew the date of the annual increase, that letter made it abundantly clear. Yet he did not complain about it at the grievance meeting held on 16 March 2020. The Trust provided a fully reasoned and detailed outcome letter to this grievance by letter on 3 April 2020, 201. There was no appeal. Nowhere in this letter is there any reference to LLW or paid holiday being part of this grievance and I find they were not.

Individual Query/Grievance about Pay and Leave April/May 2021

50. Only over a year later on **14 April 2021 did the Claimant write to Mr Gabsi**, the general manager of the non-emergency transport service, asking him to look into 'pay issues'. He wrote *'I reside in the inner part of London and as of 9 November 2020 the LLW is £10.85 and I believe I'm receiving £10.7*5'. The claimant repeated this inquiry as a 'grievance' on 18 April. Mr Gabsi replied on 22 April 2022 that '*it was agreed that employees on remunerations outside AfC would be signed up to the prevailing minimum LLW. As this has now increased, arrangements are in hand to ensure this is reflected appropriately to affected employees this will be backdated to when the change was made.'*

51. I agree with Ms Tether that Mr Gabsi's response was ambiguous about the period of the backdate, but the matter was cleared up when, later that month, on 28 April 2021 the Trade Union wrote on the Claimant's and others' behalf to Ms Okonmah, associate director of patient transport, stating '*One question that our members are asking is are they getting the LLW increase from the 1st April?'* By email of 1 April 2021, Ms Okonmah confirmed the increase would be backdated to 1 April. I find that the Claimant received a response to his grievance by Mr Gabsi and Ms Okonmah's letters. He did not seek to appeal it. It is significant that Mr Purcell's letter shows he and members understood the date for uprating was 1 April.

52. On 4 May 2021 Ms Okonmah answered Mr Purcell's questions including about some members (not all) who did not think they had had AfC holiday entitlement. She stated: *all staff annual leave has been aligned, feel free to flag or ask your members to bring this query to their line managers and they will address it.* The Claimant did so in an email to his line manager in September 2021. Mr Gabsi informed him on 29 September 2021 that he was entitled to 29 days annual leave including bank holidays, which was correct. Thus Mr Purcell's collective question and the Claimant's individual question about annual leave received prompt responses.

October 2021 Grievance

53. In early October 2021 several collective and individual grievances were made including by the Claimant (239 ff). They included about not receiving '*full NHS annual leave entitlement'* and having their holiday entitlement incorrectly calculated. They did not include any issue about LLW.

54. On 6 October 2021 the Trust informed those grieving that it had decided to deal with all of those grievances together because they raised similar issues, which in my judgment they did. This was a wholly sensible approach.

55. A meeting was held in November 2021 to discuss the grievances. The Claimant suggests he raised an issue about the backdating the LLW at this meeting. I find it highly unlikely that he did so. There is no note of him raising this point in the minutes of the meeting nor in any of the written grievances. If it was an issue for the Claimant he is likely to have written it, given that one of the grievances was an individual one by him. Nor did the Claimant suggest he had made this verbal complaint in his witness statement.

56. On 20 December 2021 the Trust wrote deciding that the grievance was paused pending the close of the AfC consultation in March 2022. This was because if there was a move to AfC terms then it would resolve the grievances. Again this was an entirely sensible and logical approach.

February 2022 Grievance

57. On 7 February 2022 the Claimant submitted a further collective and individual grievance in which he raises a complaint about LLW not being increased at the right time.

58. There then followed some confusion when Mr Purcell and the claimant withdrew the November 2021 grievance. The difficulty was that they did not appear to have authority to do this for all those who had originally complained.

59. Nevertheless Ms Bowen of the Trust did an excellent job in analysing each ongoing grievance, identifying ongoing and new issues and setting them out in the letter of 24 February 2022 (347). She identified that issues C, D

and E in her letter were new issues, including the issue about when LLW should be uprated. The Claimant agreed that they were new in writing. And did not object to Ms Bowen identifying it as a new issue at the time.

60. A further collective grievance was raised for GMB members on 14 March 2022. This was broadly the same as the grievance raised in February 2022.

61. On 18 March 2022 the Trust decided to merge all the grievances (the October and February and March grievances) because they raised similar or interrelated concerns.

62. This caused some delay in dealing with the grievances while meetings took place with the GMB and the Trust to understand its position on 23 March 2022, 25 April 2022 and 5 May 2022.

63. A meeting to consider all of the grievances took place on 13 July 2022. At that meeting the Claimant, contrary to his assertions in his oral evidence, had every opportunity to make points and discuss the issues. There was much discussion about the LLW date of increase issue.

64. On 28 September 2022 the Trust provided an outcome letter dealing in detail with each and every issue identified in the grievances. It is plain from that outcome letter that the date of increase of the LLW was an issue raised and responded to.

65. I accept that the delays in dealing with the February grievances arose out of the confusion created by the attempt to withdraw the earlier grievance; the change in trade union and then a similar but new grievance in March. It was appropriate to deal with all the grievances together as they dealt with similar and overlapping issues and this would avoid any confusion in the outcome and give all those grieving the opportunity to be heard. The Claimant seemed to suggest his grievance should have been given priority. This would have been unreasonable: it was far fairer for the Trust to deal with the grievances as a whole.

Alleged Much Earlier Oral Complaint

66. The Claimant said for the first time in oral evidence that he complained to ‘management’ about LWW in about May 2018. He thought this manager was Terry. He recalls Terry saying the matter would be ‘sorted out’ and telling him to ‘wait’. None of this was in his witness statement despite the importance of the evidence. I have decided this evidence was not reliable because nowhere in the emails, written grievances and meeting minutes does the Claimant refer back to this early verbal complaint and his manager’s alleged reassurance. I do not consider the Claimant was likely to have been satisfied with ‘wait’ or the vague ‘it will be sorted’. He was well able to complain and would have done so sooner if he had really been fobbed off in this way.

67. The Claimant's reasons for not complaining formally sooner are not persuasive or sufficient to amount to reasonable impracticability:

    67.1. First he says he had no email – but he had the opportunity to write in other ways to management or to ask his TU representative to complain on his behalf. By November 2018 he used his personal email to write to the Trust in relation to other matters.

    67.2. Second, he said he had complained verbally and told it would be sorted out. But even if I accept this (which I don't) it is not a good enough reason not to formalise the complaint when it had plainly not been 'sorted'.

    67.3. Third, and most obviously, he was highly involved in making and pursuing written complaints about other matters. He knew how to complain and would have done so earlier if he had thought the LLW date was a problem.

    67.4. In closing he told me about his father's illness and bereavement. That must have been a difficult time for him. But I am afraid that it does not fully explain the very long delay in complaining.

68. The Claimant in fact took 37 days of paid holiday in the leave year 2020/2021.

69. In so far as the Claimant alleged he had worked every bank holiday, this was unreliable evidence given that he had taken 3 bank holidays off in 20/21 and one bank holiday off as paid holiday in 2021/22.

Legal Principles

70. I refer to Ms Tether's excellent skeleton argument and closing submissions for the relevant law. I summarise it here far less ably than she has done.

TUPE

71. An employee transfers on same contractual terms and conditions he had with his original employer unless and until there has been agreed variation.

Unlawful Deduction of Wages

72. The Claimant brings unlawful deduction of wages claims. Section 13 ERA provides so far as is relevant.

    (1) An employer shall not make a deduction from wages of a worker employed by him unless

    (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract or

    (b) the worker has previously signified in writing his agreement or consent to the making of the deduction…

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

73. Section 27 ERA defines 'wages' as '*any sums payable to the worker in connection with his employment including (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise*….

74. I agree with Ms Tether that wages are not properly payable unless there is a legal entitlement to them. This typically arises under the contract of employment though not necessarily.

75. There is a primary 3 month time limit to bring deduction of wages complaints, section 23 ERA. Time starts to run from the date that the wages should have been paid, or if a series of deductions to wages, the last in that series. I have a discretion to extend time only if it was 'not reasonably practicable' to bring the claim in time and the extension can only be to the point when it was reasonably practicable.

76. Where there is more than a 3-month gap in a series of deductions, the current law is that this gap stops that series from being a series under section 23, Bear Scotland v Fulton [2015] IRLR 15 EAT. This principle has been doubted in later cases and is the subject of a Supreme Court case yet to be decided, but today it is binding upon me.

77. Finally, section 23(4A) ERA creates a clear backstop that I cannot consider any part of a complaint if it relates to a deduction from wages '*where the date of the payment of the wages from which the deduction was made was before the period of 2 years ending with the date of presentation of the complaint'*. Here that means before 18 March 2020. This was explained to the Claimant by AREJ Burgher at the hearing on 5 May 2023.

Holiday Pay and Wages

78. Unlawful deduction of wages claims require there to have been a deduction of wages properly payable. I agree with Ms Tether therefore that a claim that argues an employee was entitled to more paid holiday is not a claim for wages, unless he has taken that extra holiday and not been paid for it. I agree with the reasoning of EJ Brewer in Niouman v Barts Health NHS ET 3220557/2020 although it is not binding upon me.

79. Where an employee argues they were entitled to more holiday under their contract and they have been denied it then that is a breach of contract claim. I do not have the power to hear breach of contract claims unless they are outstanding after the termination of employment. The Claimant

remains employed therefore in his case even if he had brought such a claim I have no power to hear it.

Contract Principles

80. The legal requirements for a contract are summarised at paragraph 49 of the judgment of Leggatt J in Blue v Ashley [2017] EWHC 1928 (Comm). The fourth requirement is that there must be:

    80.1. Sufficient certainty and completeness for the agreement to be enforceable.

81. Mr Blue sought to establish a legally binding contract through an oral agreement made in a pub during a social evening of drinking among business associates. Mr Ashley was said to have promised Mr Blue £15m if the share price of the company reached £8. At that time it was £4. One of the reasons Mr Blue failed in that case was because he could not show that there had been any agreement about the time within which share price had to reach £8. This meant the agreement was not complete and was not certain enough to have been enforced.

82. When I look at alleged oral agreements I must consider what objectively the words meant rather than the subjective views of the parties.

83. Ms Tether has also taken me to the remarks of Leggatt J on how best to assess evidence about an oral agreement reached in undocumented conversations. In Ashley Leggatt J recited the difficulties he had first set out in Gestmin, namely the difficulties of memory evidence bearing in mind current psychological research on memory. He suggested, certainly in a commercial case, given the difficulty with such evidence, the best approach to adopt is to 'place little reliance on witnesses' recollections of what was said in meetings and conversations and to base factual findings on inferences drawn from the documentary evidence and known or probable facts' (para 65-70). While this is not a statement of law that I must slavishly follow, it is refreshing as a judge of the facts to see the difficulties I face in assessing recollection evidence set out starkly in this way. My job is to decide what I think is most likely to have been said. In doing so I take into account the ways in which memory of an event can be unreliable, self-serving, partial and so on. I also put much reliance on the context and the contemporary documents.

Implying terms

84. Some contracts include implied terms: those not expressly stated or written but that are included in it by legal 'implication'.

85. The law is clear however that I cannot imply a term into a contract because I think it would be a reasonable or sensible term to have. I can only find an implied term if I can presume that it would have been the intention of the

parties to include it in the agreement at the time the contract was made. In order to do so, I must be satisfied that so far as is relevant here:

85.1. the term is *necessary* in order to give the contract 'business efficacy'; or

85.2. the term is so obvious that the parties must have intended it.

Unilateral Variations: acceptance by conduct/waiver

86. If an employer attempts to impose or vary a contractual term and the employee does not expressly agree then what is the position if they continue to work? By working, the argument goes, the Claimant is continuing to perform the contract and must be taken to have agreed the change. It is not quite as simple as that.

87. If a contractual term is imposed to the Claimant's advantage, like an increase in pay, he does not have to expressly agree it before it becomes a term of the contract. The variation can be assumed by his conduct in continuing to work, see Elias LJ in Abrahall and others v Nottingham City Council and another [2018 ICR 1425 CA. Where the term is to the employee's disadvantage that I must look more carefully at whether continuing to work without protest amounts to an acceptance of the term.

88. The starting point is Abrahall para 85 Underhill LJ '*I can see no reason why an employee's conduct in continuing to perform the contract, in circumstances where the employer has made clear that he wishes to modify it, may not in principle be reasonably understood as indicating acceptance of the change.'*

89. Underhill LJ went on at paragraphs 86-88: '*However, to say that in some circumstances continuing to work following a contractual pay cut may be treated as acceptance does not mean that it will always do so. On the contrary, what inferences can be drawn must depend on the particular circumstances of the case.' ...The authorities illustrate some specific points about the proper approach to the question of when continuing to work may constitute acceptance. … I briefly identify them as follows.'*

First and foremost, the inference must arise unequivocally. If the conduct of the employee in continuing to work is reasonably capable of a different explanation it cannot be treated as constituting acceptance of the new terms: that is why Elias J in the Solectron case used the phrase 'only referable to'.

Secondly, protest or objection at the collective level may be sufficient to negative any inference that by continuing to work individual employees are accepting a reduction in their contractual entitlement to pay, even if they themselves say nothing. This is clear from Rigby v Ferodo Ltd *[1988] ICR 29*

Thirdly, Elias J's use in para 30 of his judgment in Solectron of the phrase 'after a period of time' raises a point of some difficulty. It is easy to see how it may not, depending on the circumstances of the particular case, be right to infer acceptance of a contractual pay cut as from the day that it is first implemented: the employee may be simply taking time to think. Elias J's formulation is intended to recognise that a time may come when that ceases to be a reasonable explanation.

90. In Solectron Scotland Ltd v Roper [2004] IRLR 4, EAT Elias J observed: '*The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer*? *That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions.*

ACAS Uplift

91. Under s207 of the Trade Union and Labour Relations (Consolidation) Act 1992, it is admissible for us to consider the ACAS Code.

92. The provisions of s207A of that Act mean that if either of the claims is successful then I can consider whether the awards should be increased. This is not a separate head of claim but is only relevant if the Claimant wins his wages claims. If so, I must ask the following questions:

    92.1. Was there a breach of the ACAS Code;

    92.2. Was that breach unreasonable;

    92.3. Is it just and equitable to increase the award. And, if so, by how much (up to 25%).

Application of Facts and Law to Issues

LLW Date of Annual Increase

93. The LLW is not a legal entitlement. There is no rule of law that if an employer agrees to pay it, they must do so as soon as possible from the date of the announcement. Even the LWF does not require that from employers because they give a backstop date of 6 months.

94. The Claimant cannot establish on the facts that there was a term of his contract that the LLW should be paid as soon as possible from the date of the announcement.

    94.1. First there was no express term to that effect: it was not written down and agreed. Nor was it agreed verbally at the meeting between the Claimant and Mrs Moriarty.

94.2. Second, even if words to that effect had been said, they are too uncertain to be a contractual term. As Ms Tether pointed out – 'as soon as possible' doesn't help me decide what particular day the new rate begins and the Claimant could not therefore have enforced the term.

94.3. Third, it is not necessary for business efficacy to imply such a term. Business efficacy does not demand that the rate be paid immediately, indeed that is something even the LWF does not require. It requires accredited employers (the Trust was not one of those) to pay the rate within 6 months.

94.4. Fourth, it is not such an 'obvious' term that it can be implied because the parties must have intended it. It is not at all 'obvious' that this date is what the Claimant and Trust would have agreed if it had been raised. First because it is uncertain, second because the LWF gives businesses time to implement, and third because the Trust has a standard pay review date of 1 April.

95. I agree with Ms Tether that, in any case, it was highly improbable that the Trust would have agreed verbally or in writing to such a date. The Trust had a set date of 1 April for its salary increases that aligned with its budget and financial year. Both measures letters make it clear this is the salary review date. It is highly unlikely that in any situation Mrs Moriarty would have agreed to a different date.

96. Given there was no contractual term to increase wages to the LLW rate as soon as possible after it was announced, then there has been no deduction of wages properly payable to the Claimant.

97. My decision would be the same if the Claimant had argued that the term was to implement the increase on the day of the announcement. While that would have not failed on the grounds of uncertainty: my findings of fact are that such a term was not entered in to expressly between him and the Trust, whether in writing or verbally; and it is not necessary to imply such a term for the other reasons I have already given.

98. This decision means that the LLW deduction of wages claim fails.

Alternative Defences

99. At the request of the Trust and because this is a lead case where the facts of what was said between the parties may differ in other cases, I have gone on to consider the alternative defences the Trust has raised.

Time Limits

100. The claim was presented on 18 March 2022 after a period of early conciliation between 2 and 4 March 2022. The LLW increase announcement was made at some time in the autumn of 2021, and, if his claim had been a good one, the Claimant would have experienced a series

of deductions in relation to it each month to March 2022. Thus his claim would have been in time in respect of the 2021 autumn announcement. But, applying Bear Scotland, it would have been out of the primary time for the earlier announcements because there would have been more than a 3 month gap between deductions.

101. On the evidence I have heard it was reasonably practicable for the Claimant to have brought his claim in time for the earlier alleged deductions, certainly from May 2018 onwards when he was aware that the increases were only made by 1 April 2018. He has not persuaded me that there was any practicable problem in bringing his claim earlier. He was well able to raise queries, research and complain. If he had done so he would have found out from mid 2018 onwards that the LLW increase was announced each autumn. He would therefore have known all the facts necessary for bringing this claim far sooner. None of the personal matters he has raised before me put a practical impediment in his way to bringing a claim long before he did. Thus, if he had established a contractual right to be paid the LLW at the time he alleges each year, he would have only been able to claim deductions from the autumn of 2021 onwards.

Temporal Limit

102. Even if I am wrong about the time limit, the Claimant would have been prevented by section 23(4A) in pursuing a claim for any deduction of wages prior to 18 March 2020.

Waiver

103. If I am wrong, and there was a term that the LLW should increase as soon as possible or at the date of the LWF announcement, then has the Claimant waived the breach of that term by continuing to work without complaint for so long or, putting it another way, accepted the imposed variation of contract by conduct?

104. On my findings of fact it took until, at the earliest, April 2021 for the Claimant to raise any kind of grievance about the date of the uplift to LLW. He had experienced three years of uplifts in April without complaining at all. The counter proposal in October 2019 cannot be interpreted as a complaint.

105. This question is something I must consider objectively. In principle, conduct can amount to acceptance of a variation but it does not have to do so, I must consider all of the circumstances.

106. If it had been necessary for me to do so, I would have found that, viewed objectively, the Claimant had waived any breach or accepted the imposed variation in relation to the timing of the LLW increase.

    106.1. He continued to work, knowing that his wages were increased on 1 April: these increases happened three times before he raised the

matter. He knew when his pay increased: that much was obvious from his payslips which set out the hourly rates.

106.2. He could easily have researched what the LLW was and seen when announcements were made. We know that he did so at a later date.

106.3. Even if I am wrong about that the annual review date was certainly made clear by the Trust's letter of 27 February 2020 and the Claimant continued to work through 2 more increases on 1 April before he complained in writing.

106.4. The fact of the matter is that for several months of each year the Claimant continued to work and receive less pay than he thinks now he should have been paid. This cannot really call for a different explanation other than acceptance of the pay review date imposed.

106.5. There was no protest at a collective level in the intervening years. On the LLW issue there was no formal grievance until February 2022.

106.6. This is one of those cases where so much time had passed that it cannot be explained by the employee having to think about his options. It can only be explained in my judgment by an acceptance of the term as to pay review date.

106.7. I agree with the ways in which Ms Tether has distinguished Abrahall on the facts.

106.8. My view, for what it is worth, is that the Claimant has added the concern about the LLW date of increase as a makeweight to the ongoing grievances he and his colleagues had about being moved to AfC terms.

Holiday Entitlement

107. My clear conclusion is that there was no agreement reached about paid holiday entitlement between the Claimant and Mrs Moriarty at their meeting. This is because I have found she likely told him there would be consultation on moving to NHS annual leave terms. Saying that you are going to consult on a proposal is not the same as offering it. Mrs Moriarty was effectively saying 'we are thinking about moving you to NHS annual leave terms' and we will discuss that with you after the transfer to get your point of view. This is, of course, what the Trust eventually did.

108. In my judgment the Trust imposed a term that the Claimant would be entitled to AfC paid holiday terms at the conclusion of the consultation. This was a unilateral variation of the Claimant's contract. It was a variation ultimately beneficial to him because it increased his paid holiday entitlement once he had 5 years' service. The Claimant thought he was on

NHS annual leave terms so there was no need for him to accept this variation expressly, he understood it to be the case. I find it was a term of his contract that he was to be entitled to AfC paid holiday entitlement.

109. The difficulty for the Claimant is that he has misinterpreted AfC terms. He is not entitled to the paid holiday he claims. When the new holiday terms were imposed, he was still only entitled to 28 days paid holiday a year including paid holidays on or in lieu of bank holidays. This was the case until 11 August 2019 when he completed 5 years' service and was then entitled to 29 days paid holiday. The Trust has not denied the Claimant the paid holiday he was due.

110. In any event I agree with Ms Tether that the claim fails on the jurisdictional point she raised. This is because it is really not a claim for unpaid wages or holiday pay at all but a claim for compensation for losing extra days of holiday. Claims arising under section 23 ERA are money claims. Here the claimant has not lost any money: he was paid the same whether on holiday or at work. His real complaint is that he has lost days off. I disagree that he has done so, but even if I am wrong, this is not a claim for pay but for compensation for lost days of rest. I agree with the reasoning of EJ Brewer in Niouman v Barts Health NHS Trust. Ms Tether persuasively reinforces her point with an analogy with the way Regulation 30 of the Working Time Regulations distinguishes between claims for lost pay and refusal of leave.

111. Even if I am wrong about all of the above, the same temporal limitation point would have applied. The Claimant could not pursue payment in respect of holiday falling due prior to 18 March 2020 because of Section 23(4A) ERA.

112. Further on the facts I have found, the Claimant can have no claim in respect of holiday for the leave year April 2020 to March 2021 because he in fact took and was paid for 37 days of holiday in that year.

ACAS Uplift

113. Both claims have failed so there is no need for me to decide the ACAS uplift point but I do so because as this is a lead claim.

114. It is plain to me that the Trust is not in breach of the ACAS Code and certainly not unreasonable breach.

115. The Code starts by stating '*If it is not possible to resolve a grievance informally, employees should raise the matter formally and without unreasonable delay…'*

116. The Code goes on to make four key recommendations in relation to the handling of formal grievances:

    116.1. hold a meeting with the employee to discuss the grievance without unreasonable delay;

116.2. allow the employee to be accompanied at the meeting;

116.3. decide on what action, if any, to take; and communicate decisions to the employee without unreasonable delay; and

116.4. allow the employee to take grievance further if not resolved

117. The first point to note is that the Claimant plainly has not raised his grievance about LLW or annual leave without delay. He has this responsibility under the Code and has not complied with it.

118. When the Claimant did raise grievances the Trust has always responded to them as my findings of fact show. Even if he does not agree with the outcome, they were taken seriously and responded to in detail. There is no breach of the ACAS Code in this respect.

119. The Claimant argues the grievance he made on 18 April 2021 was not responded to but it was by the letter of 22 April 2021. He did not appeal this response or take the matter any further. His inquiry and grievance were in the same format and the response was in substance a response to both. It is unreasonable for him to suggest that the same response should have been sent to him twice.

120. There was no unreasonable delay given the number of grievances, the intervening consultation on AfC, and the intervention of the GMB. It was appropriate to wait until consultation on Afc terms had completed before considering the grievance because it may have resolved it.

121. Any delay caused by the merger of the grievances was also not unreasonable: it was appropriate to do so because of the overlapping issues. Nor would it have been appropriate to treat the October grievance as withdrawn when all those signed up to it had not given their authority. Nor would it have been reasonable to prioritise the Claimant's grievances over others.

122. Thus, if I had had to decide it, the Claimant would not have persuaded me that the Trust was in breach of the ACAS Code let alone an unreasonable breach. In fact it is the Claimant who was in breach of the ACAS Code by not bringing grievances about LLW and the annual leave provisions promptly.

Employment Judge Moor
Dated: 30 May 2023

Schedule A

The cases that are currently continuing for which this is a lead case are as follows:

1. Mr Younus Miah 3201124/2022
2. Mr Habibur Rhaman 3201127/2022
3. Mr Helal Ahmed 3201130/2022 (this claim)
4. Mr Kamran Ali 3203227/2022
5. Mr Mohammed Redwan Ahmed 3203237/2022
6. Mr Mohammed Nasir Hoque 3203258/2022
7. Mr Mnor Singh 3203805/2022
8. Mr Gary Hanlon 3204611/2022
9. Mr Mohammed Fokrul Ali 3204292/2022
10. Mr Adnan Khalid 3204671/2022
11. Mr Mohammed Zubair Ahmed 3203823/2022
12. Mr Terrell Davis 3203843/2022
13. Mr Mark Huie 3203849/2022
14. Miss Patrice Powell 3203981/2022
15. Mr Abdirizak Mohamed 3203992/2022
16. Mr Olumuyiwa Leigh 3203944/2022
17. Mr Oluwatayo Rhys Peters-Oshinowo 3204059/2022

The other claimants on AREJ Burgher's original Schedule A list attached to his order of 17 October 2022 have withdrawn their claims. Judgments have been or will be promulgated dismissing their claims.