EMPLOYMENT TRIBUNALS

Claimant: **Ms S Ogunlola**

Respondent: **London Ambulance Service NHS Trust**

Heard at: **East London Hearing Centre (via Cloud Video Platform)**

On: **18, 19 and 20 April 2023**

Before: **Employment Judge Brewer**
Members: **Ms P Alford**
Ms M Legg

Representation

Claimant: In person
Respondent: Ms H Patterson, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claimant's claims of direct race discrimination fail and are dismissed.

2. The claimant's claim of unfair dismissal fails and is dismissed.

3. The claimant's claims of unauthorized deductions from wages fail and are dismissed.

4. The claimant's claims of breach of contract fail and are dismissed.

REASONS

Introduction

1. This case was listed for a 3-day hearing before a full Tribunal. At the hearing the claimant represented herself and she gave evidence on her own behalf. She did not call any other witnesses. The respondent was represented by Ms Patterson

of Counsel. She called Mr Daniel Gyamfi, HR Manager, Mr J Ivory, 111 Deputy Manager, Ms M Khalid, Integrated Urgent Care Team Lead, Ms M Nugent, Associate Pathways Tutor, Ms L Priestley, Internal Auditor and Accredited Pathways Trainer and Ms V Rogers, Accredited Pathways Trainer.

2. Each witness produced a written witness statement which the tribunal read in advance and the statements were taken as read.

3. The Tribunal also had an agreed hearing bundle running to 627 pages along with a supplementary bundle containing documents relevant to the assessments undertaken by the claimant (the CM bundle). At the end of the evidence, we heard submissions from both parties. The hearing concluded at around 11.45 on the third day and we agreed, if possible, to give a short judgment later that afternoon to be followed by full written reasons which in the event we were able to do. What follows are the Tribunal's detailed reasons.

4. We should just mention that the CM bundle was the subject of an application by the respondent to redact certain parts that bundle and also to require witnesses to refrain from making certain specified comments on the basis that the tests or assessments which we were going to discuss in some detail are undertaken regularly and on a national basis and the respondent argued that it would not be appropriate to give away any questions or answers in relation tom those assessments in what was after all a public hearing.

5. Although the claimant objected to the respondent's application, she was a little unclear as to the basis of that objection other than to say that it was her right to be heard and that if necessary, the questions in the assessments could be altered. We had to balance the principle of open justice with what would obviously be a problem for the integrity of the assessments If the questions and answers became the subject of public discussion. It was not in our view as simple as saying that the questions could be altered because of course the questions are not set by the respondent but by a third party which is discussed below. After deliberation the Tribunal accepted the application, and we made an order which was served on the parties in relation to redaction and limiting responses in cross examination to avoid giving away any details of the tests.

Issues

6. There was an agreed list of issues as follows.

Direct race discrimination (Equality Act 2010 section 13)

7. The Claimant relies on the protected characteristic of race and identifies as Black.

8. Did the Respondent do the following things:

    8.1. Mahum Khalid and Jamie Ivory of the respondent required the claimant to undertake the NHS Pathways Core Module 2 ("CM2") training and sit an exam, despite the claimant having been an employee of the respondent for almost three years?

8.2. Michelle Nugent and Lucy Priestly deliberately omitted marks from the claimant's first attempt at the CM2 exam, and thereby failed the claimant, and

8.3. Michelle Nugent and Victoria Rogers deliberately marked questions on the CM2 re-sit wrong, causing the claimant to fail the exam the second time.

8.4. The claimant was stood down from work between the first exam and the re-sit and after the re-sit?

9. Was that less favourable treatment?

10. The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

> The claimant says she was treated worse than Mr Islam Murti, Ms Lesley Tyson and a third comparator to be identified.
>
> If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated (a 'hypothetical comparator').

11. If so, was it because of race? In relation to causation, the claimant disputes that it was a requirement to sit for the CM2 exam in order to carry out her role.

Time limit for discrimination claim

12. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 20 March 2021 may not have been brought in time.

13. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

13.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

13.2. If not, was there conduct extending over a period?

13.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

13.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

13.5. Why were the complaints not made to the Tribunal in time?

13.6. In any event, is it just and equitable in all the circumstances to extend time?

Unfair dismissal

14. Was the claimant expressly dismissed? The claimant says she gave notice of resignation to elapse at the end of December 2021, but during her notice period the respondent expressly dismissed her on 30 November 2021. The respondent says the claimant gave notice of resignation which elapsed on 1 December 2021, and that the claimant's employment was terminated on that date by her resignation.

15. Alternatively, if there was no express dismissal and the claimant's employment was terminated by her resignation, was the claimant constructively dismissed?

16. Did the respondent do the things set out at paragraph 6 above and additionally, on 5 November 2021, invite the claimant to a capability hearing scheduled for 12 November 2021?

17. Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

    17.1. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

    17.2. whether it had reasonable and proper cause for doing so.

18. Did the claimant resign in whole or in part in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

19. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

20. If the claimant was dismissed, what was the reason or principal reason for dismissal? If the claimant was constructively dismissed, this requires consideration of what was the reason for the breach of contract?

21. Was it a potentially fair reason?

22. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Wrongful dismissal / breach of contract

23. What was the claimant's notice period?

24. Was the claimant paid for that notice period?

Unauthorised deductions from wages / breach of contract

25. Was the claimant entitled to be paid the following sums, and if so, did the respondent fail to pay them:

25.1. pay in respect of 123.46 hours of annual leave at £13.1306 per hour totaling £1,621.10; and

25.2. arrears of pay in respect of her unsocial hours payment for the month worked in October 2021 of £415.27.

Law

Direct race discrimination

26. In relation to direct race discrimination, for present purposes the following are the key principles.

27. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

28. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

29. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

30. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

31. In **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. race) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

Unfair constructive dismissal

32. The claimant claimed that she had been constructively dismissed. She resigned following, she says, a series of acts, faults and omissions by the respondent which, she says, amounted to a breach in the implied term of trust and confidence. The relevant law is as follows.

33. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in **Malik v BCCI; Mahmud v BCCI** 1997 1 IRLR 462 where Lord Steyn said that an employer shall not:

> *"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

34. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence — **RDF Media Group plc and anor v Clements** 2008 IRLR 207, QBD. As in that case, this will usually be the employee.

35. In **Hilton v Shiner Ltd — Builders Merchants** 2001 IRLR 727, EAT, for example, Mr Recorder Langstaff QC stated in connection with a submission by counsel as to the proper legal test for establishing a breach of the implied term in the context of a case where the employer was alleging that the employee's misconduct had destroyed trust and confidence:

> *"When Mr Prichard identified the formulation of the trust and confidence term upon which he relied, he described it as being an obligation to avoid conduct which was likely seriously to damage or destroy a mutual trust and confidence between employer and employee. So to formulate it, however, omits the vital words with which Lord Steyn in his speech in Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) (above) qualified the test. The employer must not act without reasonable and proper cause… To take an example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process. Yet it could never be argued that an employer was in breach of the term of trust and confidence if he had reasonable and proper cause for the suspension, or for taking the disciplinary action."*

36. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. That is commonly called constructive dismissal.

37. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

> *'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged*

from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed'

38. In order to successfully claim constructive dismissal, the employee must establish that:

38.1. there was a fundamental breach of contract on the part of the employer;

38.2. the employer's breach caused the employee to resign;

38.3. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

39. We note that a constructive dismissal is not necessarily an unfair one — **Savoia v Chiltern Herb Farms Ltd 1982** IRLR 166, CA.

40. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract — **Lewis v Motorworld Garages Ltd** 1986 ICR 157, CA. However, an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. This was confirmed in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

41. There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer — **Logan v Customs and Excise Commissioners** 2004 ICR 1, CA.

42. In **Omilaju v Waltham Forest London Borough Council** 2005 ICR 481, CA, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test. In that context, in **Chadwick v Sainsbury's Supermarkets Ltd** EAT 0052/18 the EAT rejected a tribunal's finding that a threat of disciplinary action was 'an entirely innocuous act' that could not constitute a last straw.

43. Where the act that tips the employee into resigning is entirely innocuous it will be necessary to consider whether any earlier breach has been affirmed. In ***Williams***

v Governing Body of Alderman Davies Church in Wales Primary School *EAT 0108/19* a teacher, W, was suspended for an alleged child protection matter. He was also subject to disciplinary proceedings for alleged breach of the school's data protection policy. He was dissatisfied with the process and resigned after several months, stating that the last straw was learning that a colleague, under investigation for a connected data protection breach, had been instructed not to contact him. The tribunal found that this instruction was reasonable in the circumstances and entirely innocuous. It held that, following ***Omilaju***, this act could not contribute to a breach of the implied duty of trust and confidence and was not a last straw entitling W to treat his employment contract as terminated. On appeal, the EAT held that, where there is conduct by an employer that amounts to a fundamental breach of contract, a constructive dismissal claim can succeed even if there has been more recent conduct by the employer which does not in itself contribute to a breach of the implied term of trust and confidence, but which is what tips the employee into resigning. Crucially, however, the employee must not have affirmed the earlier fundamental breach and must have resigned at least partly in response to it.

44. In terms of causation, that is the reason for the resignation, a tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause — **Wright v North Ayrshire Council** 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in **Abbycars (West Horndon) Ltd v Ford** EAT 0472/07,

> *"the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon"*

45. Where an employee has mixed reasons for resigning their resignation will constitute a constructive dismissal provided that the repudiatory breach relied on was at least a substantial part of those reasons (see **Meikle v Nottinghamshire County Council** [2004] EWCA Civ 859, [2005] ICR 1).

46. Thus, where an employee leaves a job as a result of a number of actions by the employer, not all of which amounted to a breach of contract, they can nevertheless claim constructive dismissal provided the resignation is partly in response to a fundamental breach.

47. If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract resulting in the loss of the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the employee

> *"must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged"*

48. This was emphasised again by the Court of Appeal in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, although Lord Justice Jacob did point out that, given the pressure on the employee in these

circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation.

49. The Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** 2019 ICR 1, CA, held that, in last straw cases, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

50. If one party commits a repudiatory breach of the contract, the other party can elect to either affirm the contract and insist on its further performance or accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses. If they affirm the contract, even once, they will have waived their right to accept the repudiation.

51. As to any delay in making such a decision, the employee must make up their mind soon after the conduct of which they complain. Tribunals must take a '*reasonably robust*' approach to waiver; a wronged employee cannot ordinarily expect to continue with the contract for very long without losing the option of termination (see, e.g., **Buckland v Bournemouth University Higher Education Corporation [**2010] EWCA Civ 121, [44], per Sedley LJ).

52. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation. For example, in **Hoch v Thor Atkinson Steel Fabrications Ltd** ET Case No.2411086/18 H resigned nearly three weeks after receiving an email accusing him of not doing his job properly, which was the last straw following several incidents of harassment on the grounds of race and sexual orientation. The tribunal found that he could not be said to have affirmed his contract by not resigning earlier as he had been on holiday. That said, affirmation can be implied by prolonged delay and/or if the innocent party calls on the guilty party for further performance of the contract by, for example, claiming sick pay.

53. In relation to whether the contract has been affirmed, or the breach waived by the claimant, the Court of Appeal in **Kaur** (above) offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

    53.1. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

    53.2. has he or she affirmed the contract since that act?

    53.3. if not, was that act (or omission) by itself a repudiatory breach of contract?

    53.4. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

53.5. did the employee resign in response (or partly in response) to that breach?

Unauthorised deductions

54. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

> *'An employer shall not make a deduction from wages of a worker employed by him.'*

55. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).

56. Section 27(1) ERA defines 'wages' as:

> *'any sums payable to the worker in connection with his employment'*

57. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract 'or otherwise'.

58. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *'or otherwise'* does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

59. Finally, there is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

Breach of contract

60. In relation to breach of contract the principles are not complex. There is a need to determine what the claimant's contractual entitlement was and then to decide whether the respondent breached that contract.

Findings of fact

61. We make the following findings of fact. References are to page numbers in the bundle and the CM bundle unless otherwise stated.

62. The respondent is the provider of ambulance services for London. This of course is the well-known 999 service.

63. The respondent is also one of the providers of the 111 Service for London. The 111 service has a number of providers who provide the service under licence from NHS Digital, which is part of NHS England, the organisation which leads the NHS.

64. The 111 service is essentially a triage system in which callers are put through to a call handler who, by asking appropriate questions and assessing the answers, takes the caller down particular pathways and then ultimately to appropriate advice. The pathways are created by NHS Digital. So, for example, there will be a pathway dealing with strokes, a pathway dealing with immediate threat to life, a pathway dealing with self-harm and so on. The pathways are accessed by using software called NHS Pathways. Only accredited call handlers may access this software.

65. NHS Digital requires all of those undertaking work using NHS Pathways to undergo specific training [145 – 162]. All individuals who successfully undergo the training become accredited, in this case accredited call handlers, who are referred to by the respondent as health advisers (although for the sake of clarity we shall continue to use the term call handlers). The requirements for accreditation as a call handler are successful completion of the NHS Pathways Core Module Part 1 (CM1) and the NHS Pathways Core Module Part 2 (CM2).

66. To achieve CM1 staff undergoing period of 10 days study. To achieve CM2, there will have been successful completion of CM1, a period of supervised practise followed by two days of training and an assessment. The documentation provided by NHS Digital states expressly that "*the processes and standards within this document must be completely adhered to for quality control purposes*" [147]. Furthermore, it states that "*the safe and appropriate use of NHS pathways is predicated on the delivery of the common learning programme to all users prior to live NHS pathways system use. Completion of this must be recorded in the NHS pathways user passport*".

67. Thus, in theory by checking a person's NHS pathways user passport, it should be relatively straightforward for an employer to check whether somebody it proposes to employ as a call handler for the 111 service has completed their accreditation training.

68. In the normal course of events, it follows that CM1 will be undertaken by those new to call handling in the 111 service and CM2 should follow some 10 weeks after completion of CM1 [149]. It is also clear that CM1 is achieved through training whereas CM2 is largely based on learning from supervised practise [see also 366 – 382].

69. We should also deal with one matter which the claimant appeared to raise during her cross examination which is that there is no requirement for what she referred to as an exam for the CM2, although as we say the better view is that there is an assessment. It is quite clear from the NHS Digital documentation that there has to be an assessment of competence certainly in relation to the CM2. A training programme for the CM2 is set out at [149] which talks about different types of supervised practise, so-called consolidation shifts and in week 10 it states, "*Core Module Two during this week*". It follows that if CM2 was not the test, but the 10-

week supervised practise, these words would be meaningless. Week 10 would simply be "completion of Core Module 2" or some other such wording. Furthermore, there is a clear reference to staff re-sitting a failed assessment in the documentation from NHS Digital which starts at [366].

70. We find as a fact that there is a requirement for a CM2 assessment, test or examination and that success at CM2 is a reference to completion of both the period of supervised practise and the examination or assessment at the end of that. We also note that the claimant conceded in cross examination that there was a requirement imposed on the respondent by NHS Digital that call handlers had passed CM2 [see also 366 *et seq*].

71. The pass mark for the CM2 assessment is 70%.

72. The claimant had been employed as a call handler in the 111 service by a company called Vocare. In 2018 she applied for and was offered the same role with the respondent. She started her employment with the respondent on 29 October 2018 on the standard terms and conditions of service for most NHS staff known as Agenda for Change [177].

73. The claimant's contract of employment included at clause 15.2 the following:

> *"… you will be required to give and are entitled to receive a minimum of four weeks' notice of termination of your contract…"* [186].

74. For reasons which remain entirely unclear, there appears to have been no check or confirmation that the claimant had passed CM2. There is no dispute between the parties that the claimant did have CM1 and did not have CM2 when she joined them in 2018. This means that she was not an accredited call handler and in effect that the respondent was operating the 111 service in the breach of its licence.

75. The call handlers' calls are routinely audited and on a number of occasions the claimant's calls failed the audit. We shall say more about this below.

76. More significantly for our purposes, the failed audits led the respondent to inquire further into the claimant's training record and during February 2021 it was discovered that she had not passed the CM2. Ms Khalid, the claimant's line manager, advised Mr Ivory of this fact in the middle of February 2021 and he then spoke to the head of training, Ian Lain who confirmed that the claimant had been booked on the next available CM2 course which was due to take place in March 2021.

77. The claimant was not happy about being put on the CM2 course and believed that she had undertaken all of the required training when she was with Vocare. However, she could not provide any documentary evidence of this, although she did have a certificate in relation to CM1. Mr Ivory did in fact contact the claimant's former employer, Vocare who confirmed that the claimant had not undertaken the CM2 training with them.

78. The claimant eventually sat the CM2 assessment on 30 April 2021. She scored 60% which was significantly short of the 70% pass mark. Given that the claimant

was therefore not accredited she was stood down from the call handler role, although she remained on full pay.

79. Mr Ivory gave the claimant feedback on her responses to the CM2 assessment and arrangements were made for the claimant to re-sit the assessment. Initially the claimant said that she would not re-sit the assessment and Mr Ivory worked hard to persuade her that it was necessary for her to do so should she wish to continue in her role. See for example the emails at [263, 264, 265, 266, 267, 268, 269,]. Mr Ivory agreed to provide and pay for individual coaching for the claimant to be arranged at times to suit her working pattern (the claimant worked nights) and the Tribunal's view is that in essence Mr Ivory bent over backwards to help the claimant to achieve accreditation.

80. Following the failed CM2 assessment, the claimant was stood down from her role as a call handler. This was in accordance with the requirements of NHS Digital that only accredited call handlers can use NHS Pathways.

81. The claimant re-sat the CM2 assessment on 10 June 2021 but again she failed to achieve the required 70% pass mark.

82. Following this, the respondent endeavoured to engage with the claimant to discuss options available including temporary or permanent redeployment, but the claimant failed to engage with that process.

83. The respondent considered that the claimant's failure to pass the CM2 assessment was a capability issue and on 5 November 2021 Mr Gyamfi invited the claimant to a capability hearing to take place on 12 November 2021 [392 - 394].

84. In response, on 6 November 2021 the claimant emailed Mr Gyamfi as follows:

> *"I refer to your e-mail and would state that I still maintain my stand that I did not fail the CM2 training and there is absolutely no basis for a capability hearing. However, I have decided to resign my employment from LAS with one month notice effective from 1st December 2021.*
>
> *After giving careful thought to the way and manner that I have been treated unfairly, subjected to harassment and victimisation so far, I have decided to resign for my own Peace of Mind and well-being. I need to move on to concentrate on more important things in my life.*
>
> *Accept this e-mail as notice of my resignation. Please ensure my full salaries and all my accrued annual leave are paid accordingly"*
>
> [399 – 400]

85. Mr Gyamfi noted the claimant's resignation but pointed out that given she remained employed she would still be required to attend the capability hearing [399].

86. The claimant refused to engage in that process and on 8 November 2021 emailed Mr Gyamfi in the following terms:

> *"… I find the process to be unfair and a further detriment towards me. Unfortunately, I will not be in a position to attend such meeting. Besides I have resigned my employment with one month notice as per my contract of employment…"*

87. Those then are the essential findings of fact in this case and before we turn to the specific allegations made by the claimant and our conclusions on those, we wish to consider the question of credibility.

Credibility

88. The Tribunal is well aware that credibility is not necessarily "all or nothing", that is to say that certain parts of and individual's witness evidence may be credible and other parts may not be.

89. However, in this case the Tribunal's view is that the claimant was not a credible witness of fact. We make that assessment for a number of reasons.

90. First, despite the claimant accepting almost from the outset of her cross examination that NHS Digital did require call handlers to have passed both CM1 and CM2 and that this was a requirement of the respondent's licence, in subsequent responses and as part of her cross-examination of the respondent's witnesses he appeared to maintain her argument that the requirement that she undertake the CM2 assessment was direct race discrimination. Furthermore, she continued to argue that being stood down in circumstances where she was not an accredited user of the NHS Pathways software was also direct race discrimination contrary to her evidence given under cross-examination and the contemporaneous documents from NHS Digital.

91. We also note that, despite there being no reference to it in her witness evidence, the claimant developed an argument that a number of the documents in the bundle which appear to come from NHS Digital, being branded as such with all of the appropriate logos, had been fabricated by the respondent. In particular the claimant developed an argument that her responses to the assessment questions in the CM bundle were in fact correct and that the assessors had fabricated the documents which purport to be the model answers provided by NHS Digital, deliberately to ensure that the claimant failed the assessment because of her race. This is despite the fact that had the respondent simply wanted to dismiss the claimant (whether because of race or otherwise) they could have done because she was unable to carry out the role for which she was employed.

92. The claimant simply denied what was clear and obvious on the face of the documentation on a number of occasions. One notable example is that the trainers providing the two-day training in advance of the CM2 assessment all said that on both days the claimant attended late by 30 minutes. Under cross examination the claimant said that the three trainers had colluded to lie about that, and it simply was not true. The claimant was taken to a document at [386] which is the contemporaneous attendance record and which shows quite clearly that the claimant was in fact 30 minutes late on both days of the training and indeed was not paid for those periods, yet she continued to deny the fact.

93. Perhaps most concerning of all is that despite there being very clear and specific allegations of direct race discrimination, and despite it being explained to the claimant that she would need to show evidence which was more than a difference in treatment and a difference in race between her and her comparators or a hypothetical comparator, the claimant singularly failed to adduce any such evidence or even any evidence from which an inference of discrimination could be drawn.

94. For those reasons, as we say, we did not find the claimant a credible witness and where there were conflicts of evidence, we have preferred the evidence of the respondent's witnesses.

Discussion and conclusions

95. We turn now to our conclusions on the allegations made by the claimant.

Direct race discrimination

First allegation

96. The first allegation is that Mahum Khalid and Jamie Ivory of the respondent required the claimant to undertake the NHS Pathways Core Module 2 training and sit an exam, despite the claimant having been an employee of the respondent for almost three years.

97. During cross-examination the claimant confirmed that she had never previously sat the CM2 exam, as she called it. However, she added that the exam "*doesn't exist*". The claimant was then taken to [623] which is part of the claimant's response to the respondent's application for, amongst other things, specific disclosure. Paragraph 4.1 at [623] deals with an application for disclosure of documentary evidence regarding the CM2 and although the claimant objected to the disclosure, on the sensible basis that she did not have such documentation, she did not say anything about the exam not existing, she simply said that she had never been asked to do it. In response to a question about that under cross-examination the claimant said not that there was no such examination but rather "*I don't think there should be an exam*".

98. When cross-examined on the present allegation and having been taken to various pages in the bundle by Ms Patterson, the claimant agreed that it was a requirement of NHS Digital that 111 call handlers must have passed the CM2.

99. The claimant also said that she had no reason to dispute any of paragraph 5 of the witness statement of Mr Ivory in which he states clearly that the NHS Pathways software belongs to NHS Digital, which is in turn part of NHS England, and that the respondent is licenced to use the software and part of that licence is that the respondent must follow the training programmes for certain staff stipulated by NHS Digital. The claimant did seek to maintain at this point that there was a requirement to follow a core module, called CM2, but that it was not a requirement to be examined. However ,ultimately the claimant was taken to [377] which is a flow chart of the call handler training programme set out by NHS Digital. This shows, both in relation to CM1 and CM2, that where a call handler is

"*unsuccessful*" in completing the core module, there is a "*Re-sit Paper*" and it was at this point that the claimant said that she agreed that the documentation did refer to an assessment.

100. The claimant agreed that given that she had been call handling at this stage for around three years for the respondent without having the appropriate accreditation, getting her to complete the CM2 assessment was urgent.

101. The Tribunal note that during the claimant's cross-examination of the respondent's witnesses, despite having made all of the above concessions, she still referred to herself as having been the subject of a witch hunt, and when asked what the nature of the witch hunt was, she confirmed that her view was that she had been put on the CM2 assessment as a means of removing her from the respondent, thus seemingly forgetting that she had conceded that the respondent had a need to ensure that she was accredited by her completion of the CM2 assessment and that this was a requirement of the 111 licence from NHS Digital and was therefore essential and urgent.

102. It was stressed to the claimant when she was being cross-examined, and we reiterate here, that there was no criticism of the claimant for not having passed the CM2 assessment prior to her joining the respondent. For whatever reason she was never asked to do the CM2 assessment and, as we have set out above, it is unclear why the respondent did not pick this up when they initially employed the claimant. Indeed, the claimant accepted that the respondent was not critical of her being in this position and that the respondent was supportive and did not blame her for the circumstances in which she found herself.

103. In all the circumstances the Tribunal is clear that the claimant was required to undertake the two-day training and CM2 assessment paper entirely because it was a requirement of the respondent's licence from NHS Digital that all call handlers accessing the NHS Pathways software, which was necessary for them to do as part of their role, had to be accredited and that accreditation meant passing assessments at CM1 and CM2.

104. In our judgment the claimant has not proved facts from which we could conclude, in the absence of anything the respondent says, that she was subject to direct race discrimination when being required to undertake the CM2 assessment.

105. Furthermore, given that all call handlers are required to undertake both CM1 and CM2 assessments, the claimant did not suffer less favourable treatment.

106. The Tribunal accepts the respondent's case, as did the claimant during the hearing, that if the claimant wished to continue being a call handler she had to undertake and pass the CM2 assessment and that the claimant's race played no part in that decision.

107. This allegation fails and is dismissed.

Second and third allegations

108. We can deal with the second and third allegations of direct race discrimination together. These allegations are that:

108.1. Michelle Nugent and Lucy Priestly deliberately omitted marks from the claimant's first attempt at the CM2 exam, and thereby failed the claimant, and

108.2. Michelle Nugent and Victoria Rogers deliberately marked questions on the CM2 re-sit wrong, causing the claimant to fail the exam the second time.

109. It is necessary to set out in a little detail how the assessment operated.

110. There is an assessor question sheet which sets out the questions the candidates must answer and all acceptable answers, that is to say answers which will score a mark. Each question is allocated a maximum number of marks. In the first sitting of the assessment there were 29 questions some of which were broken down into sub-questions. The instructions to the assessors are that

> *"a mark will only be awarded for the first answers given, for example, for a three mark question, only the first three answers will be considered. The number of answers expected is indicated in brackets after each question"*
>
> [CM Bundle 6]

111. We pause to note that it was no part of the original allegations which were agreed between the parties that any of the documentation in the bundles had been fabricated whether in relation to this or any other allegation and that this was a theme developed by the claimant during cross-examination of her when it became apparent that she had not answered the questions correctly when compared to the model answers.

112. It was also during the cross-examination of the claimant on these allegations that she said that because she had worked for the respondent for three years she was being singled out and that there was a witch hunt in order to target her for removal from the respondent.

113. It was pointed out to the claimant that she was not being singled out, because all call handlers were required to undertake the CM1 and CM2 assessments, and that she had already accepted that everyone undertaking her role was required to sit the assessments, but the claimant seemed unable to accept that notwithstanding her agreement that everyone was required to undertake and pass the assessments in order to be accredited and use the relevant software, she was not being singled out. Indeed, when the claimant was cross-examining Ms Nugent, Ms Priestley and Ms Rogers, she put to them that she had been singled out because of her race.

114. As part of the claimant's cross-examination, she agreed that both the original paper and the re-sit paper were double marked and that the purpose of that was to ensure fairness. So, the claimant's first paper was marked by Ms Nugent who scored the claimant 55%. Ms Nugent then asked her colleague Ms Priestley to mark the paper a second time and the score increased to 60%.

115. The claimant did not dispute that but maintained that her marks were as she put it "*deliberately reduced*". In the claimant's witness statement, there is in fact no complaint about the first CM2 paper. However, during her cross examination she said that she scored only two marks for her response to question 2 but believed she should have got 3 marks [CM bundle 1]. The model answer however only provides for a possible 2 marks [CM Bundle 6] and thus it was not in fact possible for her to score 3 marks.

116. The claimant also referred to question 2 which has a maximum of 2 marks available according to the scoring sheet and 3 possible correct answers. It was pointed out to the claimant that she only gave one correct answer at which point she said that the model answer was not correct therefore only being scored 1 instead of 2 marks was race discrimination. This was the last question for the claimant on the day one of the hearing and at this point the claimant had not suggested that the model answers had been fabricated by the respondent.

117. At the beginning of day two of the hearing the claimant's cross-examination continued and she referred to two further questions on the first CM2 paper which she said were incorrectly marked being questions 9 and 14.

118. Question 9 seeks to test understanding of leading questions and asks the candidate to say what the potential problem is with what is clearly a typical leading question without of course telling the candidate that it is a leading question, given the that is part of the answer which is being sought.

119. The claimant's response was to say that the question was "*confusing and misleading*", neither of which were the correct response.

120. Question 14 asks the candidate to list three common symptoms of a stroke apart from one sided limb weakness and difficulty speaking. Three marks were available and there were five possible correct answers. The claimant's response was "f*ace dropped to one side inability to raise both arms*". She was awarded 1 mark. The claimant suggested that she should have got 2 marks because she had not said one sided limb weakness, but it was pointed out to her that if a caller could not raise both arms then the caller could not raise one or other of their arms which would suggest one sided limb weakness. In other words her response about inability to raise both arms incorporated the inability to raise one arm and therefore she did not get 2 marks.

121. Those were the claimants only concerns about the original paper.

122. The claimant's concerns about the re-sit paper were set out in her witness statement. The re-sit paper is at [CM Bundle 12 – 14] and the model answers are at [CM Bundle 15 – 20].

123. The claimant took issue with question 8 but in cross-examination accepted that her second and third responses were not in the model answer. However, it was at this point that she said that she did not accept that the respondent had applied the model and she developed this further when looking at her responses to question 21 which appear to have been marked correctly compared to the model answer, stating that *"I am saying the model answers were created by the*

respondent… I maintain the document in the CM2 bundle were fabricated by the respondent".

124. Notwithstanding the new allegation of fabrication, the claimant was taken through each of the questions with which she took issue and on the face of it she seemed to have been marked correctly against the model answers. However, the claimant maintained that she did not fail the assessment, that the assessors acted maliciously and that she "*did pass the exam very well*". When the claimant was asked what she says the link was between the marks given and her race the claimant again fell back on her argument that she had been singled out.

125. We also note that as well as double marking the assessments, given that the claimant had been working for three years and that the respondent had been in breach of its licence, the respondent took the step of engaging with NHS Digital about the claimant's case.

126. On 11 June 2021 Ms Rogers send an e-mail to a Mr Paul Bullen, Education and Development Officer, NHS Pathways Training at NHS Digital on the basis that although the claimant's re-sit paper had been double marked, "*there are a few things all the Trainers can't completely agree on, and it is the difference between a pass and fail*". In those circumstances Ms Rogers asked whether "*it would be at all possible for you to have a look at it and mark the paper so we can be sure we are doing the right thing*" [298].

127. Mr Bullen did review the claimant's re-sit paper with a colleague and on the same day, 11 June 2021 emailed Ms Rogers in the following terms:

> "*I have reviewed the CM2 resit paper with a colleague and we are both in agreement that the participant has not reached the required pass mark and standard to pass that assessment*" [295]

128. The claimant named four comparators whom she says were treated more favourably than she was in relation to this allegation, but the documentary evidence shows that each of the four comparators took and passed the CM2 assessment [491, 492, 493 and 494].

129. The Tribunal was not presented with any evidence from the claimant either directly to show, or from which we could infer, that the respondent had fabricated documents. We accept the respondent's evidence the documents detailing the model answers are from NHS Digital. We find that the claimant was marked appropriately against the model answers.

130. In the circumstances there is no evidence that the claimant suffered less favourable treatment and we consider that the claimant has not proved facts from which we could conclude, in the absence of anything the respondent says, that she suffered direct race discrimination. Even if the claimant had shifted the burden of proof, we are satisfied that the respondent has shown that it did not discriminate against the claimant and the second and third allegations fail and are dismissed.

Fourth allegation

131. The fourth and final allegation of direct race discrimination is that the claimant was discriminated against by being stood down from her role as a call handler between the first sitting of the CM2 assessment and the re-sit.

132. In effect during her cross examination the claimant accepted that having failed the CM2 paper, she was not accredited and could not continue in her role unless and until she became accredited. She was offered coaching and support during the period she was stood down. The claimant said, in terms, during this part of her cross-examination that "*I now understand I wasn't accredited*".

133. The claimant said that she agreed that the 111 service was very important and that it was important to use the correct pathways. She agreed that the respondent had a responsibility to ensure that she was not a risk to patients. When asked how she says she had been treated less favourably she said "*I can't think of less favourable treatment*" although to be fair to the claimant she maintained that she had been singled out and that the respondent was trying to get rid of her.

134. It is clear to the Tribunal that the claimant was stood down from her role as a call handler because to do otherwise would have been a continuation of the breach of their licence from NHS Digital and for no other reason. There is no evidence from which we could conclude that standing the claimant down in these circumstances amounted to direct race discrimination and even if there was, we are entirely satisfied with the respondent's explanation, as indeed was the claimant during the hearing, that it was necessary to stand her down given that she was not accredited to undertake the role for which she was employed at that stage.

135. In the circumstances the fourth allegation fails and is dismissed.

Constructive dismissal

136. We turn now to the claim for constructive unfair dismissal.

137. The claimant relies on breach of the implied term of trust and confidence. This implied term is that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

138. The claimant has presented a last straw case and the straws she relies upon are as follows:

    138.1. that the respondent required the claimant to undertake the CM2 training and sit an exam, despite the claimant having been an employee of the respondent for almost three years,

    138.2. that Michelle Nugent and Lucy Priestly deliberately omitted marks from the claimant's first attempt at the CM2 exam, and thereby failed the claimant,

    138.3. that Michelle Nugent and Victoria Rogers deliberately marked questions on the CM2 re-sit wrong, causing the claimant to fail the exam the second time,

138.4. that the claimant was stood down from work between the first exam and the re-sit and after the re-sit, and

138.5. that the respondent invited the claimant to a capability hearing on 5 November 2021 to take place on 12 November 2021.

Undertaking the CM2 training and assessment

139. Given the evidence and the concessions made by the claimant at the hearing, we consider that the respondent had reasonable and proper cause to require the claimant to undertake the CM2 training and sit the assessment or examination. In short, it was a requirement of the respondent's licence from NHS Digital that all call handlers achieve accreditation to use the NHS Pathways software, which is necessary because it is that software which forms the basis of the interaction between the call handler and the 111 caller. That accreditation is shown by the completion of two modules, CM1 and CM2, both of which require an assessment or examination. The claimant accepted that she had not achieved CM2 and was therefore not accredited.

140. In order to assist the claimant to achieve accreditation she was given paid time off, individual coaching at times to suit her and after failing the first sitting, individual feedback on her responses provided by Mr Ivory.

Marking of the assessments

141. In relation to the marking of the assessments, as we have seen from the evidence, the marks given on both assessments were correct and they were not only double marked by the respondent but the second paper, the re-sit paper, was itself double marked again by Mr Bullen and one of his colleagues at NHS digital.

142. The respondent acted reasonably and properly in marking the claimant's assessments as they did, the assessments were not deliberately marked incorrectly nor were marks deliberately omitted.

Being stood down

143. In relation to standing the claimant down from her role between the first and second sittings of the CM2 assessment papers, given that the claimant was not accredited during this and therefore was not allowed to use the required NHS Pathways software, standing her down was a reasonable and proper course of action in the circumstances.

Invitation to a capability hearing

144. Turning to the last straw, the invitation to the capability hearing, the genesis of the invitation goes to the question, what does an employer do where an employee has failed to achieve accreditation under the NHS Pathways software?

145. After the failed re-sit assessment, Mr Ivory asked Ms Rogers to call Mr Bullen to ask him what the next steps should be regarding the claimant [303 – 304].

146. Ms Rogers did so, and on 14 June 2021 Mr Bullen sent an e-mail to Ms Rogers stating that "*our response to this is that you would need to deal with this situation internally following your capability policy*". Before making that response Mr Bullen had spoken to the Head of Learning and Quality at NHS pathways [303].

147. Ms Rogers Reported this back to Mr Ivory on 15 June 2021 [302].

148. What followed this was that a discussion took place internally at the respondent as to setting up a capability hearing which included producing a capability pack, asking a manager to undertake the hearing and in the meantime going through with the claimant her responses on the failed re-sit paper.

149. As a result, a "Learner Report" was produced by Mr Simon Dady, Education Manager - Integrated Patient Care, and Ms Rogers. This took some time and was completed on 27 October 2021 [318 – 391]. It is by any standard a detailed and comprehensive report Including witness statements, e-mail exchanges, the Guide to the NHS Digital licence, time sheets, audit records and other relevant information.

150. On 17 September 2021, prior to completion of the Learner Report, the claimant met Mr Ivory who, as part of a wider discussion, advised the claimant that several outcomes were possible from the capability hearing which included redeployment and retraining.

151. It is fair to say that the claimant's response to Mr ivory in relation to being stood down, failing the CM2 assessment and, more generally, was very negative [348 – 349]. At the hearing the claimant confirmed that she would have rejected redeployment to the role of service advisor and would have rejected further re-sitting of the CM2 assessment.

152. By a letter dated 4 November 2021, emailed to the claimant on 5 November 2021, the claimant was invited to a capability hearing to take place on 12 November 2021. The invitation letter was from Ms C-A Burchett, Assistant Director of Operations – South East, who stated that she would chair the hearing [392 – 393], The e-mail sending out the letter was from Mr Gyamfi [394].

153. As we have set out in our findings of fact, the claimant's response was to send in her e-mail resigning from her employment [400].

154. We remind ourselves of the **Kaur** questions to be answered in a constructive dismissal case:

    154.1. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, her resignation?

    154.2. has she affirmed the contract since that act?

    154.3. if not, was that act (or omission) by itself a repudiatory breach of contract?

154.4. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

154.5. did the claimant resign in response (or partly in response) to that breach?

155. The last act was the invitation to the capability hearing which the claimant received on 5 November 2021.

156. We do not consider that the claimant affirmed the contract, nor was it suggested by the respondent that she had.

157. Although the claimant continued to insist that she had passed the CM2 assessment and that there was a conspiracy to remove her from the respondent, she provided no evidence to the respondent of her allegations, and this amounted simply to her belief. To put it bluntly, she simply did not believe that having worked for three years as a call handler she could have failed the assessment, but we are satisfied that she did. It is worth remembering that the claimant had been taken through the questions and answers she gave in her first failed assessment by Mr Ivory, she had been offered support and further training to try and get her up to the required standard in preparation for her re-sitting of the assessment, she was provided with all of the relevant documentation regarding the need for accreditation, she was told that her papers had been double marked and that the re-sit paper had been externally marked and it had been explained to her many times that in order to be licenced to use NHS Digital's NHS Pathways software she needed to be accredited and that accreditation was not available until she had achieved a successful CM2 assessment. Furthermore, the claimant was offered the opportunity of avoiding a capability hearing by meeting Mr Ivory to discuss accepting an alternative role which she rejected out of hand.

158. In the circumstances, the invitation to the capability hearing was not in the Tribunal's judgement a repudiatory breach of contract. The invitation was entirely in line with what the Tribunal considers to be normal practise where an employee is no longer capable of undertaking the role for which they were employed which was clearly the case here.

Course of conduct

159. As to whether there was a course of conduct which cumulatively amounted to a repudiatory breach of contract, the Tribunal's judgment is that there was not. Each of the straws set out by the claimant in her claim either did not take place or if they did, did so for proper and reasonable cause.

160. We find:

160.1. that placing the claimant onto the CM2 course and assessment was not simply reasonable but necessary in her own interests,

160.2. that both of the CM2 assessments were correctly marked,

160.3. that the claimant was stood down from her call handler (health advisor) role which again was not simply reasonable in the circumstances but necessary given that she was not accredited to do the work and,

160.4. given that a decision about her future had to be taken, whether that be an offer a redeployment or some other course of action, it was proper and reasonable for the respondent to do that at a capability hearing particularly given that the claimant refused to discuss the matter on a more informal basis.

161. It is our judgment that none of the matters raised by the claimant in this claim amount to repudiatory breaches of contract in and of themselves nor, taken together, do they amount to a breach of trust and confidence on a cumulative basis.

162. For those reasons the claim of constructive unfair dismissal fails and is dismissed.

Unauthorised deductions from wages

163. We turn next to the claims for outstanding holiday pay and the payment for unsocial hours.

Holiday pay

164. The basis of the claimant's claim for unpaid holiday pay was very confusing. The claim was for 123.46 hours pay at £13.13 per hour. Some 23.46 of these hours relates to the period which is in dispute in relation to the notice period and we shall deal with that below. The claim up to the date the respondent says was the effective date of termination, 1 December 2021, is therefore for 100 hours.

165. The respondent's holiday year runs from 1 September to 31 August. It was agreed that in the holiday year 2020/2021, because the claimant had carried over some holiday from the previous holiday year, her total holiday entitlement was for 141.56 hours.

166. The claimant booked and took 100 hours holiday in the leave year 2020/2021. The confusion in this claim was the claimant's assertion that she had cancelled some holiday and she insisted on a number of occasions that that cancellation meant that the holiday was not taken and therefore she should be paid for it.

167. A considerable amount of hearing time was taken up looking at the document on [496]. This shows that up to 29 May 2021 the claimant had booked and taken a total of 100 hours leave. The claimant was quite correct that she did in fact book holiday which she later cancelled but the proposed dates of those cancelled holidays all post-date the leave taken up to 29 May 2021. So,

167.1. on 1 July 2021 with the claimant cancelled leave booked for 23 and 24 July 2021 [308 – 309],

167.2. on 3 August 2021 the claimant cancelled leave booked for 13 and 14 August 2021 [312 – 313],

167.3. on 17 August 2021 the claimant cancelled leave booked for 20 and 21 August 2021 [314 – 315], and finally,

167.4. on 17 August 2021 the claimant also cancelled leave booked for 8 and 9 October 2021 [315 – 316].

168. Thus, none of the cancelled leave formed part of the calculation of the 100 hours holiday taken in the 2020/2021 holiday year as shown on [496].

169. Having taken the 100 hours holiday, the claimant was left with 41.56 hours accrued untaken holiday at 1 December 2021, which is the date the respondent says the employment terminated.

170. The respondent then calculated what holiday the claimant accrued in the holiday year 2021/2022, which of course is the holiday year in which the claimant's employment terminated. The respondent correctly calculated that the claimant accrued 9 hours holiday per month. The claimant's employment terminated, according to the respondent, after three months of the holiday year 2021/2022, thus she had accrued a total of 27 hours.

171. The respondent's evidence was, and the Tribunal agrees, that up to 1 December 2021 the claimant had 68.56 hours accrued untaken holiday comprising 41.56 hours carried over from the prior holiday year and 27 hours accrued in the then current holiday year.

172. As can be seen from the pay slip at [506], on 23 December 2021 the claimant was paid in lieu in respect of 105.43 hours holiday made up of 41.56 hours carried over, 27 hours pro rata for the then current holiday year and an adjustment which added an additional 36 hours.

173. The Tribunal's judgment is that the claimant received all of the holiday pay in respect of accrued untaken holiday to which she was entitled at 1 December 2021 and the claim for unauthorised deductions from wages in respect of unpaid holiday pay fails and is dismissed.

Unsocial hours pay

174. Given that the claimant worked nights she was entitled to receive an unsocial hours payment as an addition to her basic pay.

175. The unchallenged evidence of Mr Gyamfi was that where an employee works unsocial hours the unsocial hours payment is automatically paid to them in their monthly pay. However, where an employee entitled to unsocial hours payments is not working, the payment is not made automatically and has to be claimed. It was not disputed that the claimant has never claimed unsocial hours payments for the entire period she was stood down from work.

176. We have to decide on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the claimant on the "relevant occasion", in this case during the period she was stood down from work.

177. Given that the unchallenged evidence we heard was that in the normal course of events a person who was working unsocial hours would automatically receive the payment but they would have to claim it if they were not at work, and given that the claimant did not claim the payment, we are satisfied that on each occasion she was paid during the period she was stood down, she received the correct pay, that is to say her pay *absent* the unsocial hours payment.

178. In our judgement the claimant did not suffer any unauthorised deduction from her wages in respect of the unsocial hours element of her pay and this claim fails and is dismissed.

Breach of contract

Unsocial hours pay

179. In relation to the unsocial hours payment, should it be expressed as a claim for breach of contract, that claim must also fail.

180. The tribunal's jurisdiction is limited to claims for money which arise or which are outstanding on termination of employment (see **Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994**).

181. Given that we accept Mr Gyamfi's unchallenged evidence, that in the circumstances of this case the claimant was obliged to make a claim for the payment, and she did not, the unsocial hours payments were not outstanding at the date her employment terminated, nor did they arise on that date. In fact, given that the claimant has never claimed the payment until these proceedings, there is no obligation on the respondent to pay them and the tribunal does not have jurisdiction to hear this as a breach of contract claim. This claim fails and is dismissed.

Notice pay

182. The final claim is for notice pay.

183. The claimant was required to give four weeks' notice of termination. On 6 November 2021 she sent an e-mail which said the following

"I have decided to resign my employment from LAS with one month notice effective from 1st of December 2021"

184. The claimant says that it was her intention that her four weeks' notice period ran from 1 December 2021, in other words "with effect from" that date.

185. The respondent says that this was not their understanding and in fact they believed she had given 4 weeks' notice on 6 November and that her last day of employment would be 1 December 2021.

186. We have considered how to construe the claimant's words and we accept that there is some ambiguity in them. However there is other evidence which assists us in coming to a conclusion on this matter.

187. Following the claimant's resignation e-mail [400] there was continued correspondence between her and Mr Gyamfi around the proposed capability hearing because Mr Gyamfi's view was that the fact that the claimant had tendered her resignation did not prevent the respondent holding a capability hearing during the notice period [399].

188. On 8 November 2021 in an e-mail to Mr Gyamfi, the claimant says, "*I have resigned my employment with one month notice as per my contract of employment*" and there is no reference to the notice period starting at some point in the future.

189. We note that given the hours the claimant worked and given that she gave notice on 6 November, from her point of view by 1 December four working weeks would have passed. Furthermore, it is highly unusual for an employee, particularly one claiming constructive dismissal, to purport to give notice and for the notice to start at some point in the future and it is no surprise to us that the respondent did not consider that this was the correct way to interpret the notice given by the claimant.

190. Having considered the matter we agree with the respondent that the better reading of the claimant's resignation is that she was giving four weeks' notice to leave on 1 December 2021.

191. For those reasons the claim for breach of contract in respect of notice pay (and therefore to further accrued untaken holiday pay) fails and is dismissed.

Employment Judge Brewer
Dated: 4 May 2023