EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104055/2018

Hearing Held at Inverness on 3, 4 and 5 December 2018

Employment Judge: Mr A Kemp

Dr Fiona McClean	**Claimant** **In person**
Highland Health Board	**Respondents** **Represented by:** **Mr R Davies** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Claimant was constructively dismissed by the Respondents, the dismissal was unfair and the Tribunal awards the sum of FIVE THOUSAND AND THIRTY SEVEN POUNDS NINETY THREE PENCE STERLING (£5,037.93) payable to her by the Respondents.

2. The claim for unlawful deduction from wages is dismissed for want of jurisdiction.

REASONS

Introduction

1. The Claimant made a claim for unlawful deduction from wages, and what is normally referred to as a claim for constructive dismissal, against the Respondents. The Claim was denied.

2. The Claimant represented herself. The Respondents were represented by Mr Davies.

Issues

3. The Tribunal identified the following issues:
   (i) Did the Tribunal have jurisdiction to consider the claim for unlawful deduction from wages under Part II of the Employment Rights Act 1996 ("the Act")?
   (ii) If so had there been any unlawful deductions from wages under section 13 of the Act?
   (iii) If so, in what amount?
   (iv) Had the Respondents dismissed the Claimant under section 95(1)(c) of the Act?
   (v) If so, what was the reason for that dismissal?
   (vi) If the reason was potentially fair under section 98(1) and (2), was that dismissal unfair under section 98(4) of the Act?
   (vii) If there was an unfair dismissal, what was the extent of the Claimant's losses and what remedy should be given?

Evidence

4. The Tribunal heard evidence from the Claimant herself, Dr Janine Robinson and Ms Alison Leask, and for the Respondents from John Dreghorn, Nicola Gillespie, Lorraine Paterson and Donald Watt. Documents were spoken to from a single bundle the parties had prepared. Not all documents in that

bundle were spoken to in evidence. The parties had helpfully also agreed a Joint Statement of Agreed Facts

Facts

5. The Tribunal found the following facts to have been established:

6. The Claimant is Dr Fiona McClean. She is a Clinical Psychologist.

7. The Respondents are Highland Health Board. They manage NHS Highland, part of the National Health Service. They were the employers of the Claimant under a contract of employment dated 9 January 2012. It was subject to the Agenda for Change Terms and Conditions of Service, within which were various policies (the relevant ones of which are referred to below).

8. The Claimant was employed as a Clinical Psychologist at Post Grade 8A, with a date of commencement of 20 February 2012. Her duties and responsibilities were set out in a Job Description. Her place of work was stated to be Argyll & Bute Hospital, Lochgilphead, but she was required to work, with reasonable notice, at other locations where the Respondents provide a service. She worked five days per week, 37.5 hours per week.

9. The Job Description was detailed, and came with the heading “Agenda for Change NHS Job Evaluation Scheme”. The job title was “Clinical Psychologist Co-ordinating Adult Mental Health Psychological Services within the specified area of Argyll & Bute (Mid Argyll, Kintyre and Islay)”.

10. The Claimant undertook that role. The specified area within which she did so was referred to as “MAKI”. It is one of four localities within Argyll and Bute, the others of which are Oban, Lorn and the Isles, Cowal and Bute; and Helensburgh and Lomond. She worked in various locations to fulfil her role, but was based in the Community Mental Health Team (“CMHT”) at the Caladh Centre, Aros, Lochgilphead.

11. In June 2014 an Adult Diagnostic Service ("ADS") Strategy for adults who may have autism within Argyll and Bute was approved by the then management board of the Respondents, following an initiative to require such a strategy by the Scottish Government. The Scottish Government had not provided additional funding for that ADS but their initiative effectively required the Respondents to provide an ADS for adults who may have autism in, amongst other areas, Argyll and Bute.

12. The Claimant had had an increasing interest in the diagnosis and treatment of those with autism, particularly adults who had not been diagnosed as children. She was aware of the initiative, and the ADS strategy which had been approved.

13. In July 2014 the Claimant prepared a paper titled "Services for Adults with ASD (Autism Spectrum Disorders)." It made proposals for the ADS in Argyll and Bute and set out a costing for providing such a service estimated at £40,900 per annum. It was sent to and revised by Mr John Dreghorn one of her line managers in January 2015. The estimated annual cost after that revisal had increased to £87,000. The funding for such a cost was not however available at that time and it was not at that stage introduced.

14. In about March 2015 the Claimant discussed with her managers, then Mr Douglas Philand as CMHT Team Leader, and Mr Dreghorn as Locality Manager for MAKI, whose responsibilities covered adult mental health and social services, about her providing such an ADS. She was interested in doing so as a part of her role.

15. Autism is not necessarily a mental health issue. It is a neuro-developmental condition. Its diagnosis requires specialist training and expertise. It can be a difficult diagnosis to make in adults. Not all who are referred to assessment are decided to be autistic. A diagnosis of autism can however be important in a number of respects, one of which is the treatment of conditions such as

anxiety and depression, which are mental health issues. The treatment for such conditions may require to be different if a diagnosis of autism is made.

16. The decision made between Mr Philand, Mr Dreghorn and the Claimant was that the Claimant would commence work providing an ADS for two days per week. She was to provide that service within the whole geographical area of Argyll and Bute, not merely within MAKI. The other three days per week were spent by her within the CMHT working solely within MAKI. That decision was not fully documented. Mr Dreghorn had earlier raised the proposal with the Head of Finance and Chief Officer of the Respondents, who agreed with it in principle, but were not able to provide permanent additional funding for it.

17. It did amount to a material change to the role of the Claimant. It would ordinarily have led to the development of a new Job Description under the NHS Evaluation Handbook provision (referred to below). Once that had been done, that Job Description would then have been sent for job evaluation by an Independent Matching Panel set up for that purpose. The Panel would then have made a decision as to whether the grade remained at 8a or might be increased to 8b or 8c. If so increased, the Claimant would have been entitled to extra pay.

18. Mr Dreghorn did not progress the Job Description for the new role, although he started the exercise of drafting it with the Claimant. The reason he did not complete it is that he did not have the funding for any permanent increase in salary. He had been able to obtain funding for the two days per week performance of the role in ADS by the Claimant by using funds from the CMHT budget for a post that had not by then been filled. He considered that the funding arrangement was an “at risk” one, meaning that it was a form of temporary arrangement to allow the proposal to commence, in the hope of finding more permanent funding later. It was non-recurring funding. He had the approval of his managers to do so. He did not however clearly explain that to the Claimant at that time. He had expected to be able to secure the

required permanent funding and then to be able to commence the formal process for job evaluation, but in fact was not successful in so doing.

19. The Claimant was keen at that stage to develop that aspect of her practice. Her motivation was to provide a necessary service in an area she had interest in, rather than a purely monetary one by seeking a salary increase. There was no specific discussion between the Claimant and her managers in or around March to May 2015 about whether the change to her role would lead to any increase in grading or salary. The new arrangements whereby the Claimant was to provide an ADS in Argyll and Bute two days per week commenced in about May 2015.

20. The Claimant's job description was not formally amended at that time or later. She remained in the role of Clinical Psychologist at grade 8a and was paid according to that grade. In practice her role was split between the role within her Job Description spent three days per week, working within MAKI, and her role providing an ADS across Argyll and Bute spent two days per week, for which she did not have a formal Job Description.

21. Mr Dreghorn made an application for additional permanent funding for the ads to the Core Team being senior managers of the Respondents in January 2016, and approval to employ an administrator Ms Chris Turner was granted, but not for funding beyond that, in particular no funding for the Claimant's ADS role.

22. When the Claimant started her employment she worked within NHS Highland, for which the Respondents were responsible. As a result of a Scottish Government strategy, the areas of health (provided by the NHS) and social care (provided by local authorities) were combined. There was an initial transition period, and integration of the two services commenced on 1 April 2016. A Health and Social Care Partnership ("HSCP") was formed between the Respondents and Argyll & Bute Council ("the Council") in order to provide the integrated service.

23. The integration was a complex exercise. Many managerial posts required to be integrated between the Respondents as health providers for that area, and Argyll and Bute Council as social care providers. Some managers were matched to posts in the new organisation, others had to apply for them in competition with others. The roles and responsibilities of many managers changed, to various extents. The organisation, particularly more senior managers, came under substantial pressure as a result.

24. The HSCP is governed by an Integrated Joint Board ("IJB"). It is a statutory board made up of four members of the Respondents' board and four members of the Council, together with non-voting members. Reporting to the IJB is a Strategic Management Team ("SMT") which has strategic overview on delivery of services for the HSCP.

25. On 17 February 2017 the Claimant emailed Mr Dreghorn about "the Adult ASD diagnostic service", in which she referred to funding and "how we most usefully use the bridging funding you hope to be able to access for 2015-16". There was no reply to that email. In the period from March 2015 to June 2016 the Claimant made sporadic attempts to progress the Job Description with Mr Dreghorn without success. Mr Dreghorn did not seek funding for the Claimant's ADS post in that period, in the reasonable belief that such an application would not succeed at that stage. There were periods when he did not respond to the Claimant's attempts to contact him.

26. On 28 June 2016 in order to seek to make progress on the matter the Claimant sent a draft of a Person Specification, being one part of a Job Description, to Mr Dreghorn to cover the role she performed in ADS, and referred to her view that it fell between an 8b and 8c grade. He replied two days later to say that the draft looked fine but that it was unlikely to lead to an 8c grading.

27. On 8 August 2016 Mr Dreghorn emailed the Claimant to say that it would make sense for the autism work, by which he meant the ADS role, she carried out to be managed by Nicola Gillespie. He also referred to the 16/17 budget, which he said was "non-recurring until we finalise the psychology post", but that the "aim would be to make this recurring budget…..in future years". A further email was sent by him to the Claimant on 25 August 2016 to confirm that he had emailed Ms Gillespie, and Donald Watt, to confirm the line management arrangements.

28. On 5 September 2016 the Claimant emailed Mr Dreghorn indicating that she understood that he remained the line manager for ADS, and making comments about doing some work from home. There was then an email trail regarding the detail of that which included comments by Ms Gillespie. Mr Dreghorn continued to act as line manager of the Claimant, for example regarding approval for study leave on which he emailed her on 19 December 2016.

29. The Claimant was becoming increasingly concerned at the lack of progress on her Job Description and the lack of clear line management for the ADS part of her role. She provided the large majority of the assessments of the ADS herself, but was assisted to some extent by another Clinical Psychologist Ms Lucia Swanepoel. She raised her concerns with Dr Janine Robinson, Consultant Clinical Psychologist, who was providing her with external supervision in a form of continuing professional development in the field of autism assessment, as approved and paid for by the Respondents, in about April 2017.

30. On 25 April 2017 the Claimant wrote to Mr Dreghorn, copied to Ms Nicola Gillespie then CMHST Team Leader, intimating that she was withdrawing from the attempt to provide adult autism diagnoses outside her own locality of MAKI, but stated that she would continue with the other aspects of the role she described as Lead Clinician. She concluded by saying that she remained

very committed to driving forward the Autism Strategy and finding a way to offer the service again.

31. The following day Alison Leask, the Chair of Autism Argyll, a third sector organisation, emailed Allen Stevenson and Mike Hall who were Council and Respondent employees respectively but who had an overall responsibility for the strategy, in effect complaining at the lack of a full ADS service in light of that letter. Ms Leask had been seeking to promote the ADS strategy, and improve its implementation. She was aware of increasingly lengthy waiting lists.

32. On 25 May 2017 the Claimant emailed Ms Gillespie to complain that there had been no reply to her letter to Mr Dreghorn or those who were also sent it. Ms Gillespie replied the same day to state that she was not involved in the autism service, and that it remained with Mr Dreghorn. She referred to a recent discussion they had had when the Claimant had expressed "much frustration".

33. Mr Dreghorn also replied by letter dated 25 May 2017 to the Claimant's letter of 25 April 2017. He apologised for the delay, and set out an explanation for the current position in detail. He stated that his involvement in the autism service effectively ceased when responsibility for leading the autism service transferred to Mr Stevenson in 2016 (the letter did not state precisely when) and he apologised that this was not formally communicated to her. He stated the following with regard to the job matching of the role she performed in ADS:

> "I acknowledge that we did start to work on a new job description for an autis specialist psychologist post in 2015. Unfortunately this did not progress beyond an early draft, in part because we could not identify a similar post that could be used as a template, but also because of the lack of available funding to implement this change. Again I apologise for not making this clear at the time or subsequently."

34. He concluded that he had been asked to prepare a paper to put to the SMT in June for consideration.

35. The Claimant responded by letter dated 6 June 2018 challenging the comments Mr Dreghorn had made.

36. Mr Dreghorn had suffered from ill health for some time, and on 8 June 2017 retired from the Respondents. On the day of his retirement he explained to the Claimant that a paper was to proceed to the SMT. In 2016 some of his responsibilities had been taken from him in light of concerns over his health. The responsibilities that were so removed from him included the CMHT. It had not been clear however whether those responsibilities included ADS.

37. Donald Watt acted as Locality Manager on an interim basis after Mr Dreghorn's retirement from the Respondents, and in effect replaced Mr Dreghorn in that role.

38. On 9 August 2017 the Claimant emailed Mr Watt, and a copy to Ms Gillespie, applying for a secondment of 6-9 months in a specialist clinic in the London area, stating that the service involved sought an answer as soon as possible. This secondment was to an external body. It involved work primarily in the field of autism. For the Claimant it was a particularly compelling opportunity, both to be able to develop her skills in an area she had an increasing interest in, but also to be removed temporarily from the difficulties she perceived she had with the Respondents. The Respondents were likely to benefit form her increased knowledge and experience after the secondment ended.

39. The secondment was intended to be for an agreed period, after which the Claimant would return to the substantive role with the Respondents. Secondments were generally encouraged by the Respondents under their policy for the same (referred to below).

40. On 10 August 2017 Mr Watt replied that he needed to be mindful of the impact a secondment may have on the service, and wished to discuss that with Ms Gillespie. She was then on holiday. He suggested that the paperwork be completed and sent to Ms Gillespie. The Claimant did so, although the written application she made was not before the Tribunal.

41. On 15 August 2017 a meeting was held with a number of parties to consider the ADS. Those parties included two representatives of the Scottish Government, by video conference, the Claimant, Ms Paterson, Mr Watt, Ms Gillespie and others. No minute of that was provided. At the meeting there was a discussion about the future of the ADS. Ms Paterson, who held the title of Head of Adult Services, West, section (which included the MAKI area) confirmed at it that the ADS was part of her own overall responsibility. In practice it was however a small part of a very wide responsibility.

42. There was a discussion about the Claimant's letter of 25 April 2017 under which she had withdrawn from providing a service outwith MAKE. Ms Paterson stated that it was not possible to withdraw a service that existed without consultation, and that required the Claimant to continue to provide ADS outwith MAKI, as she had previously. The Claimant agreed to do so.

43. Various matters were to be addressed after the meeting by the operational managers, particularly Mr Watt and Ms Gillespie, both of whom reported to her. They included seeking information as to funding for the future ADS service, and how in detail that service was to be provided. Funding remained a concern for the Respondents.

44. The Claimant emailed Ms Paterson shortly after that meeting on 16 August 2017 commenting on the need for funding, appreciating that funding for ADS was at the cost of another area, and making her own proposals for that funding. She did not receive a reply. Ms Paterson received 100 – 200 emails daily, and they are managed by her PA. She did not recall seeing that email, and no reminder or follow up email was sent by the Claimant.

45. On 17 August 2017 the Claimant emailed Ms Jo Coombs and referred to the secondment as her “ideal job”, and stated that she was tempted to resign.

46. On 18 August 2017 Ms Gillespie emailed the Claimant following a discussion with Mr Watt about the application for secondment by the Claimant. She stated “As an organisation we are in support of your secondment”. She considered that that reply was the formal granting of approval for it. She was not aware of the need for a secondment agreement or other steps as required by the policy on secondment, referred to below. By about that time Ms Gillespie had become the Claimant’s line manager. She (Ms Gillespie) held the title of Local Area Manager for the MAKI area. She reported to Mr Watt, who was the Locality Manager.

47. The Claimant replied on 21 August 2017 with comments on the practicalities of the arrangements, and that she could now formalise matters with the provider who had required confirmation that the Respondents were prepared to release her. The Claimant had been surprised to have had the request for secondment granted.

48. The secondment was intended to be for a period of nine months, and although initially it may have commenced in November 2017 the date was agreed to be 8 January 2018. It was working at a specialist ADS clinic which received referrals from the NHS. It was not working for an NHS employer, but an agency providing services to the NHS. The secondment provided the Claimant with additional skills, which she would be able to deploy with the Respondents after the secondment concluded. It was of benefit both to the Claimant, and the Respondents.

49. On 24 August 2017 the Claimant sent an email to a number of colleagues, with a copy to Ms Gillespie, confirming the secondment from January to September 2018 and that she was “gradually letting all my clients know”. On

25 August 2017 she sent Ms Gillespie by email confirmation of the offer from the third party.

50. On 29 August 2017 the Claimant emailed seeking clarity about who her manager was, and providing waiting list information. Ms Gillespie replied that that remained with Mr Dreghorn for ASD.

51. In about late August 2017 Gordon Murray of the Respondents prepared a paper with the title “Adult Autism Diagnostic Service” for presentation to the SMT. It had been prepared in conjunction with Mr Dreghorn but not the Claimant. It stated that the ADS was line managed by Ms Gillespie, Area Manager MAKI. It stated that the service was not sustainable as it was currently configured, and was not able to meet commitments within nationally recognised timescales. It referred to the need to develop a multi-disciplinary team under the Claimant and Ms Swanepoel, which was a change to the then existing arrangements, and referred to the Claimant moving to work three days per week in ADS. It referred to the Claimant’s secondment, and using her salary when doing so “to buy in from external agencies a block and targeted diagnosis across Argyll & Bute”. If there was an acceptance of a multi-disciplinary team that would operate under the guidance and management of the Claimant.

52. The Claimant was not provided with that report, or asked to comment on a draft of it.

53. Mr Stevenson who had been chair of the Argyll and Bute Autism Strategy Group resigned from the Council which had employed him, around the end of August 2017. Mr Murray was appointed on an interim basis to replace him. In September 2017 Mr Watt was promoted permanently to the role of Locality Manager, having held the role on an interim basis since June 2017. He had realised on or about 1 August 2017 that his role included responsibility for ADS.

54. On 6 September 2017 a meeting of the SMT took place, attended by parties including Ms Paterson. Mr Murray presented the paper he had drafted. The SMT agreed that a meeting be held with the Claimant to provide feedback on the outcome of the discussion held and the SMT decisions. They included that there was a mental health redesign reviewing the total service which included the capacity to undertake ADS assessments, and that depending on agreement of the secondment the Claimant's salary "would be utilised for team training and sourcing supervision to spread knowledge of the service and to build team capacity to provide a multi-disciplinary approach to AASD." It continued that it was not agreed that after secondment the work of the Claimant under ADS be increased to three days per week, or the multi-disciplinary team being managed by her.

55. On 24 October 2017 Ms Gillespie wrote a formal letter to the Claimant confirming that the application for secondment had been successful. The letter stated that the "leave commences on 8 January 2018 and you will resume your permanent position in the MAKI CMHT on 28 September 2018". She added "In accordance with policy we are to confirm dates for staying touch days."

56. On 27 October 2017 Mr Murray sent the Claimant an email with an extract from the minute of meeting of the SMT held on 6 September 2017, and his report. He referred to a discussion the previous day. The Claimant sent that to Ms Paterson and Mr Hall seeking clarity on a number of points, referring to the fact that they were at the meeting. Ms Paterson did not reply to that email. She did not recall receiving it.

57. On 30 October 2017 the Claimant emailed Dr Robinson with a copy of Mr Murray's email and attachments. She said that she was trying hard not to over-react, but that it was increasingly hard not to feel that it was a little personal. She thought that the reference to her not leading the team was a form of demotion.

58. In about October 2017 the HSCP undertook an exercise to assess the extent to which the finances were meeting the budget set, at a point six months into the financial year. It was discovered that there was a deficit then understood to be of about £9 million. That deficit was serious and significant. It required steps to be taken to reduce or eliminate it.

59. In November 2017 a draft recovery plan to seek to do so was prepared. It sought to make sufficient cost savings to return the budget to balance by eliminating the anticipated deficit. It updated the earlier assessment, and identified a higher figure for the deficit.

60. The aspect of that plan for MAKI and Mental Health identified a series of cost savings that, it was thought, could and required to be made. It identified that 318.7 million of savings required to be made. It included a reduction in care packages provided to clients of 15 minutes. There was a column for client impact which stated “Poorer standard of care delivered to vulnerable clients”, and for Risks which stated “Availability of staff to carry out the reviews in a timely manner”. A further entry was to stop all sleepovers, where staff sleep in with a client, and replace that with “telecare to support clients where appropriate”. The client impact was “Increased risk of anxiety and stress on clients”, and the risks “Reduction in the number of carers within the organisation and local community”. Radiography services were reduced on call in Kintyre and Mid-Argyll, such that only one unit was operational at night Mondays to Thursdays. The client impact was “Lack of available diagnostic services for injured and ill patients”, and the risks “Public perception”.

61. There were two entries relevant to the Claimant. The first was the “termination of all secondments out of mental health services”, with the risks being “Risk of staff not being developed”, and under the description of “autism service” reference was made to the Claimant going on secondment for nine months, and an administrator on secondment for four months. The client impact was - “No assessments for autism will be carried out” and risks were stated as -

"N". It is not known what if anything "N" intended to refer to. There were a total of 24 individual items of cost savings for MAKI on that plan.

62. On 2 November 2017 the Claimant received an email from the Respondents' HR department regarding a query she had made about annual leave entitlement in regard to the secondment which she had referred to in an original enquiry dated 16 October 2017.

63. On 6 November 2017 the Claimant intimated a grievance orally, and completed a form to do so. That form was not before the Tribunal, but its terms can be gleaned from the decision in relation to it given in April 2018, and was (i) undertaking the ADS role without clear and effective management (ii) failure to make changes to the Job Description and banding for the role with efforts to do that being ignored and (iii) the SMT minute from the meeting of 6 September 2017 relating to her not leading a multi-disciplinary service.

64. On 8 November 2017 Ms Gillespie sent an email to the Claimant about a draft letter she had prepared to send to clients regarding the autism service, and said that the content was not appropriate but that she would arrange for a letter to be sent.

65. On 16 November 2017 the Claimant emailed Ms Gillespie with details about the service she provided. Ms Gillespie replied stating that she "now required to understand this much more indepth to see if or how to keep it going". Ms Gillespie had attempted to secure alternative provision for ADS assessments during the period of proposed secondment for the Claimant. She had spoken to Ms Swanepoel but she did not wish to provide any service outwith one location. She had also spoken to Dr Barclay a psychiatrist but he was only able to offer up to half a day a month. She did not consider that it was likely that an agency could provide any cover given the difficulties that had been experienced in recruiting to such posts for remote and rural locations such as Argyll and Bute. Ms Gillespie was concerned at what service practically could be provided during the secondment, if any.

66. On 24 November 2017 the Claimant sent Mr Watt an email asking about the grievance she had given to him on 6 November 2017. He replied to state that he had forwarded it to HR the previous week and would be writing to her about it. He did so on 27 November 2017, referred to her "formal" grievance, and informed her that Ms Gillespie would investigate it.

67. On 29 November 2017 the Claimant met Mr Watt, Ms Gillespie and Mr Charlie Gibson of HR. The meeting discussed the need for a secondment agreement. Ms Gillespie apologised for not noticing that earlier, and Mr Watt apologised for not better supporting Ms Gillespie. Mr Gibson said that "we are where we are", and there was a discussion about what was required for the secondment agreements. One such agreement was required between the Respondents and the new employer during secondment, the other between the Respondents and the Claimant herself. There was no discussion about specific terms and conditions of the secondment agreement with the Claimant, including as to notice, and Mr Gibson was left to prepare drafts. The Claimant was not informed or advised about what the terms and conditions would be.

68. Also on 29 November 2017 a meeting of the IJB took place. An updated financial recovery plan, which included the actions in respect of MAKI set out above, was approved. The intention behind that plan was to return the finances of the HSCP to balance against the budget by the end of the financial year. The financial situation was exceptional. The changes that required to be made were serious and significant, and included reductions in the level of service and care to clients. The position was the worst that Ms Paterson had encountered in her career of over 30 years.

69. The changes decided upon included the proposed cancellation of all secondments. The reason for that decision was that the time and skills of the staff involved were required for delivery of front-line services. It was intended to be part of the cutting of cost. The Respondents did not consider that they

could afford the cost of such secondments. That cost included the higher cost of replacement staff, where they could be obtained, and additional costs such as for hotel accommodation.

70. On 4 December 2017 the Claimant emailed Mr Watt about the detail of the secondment arrangements, and on 6 December 2017 emailed to state that the agency she would be employed by had not yet heard from Mr Gibson. By that stage she had sourced accommodation in London, agreed terms for that and paid a deposit, made arrangements for her family life around that, and told her patients of her secondment. She intended to work for the period up to the Christmas holiday, then take time off before commencing the secondment on 8 January 2018. Her last working day before starting the secondment was expected to be 22 December 2017.

71. Mr Watt was informed of the decision of the IJB by Mr Gibson on or about 13 December 2017, and that that included terminating secondments, one of which was for the Claimant. He was asked to inform the Claimant personally. He was aware that she would not receive the decision well, and wished to do so face to face. His PA emailed the Claimant on 14 December 2017 to confirm a meeting on 20 December 2017 after speaking to her about that by telephone that day.

72. The Claimant was concerned about what that meeting might relate to. She emailed to ask Mr Watt to advise her of "any movement" as soon as possible so that she knew where she stood. He did so on 15 December 2017 stating:

> "Apologies for not responding sooner I have been out of the office this week. The Strategic Management Team have made the decision that your secondment should not progress due to service need. Charlie and I wanted to meet face to face to discuss with you. This is not only about your secondment as we are working with other staff on secondment to return them to their substantive posts. I am sure this is not news you wanted to receive. We can discuss it further in person next week."

73. On 18 December 2017 the Claimant wrote to Mr Watt with a second grievance about the handling of the secondment and its withdrawal. She referred to her having made arrangements to live and work in London including paying deposits for accommodation and travel. On the same day she emailed Mr Watt to ask that he go back to the SMT and request a reconsideration. She said in that message that she was "devastated" by the decision, and that she had finished up with clients. She referred to having made commitments to those in London.

74. The meeting between the Claimant, Mr Watt and Mr Gibson took place on 20 December 2017 as had been arranged. At it, Mr Watt explained that there was no possibility of the withdrawal of the agreement to secondment being reconsidered. He explained that the decision had been taken "due to the current financial position". He did not explain what that position was. He reiterated that what he said was the SMT decision applied to all secondments. The Claimant asked about the financial impact the decision had on her, and Mr Watt stated that he was unable to answer that but that it could be addressed as part of her second grievance. He then wrote to her to confirm the position by letter dated 21 December 2017.

75. Also on 21 December 2017 the Claimant wrote to Mr Watt to tender her resignation, stating that she felt that she had no alternative. She did so as she considered that her trust and confidence in her employers had been destroyed in particular by the withdrawal of agreement to secondment in the circumstances set out above. She said in the letter that she would work for the time needed to complete clients' diagnosis reports, but did so under protest. Mr Watt replied on 22 December 2017 expressing that he was sorry that she felt as she did.

76. The Claimant worked to 27 December 2017, on which date her employment terminated.

77. On 10 January 2018 Mr Watt wrote to the Claimant with a response on her second grievance, and rejected it. He stated the following on the reason for the decision to withdraw agreement for secondment:

> "The current financial position within Argyll & Bute HSCP is challenging and being able to provide frontline services for patients in Argyll & Bute must be a priority. As part of the HSCP financial recovery plan, SMT agreed to review all secondments and fixed term posts and prioritise the staff to the delivery of these frontline services. I acknowledge that this decision came late in the secondment process however the HSCP were dealing with extremely difficult financial decisions and the formal secondment agreement between NHS Highland and the Host organisation had not been finalised at the time SMT made this decision".

78. The Claimant replied on 18 January 2018.

79. On 30 April 2018 Ms Gillespie replied to the first grievance, apologised for the delay in doing so, and rejected it. That reply makes clear that the grievance had been in relation to undertaking the ADS role without clear and effective management, changes to the job description and banding for the role, efforts to resolve that being ignored, and the SMT minute relating to her not leading the multi-disciplinary service.

80. The Claimant replied on 14 May 2018 but that letter was not before the Tribunal. Ms Paterson reviewed the position and upheld the response Ms Gillespie had given by letter dated 4 July 2018.

81. The NHS Evaluation Handbook, part of the documents forming the contract of employment for the Claimant, has the following provision at paragraph 4.1

> "Where a job has changed there should be a re-match or re-evaluation and the whole job should be assessed, albeit with a reference back to the original match or evaluation. Just dealing with some of the factors could lead to inconsistencies."

82. NHS Scotland has a Policy on secondment, which is part of the documents forming the contract of employment for the Claimant. It has the following provisions (with references to paragraph numbers):

(i) In the Ministerial Foreward it confirmed that the Partnership Information Network (PIN) policies set a minimum standard of practice in the area of employment policy, and form part of the terms and conditions of employment of all NHS Scotland employees.

(ii) 2.1.1 Boards strive to be exemplary employers.

(iii) 2.1.3 recognises the value of secondment for both employee and organisational development.

(iv) 2.1.4 and 2.1.5 refer to organisations developing from secondment, and retain experienced, skilled and valued employees, helping organisations to modernise and adjust to service changes to the overall benefit of NHS Scotland.

(v) 2.2.4 states that no application for secondment will be unreasonably refused.

(vi) 2.2.5 states that Boards will ensure that clear arrangements are in place in advance of any secondment including an appropriate secondment agreement ensuring that stakeholders are fully aware of their roles and responsibilities under the secondment.

(vii) 2.4.2 sets out the roles and responsibilities of the accountable manager, which includes the secondment agreement and that the employee fully understands any terms and conditions implications.

(viii) 2.5 sets out the requirements for secondment agreements, which includes one between the Seconding Organisation and Host Organisation, and one between the Seconding Organisation and Secondee. Appendix A contained a model agreement appropriate to secondment to a Host Organisation.

(ix) 2.8.7 states as follows:

> "….the Accountable Manager reserves the right to recall Secondees prematurely if required in exceptional circumstances. Termination of the secondment, prior to expiry at is agreed end date, will normally

be subject to an agreed period of notice, as stipulated in the secondment agreement…."

83. Schedule Part 3 contained a model employment contract between Seconding Organisation and Secondee. Clause 2.2 of that states:

"The secondment may be terminated……

(d) *By the Board subject to the service of [state months] prior written notice to the Host]* "

84. Clause 9.7 of the model employment contract states:

"Secondment opportunities should generally be allowed to run their course, in line with the terms of each individual secondment agreement. However, the Accountable Manager within [*name of organisation]* reserves the right to recall Secondees prematurely if require in exceptional circumstances. Termination of the secondment, prior to expiry at its agreed end date, will normally be subject to an agreed period of notice, as stipulated in the secondment agreement. Any extension to the secondment proposed must be by mutual agreement of all parties."

85. The Respondents published their own policy on secondment, which has the following provisions (with reference to paragraph numbers):

(i) 1.1 NHS Highland strives to be an exemplary employer….As a learning organisation, NHS Highland recognises the value of secondment for both employee and organisational development.

(ii) 1.2 By placing employees in different work situations, secondment offers the opportunity for individuals to develop new skills or enhance existing skills, enabling NHS Highland to develop and retain experienced, skilled and valued employees

(iii) 1.3……secondment helps [NHS Scotland and partner organisations] to modernise and adjust to service change, to the overall benefit of NHS Scotland.

(iv) 3.3 No application for secondment will be unreasonably refused

(v) 4.2 The Types of secondment included “External secondment eg to a Scottish Government, local authority, trade unions, professional organisations and the voluntary sector)

(vi) 5.2 set out the role of the Accountable Manager which included ensuring that the appropriate secondment agreement had been completed prior to commencement, and that the employee fully understands any terms and conditions implications

(vii) 6.1.1 stated the need for a secondment agreement between NHS Highland and the Host Organisation and a secondment agreement between NHS Highland and the employee. Host Organisation was defined as the organisation to which the secondee was seconded when outside NHS Highland

(viii) 9.7 repeated the terms of NHS Scotland PIN policy paragraph 9.7 as above.

86. The Claimant’s net earnings when her employment terminated were £654.17 per week. Her gross annual salary was exactly £49,000 per annum. She also had an entitlement to pension which was agreed to be valued at 9.5% of salary.

87. The Claimant was 48 years of age at the effective date of termination.

88. She commenced the contract with the agency on 8 January 2018, and that continued until 30 September 2018. Her pay, less the cost of rent, was no less than that which she had received during her employment with the Respondents, and she has no loss in that period.

89. Since May 2018 the Claimant has had earnings in private practice totalling £3,936.64. She is seeking to build a private practice as a clinical psychologist in Argyll and the surrounding area. It is likely that the income from that role will be about £10,000 in the year from 1 October 2018. The Claimant has not been seeking employment outside that private practice.

90. The Claimant did not receive any benefits after the termination of employment.

Submissions for Claimant

91. The Claimant made an oral submission which I set out below.

(i) Constructive dismissal

92. The Claimant highlighted what she argued was the central fact as the withdrawal of the secondment effectively, she said, with two days' notice in 2017. The Scottish Government PIN Policy on Secondment set minimum standards of best employment practice, which clearly set out rules and responsibilities for the parties, including the secondee and accountable manager. The Respondents' witnesses had agreed that she had undertaken her obligations by doing all that she could to ensure that the authorisation was provided by her accountable managers prior to her accepting it.

93. Donald Watt and Nicola Gillespie were jointly acting as accountable managers and had separately confirmed that they did not meet the key responsibility of ensuring that an appropriate secondment agreement had been concluded. Therefore there were no documented terms and conditions, and they had failed in the responsibility to ensure that she understood those terms and their implications. Specifically there was no agreement about what should happen if a secondment was to be withdrawn or terminated early including a notice period.

94. Donald Watt had been informed of the decision to cancel the secondment and knew that this would be a difficult matter to relate to her and planned to tell her at a face to face meeting on 20 December 2017, which was two working days before the secondment was due to start. She was informed by email on 15 December 2017 only because she had specifically asked to be. He could "see how this could be viewed as unreasonable". This, and the failure to provide a formal secondment agreement, was of significant severity

to amount to a repudiatory breach of contract, and of trust and confidence in her employer, and was grounds for constructive dismissal.

95. She also claimed that this was a last straw, following failures by various element of her management, which have cumulatively amounted to a breach in her trust and confidence in her employer. Dr Robinson had confirmed that that was in fact the effect on her. She relied on the following matters:

(i) The repeated initiation and then failure to complete the Job Description, which was the first step in the Job re-evaluation process, which is required if a job is significantly changed. The resultant failure to match her job appropriately had resulted in a significant loss in income and unlawful withholding of wages, but she accepted that only a Matching Panel can decide at what level a job should be banded.

(ii) The confusion over her line management within the ADS. This was confirmed by Mr Dreghorn who admitted providing her with inaccurate information at the time

(iii) Communication failures and shortcomings for example the lack of response to emails to Mr Dreghorn, the lack of response to emails to Ms Paterson particularly in relation to the extract from the SMT meeting relating to the ADS. Ms Paterson admitted that she had managerial and governance accountability for Mr Dreghorn and Mr Watt who in turn had responsibility for Ms Gillespie. There was a disconnect in communications between her and her more junior management team evidenced by a lack of documentation of any risk potential risk in losing her from the service. That was in sharp contrast to the expressed views of Mr Watt and Ms Gillespie that they might lose her, or were not surprised to have done so. Ms Paterson had a belief that her subordinates were so clear about aspects of her communication and their intentions to act on them that she did not feel the need to respond directly to queries either from the Claimant or Ms Leask.

(iv) A sense of being undermined and excluded from discussions about how the service could be supported or progressed for example Ms Gillespie's attempts to secure cover for her, her email to all bar the Claimant about

how to take the service forward and not being given sight of papers about the ADS before they were submitted.

96. She also noted that the Respondents had argued that the decision to withdraw the secondment at the very last minute was due to new and exceptional financial circumstances, and in response to a late realisation that cover would be hard to find. All of this could easily have been foreseen. Perhaps the decision to agree to secondment in August 2017 should never have been made, but certainly there was plenty of time between then and 15 December 2017 in which changes to arrangements could have been made. The Respondents also argued that the decision was made to save money. The reality was that it was not effective in doing so, as the post has been unfilled despite several rounds of advertisement, the costs of the Tribunal, legal expenses and any remedy that may be awarded.

(ii) Remedy

97. For the constructive dismissal the Claimant sought a basic award of 33,810. For the compensatory award she sought past losses for the period from 1 October 2018 to the date of the hearing, for the earnings she would have received with the Respondents less her earnings of £3,963.64. She accepted that there had been no loss during the period working in London. For the future, she had set up in private practice in a remote and rural location, and reference was made to her Schedule of Loss with its estimate of income.

98. Mr Davies accepted the figure provided for earnings in the period to the date of the hearing when that was raised with him for clarification.

Submissions for Respondents

99. Mr Davies produced a written submission, which is reproduced below. One amendment to it was made orally.

Issues

100. The correct place to identify the issues is the pled cases:

101. ***Chandhok v Tirkey [2015] ICR 527*** where the EAT noted:

> "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."

102. Also ***Ladbrokes Racing v Traynor [2007] UKEAT 0067_06_0310***: Paragraph 40:

> “The Tribunal's decision is further flawed by its having been influenced by a view that the Respondents should have ‘seen it coming’ because of what was in the documents and then, as explained in their reasons, that the Respondents were ‘not entirely unfamiliar’ with the matters raised because criticisms of procedural irregularity had been raised at the disciplinary hearing. If the first of these propositions was correct, then parties would require to prepare for cases on the basis that their opponent will be able to rely on any case that could be made against them out of the material in the documents lodged whether or not it is foreshadowed in the ET1 or 3. That would not be fair or just. Each party is entitled to approach the hearing on the basis that the case they have to meet is that of which notice is given in the ET1 or 3”.

103. This is relevant if the Tribunal were inclined to consider a constructive dismissal case based on breach of express terms, as opposed to breach of the implied term regarding trust and confidence.

104. As per the ET1, the issues are as follows:

(i) Whether an unlawful deduction from wages occurred on the basis that there was a failure to pay what was properly payable, and if so, what remedy is appropriate (Grounds of Claim paragraph 24).

(ii) Whether the Claimant was constructively dismissed:

(a) By deciding not to progress the Claimant's secondment such that there was a breach of the implied term regarding trust and confidence (Grounds of Claim paragraph 20); or

(b) By a series of actions which undermined the employment relationship, the final straw being the decision not to progress the secondment (Grounds of Claim paragraph 21); or

(c) By not paying wages which were correctly due (Grounds of Claim paragraph 22).

105. And in relation to the constructive dismissal claim, from the Grounds of Resistance:

(d) whether the claimant resigned in response to any breach of contract by the respondent;

(e) whether any final straw was sufficiently serious as to revive earlier alleged breaches of contract; and

(f) whether there was reasonable and proper cause for any of the actions or omissions relied on by the claimant.

106. The Respondents' argument regarding delay, set out at paragraph 18 of the Grounds of Resistance, is no longer relied upon in relation to the final straw of withdrawing permission for the secondment.

Unlawful deductions

107. The burden of proof is on the Claimant.

108. It is denied that the sum sought by the Claimant was ever "properly payable" to her.

109. The evidence, including the joint statement, has shown that in order for 8B pay to be properly payable, an appropriate job description would need to be evaluated independently to determine the appropriate level of pay. Only if the job evaluation process decided that 8B was the appropriate pay would it become properly payable. It is agreed by the parties that this did not happen. There was therefore no legal entitlement to the higher pay.

110. In relation to job evaluation, I refer to ***Kingston Upon Hull City Council v Schofield and others UKEAT/0616/11***, which held that in an unlawful deductions claim, the tribunal could not be asked to put itself in the place of the employer and determine the value that should be attributed to the claimants' jobs.

111. This is not a contractual interpretation case.

Constructive dismissal

Law

112. Unless a breach of contract is significant and either goes to the root of the contract, or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, it will normally fall short of being a repudiatory breach.

113. The test of whether there has been a fundamental breach of contract is objective.

114. The implied term of mutual trust and confidence derives from the House of Lords' judgment in ***Malik and anor v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL***, where their Lordships concluded that there was an implied contractual term that an employer 'will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee'.

115. As for the 'no reasonable and proper cause' element of the test, the EAT confirmed in ***Sharfudeen v TJ Morris Ltd t/a Home Bargains EAT 0272/16*** that even if the employee's trust and confidence in the employer is in fact undermined, there may be no breach if, viewed objectively, the employer's conduct was not unreasonable.

116. A last straw argument, as pled in this case, relies on an alleged breach of the implied term regarding trust and confidence, see for example ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978***.

Management support

HSCI

117. Health and Social Care Integration ("HSCI") had happened on 1 April 2016. This was a merging of the social care and health functions of Argyll & Bute Council and the Respondents respectively. It happened because the Scottish Government had decided it should happen.

118. This resulted in "a huge amount of managerial reorganisation which has inevitably taken up a large amount of resource and focus" (opening statement, page four, first paragraph).

119. Alison Leask described it as having had a significant impact, which included: constant changes of personnel, managers not knowing who reported to whom, job titles changing constantly, people being stretched, and it being a difficult time for staff.

120. The effects of HSCI were described in neutral terms by the Claimant and Alison Leask, in so far as neither individual was seeking to blame the relevant organisations for the consequences of HSCI. They did not appear to extend this sympathetic view to the individual managers involved in this case, who were necessarily directly caught up in HSCI.

121. Lorraine Paterson explained that HSCI resulted in all managers losing their jobs and having to re-apply for new posts. The previous management structures of the two organisations disappeared, and were replaced by a new structure. This created extra workload for management.

122. It is submitted that this evidence should be accepted as providing relevant information about the context within which the Respondents' managers were operating from April 2016 onwards.

123. Responsiveness and clarity around who line manager was

124. As locality manager, and for a time the Claimant's line manager for ADS, John Dreghorn ("JD") had multiple responsibilities, including all local health and social work services, community services mental health inpatient services, and community mental health services. He was responsible for four hospitals within his locality. He had three local area managers reporting to him.

125. He was based in a different location from the Claimant. Argyll and Bute is remote and rural.

126. In June 2016, he had requested to drop mental health from his portfolio. He had suffered from undiagnosed anxiety and depression in the year leading up to June 2016. In his view, these conditions were probably entirely workload or work-related. His workload was significant and had increased gradually over the years. He was overworked.

127. He did not consciously avoid responding to emails.

128. He retired on health grounds in June 2017.

129. Nonetheless there is evidence in the bundle of John Dreghorn engaging with the Claimant in relation to managerial responsibilities such as discussing her pay band, funding for her role, and approving study leave.

130. Insofar as the Claimant alleges that she did not receive a reply from Lorraine Paterson to certain emails, Lorraine was three levels above her in the line management hierarchy. Lorraine had a huge organisational portfolio of responsibility. Within that, the ADS amounted to two individuals working part time, and receiving a relatively small number of referrals compared to other services. Lorraine Paterson received between 100 and 200 emails a day, and required to have her emails filtered and prioritised by her PA.

131. The reason why Lorraine did not reply to the Claimant's email in late October was that she did not want to undermine the position of her managers, who had been tasked with taking the matter forward. There is no evidence that the Claimant followed up her email with a chaser.

132. Although the Claimant said that she had no manager for a period of 18 months (from August 2016 until she left), she accepted that in August 2017, Nikki Gillespie was her line manager, and there is evidence of this being the case in Nikki's processing of the application to go on secondment, and in there being one-to-one meetings between Nikki and the Claimant in August and September 2017, during which cover for the secondment was discussed.

133. There is no evidence of any serious detriment to the Claimant from any confusion regarding who managed her.

134. Although the lack of clarity at times regarding the identity of the Claimant's line manager would subjectively have been frustrating and unsatisfactory, I submit that it is not objectively serious enough to form part of a breach of the implied term regarding trust and confidence.

135. In any event, there was reasonable and proper cause for any such breach in the evolving managerial circumstances following HSCI in April 2016.

Funding

136. The Claimant wanted the ADS to be better funded and expanded. Lorraine Paterson explained that whilst the Scottish Government had said that an autism diagnosis service should be created, it had not provided any extra money for this. The Claimant knew that developing and supporting a new service would be extremely challenging in the current financial climate (108), and that there was no new money and money would need to be found at the cost of something else (117).

137. A mental health redesign was underway. This included ADS. Decisions on the future shape and funding of ADS had not yet been made, and following the September 2017 SMT meeting, the SMT asked for more information to inform its decision making process.

138. It was the role of the SMT to make the big decisions regarding how money was spent.

139. These factors amounted to a reasonable and proper cause for any decision by the Respondents not to provide increased funding to the ADS.

Demotion on return from secondment

140. This is alleged at paragraph 5 and 10 of the Grounds of Claim.

141. In her ADS work, the Claimant was not a manager. Although she perceived herself as having a leadership role, this was informal, and she was not a team leader. There was no team. There was just the Claimant and Chris Tanner, who provided admin support. This was not a multi-disciplinary team.

142. Lucia Swanepoel carried out some autism diagnosis, but had no dedicated time for this. It cannot be reasonably concluded from this that the Claimant was in a managerial relationship to Ms Swanepoel.

143. Gordon Murray's paper (135-139) on the future of the ADS proposed the creation of a multidisciplinary team "under the guidance and management" of the Claimant (p139 para 1.6).

144. This team did not exist at the time.

145. This proposal was considered by the SMT in early September 2017 and the decision of the SMT is minuted at page 160 of the bundle.

146. The Claimant received a copy of this minute on 27 October 2017 (160).

147. Although at the time, the Claimant had some queries arising from the minute, in her evidence she accepted that she had understood the meaning of the fourth bullet point of the extract from the minutes, which says that "the mental health redesign is reviewing the total service", and she understood this to include ADS.

148. The sixth bullet point stated that SMT did not agree to the Claimant increasing her ADS days from 2 to 3 on return from secondment, or that she would manage the multidisciplinary team.

149. The Claimant confirmed that she understood the meaning of these words when they were put to her in cross examination. In any event, the meaning of the words is objectively clear.

150. Although the Claimant says that many questions arose from the reading of these minutes, and she emailed Lorraine Paterson for clarification, but did not receive a response, I submit that this is not material, if the meaning of the words in the sixth bullet point could be understood by her.

151. The response of the SMT in the sixth bullet point to the proposal made by Gordon Murray did not amount to a demotion of the Claimant or the removal of any leadership role. The SMT were saying that the Claimant would not

manage a multidisciplinary team. Managing is different from leading. It has a specific organisational meaning, relating to being a manager. The Claimant was, at the time of this decision, not a manager. The multidisciplinary team did not exist. Deciding that the Claimant would not manage a team which did not exist did not, viewed objectively, amount to a proposed demotion or a removal of her informal leadership role.

152. In any event, the SMT had the authority within the HSCP to make decisions on the future shape of any services.

153. In any event, the Claimant knew (159) that a new role would require to be advertised and interviewed for appropriately, and so could not have legitimately expected to be simply given a new role. Managing an expanded multidisciplinary team would have been a new role. Any subjective disappointment on her part ought, objectively, to have been tempered by this knowledge.

154. Accordingly, when viewed objectively, this decision by the SMT did not amount to something which contributed towards a breach of the implied term regarding trust and confidence.

155. As regards the Claimant emailing Lorraine Paterson and Mike Hall with queries (159), and not receiving a response, I refer to my submissions above in relation to management support. I also reiterate this submission that the minutes of the SMT were, viewed objectively, and as confirmed by the Claimant's evidence in cross examination, sufficiently clear that a failure by Lorraine Paterson to respond to the Claimant's email did not amount to a contribution towards a final straw constructive dismissal.

156. An additional element of the final straw was described by the Claimant as discussions happening around and above her about things that she should have been involved in. The Claimant agreed that the SMT made the big decisions about funding and so on. There was no evidence that the degree

of consultation by senior management with the Claimant was less than it ought reasonably to have been, measured by an objective standard.

Pay

157. No promises on pay were made at the outset in early 2015. The Claimant did not make her commencing of the ADS work conditional on receiving 8B pay. Her evidence in chief was that nothing was discussed about salary at the point in time when she started the ADS.

158. The Claimant knew in August 2016 that recurring permanent funding had not been obtained, and confirmed in April 2017 that "the role was never formalised" (95).

159. The job evaluation or banding process had not progressed because of problems finding a template, and also because permanent funding for the Claimant's work had not been decided on (106). As John Dreghorn explained, without secure funding, no new role would be signed off by the chief officer, and without that there would be no job description, and without a job description there would be no job evaluation.

160. Although the Claimant says she was not advised of this connection between funding and job banding until John Dreghorn's letter dated 25th May 2017 (105-106), it is submitted that this nonetheless amounts to a reasonable and proper cause for not progressing the Claimant's ADS work through the job evaluation process.

161. It could be argued that JD should have persisted in attempting to persuade the SMT to fund the Claimant's ADS work on a recurring basis (which, if approved by the SMT, would have opened the gateway towards job evaluation) and that by not doing this, it was part of the alleged cumulative breach of contract.

162. However, it is not clear from the Claimant's evidence that this specific omission formed part of the reason for her resigning. The Claimant's position in evidence appears to have been that what she had an issue with was the failure to complete the job description and take the job description through the job evaluation process. She had been unaware, at least until May 2017, that permanent funding of the post was a prerequisite to this happening.

163. In any event I make the following submissions on this potential line of argument:

164. John Dreghorn's evidence has been that the decision on whether to fund a post would be made by the SMT. They had declined in 2014 and 2015 to fund the Claimant's post. Because of this, John Dreghorn had required in early 2015 to proceed "at risk", using money which was temporarily available because another post had not been filled.

165. He could at a later stage potentially have gone back to the SMT with a further proposal that the post should be funded, but would have had to be able to show that the post could be funded on a cost neutral basis, in other words that it would not cost any more money.

166. He thought he could do this, but then qualified this by saying that the financial position of the organisation got worse over 2015 to 2016, and also between 2016 and 2017, with each manager having to deliver savings, and any savings that were made had to be ploughed back in to the budget.

167. In these circumstances, if he had approached the SMT, he thought it highly unlikely that SMT would have agreed to the post being created.

168. It is also a matter of agreement that funding for the role was never formalised (joint statement paragraph 6).

169. I submit that this explanation amounts to a reasonable and proper cause for JD not returning to the SMT to seek approval for the formal creation of an ADS post. It would not be reasonable to expect him to do something which he thought highly likely to fail.

Secondment:

170. The secondment was external to the Claimant's job with the Respondent.

Agreeing to let the Claimant go

171. It could be argued that the Respondents should only have agreed to let the Claimant go on secondment once it had determined that there were no possible reasons, and that at no point in the future would there be any possible reasons, for changing its mind.

172. Nikki Gillespie's evidence is that, as a remote and rural area, recruitment and retention of staff within Argyll & Bute is very difficult.

173. Alison Leask said that "remote and rural areas have particular challenges with recruitment and retention. It is important to nurture what you have".

174. NG knew that the Claimant was very keen to go, and that she was in a hurry to get a decision. She was worried that the Claimant would go regardless of whether agreement was given, which would mean losing a valuable member of staff. She felt between a rock and hard place. This was not unreasonable.

175. (Nikki Gillespie was not aware at the time she made a decision that the Claimant had said as much to the recruitment agency in email correspondence (129).)

176. Donald Watt was also involved in the decision, and his explanation was that the policy says that the Respondents should support staff to develop.

177. For the Claimant, the secondment role was her "ideal job", and she would have been willing to resign in order to make it happen. Already in August 2017, she would have been extremely disappointed if it had not worked out (129).

Arranging cover

178. At the time when permission was granted for the Claimant to go on secondment, the Claimant had already anticipated that covering her absence would be a problem for management.

179. Whilst the Claimant's view was that cover for the ADS service could easily have been arranged, Nikki Gillespie found it to be not easy at all. She made efforts in September 2017 to put in place cover, but having tried various avenues, including that suggested by the Claimant, she was only able to get agreement from Gordon Berkeley, consultant psychiatrist, that he might be able to do a half day per month. He would not commit to a fixed slot, Nikki Gillespie would have to chase him to check his availability, and he would only be able to do this work from Lochgilphead. By contrast, the Claimant had been doing her ADS work two days per week (so eight or nine days per month) and covered the whole of Argyle and Bute.

180. Nikki Gillespie did not try to put in place cover through attempting to procure the services of an agency worker, because this was not viable. There was no existing agency which was used for psychology staff, so a contract would have had to have been set up, and this would have taken months. Also, there was no job description to use for this purpose. The HSCP did not have any extra money to pay for agency staff and was under huge financial pressure. Agency rates are much higher than the normal staff rate. There would also have been an additional cost by way of hotel accommodation having to be provided. In the past, when attempts had been made to use an agency for cover, it had not been successful, and the shifts had not been filled.

181. I submit that Ms Gillespie had reasonable and proper cause for approving the secondment, and thereafter made reasonable efforts to put in place cover. Insofar as "service need" was part of the reasonable and proper cause for withdrawing permission for the secondment, this was not a situation which the Respondents itself had unreasonably created.

182. In any event, as submitted below, the financial crisis overtook the arrangements which NG had made. Finance and service need, in Lorraine Paterson's evidence, are inextricably linked.

183. The difficulty putting in place cover for ADS meant was that if the Claimant commenced her secondment, the ADS service would effectively cease to be delivered for nine months. In November 2017, there was a backlog of 33 service users, and there was an average of three new referrals per month.

184. By mid November, it would have been clear to the Claimant that the ADS would struggle in her absence. Putting cover in place was proving difficult. The secondment was looking like a very bad idea for the service which the Claimant delivered single handedly. There is no evidence that the Claimant suggested cancelling her secondment.

<u>Financial crisis and IJB decision</u>

185. At the start of the financial year, a quality and finance plan was in place in order to ensure that the HSCP stayed within budget. This included the savings that were expected to be made by the larger redesign proposals such as the mental health redesign

186. By October 2017, it had become clear that the targets within the quality and finance plan for that financial year would not be met. In around September or October, it was predicted that there would be a £9 million overspend.

187. As narrated in the minutes of the IJB meeting (208), a financial recovery plan was presented to the IJB on 25 September 2017. This did not deliver the

planned improvements, and so, an updated financial recovery plan was created by the SMT (167). It is dated November 2017.

188. This updated plan included various proposals for saving money within that financial year. This included for example, not recruiting to vacant posts, reducing care packages and reducing radiography services. It also included cancelling all mental health secondments, and noted that the secondments within the autism service would lead to no assessments for autism being carried out. Secondments were viewed as incurring extra cost in terms of cover, or in terms of reduced productivity.

189. This financial recovery plan was presented to the IJB, and approved by the IJB on 29 November 2017. The decision of the IJB was binding on the SMT.

190. The minute of the IJB meeting records details of the degree of budgetary overspend in that financial year and the risk of far greater overspend in the following year.

191. In 30 years' experience of working in the NHS, Lorraine Paterson has not known such drastic financial circumstances.

192. These were not easy decisions. In her view, these were exceptional circumstances.

193. In Lorraine Paterson's words, the reason for cancelling the Claimant's secondment was that the Respondents needed the Claimant's time and skills to continue doing adult mental health and ADS work, and could not afford any additional costs which might be incurred by allowing her to go on secondment.

194. I submit that the reasons given by Lorraine Paterson amount to a reasonable and proper cause for any prima facie breach of the implied term to uphold trust and confidence in the employment relationship.

195. The timing of the decisions in relation to the financial recovery plan, and the timing of the updated financial recovery plan itself (dated on its face as November 2017) are important. Whilst the Claimant may argue that the Respondents should have known from the start that covering her absence would be difficult, Nikki Gillespie's evidence is that despite this difficulty, she intended for the secondment to go ahead.

196. What changed was the worsening financial situation. In particular, after the previous version of the recovery plan proved ineffective in the period after 25 September 2017 (see p208), there was a requirement to update the financial recovery plan to add new money-saving measures, which were then considered and approved by the IJB at the end of November. These were new and material factors at play in November 2017 which the Respondents could not reasonably have foreseen in August 2017 when permission was initially granted.

197. It was suggested to Lorraine Paterson that the Respondents should perhaps have foreseen that a consequence of its decision to withdraw the permission to go on secondment from the Claimant would have been that she would resign, thereby creating a bigger problem than that which they set out to solve.

198. There is no evidence that the Respondents ought reasonably to have known that this was likely, or that in the drastic financial circumstances it would have been reasonable for the Respondents to hold back from taking money-saving measures on the off chance that they might create unintended consequences.

199. In any event, I submit that this is not relevant to the question of whether there was a fundamental breach of contract, nor does it detract from the quality of the reasonable and proper cause defence. The Respondents acted in the

best interests of the HSCP, in drastic and unprecedented financial circumstances, with the knowledge it had at the time.

200. The Claimant was very disappointed, but in my submission it is objectively relevant to note that, when the permission was withdrawn, she was simply left in the position of being expected to carry on doing the job she was employed to do.

Absence of secondment contract

201. The delay by the Respondents in putting in place at secondment contract in accordance with the policy was being remedied by early December 2017 (220). It would have been comforting for the documentation side of things to have been dealt with earlier, but by the time the Claimant resigned, progress on this was underway. Accordingly, I submit that it did not contribute to a cumulative breach of trust and confidence.

202. NG said that the situation as regards the documentation "did not halt the secondment".

203. No mention of secondment documentation is made in the letter of resignation.

Timing of the withdrawal of permission

204. The Claimant's evidence was that, while she accepted that permission could be withdrawn, she objected to the timescale (Re-examination of the Claimant: "absence of cover did not justify pulling it at short notice. I don't say they are not allowed to withdraw [permission] at short notice, but the PIN Policy says that they should do so within agreed timescales").

205. She said that she was given two working days' notice. This is not quite true.

206. As of 15th December (222) the Claimant knew that permission for the secondment had been withdrawn. She was due to start on 8th January. That

was some three weeks hence, although there would be four days of public holidays during this period.

207. There was no evidence from the Claimant on what a reasonable notice period would have been for her. There was no evidence that, for example, receiving four weeks' notice instead of three would have made a material difference, such that the failure to give four weeks' notice was part of a fundamental breach of contract.

208. In the absence of evidence to the contrary, the tribunal is entitled to conclude that in the normal course of things, property rental can be cancelled, courses can be missed, and the host organisation can be told that the Claimant is not coming.

209. Whilst the Claimant made a point of saying that she did not want to let down patients in London, by resigning, she demonstrated that she was willing to let down her existing patient group in Argyll & Bute over the longer term.

210. And the Respondents were open to looking at the costs which the Claimant would have wasted. These appear to have been less than £1000.

Expenses incurred

211. In anticipation of the secondment proceeding, the Claimant had already paid for travel accommodation, a training course, and a deposit on rent.

212. Before she resigned, she raised this with Donald Watt at the meeting on 20 December. He said that it would be looked into as part of the grievance which the Claimant had by then raised in relation to the secondment. He did not say that she could not be reimbursed for this outlay. The Claimant resigned before she could see the grievance outcome, which was dated 10th January. Accordingly the Claimant did not resign in response to any refusal to reimburse her for potentially wasted outlays.

Breach of written agreement

213. As I discuss above under the heading of issues, it is not pled that the Claimant resigned due to the breach of a written variation of contract.

214. In any event, the Claimant's own evidence was that she accepted that permission for the secondment could be withdrawn, but it was the timing of the withdrawal which she objected to. In other words she did not resign in response to a breach of a written agreement.

215. In any event the NHS Scotland PIN policy, in my submission, is a contractual document which it should be implied allows for permission to be withdrawn by the Respondents in certain circumstances, such that withdrawal of the permission did not amount to breach of a contractual term. See below.

NHS Scotland PIN Policy

216. The NHS Scotland PIN Policy is part of the Claimant's contract of employment.

217. Although discussions could be had about whether the Claimant was truly due to go on a secondment within a strict definition of the term, this would be irrelevant, as the relevant parties viewed the Claimant's work in London as being a secondment, and it is agreed that the NHS Scotland Secondment PIN policy applied.

218. The Respondent's policy provides (paragraph 5.2) that benefits to the organisation and the individual, as well as replacement costs and arrangements for cover are relevant matters.

219. Paragraph 9.7 of the model policy within the NHS Scotland PIN, in relation to secondments which are underway, gives the Respondents the right to end them prematurely in "exceptional circumstances", by giving the amount of notice which is prescribed in the secondment agreement.

220. The Respondents also founded on clause 2.8.7 of the PIN, which (he argued) provided for a right to termination.

221. However the Claimant's secondment had not started at the time when permission for it to proceed was withdrawn, so this contractual provision at paragraph 9.7 does not squarely apply to the circumstances of this claim.

222. However I submit that if the parties to the PIN agreed to include this right for when the secondment is already underway, then to reflect the parties' probable intentions at the time of entering agreement on the terms of the PIN, it should be implied that they would also have agreed that the Respondents would also have the right to stop a secondment going ahead when the secondment has not even started, subject to the "exceptional circumstances" requirement. At such time the degree of disruption would be less. And if the Respondents had the express right to interrupt a secondment once it was underway, it would have been perverse and contrary to common sense for the Respondents only to have been able to terminate a secondment which had not yet started if it first had to wait for that secondment to commence.

223. As regards the requirement of an agreed period of notice, paragraph 9.7 of the model policy provides that this period of notice should be that which is stipulated in the secondment agreement. In the Claimant's case, the secondment agreement had not been concluded and so there was no agreed period of notice. However I submit that, even if for example, a four week period of notice were to be implied, failure by the Respondents to comply with that implied notice period did not, objectively amount to a breach of the implied term. This is because, the practical consequences would not have benefited the Claimant, and would have been slightly absurd.

224. In other words, if four weeks' notice to terminate the secondment had been given on 15th December, this would have meant the secondment ending within a week of starting on 8th January. This would have put the Claimant in no better position than the one in which she found herself.

225. In any event, putting aside the contractual PIN and the Respondent's policy which is based on it, I submit that the drastic financial circumstances and the imperative of service delivery amounted to a clear "reasonable and proper cause" for the withdrawal of permission to go on secondment.

226. In all the circumstances, there was no constructive dismissal.

Quantum

Unfair dismissal

227. Net weekly basic pay, date of birth, period of service, complete years of service and age at effective date of termination are all agreed.

228. The Claimant agreed that gross annual pay was £49,000, according the gross weekly pay would be that divided by 52, i.e. £942.31.

229. Basic award: the statutory limit on a week's pay at the time of the alleged dismissal was £489 and not £508. The correct total figure is £3667.50.

230. Paragraph 3.2: loss of statutory rights: if the Claimant is seeking to establish herself in private practice as a self-employed person, then nothing should be awarded, as she does not require statutory protection from unfair dismissal. In any event this figure should not exceed £300.

231. Paragraph 3.4: the weekly pension benefit figure is agreed as £62.15.

232. Paragraph 3.6: London rent should not be included as a relevant expense, as it was due to be incurred anyway, if the Claimant had not resigned.

233. Paragraph 3.7: loss of long notice period. This should be deleted, there being no precedent for this award.

234. Compensatory award: Remedy is to be just and equitable, for loss which is attributable to the employer as a consequence of the dismissal (ERA s.123).

235. In my submission, it would not be just and equitable to award any compensation when the main reason the Claimant resigned was to ensure she could take up a dream job, and where she had said she would be willing to resign from her current post to make this happen. In essence, she got what she wanted, and came out of it with a net increase of income for the nine months.

236. The statutory cap is a year's gross salary (£49,000), I submit that the intention of this is to compensate for up to a year's salary loss after dismissal; and so I submit that the tribunal should deduct from that year's salary the money actually earned in the year following dismissal, viz the £46,481 gross which the Claimant earned in London, plus the £400 earned from private work.

237. This leaves a balance of £2284.

238. If the Tribunal is not with me in relation to the above two points, I invite it to make a just and equitable award.

Unlawful deductions claim

239. The base figures here are agreed, although if the claim is upheld, the tribunal will require to determine at which point in time 8B pay became properly payable. The burden of proof is on the Claimant for this.

Law

240. The claim for unlawful deduction from wages falls under Part II of the Employment Rights Act 1996. The right arises under section 13 of that Act which states:

> "13 Right not to suffer unauthorised deductions
>
> (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 worker's contract, or

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

(2) In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker 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."

241. The right to pursue a claim for a breach of that section, at the Employment Tribunal, is conferred by section 23.

242. The Act further provides a definition of wages at section 27 as follows:

"**27 Meaning of 'wages' etc**

(1) In this Part 'wages', in relation to a worker, means 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……."

243. Section 95 of the Act provides, so far as material for this case, as follows:

"**95 Circumstances in which an employee is dismissed**

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

……..

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

244. Section 98 of the Act provides, so far as material for this case, as follows:

"98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."……..

Discussion

(i) Observations on the evidence

245. All of the witnesses who gave evidence were seeking to be honest. Each of the witnesses gave evidence in a careful, responsible and professional manner. All were clearly committed professionals. There was limited dispute over the facts. The dispute centred around the analysis of what had happened, why that was, and the extent to which there was or was not reasonable and proper cause for the events that took place, and the decisions that were made.

246. Each of the submissions made was strong, from their different perspectives. This has been a particularly difficult case to decide.

(ii) Unlawful deduction from wages

247. The first issue to address was whether or not the Tribunal had jurisdiction, in circumstances where the Claimant had had a contract of employment which provided for a grade of 8a, and where that had remained the position during her employment. She was arguing that as her role had materially changed, that should have led to a new job description, which in turn would then be sent to the Matching Panel for consideration, and if appropriate a regrading. Her argument required that I seek to ascertain whether her role was properly one at grade 8a, or not. That required in turn assessment of the position where she had spent two days per week working in the ADS role, and three days per week in the original role. There were other factors that might have influenced the decision of the Matching Panel, but in essence she sought a

job evaluation assessment, arguing that that had not been carried out when it ought to have been.

248. In ***Kingston-upon-Hull City Council v Schofield and others, UKEAT/0606/11/DM*** the Claimants alleged that the Respondents had wrongly evaluated their jobs under a job evaluation scheme. Their argument was that if their jobs had been properly evaluated they would have been awarded higher scores, entitling them to a higher grade and therefore higher pay. They brought claims for unlawful deduction from earnings under section 13 of the Employment Rights Act 1996. The Employment Judge had not struck out the claims on the basis that there was no reasonable prospect of success, or on the issue of jurisdiction, and against that decision the Respondents appealed. In giving its decision to allow the appeal, the EAT stated the following in respect of the paragraphs founded upon by the Respondents:

> "[39] The value to be attributed to a job is a question of judgment not an issue of fact. In contested equal value claims under equal pay legislation the parties' experts may differ on the value to be attributed to the same job although there is no dispute over the job content or evaluation criteria. The EJ erred in holding that the resolution of a dispute of the value to be attributed to the Claimants' jobs was an issue of fact. Further, he erred in holding that the ET had jurisdiction under ERA s 13 as he expressed in para 10 to "put itself in the place of the employer" and to determine the value to be attributed to the Claimants' jobs. The Job Evaluation Scheme adopted by the Respondents did not entitle an ET to conduct an evaluation under the scheme. Nor is there any statutory power for an ET to conduct a job evaluation. Under the Equality Act 2010 an ET has power to decide whether there has been a breach of an equality clause. They may have to determine whether one person's work is of equal value to another's. Detailed procedures are set out in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 Sch 6 for dealing with such claims. These procedures do not apply to the determination of deduction from wages claims.

……

[42] The Claimants' claims were for damages not for sums which were ascertained or ascertainable. The EJ erred in holding that the claims were for sums which were ascertainable by resolution of an issue of fact. The EJ envisaged that the assessment of whether the Claimants' jobs had been evaluated properly by the Respondents would require the ET putting "itself in the place of the employer". The exercise of job evaluation or assessing whether or not the job evaluation had been carried out properly was not the determination of an issue of fact nor was it one which the ET has jurisdiction to undertake in determining a claim under ERA s 13."

249. The EAT had also made the following comments in its decision:

"[27] There is broad agreement between the parties as to the principles applicable to claims falling within ERA s 13 so that an ET has jurisdiction to determine them under s 23. The Claimants must establish that the Respondents have not paid them wages to which they have a legal entitlement whether payable under their contract or otherwise. In order to fall within s 13, the claim must be for a specific sum of money or a sum capable of quantification which has not been paid by the employer. Sums claimed by way of damages which are uncertain in amount do not fall within s 23. Such claims brought by employees continuing in employment must be brought in the courts as ETs have no jurisdiction to hear them."

250. In ***Whitmore v Commissioners of Inland Revenue [2003] All ER (D) 514***, which is one of the authorities referred to in ***Kingston***, the EAT observed as follows, in paragraph 25 of the judgment:

"We accept that the two causes of action or heads of claim are different and that there may be situations in which a breach of contract claim could not, on any view, be said to be also a wrongful deduction claim. One example might be a claim that, because an employer had failed to carry out a re-grading exercise which on the employee's case would or could have resulted in his being entitled to a greater remuneration, the employee had not received what, had there been no breach of contract

he would have received. Such a claim would appear to be only capable of being put as a claim for damages for breach of contract."

251. In ***Coors Brewers Ltd v Adcock and others [2007] IRLR 440***, again which had been cited in ***Kingston***, the Court of Appeal made the following comment at paragraph 56:

"Part II of ERA, as I read it, is essentially designed for straightforward claims where the employee can point to a quantified loss. It was designed to be a swift and summary procedure."

252. Similarly, in ***Allsop v Christiani and Nielsen Ltd (In administration) UKEAT/0241/11 JOJ*** the EAT noted that that Part of the Act was

"designed for straightforward claims where the employee can show that he has not been paid quantified or quantifiable sums properly due to him under his contract. It cannot be used as the vehicle to advance claims for damages for breach of contract, consequent, for example, upon the non-exercise or allegedly capricious exercise of a contractual discretion."

253. In light of those authorities, I concluded that I did not have jurisdiction to consider the claim for unlawful deduction from wages, and required to dismiss that claim accordingly. I understand that the Claimant, to her credit, accepted that.

(iii) Dismissal

254. The next issue I require to address is whether or not there was a dismissal under section 95(1)(c) of the Act. I accept Mr Davies' submission that no case is pled as to breach of an express term, and that the case is pled under the implied term as to trust and confidence.

255. The onus of proving a dismissal where that was denied by the Respondents fell on the Claimant. From the case of ***Western Excavating Ltd v Sharp [1978] IRLR 27*** followed in subsequent authorities, in order for an employee to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the employer, actual or anticipatory.

(2) That breach must be significant, going to the root of the contract, such that it is repudiatory

(3) The employee must leave in response to the breach and not for some other, unconnected reason.

(4) She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may have acquiesced (or affirmed under English law and terminology) in the breach.

256. In every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20***, which was slightly amended subsequently. The term was held in Malik to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

257. ***In Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that the test should be "calculated or likely". That was reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT:***

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

258. The law was summarised by Lord Justice Dyson in ***Omilju v Waltham Forest London Borough Council [2005] ICR 481*** as follows:

"1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see ***Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27***.

2. It is an implied term of any contract of employment 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: see, for example, ***Malik v Bank of Credit and Commerce International SA [1997] IRLR 462***, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne-Wilkinson J in ***Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347***, 350. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in ***Malik*** at p.464, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer." (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para. [480] in Harvey on Industrial Relations and Employment Law:

> "[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time.

> The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

259. He also gave the following explanation about the final act, in response to an argument that it required to be unreasonable or blameworthy, at paragraph 20:

> "I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred."

260. More recently in ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** the Court of Appeal endorsed the ***Omilaju*** authority and gave guidance in what are "last straw" cases which included as one of the tests to apply whether there was a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence. Both of those cases referred with approval to the following quotations from ***Lewis v Motorworld Garages Ltd [1985] IRLR 465***. Lord Justice Neill said at page 167 that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps

quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Lord Justice Glidewell added at page 169:

> "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? … This is the 'last straw' situation."

261. I conclude from these cases that in a last straw case, each individual element prior to the last straw, as well as the law straw itself, need not be blameworthy or unreasonable of itself, although it may have those qualities, but must firstly relate in some way to trust and confident, and secondly contribute in some way to the accumulation of matters which together amount to a repudiatory breach.

262. There are two authorities bearing on the phrase "reasonable and proper cause". If such cause exists, whilst there may have been a repudiatory breach of contract, there may be no dismissal under the statute. The first is ***Hilton v Shiner Ltd [2001] IRLR 727***. An employee was suspected of theft, and moved to new duties. The EAT allowed the employee's appeal against a finding that there had been no constructive dismissal. It indicated that the removal of what had been long held duties was most likely to be a constructive dismissal, but remitted that to a new tribunal. At paragraph 34 they made the following obiter comments:

> "The implied term, as formulated in ***Malik v BCCI***, is qualified by the requirement that the conduct which is complained of must be engaged in without reasonable and proper cause. Other cases have referred to the duty as being one not to act arbitrarily nor capriciously in the exercise of a discretion or power open to an employer. It has been termed an obligation of fair dealing. Merely to say that an employee is no longer trusted to handle money, when it is plain that the employer still has

> sufficient confidence in him to wish to continue to employ him, is not in our view a breach of the implied term not to conduct oneself so as to be likely seriously to damage or destroy the relationship between employer and employee, in circumstances where there are fully justified suspicions of dishonesty and the alternative to retention in employment is dismissal."

263. The second, particularly founded on by the Respondents in their submission, is ***Sharfugeen v T J Morris Ltd UKEAT/0272/16***. The Claimant raised a grievance against the failure of the employer to relocate him to one of the jobs available at a new store; and argued that this was because of race discrimination. The employers had considered his application in which he had performed badly; however, had used a procedure for internal promotions, not relocation, for which there was no specific procedure. When his grievance was rejected he resigned and claimed constructive dismissal alleging breach of the implied term as to trust and respect, and race discrimination. The tribunal rejected the discrimination claim on the facts, and in relation to constructive dismissal held that, although subjectively he had lost trust and respect, the employer had behaved reasonably in using that procedure (on the basis that they had had to use something) and were not in breach of the implied term. The Claimant argued before the EAT that the tribunal had wrongly applied a range of reasonable responses test to constructive dismissal. The EAT held that the tribunal had approached the position properly, and that the test is whether the employer had destroyed trust and confidence 'without reasonable and proper cause'.

(iv) Withdrawal of secondment

264. The Claimant's first argument was that the withdrawal of the secondment which had been confirmed in August 2017 including the manner and timing of that being done was itself a repudiatory breach, and amounted to a dismissal of itself. The Respondents' contention, in short, is that there was a reasonable and proper cause to do so.

265. Although the decision to withdraw agreement was intimated initially by email of 15 December 2017, it did not accurately record the process of decision-making. It had referred to the decision of the SMT, whereas in fact the decision had been by the IJB. It also referred only to "service needs", and not also to financial considerations. The issues were then discussed further at a meeting on 20 December 2017, at which financial considerations were mentioned, although without any detail, and that was confirmed in the letter sent to confirm that meeting. I consider that the error with the identifying of the decision making body was not material matters given the discussion on 20 December 2017. It is however noteworthy that the reason given as service needs was not in accordance with Ms Paterson's evidence, and the evidence as a whole, that the primary reason was a financial one.

266. The meeting on 20 December 2017 was not a consultation one, it was an intimation meeting. It was made clear to the Claimant that the decision had been taken, and would not be reversed. The communication to her was made by Mr Watt and Mr Gibson, but they had been given very little information to go on. Mr Gibson did not give evidence. I can only infer that Mr Gibson was given the detail such as it was by his superior who had been in attendance at the IJB meeting. In any event the full context of the decision including the terms of the recovery plan was not made clear to them and so was not given to the Claimant at the time.

267. The document submitted to the IJB had reference to the proposals, put forward by the SMT, to save cost in a number of respects, of which terminating secondments was one. It only had the letter "N" in the column for risk, and Ms Paterson who was not on the IJB but did sit on the SMT could not explain what that was intended to mean. She did not think that there had been any Human Resources consideration of the impact of the decision on secondments for those affected, as the head of HR was at the meeting and had not made any comment. There was no evidence that the particular circumstances of the Claimant were considered either by the SMT or IJB,

although no witness who gave evidence sat on the IJB or was present at the meeting.

268. I found that lack of consideration of the impact of such a decision on secondments surprising. Whatever the rights and wrongs of the decision to terminate the secondments in principle, doing so was inevitably going to affect the employees concerned. For the Claimant matters were exacerbated by the fact that the written confirmations of approval for secondment had not referred to any conditions or requirements, clients had been told of the position, arrangements to move to London had been made, the appropriate secondment agreements had not been identified initially, had not yet been drafted, there had been no discussion on issues such as notice, and the working days before that secondment was to take place were very limited. The relevant documentation had not been brought to the Claimant's attention, that being particularly the two policies, one from the Scottish Government and one from the Respondents. Advice as to the terms and conditions had not been given. The Respondents had failed to act on their own policies, but had at least identified that fact by late November 2017, and were in the process of addressing it.

269. Co-incidentally the meeting held with HR and the Claimant, with Mr Watt, was on the very same day that the IJB made its decision. It then took some time for that to filter down to Mr Gibson and Mr Watt.

270. The context for the Claimant was not I consider ever part of the assessment of the SMT or IJB. No one in the management of the Respondents looked at that issue, or if they did, did so with any care. The Claimant had been given written confirmation of the acceptance of her secondment by Ms Gillespie after discussion and approval from Mr Watt, who was the Accountable Manager. There had been discussion about the secondment agreement in a meeting on 29 November 2017 with Mr Gibson of HR, and it was being taken forward at that time with no indication of any possibility of withdrawal,

although it had been the subject of discussion within the SMT before being addressed to the IJB.

271. Secondment agreements required to be completed only before the secondment commenced, and it was due to commence on 8 January 2018, but given the holiday period the actual time to do so was very limited as well. The responsibility for that state of affairs lies with the Respondents.

272. Both Ms Gillespie and Mr Watt were aware of the position of the Claimant and that the secondment opportunity, as it was described, was something she was very keen to progress. Ms Gillespie spoke eloquently of being in between a rock and a hard place when she first considered the request for secondment, as if she did not agree to the secondment application the Claimant was likely to leave anyway, and if she did for nine months she would have a vacancy for a psychologist which was going to be very difficult if not impossible to fill. I consider that she was doing the best she could in that difficult situation. But she accepted in evidence that she had discussed matters with Mr Watt and had granted her approval. At that stage neither of them were aware of the terms of the two policies.

273. She did try to secure cover. She spoke to Ms Swanepoel, and Dr Barclay, and thought that agency cover would not be either possible or affordable or both. By late November 2017 it appeared to her that securing sufficient cover for the Claimant's absence on secondment would be extremely difficult if not impossible.

274. Whilst service need had been given as the initial reason for the decision as set out above, I consider that the determinative factor in the decision to withdraw the secondment was financial. The extent of the financial position only became apparent when there was a half year check of finance against budget. There was an increasing deficit, which at that time was estimated at a total of about £9 million. It became necessary to make substantial, and serious, cuts to service to meet that deficit.

275. The extent of those cuts was clear from a document drafted by the SMT and submitted to the IJB dated November 2017. Its proposals were obviously ones that no one on either body wished to make. To give but one example, those receiving care packages were to have a reduction in time of 15 minutes. That was itself an extremely important matter, and indicates I consider the severity of the financial position. That had not been known to the Respondents until that point, and it was I consider an exceptional set of circumstances. Ms Paterson spoke to it being the worst she had known in her career of over 30 years.

276. Whist the Claimant was concerned at the timing of the decision, that was not I consider a result of the work of Ms Gillespie, and a what was said by the Claimant to be a late realisation of the difficulty of providing cover for the Claimant's absence. The driver for the decision was the financial predicament, although the practical difficulties of securing cover for the Claimant were not irrelevant, and it was simply coincidental that the timing was so close to the start of the secondment for the Claimant.

277. It is in that overall context that I must consider firstly whether the decision in principle to end secondments was for a reasonable and proper cause. I have concluded that it was. The financial situation was serious, and exceptional. A decision to make savings by terminating secondments in general terms was one a reasonable employer could have made.

278. But the test of reasonable and proper cause does not only apply only to the decision to terminate secondments, I consider, but also secondly to how that decision was then applied to the Claimant and communicated, as the issue arises in the context of the implied term as to trust and confidence set out above.

279. It was entirely clear that this decision would not be well received by the Claimant. But it went further than that. There had been no secondment

agreement completed by then, and there had been a very recent discussion about doing so. The secondment itself was for a reasonably lengthy period of nine months, and was in London which clearly required alternative accommodation to be found. Details of the agency involved had been provided, and Mr Gibson was to be drafting the appropriate documentation. The withdrawal of the agreement was not something that had been mentioned before either orally or in either of the two written confirmations given by Ms Gillespie. The secondment taking place had been referred to by the SMT in their meeting in September 2017. No period of notice to terminate the secondment had been discussed. The secondment itself had not yet started, and was not therefore something that could be recalled, which is what the draft agreement within the PIN policy provided for. Neither of the two policies provided for termination of such an agreement prior to their commencement. Whilst Mr Davies argued that a term should be implied to fill that gap, the test for that implied term is that it is required to give the contract business efficacy. It must be 'necessary in the business sense to give efficacy to the contract'***: Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592***. The principles of the law of contract apply equally to employment contracts, see for example ***James v Greenwich Council [2008] IRLR 302,*** a case about whether an agency worker was an employee of the end user, in which Lord Justice Mummery stated:

> "In conclusion, the question whether an 'agency worker' is an employee of an end user must be decided in accordance with common law principles of implied contract and, in some very extreme cases, by exposing sham arrangements".

The Court of Appeal held that in that case it was not necessary to imply the term, or contract, alleged, upholding the decision of the EAT which also referred to the test of necessity in order to imply a term into a contract.

280. In the present case, I do not consider that it is necessary to imply the term proposed. Agreement had been sought, and granted. There were likely to be benefits for both parties in doing so. The Respondents could have made that approval subject to conditions, but did not. They then acted on the basis that

the agreement simply had to be documented once the requirement to do so had been identified. It was the responsibility of the Respondents to complete the drafting of the two agreements, and the fact that it had not been done by the time of the discussions with the Claimant as to withdrawal was the result of their lack of progress of it.

281. Mr Watt and Mr Gibson did not have much to go on when they had their meeting with the Claimant. They had, I consider, been provided with only a basic instruction to terminate secondments, rather than the full reasons for a proposal including the particularly serious financial situation and need to reduce a large and increasing deficit. Had they been, and had the meeting been one to discuss with the Claimant how best to deal with that situation, trust and confidence would not have been destroyed.

282. The discussion also was in the context of the Claimant having already raised her first grievance, which had not yet been addressed, and the knowledge that the secondment was, for her, something that was very important.

283. I consider that in light of the circumstances as they pertained to the Claimant, it was obvious that seeking to withdraw from an agreement reached in August 2017 at such a late stage, for an issue as important as a 9 month secondment in London with all the practical issues for accommodation and others that that entails, would destroy trust and confidence between employer and employee.

284. What happened at the time was simply an intimation of the withdrawal of an agreement that had been provided earlier and in all the circumstances I consider that that did breach the implied term as to trust and confidence, and did amount to a dismissal under the Act.

(v) Last straw

285. I also considered the Claimant's secondary argument that that was the last straw in a series of matters that cumulatively amounted to a dismissal.

286. There were a number of issues that the Claimant put forward. The first was the initiation then failure to complete the Job Description. Whilst I considered that Mr Dreghorn was acting entirely in good faith, seeking to find a way to fund carrying out ADS work without having permanent extra funding to do so, he has accepted in writing and in his evidence that he did not explain matters to the Claimant as he should have done. Essentially what he did was to proceed without going through the normal processes, which would have led to a regrading of the post, and did so "at risk", as he put it. It was a temporary measure, with his hope being of finding a permanent solution later at which point the Job Description would be finalised, submitted to the Matching Panel, and then regraded. His doing so was entirely understandable as a practical way of the Respondents providing the ADS in adult autism that the Scottish Government initiative required them to do, at a time when the funds for increased cost were not provided. It is also clear that the Claimant had an interest in autism and was keen to undertake the role. But the failure fully to explain the "at risk" arrangement to her, which he accepted, was a failure.

287. He did however explain to the Claimant in an email of 8 August 2016 that there was a non-recurring budget for the year 16/17, albeit that that did not fully explain the at risk concept, and then in his letter dated 25 May 2017 an explanation was provided to the Claimant.

288. She did not at that stage raise a grievance immediately, but she had been seeking clarification of her position for a lengthy period, commencing with an email on 17 February 2015 raising the issue of funding, to which there was no evidence of a reply.

289. The Claimant was keen to commence work on adult autism diagnosis, and had an interest in that area. The arrangements made were the only means available to Mr Dreghorn to allow the two days per week of such work in ADS to start. It required those two days that the Claimant had been spending in mental health work to be covered by others, and was not without consequence for the Respondents.

290. The Claimant was not provided with sufficient knowledge that permanent funding for the ADS role was being sought, and may not have been achieved, such that she was being required to undertake the role without being able to be considered for job evaluation under normal processes at that time. This was was neither documented, nor fully explained to her at the time. Looked at objectively I consider that it was a failure by the Respondents material to trust and confidence.

291. This did also mean however that the Claimant was providing a necessary service for the Respondents and that they had the benefit of the Claimant doing so.

292. The next issue is the lack of clear management structures. There was a failure on the part of the Respondents to be clear about who had responsibility to manage the ADS part of the Claimant's work. Both Mr Dreghorn and Ms Gillespie thought that it fell to the other person. CMHT responsibilities were taken from Mr Dreghorn in June 2016, but it was not clear whether that included the ADS line management role. ADS was managed in budgeting terms within CMHT. There was a real sense of frustration on the part of the Claimant, who was not being well informed at the position. The lack of clarity continued after Mr Dreghorn's retirement on 8 June 2017, with it being suggested after that date that he remained responsible for the management of ADS. The Respondents argue that the context of the integration of two major organisations, taking place on 1 April 2016 but which had effects continuing beyond that, meant that there was reasonable and proper cause for any failings. I appreciate the difficulties that such major integration exercises create. I also appreciate the extent of the financial challenge that was identified latterly.

293. These matters do not I consider lead to there being reasonable and proper cause for the actions or omissions. Line management is a basic function. The Claimant raised the issue several times, and it was not properly addressed

until about August 2017 when Ms Gillespie became line manager for all matters for the Claimant. I accept that Mr Dreghorn was himself suffering from ill health, as recognised when the scope of his role was reduced in June 2016, but this was an organisational matter which was not managed adequately.

294. Mr Dreghorn in his letter of 25 May 2017 to the Claimant apologised about the lack of clarity, and the failure to answer messages. I consider that the Respondents as an organisation were at fault in this regard, and that that continued up to the point that Ms Gillespie became the manager. I consider that there was a lack of necessary clarity of line management for the ADS role, which occupied two fifths of the Claimant's working week. It was a material matter, taking place from May 2015 to August 2017, during which later month the Claimant raised it in her grievance. It is relevant to the issue of trust and confidence

295. The next issue is of communications. The Claimant was seeking to resolve some of the issues, but was also concerned that decisions were being taken without her involvement. The SMT minute is an example of that. It was sent to her, but its context not fully explained to her. The way she read it was that on return from secondment she would not lead the service. In fact, the minute recorded a decision to defer a decision on whether to have a multi-disciplinary team at all. There was a lack of full discussion with her about that, or what the minute was intended to mean. She was not involved in the preparation of the paper that went to that meeting, or the development of proposals. That is I consider surprising, given that she was a subject specialist in the field.

296. The Claimant did not receive a reply to an email to Ms Paterson raising a number of queries, even one stating that this had been forwarded to her manager for example, but in the context of a daily input of emails of 100 – 200 and no evidence of a follow up email from the Claimant that is not unreasonable I consider.

297. This was again all in the context of a period of change for the organisation, both generally with the integration exercise, and with some managers moving roles or, as in the case of Mr Dreghorn, retiring from the Respondents. Taking all of the evidence into account, there was I consider a failure of communication, probably arising from the lack of clear management structures. This was a matter for which again the Respondents have a degree of fault, and is relevant to the issue of trust and confidence but I consider only to a minor extent.

298. The further issue is that the Claimant felt undermined, in that decisions were being taken about the ADS and her role without input from or involvement with her. Having such an involvement would normally be expected, and speaking to a subject specialist such as the Claimant when considering what service to provide may be a matter of common sense. The SMT however had not taken a decision, there was a full review of the area of mental health provision under way, of which ADS was a part, and it appears to me to be reasonable for the SMT to seek further information before coming to a decision. It was not a decision take to undermine the Claimant. Whilst the Claimant gave evidence that having a further meeting was not in her view required, decisions required to be taken against the background of a serious financial situation.

299. The SMT minute was sent to her by email, such that she was at least aware that the issue was being considered further. It did include the statement “SMT did not agree to the proposal that on Dr McClean’s return from secondment her days are increased to three per week and the multi-disciplinary team being managed by Dr McClean”. Firstly that appears to endorse the secondment. Secondly, although it was said in evidence to mean that there had been no decision to approve a multi-disciplinary team and therefore that there was no team to manage, it does read that the Claimant would not be the manager of the team.

300. There may not have been an intention to create such an impression, but looked at objectively I consider that it did, and that it did lead the Claimant to consider that she was being undermined.

301. Dr Robinson, a Consultant Clinical Psychologist who provided training to the Claimant and a measure of continuing support, spoke in evidence to the deteriorating trust and confidence that the Claimant had in the Respondents in about April 2017. Her evidence supported that of the Claimant that issues had arisen that did reduce trust and confidence at that stage, to the extent that it was seriously damaged.

302. The impression from the evidence is that the Claimant continued in her role despite her concerns, then fastened on to the secondment when that was approved in August 2017 as a way to resolve matters, and was then left in a position of having entirely lost trust and confidence when informed of the withdrawal of agreement for the secondment. Taking those areas where I have found some degree of failure on the part of the Respondents, although that is not necessarily required as explained in reference to the last straw doctrine, together with the manner in which the secondment and its withdrawal had been handled as described above, I concluded that there was sufficient to find that there had been a breach of the implied term as to trust and confidence.

303. In all the circumstances, applying the authorities referred to above, there was a last straw after a series of issues which cumulatively led to there being a dismissal.

(vi) Reason for dismissal

304. It is not entirely easy to fit the circumstances of a constructive dismissal case into the statutory scheme, but it is necessary both to consider the reason for the dismissal, and separately the issue of its fairness. In ***Berriman v Delabole Slate Limited [1985] IRLR 395*** the Court of Appeal stated that the Respondent had to show the reason for their conduct, where that conduct led

to the dismissal. If that reason was one that was potentially fair, that is then considered separately.

305. I consider that there was some other substantial reason for the dismissal under the terms of section 98(2), being the requirement to save cost which led to the decision to terminate secondments. The level of the deficit against budget was substantial. The steps taken to reduce it were significant ones that also affected to a material extent the level of service given to clients, for example. That is a potentially fair reason.

(vii) Fairness

306. I turn to consider the fairness of that dismissal under section 98(4) of the Act. I consider that the dismissal was unfair, in particular in light of the lack of consultation over the withdrawal of the agreement to the secondment. Consultation is at the heart of any dismissal if it is to be fair, and it was I consider what all reasonable employers would have done in the circumstance of the present case. Whilst consulting an employee before deciding to take a step that may be held to be a dismissal is not a rule of law that must always be followed, the importance of consultation was set out in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503***, in which Lord Bridge made the following comments:

> "Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [what is now section 98(2) of the Act]. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural', which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend

his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."

307. Those comments do not deal specifically with some other substantial reason for dismissal, but the principle of consulting before a decision is made is, I consider, the same. Whilst the ACAS Code of Practice on Disciplinary and Grievance Procedures is primarily directed to issues of conduct, it is not irrelevant to the some other substantial reason (SOSR) basis of dismissal (***Holmes v Qinetiq Ltd [2016] IRLR 664).*** It sets out a basic structure of establishing the facts of the case, informing the employee of the problem, holding a meeting with the employee to discuss that problem, and then deciding on appropriate action. That very basic structure is one that I consider any reasonable employer would have followed in the present circumstances if it wished to seek to withdraw from an agreement on secondment already given.

308. I have not found a case that directly addresses facts such as those in this case. There is some assistance in other authorities however. Consultation was held to be required in a case of business re-organisation (also an SOSR dismissal) in ***Ellis v Brighton Co-operative Society Ltd [1976] IRLR 419***, and although its absence did not render a dismissal unfair in ***Hollister v NFU [1979] IRLR 238*** tha***t*** was as the changes were for the benefit of the employees in that case. I also note that in ***Turner v Vestric Ltd [1981] IRLR 23***, a case about personality differences leading to an SOSR dismissal, it was held that there was a need to investigate every step short of dismissal before doing so in order to be fair.

309. I consider that in respect of the withdrawal of the secondment the Respondents did not act fairly. I consider that all reasonable employers would have informed the Claimant of the proposal, and the circumstances of it, and then consult over its effect and whether there were any other alternatives to terminating it. In respect of the earlier issues relied upon for the last straw argument, I consider also that the Respondents did not act within the band of responses open to a reasonable employer. The Respondent is a large organisation. I do appreciate the great difficulties it was working under, partly from the integration and partly from the serious financial deficit it had identified, but I consider that fundamental and basic steps to manage the issues that arose were not taken.

310. I consider that there was an unfair dismissal under section 98(4) of the Act.

(viii) Remedy

311. The basic award is the sum of £3,810.

312. The compensatory award is assessed in light of the terms of section 123 of the Act which provides:

> "123 **Compensatory award**
>
> (1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

313. The assessment that must be made is of the loss caused by the dismissal. That requires consideration of what would have been the position had there been other steps taken, which in this case means considering what the outcome would have been if there had been reasonable consultation with the Claimant before taking the decision to withdraw the agreement to the

secondment, which was the trigger for the resignation. I must consider what the position would have been had that issue been handled in the way that a reasonable employer might have done.

314. I consider that had there been adequate consultation with the Claimant on the issues that arose regarding secondments, that is likely to have led to there not being an unfair dismissal, in the sense that whilst a decision on the withdrawal of the agreement to secondment may have destroyed trust and confidence, the Respondents would then have had reasonable and proper cause to have acted in doing so. The dismissal would in that situation have been fair under section 98(4) of the Act given all the circumstances.

315. That finding is made applying the principles from the case of ***Polkey.*** It appears to me that a reasonable employer could decide to seek to save cost where it can given the financial predicament at that time, and that having staff working at the front line, as was put in evidence, so as to keep costs as low as possible, is a decision that a reasonable employer can take after considering the comments and suggestions of the employee.

316. I consider that that applies in the circumstances of the Claimant. Whilst no formal agreements had been entered into, the policies were reasonably clear, and part of the contract of employment. The draft secondment agreement within the PIN policy provided for a recall if there were exceptional circumstances. I consider that in the light of the financial situation as it was found to be in November 2017, the circumstances were exceptional. In short therefore, I consider that had the Respondent conducted the process in a fair manner, consulting the Claimant, the outcome would have been that they would still have decided to terminate the secondment, and if they had done so in a fair manner that decision would then have been a fair one.

317. I consider that it would have taken a period of two weeks to have consulted. That could have been done in the period from 20 December 2017. The likelihood is that the Claimant would in that consultation have wished to

remain undertaking the secondment. The Claimant was surprised at the granting of the secondment, as she said in evidence, and she emailed a colleague stating that it was the "ideal job" and that she was tempted to put in her notice (email of 17 August 2017). I do not consider that the Claimant would have been persuaded to remain with the Respondents and give up on that ideal job.

318. The Respondents would then I consider have decided to give notice of termination, or of recall. No period for that was agreed, and there was no evidence on that issue but the draft agreement provides for that being measured in months, and given the 9 month period of the proposed secondment I consider that it would have been likely to have been of one month. I consider accordingly that the period of loss would have been up to 3 February 2018.

319. I also consider that if one removes the termination of the secondment, and leaves the other issues that the Claimant raised both in her grievance and the present claim as issues on which the law straw stood, those were not sufficient in themselves to amount to a dismissal that would be considered unfair. The Claimant did not in fact resign until the secondment issue, and had that issue been handled in a fair manner, I consider that there is no remaining basis for a claim of unfair dismissal when one is considering the loss. The Claimant's resignation was caused by her reaction to the withdrawal of the secondment. In addition whilst there were issues of line management and communication these had been remedied by the appointment of Ms Gillespie as her line manager for all purposes in August 2017. The issue of the banding of her role, and the Job Description for it, was never resolved, but that was because of the lack of funding. The Claimant had been aware of the situation at the latest by the time of Mr Dreghorn's letter of 25 May 2017.

320. I consider that when looking at the evidence as a whole, it is clear that the Claimant had decided to take up the opportunity for secondment. The Respondents had agreed to it, but had they not done so, she would have

resigned and left their employment not because of the issues raised in her first grievance, but because of that opportunity. The secondment having been agreed to however, matters were different. The Respondents then sought to retain her in their employment. I consider that there was a dismissal that was unfair, but that the loss caused by that is limited in light of the Claimant's desire to undertake the secondment.

321. The Claimant started her new role on 8 January 2018, and there is no loss after that date during that period of notice. The result is a period of loss of 12 days. The weekly pay is £654.17, and the daily equivalent of that is £93.45. For twelve days the total is £1,121.40. Adding pension loss at 9.5% is £106.53, a total of £1,227.93 which is the compensatory award I make. In the circumstances where the Claimant is intending to operate in private practice and not an employee I agree with Mr Davies that an award for loss of statutory rights is not appropriate.

322. The total of the basic and compensatory awards is the sum of £5,037.93

323. The Claimant did not receive benefits and no recoupment applies to the compensatory award.

Conclusion

324. The Claimant was dismissed under section 95(1)(c) of the Act, that was unfair under section 98(4), and she is awarded the sum of £5,037.93 under section 123(1).

325. I would like to record my appreciation of the very professional way in which both the Claimant and Mr Davies conducted the case, and for their excellent submissions.

326. There is a final observation that I wish to make, having made that decision and having heard the evidence. The Respondents have not been able to recruit to the post formerly held by the Claimant, and their witnesses have

spoken of the difficulties of recruiting and retaining staff to work in rural and remote locations. Ms Gillespie tried to find a solution for the Claimant's period of secondment without success. Those difficulties remain. The Claimant is both well qualified and highly experienced, and lives and works in the locality where the vacancy remains. The extent to which she may be able to build up a full private practice is not entirely clear, from the little evidence I heard on that. She has the skills that the Respondents' vacancy requires, and whilst that vacancy remains unfilled the assessment of adults who may have autism may not take place as quickly as is otherwise possible.

327. Each of the parties may wish to consider whether there is a possibility of the Claimant being re-employed by the Respondents in that vacancy given that the period that would have been covered by the secondment is ended, these proceedings are now ended, and it is less than three months after the end of what would have been the secondment. Given the respectful and considerate manner in which the whole case was conducted by all of those who appeared before the Tribunal, and one consequence of these proceedings being that each side has the benefit of understanding more fully the reasons for the actions of the other, it would be remiss of me not to make some reference to that possibility.

Employment Judge: **Mr Alexander Kemp**
Date of Judgment: **21 December 2018**
Entered in Register: **24 December 2018**
Copied to Parties