



EMPLOYMENT TRIBUNALS

Claimant: Mr B Murphy

Respondent: North Lincolnshire and Goole NHS Hospital Trust

Heard at: Leeds

On: 19 and 20 October 2020,
21 October (in chambers)

Before: Employment Judge D N Jones

This hearing was hybrid (H). The witnesses of the respondent gave evidence remotely by video and the claimant gave evidence at the Tribunal.

REPRESENTATION:

Claimant: In person

Respondent: Miss L Gould, counsel

JUDGMENT

1. The respondent did not commit a fundamental breach of contract in response to which the claimant resigned. The claim for unfair dismissal is dismissed.
2. The claim for breach of contract and/or unauthorised deductions from wages is dismissed.

REASONS

Introduction and issues

1. This a complaint for unfair (constructive) dismissal, breach of contract and/or unauthorised deductions from wages.
2. The claimant was employed by the respondent on 5 February 2007 as a maintenance assistant until 5 November 2019. The claimant resigned on 8 October 2019 providing one month's notice.
3. The issues were identified at a preliminary hearing on 6 May 2020. They were clarified at the commencement of this hearing and are:

Unfair (constructive) dismissal

3.1 Did the respondent, by its managers and other employees:

- 3.1.1 Fail to provide the promised support from 13 May 2019, upon the claimant's return to work, in particular by failing to replace the mentor Aaron Browne;
 - 3.1.2 Give the claimant the "dirty" jobs/the worst jobs;
 - 3.1.3 Not respond to correspondence or contact and not provide the claimant with support;
 - 3.1.4 Not deal with the grievance about the previous incidents;
 - 3.1.5 Not provide the claimant with a proper transition, putting him on call two weeks after he returned to work with only two days' notice;
 - 3.1.6 Not provide the claimant with uniform;
 - 3.1.7 Not provide the claimant with anywhere to put his tools;
 - 3.1.8 Not properly consider the claimant for the post of technician or give him a fair interview for the post in the circumstances?
- 3.2 If so, were any of these actions, or failures to act, individually or cumulatively, calculated or likely to destroy or seriously undermine the trust and confidence of the claimant in the respondent?
- 3.3 If so, were the respondent's actions, or failures to act, without reasonable and proper cause?
- 3.4 Did the claimant resign as a consequence?
- 3.5 If so, did the claimant otherwise affirm the contract by delaying his resignation between the last act which constituted or contributed to the breach and evincing an intention to keep the contract in existence?
- 3.6 Would or might the claimant have resigned in any event?

Breach of contract/unauthorised deductions from wages

- 3.7 Was the claimant owed any remuneration, or were any wages properly payable, under the claimant's contract of employment?
- 3.8 What sums were owing at the end of the employment of the claimant or from the date of the last deduction of wages?

Evidence

- 4 The Tribunal heard evidence from the claimant, Mrs Gillian Neal, Head of HR partnerships, Mr Bryan Stephenson, Senior Estates Property Manager and Mr Richard Crookes Estates Officer. In addition the respondent submitted a witness statement of Mrs Jane Lacey-Hatton which the claimant did not challenge.
- 5 A bundle of documents running to 457 pages was submitted. The respondent's grievance policy was provided during the course of the hearing.

Background/Facts

- 6 The respondent is a NHS Trust providing acute and community health care in North and North East Lincolnshire and the East Riding of Yorkshire.
- 7 The claimant started to work for the respondent on 5 June 2007 as a maintenance assistant.
- 8 On Saturday, 23 December 2017 an incident arose which led to the institution of disciplinary proceedings against the claimant. He had been allocated to the on-call rota for that day and a call was made to him. The claimant was with his family in London but agreed to attend site, but it would have meant a three-hour journey. Mr Crookes, the team leader, informed him not to attend in those circumstances.
- 9 Mr Crookes had informed his team that he would take the principal responsibility for any on-call work in the days preceding Christmas including him taking up tasks usually allocated to assistants. He qualified this by saying that the assistant on call would still have to be available in extreme circumstances. There was discussion between the claimant and Mr Crookes in which the claimant said that he had planned to spend time with his family and Mr Crookes reassured him that he would only be called in an emergency. There is a difference in recollection between the claimant, who believes this conversation specifically included both Saturday and Sunday and Mr Crookes, who recalls the conversation about the family relating to the Sunday. At all events, the claimant agrees that he had committed himself to the on-call rota that weekend and to cover if called upon in the circumstances as discussed.
- 10 A disciplinary investigation was initiated upon the claimant's return to work on 3 January 2018. The claimant became ill and had a period of sick leave. He did not attend a disciplinary hearing but made written representations. The disciplinary hearing on 13 June 2018 was chaired by Mr Simon Tighe, Deputy Director of

Estates and Facilities. The record of the meeting indicates it lasted for one and a half hours. The panel concluded that the claimant was culpable of gross misconduct and dismissed him, summarily. It found that the claimant was fully aware of his on-call responsibility and the agreement to provide cover and that he had knowingly travelled a distance away from the respondent site which was inappropriate for service delivery requirements. The decision was communicated by letter of 14 June 2018.

- 11 The claimant submitted an appeal by letter on 20 June 2018. He submitted detailed grounds of appeal on 6 September 2018 which includes a suggestion that the job which he had been called to attend was more suited to a craftsman and not an unqualified assistance. He also complained about the involvement of Mr Whitehead and Mr Tighe in the disciplinary process, expressing the opinion that Mr Tighe bore a grudge.
- 12 The appeal was allowed on the 20 September 2018. It concluded that there was no disagreement about the essential facts: the claimant had agreed to make himself available on a day when he was visiting his family in London and had agreed to travel to the site but had been instructed not to do so because the distance was too far away to make it feasible. The appeal panel concluded that the claimant had not been grossly negligent such as to endanger patient safety and that there was not gross misconduct, but it concluded there were serious failings of the claimant in relation to compliance with basic Trust policies in respect of on-call. This had led to the claimant and others being placed in a very difficult situation on the day. The appeal panel considered a serious disciplinary sanction was appropriate and issued, in substitution for the dismissal, a written warning to remain on file for 12 months from that date. Ms Hills, a non-executive director who chaired the appeal panel, informed the claimant in a letter of 20 September 2018 that Mr Mano Jamieson, Assistant Director People and Organisational Effectiveness, would make arrangements for his return to employment. The claimant did not want to return to the Facilities department but recognised that, if no other suitable alternative employment was available, he would have no option.
- 13 Arrangements for the return did not run smoothly. The tribunal did not have all the details in respect of the meetings which took place with Mr Jamieson, but it is apparent from what correspondence is included in the bundle that the claimant was dissatisfied with the arrangements culminating in complaints being raised with the Chief Executive of the respondent. In a letter of 12 December 2018 to Ms Hills the claimant complained of the lack of progress and stated he was not prepared to return to the workshop because he felt intimidated by the team leader and staff and that Mr Tighe had a grudge against him. To his early correspondence to the Chief Executive he received no reply, resulting in further letters from the claimant chasing a response. Mr Jamieson wrote on 25 March 2019 to inform the claimant that he was putting on hold his payments on special leave. He remarked on the fact that the claimant had refused a meeting with Mr Tighe, had been applying for other roles unsuccessfully and was required to return to his substantive role.

- 14 Mrs Lacey-Hatton took up the issue pursuant to a request of the Chief Executive. She wrote to the claimant on 9 April 2019 and had a meeting with him on 24 April 2019. Mr Whitehead, Estates Manager and Mr Tighe, Deputy Director of Estates and Facilities attended. The claimant raised concerns about how Mr Whitehead and Mr Tighe had handled the original disciplinary proceedings. The claimant said he did not wish to return to his original role but wanted to work elsewhere with the respondent.
- 15 Following a break, Mrs Lacey-Hatton informed the claimant that his special paid leave would be reinstated retrospectively and that he would return to his original role which had been kept vacant. She proposed the claimant return on 13 May 2019, that this would be initially by way of a phased reintroduction and that he would have a mentor, by way of support, for the first three months. Mrs Lacey-Hatton wrote to the claimant on 25 April 2019 recording the events of the meeting. She set out the proposals: *“Simon has suggested that you return on a phased part-time basis in order to support and enable your effective integration back with the team. He has also identified Chris Donk to act as a mentor and support during the first three months of your return. I noted your statement that you would not return to the workshop under any circumstances but would ask you to carefully consider the proposed arrangements that I have set out which will enable you to return to the role with the organisation you have worked with for a number of years using your skills and experience. I note that both Simon (Tighe) and Stuart (Whitehead) have committed to ensuring your return is supported and that satisfactory working relationships are established”*.
- 16 The claimant responded on 30 April 2019. He said he was loath to return to the role and he considered the Trust had done nothing to enable him to become re-employed in another department. He expressed his belief that there had been little or no understanding of what he had endured for 16 months. However, he agreed to return but asked to whom he could direct concerns about his managers, Mr Tighe and Mr Whitehead, for their *“inappropriate behaviour”*.
- 17 On 7 May 2019 Mrs Lacey-Hatton replied. She told the claimant to report to Aaron Browne who would be his immediate support for the first 12 weeks in post. She recorded that for the first two weeks the claimant would work mornings only and that he should use some of his accrued annual leave to support a phased return. In respect of raising further concerns about his line managers’ involvement in the disciplinary process, Mrs Lacey Hatton expressed the hope that a line could be drawn under those matters to enable working relationships to be rebuilt. She said if the claimant had genuine, remaining concerns he should take them up with Lesley Mosley, from the human resources department, who would offer advice.
- 18 Upon his return to work, on 13 May 2019, the claimant informed Mr Browne that he had burned his work clothing and ID badge during his absence, out of frustration. He said he was prepared to draw a line under the sand if the sanction was removed. Mr Browne placed an order for new PPE that morning. This meant there was a limit to the tasks the claimant could undertake in the first few days of his return and Mr Crookes had a discussion with the claimant at which it was

agreed particular duties, such as flushing, would be undertaken pending receipt of the PPE. The claimant had safety shoes and PPE by 7 June 2019.

- 19 On 22 May 2019 the claimant wrote to Ms Mosley to request an investigation into complaints he made about Mr Whitehead and Mr Tighe. He set out his concerns in detail.
- 20 The claimant was on leave on 3 June 2019. This was the first week he was due back on full-time duties. A return to full duties came as a surprise when he was informed of this by Mr Crookes on 31 May 2019. The claimant had believed that the phased return was to take place over a period of three months. His requirement to be available for on-call duties was deferred until Friday, 7 June 2019. He commenced such duties from that date. He was informed of this on Tuesday, 4 June 2019.
- 21 On 6 June 2019 the claimant sent an email to Ms Larder of human resources to complain of a lack of coordination with respect to his return to work. He said he had been told he was to be placed on the on-call rota but that he would not do so unless outstanding questions he had of Mr James and Mr Browne were resolved.
- 22 On 7 June 2019 the claimant had a meeting with Mr Stephenson. The claimant complained that he did not have a place for his work tools. Mr Stephenson made an arrangement for a bench to be cleared for the claimant to work from. The claimant raised concerns about a number of other matters including whether he was on the on-call register and that he did not have a contract of employment.
- 23 Mr Jug Johal, who had taken over as Director of Estates and Facilities from Mr Whitehead, invited the claimant to a meeting on 17 June 2019 to address the concerns he had raised. This included a complaint in respect of underpayment of wages.
- 24 On 17 June 2019 Mr Johal and Mrs Neal met the claimant. In respect of outstanding pay, enquiries from payroll established that there were arrears of £4,475.38. This was paid to the claimant in the next monthly payment. The claimant raised concerns about his former managers' behaviour during the disciplinary process. Mr Johal said the matter had been reviewed at the appeal, at which the claimant had been successful. Mr Johal drew attention to the suggestion of Mrs Lacey-Hatton that, to move forward and start afresh, the wish of the Trust would be to draw a line under the earlier disciplinary and appeal processes. Mr Johal agreed to speak to Mr Tighe about the claimant's concerns. Mrs Neal offered the claimant the opportunity of attending coaching sessions to explore the circle of influence over which one has control. This is not something the claimant was interested in.
- 25 On 6 September 2019 the claimant sent a letter of formal grievance to Mrs Neal. His concerns related to the matters in respect of which he was disciplined and the processes involved. He believed that the return to work had been mishandled and was not what had been agreed, that he had not been provided with appropriate PPE, a place to keep his tools and that he had been told to draw a

line under matters repeatedly. Mrs Neal did not respond to the claimant's letter before his resignation. The claimant made a phone call to the human resources department a fortnight after he had sent the letter and he was told that it was being discussed.

- 26 A consultation process took place between 11 June 2019 and 30 July 2019 in respect of a restructure of the Estates Department. A number of one-to-one and group meetings took place. The claimant was absent on leave and did not attend. Existing staff members were asked to submit a response expressing their top three preferences of jobs in the new structure by 23 August 2019. The intention was to provide outcomes by 6 September 2019 followed by matching up employees to roles in skill assessments, to be undertaken on 9 September 2019. The new structure was to be implemented from 11 November 2019.
- 27 The claimant was late in submitting his form on 30 August 2019. He expressed an interest in only one of the roles, a band five technician. That was 2 grades above the post he then held. He attended a meeting with Mr Stephenson and Ms Mosley to discuss his expression of interest on 7 October 2019. Notes of the meeting were taken. The claimant disputes their accuracy, insofar as he believes that Mr Stephenson informed him that he would not be considered for the technician role because he did not have a level 3 leadership qualification. Mr Stephenson disputes that. He said he did not make any such comment and draws attention to the job specification which indicates that although that requirement was essential it was expanded to embrace those who were prepared to undergo training for the qualification.
- 28 I am satisfied that it is likely the record of the meeting was accurate. The claimant only wanted the technician role because he did not want to undertake on-call work. He said in the interview that he could not guarantee he would be available within half an hour for on-call duties. He had not had the job description by that time. Mr Stephenson said the new band 3 and 4 roles were not on-call, and that the requirement to attend within half an hour would not apply to existing staff.
- 29 The claimant was asked to provide originals of his qualification certificates. He said he had provided photocopies previously when he had applied for other roles. He was nevertheless required to provide the originals. This was an obligation imposed on all. Mr Stephenson invited the claimant to consider whether he wished to consider band 3 and 4 roles and asked him to reply by the following day. The claimant did not provide his original certificates.
- 30 On 8 October 2019 the claimant sent his resignation to Mr Stephenson. He stated that the management team had been quite decisive about not wanting him for the technician post because he did not have a level 3 qualification in supervision. He provided one month's notice, to terminate on 5 November 2019. He did not attend work thereafter but reported sick. He provided a fit to work note from 15 October 2019 until the end of his employment.
- 31 Mr Stephenson acknowledged the resignation letter, on 23 October 2019. He informed the claimant he had been slotted into a band 3 maintenance assistant

role because he had not provided any other expression of interest nor provided original certificates of qualification. Mr Stephenson offered a cooling off period to explore resolution of concerns until 30 October 2019.

The Law

32 By section 94 of the ERA an employee has the right not to be unfairly dismissed.

33 A dismissal is defined by section 95 of the ERA. It includes the situation in which an 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, section 95(1)(c). This is known as a constructive dismissal.

34 In order for there to be a constructive dismissal, the employee must have resigned because his employer has committed a fundamental breach of contract and he must not have otherwise affirmed the contract, for example by delaying his resignation and thereby evincing an intention to continue to be bound by the terms of the contract, see ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*** and ***Buckland v Bournemouth University [2010] IRLR 445***. The term is not to be equated to a duty to act reasonably. In respect of what is required in the nature of the breach, it is whether the employer, in breaching the contract, showed an intention, objectively judged, to abandon and altogether to refuse to perform the contract, see ***Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420*** and ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***.

35 There is an implied term in a contract of employment that neither party shall, without reasonable and proper cause, act in a way which is calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the parties, see ***Malik v BCCI SA (in liquidation) [1998] AC 20***.

36 Such a breach may be because of one act of conduct or a series of acts or incidents, some of them may be trivial, which cumulatively amount to a repudiatory breach, see ***Lewis v Motorworld Garages Ltd [1986] ICR 157***. If a series of acts, the last event must add something to the series in some way although, of itself, it may be reasonable, see ***Omilaju v London Borough of Waltham Forest [2004] ICR 157*** and ***Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1***.

Discussion and Analysis

37 The events and actions, or failures to act, which the claimant says led to a breach of the implied term of trust and confidence were clarified at the preliminary hearing and are identified in paragraph 3.1 .1 to 3.1.8 above. Those are to be

seen against the background of events, most significantly what led to the disciplinary action and the circumstances leading to the claimant's return to employment.

Failing to provide the promised support from 13 May 2019 upon the claimant's return to work, in particular by failing to replace the mentor Aaron Browne

38 The claimant did not dispute the evidence contained in the witness statement of Mrs Lacey-Hatton. There is no doubt she succeeded in unblocking the logjam in April 2019. That involved the claimant returning to his former job, notwithstanding this was very much against his wishes. There is no evidence any other suitable alternative employment was available, notwithstanding other options had been discussed earlier.

39 As arranged, the claimant met Mr Browne on 13 May 2019 and he ordered PPE and arranged the return to the Facilities Department. The claimant believed that Mr Browne was to provide the support as a mentor for three months, but he left after one week and the claimant had not understood that Mr Donk had replaced him.

40 There was scope for confusion. In the second letter sent by Mrs Lacey-Hatton, dated 7 May 2019, she wrote that Aaron would act as the claimant's immediate support for the first 12 weeks back in post. I can understand that would lead the claimant to believe Mr Browne would be responsible for mentoring for the full three months. In the first letter from Mrs Lacey-Hatton, wrongly dated 9 April 2019 but probably sent on 24 April 2019, she stated that Mr Donk was to provide the support as mentor for three months. Had the claimant read the first letter he would have known to raise any need for help with Mr Donk. Mr Donk had introduced himself at about the time Mr Browne left but not with sufficient clarity to explain he was replacing Mr Browne. In fairness to Mr Donk, he may have assumed the claimant had already been informed he was his mentor.

41 There was not a failure to provide a mentor for the full three-month period but there was confusion as to who it was to be. This could have been handled better. But I take the point made by Ms Gould that the claimant was returning to a job he knew well. If he needed help, he could have raised the absence of support after Mr Browne left, whereupon the matter would quickly have been clarified. This matter would not, of itself, objectively have destroyed or seriously undermined trust and confidence.

42 The claimant's belief that the return part time was to be phased over the three months and not two weeks was not borne out by the letter of Mrs Lacey-Hatton and was, I am satisfied, a misunderstanding on his part. He acknowledged as such in cross examination, saying they were at cross purposes.

43 Other concerns about support are addressed below.

Giving the claimant the "dirty" jobs/the worst jobs

- 44 The claimant formed the belief he was being allocated less desirable work and the more unhygienic and dirty jobs when he looked at the computer to compare his work with that of others. He had said, in cross-examination, that once a job had been completed it would have been deleted from the schedule of work the others had undertaken, so what he saw would not have given a full picture of his comparators' work tasks.
- 45 The respondent produced a printout of all the jobs undertaken by the claimant after his return to work until his resignation. According to Mr Crookes it reflected a fair allocation of work for a band 3 maintenance assistant. He said that an arrangement had to be made for the claimant to undertake a narrower range of work when he started on 13 May 2019 because he did not have his uniform and PPE. He had suggested the claimant undertake more flushing tasks. The claimant did not say whether these were undesirable, but I assume they were. Insofar as the less desirable work occurred in these early days, it was attributable to the lack of PPE and I do not consider that to have been something the respondent was responsible for, as considered below.
- 46 Mr Stephenson said that the procedure was that maintenance issues were reported to the helpdesk, a supervisor would assess the level of work and allocate it depending on the complexity of the task and the availability of different team members. He too expressed the opinion that the printout of work undertaken by the claimant reflected a fair allocation.
- 47 The claimant did not provide any specific examples and particulars of the less desirable work he was given, by reference to times or dates, specific activities or sequences. Rather he presented his impression, one which illustrated his view that his managers and work colleagues did not want him to return and were shunning him. The evidence did not establish that. There was no material from which I could conclude that the claimant had been allocated the worst jobs and singled out for them in comparison to others.

Not responding to correspondence or contact and not providing the claimant with support

Not dealing with the grievance about the previous incidents

- 48 It is appropriate to deal with these two concerns together.
- 49 The claimant was adamant that he did not wish to return to his former role. Mr Jamieson had two meetings to consider the return but these were not fruitful. The claimant says that no one took ownership of this matter and his requests for it to be resolved were passed from one person to another or, in the case of the Chief Executive, ignored.
- 50 I agree with the claimant that one would not expect a successful appeal resulting in reinstatement to involve such a prolonged delay in a return to work. It seems likely this was contributed to by the claimant's own conditions for his return, but that could have been addressed more swiftly. He had no legal entitlement to be

redeployed and rather than maintain special leave payments for a considerable period, the respondent could have insisted the claimant return to his previous job. Ultimately, that is what happened when Mrs Lacey-Hatton took the matter in hand. In these circumstances I would not regard the earlier conduct of the matter as leading, objectively, to a destruction or serious undermining of trust and confidence. Although the failure to respond to the claimant's correspondence was a legitimate concern and not appropriate, by not forcing the claimant to do his former job but allowing paid special leave to continue until March, the respondent was evincing its intention to keep the claimant in employment, not the contrary. Taking the criticisms in that context I do not consider they would have destroyed or seriously undermined trust and confidence.

- 51 Following his return, I am satisfied there was an attempt to maintain a positive dialogue with the claimant and to address his concerns. The correspondence reflects appropriate consideration of the matters raised and meetings held to address them, for example the meeting with Mr Johal on 17 June 2019, to pick up the concerns expressed by the claimant in his emails to Ms Mosley dated 22 May 2019 and Ms Larder of 6 June 2019. Complaints about his workstation were addressed by Mr Stephenson as soon as they were raised, new PPE was ordered immediately upon his commencement (and no action taken in respect to his destruction of the respondent's property, in the form of his uniform and PPE), the shortfall in wages was refunded. An arrangement had been made to defer the commencement of the on-call duty to the end of his first week of return to full duties.
- 52 The claimant remained very unhappy about unresolved concerns about his managers Mr Whitehead and Mr Tighe. By this time Mr Whitehead had left. Mr Tighe had put measures in place to enable the return after the meeting with Mrs Lacey-Hatton.
- 53 I do not regard the suggestion of Mrs Lacey-Hatton and Mr Johal to draw a line under the matters to be such as to destroy or seriously undermine trust and confidence. The suggestion was to move matters forward with a view to retaining the claimant's service.
- 54 The claimant was fully entitled to reject that advice and lodge a formal grievance, which is what he did on 6 September 2019. The grievance procedure states that a grievance meeting will be organised within 10 working days wherever possible of the formal written notice having been received by the manager. The outcome of the meeting would then be confirmed in writing within seven working days. Delays are envisaged as possible due to availability of panel members and union representatives.
- 55 Failure to respond to the claimant in writing before he resigned, a month later, was clearly a failure to meet the spirit and the letter of the policy. Mrs Neal accepted that, at the very least, she should have sent a holding letter to the claimant to explain that she was considering how to progress the issues the claimant raised.

56 The grievance ran to 14 paragraphs. It covered the events from prior to Christmas 2017, the dismissal process and appeal and covered much of the ground that is the subject matter of this claim. I recognise it was not a straightforward issue to address, not least because the policy states complaints should be brought within three months and, at the most six, from when they arose. A meeting within 10 days was probably unrealistic. Nevertheless, the claimant was entitled to a relatively early response to this complaint and he did not receive one. Had the respondent indicated that it did not intend to deal with any of these complaints, his trust in his employers could justifiably be said to have been seriously damaged. That did not happen. In fact, the claimant was aware that the matter was still under consideration following his phone call. Whilst the delay was unacceptable, I do not find, of itself, it was conduct which destroyed trust and confidence or seriously undermined it, although in conjunction with other failures it may well have done so.

Not providing the claimant with a uniform

57 When the claimant returned to work, he informed Mr Browne that he had burnt his uniform out of frustration. Mr Browne immediately ordered replacement PPE which arrived within 14 days. In the meantime the claimant was provided with alternatives.

58 This is the least attractive part of the claimant's case. He placed himself in a position of not having the appropriate gear and equipment. His managers were not to know of that and took all reasonable steps to replace it as soon as they did. Insofar as anyone conducted themselves in a manner calculated or likely to destroy trust and confidence, it was the claimant by destroying the respondent's property.

Not providing the claimant with anywhere to put his put his tools

59 Maintenance assistants did not automatically have a place allocated to store their tools. The claimant previously had a workbench, but this was reallocated following his dismissal and the lengthy period prior to his return.

60 The claimant raised this problem with Mr Stephenson on 7 June 2019. He was immediately provided with a workbench. There was no conduct of the respondent which constituted a breach of the implied term in this respect.

Not properly considering the claimant for the post of technician or giving him a fair interview post in the circumstances

61 The claimant misunderstood the new role of band 3 and band 4 maintenance assistants in the new structure. The job specification made it clear that on-call duties at the Scunthorpe General Hospital were not the norm. Not knowing this, the claimant only specified the band 5 technician post.

62 It is apparent from the interview notes that Mr Stephenson clarified the position in relation to the various roles in the new structure. He asked all candidates for the

original certificates of their qualifications. The claimant suggests this was unreasonable because he had provided photocopies previously. It was permissible for Mr Stephenson to impose this requirement. The claimant was not singled out for different treatment.

63 I do not find that he was told by Mr Stephenson that he was being ruled out for the technician post. This is not included in the notes and was denied by Mr Stephenson. I have had regard to the fact the claimant was mistaken about the specification for the posts and that not having the level 3 qualification presented a difficulty. I can understand why he inferred he was not eligible but I am not satisfied it was stated.

64 I reject the suggestion the interview and the procedure adopted was unfair. The claimant was slotted in to a band 3 role, because he had not returned any original certificates, not replied to the request to provide any alternative role nor said he would undergo training for a level 3 supervision qualification.

65 Mr Stephenson had agreed to a cooling off period for the claimant to withdraw his resignation. This does not reflect an employer which is intent on alienating an employee and placing pressure upon him to leave the organisation.

Breach of contract/unauthorised deductions from wages

66 In his evidence the claimant said that he should have received payments from the beginning of 2018 to the disciplinary hearing at his full rate of pay, as if he had been suspended. He said the actions of the respondent had led to him becoming ill and that is why he was unable to work.

67 The claimant was on sick leave for this period and received sick pay at the appropriate rate. There was no suspension. There was no contractual entitlement to the same remuneration as if he were suspended under his contract of employment.

68 The balance of the claim was that the claimant was deprived of the opportunity to on-call pay and did not enjoy the same level of remuneration as in previous years. On call payments were additional to basic pay. These were not paid whilst the claimant was on special leave because he wished to be redeployed. There was no contractual entitlement to additional pay and benefits under the claimant's contract in circumstances in which he was not discharging the duties which gave rise to the entitlement.

69 The claim for shortfalls in pay is not made out.

Conclusion

70 From these findings I am satisfied that, in some respects, the managers of the claimant and the human resources department could have handled matters better with regard to arranging a swifter return to work, being more proactive in identifying Mr Donk's role and applying the grievance policy by responding within days to the grievance letter of 6 September 2019.

71 In the main, however, I do not uphold the criticisms levelled at the respondent. Although mistakes were made which caused understandable frustration, they were not of the character or extent, even taken together, to destroy or seriously undermine trust and confidence. The shortcomings must be seen in the context of all factors; the claimant's return to his former role against his wishes and a number of efforts to assist and reintegrate him by the respondent's management and to move matters forward. I reject the claim that there was a breach of the implied term.

72 The claimant was not constructively dismissed.

73 No claim for outstanding wages arises for the reasons given.

Employment Judge D N Jones

Date: 29 October 2020