



THE EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr R Asare

v

Royal Free London NHS
Foundation Trust

Heard at: London Central

On: 17-19 March 2020; 20 March 2020
in chambers

Before: Employment Judge Glennie

Representation:

Claimant: Ms D Badrick (lay advocate)

Respondent: Ms R Kennedy (counsel)

JUDGMENT

1. The judgment of the Tribunal is that the complaints of unfair constructive dismissal; breach of contract (notice pay); unlawful deduction from wages; and non-payment of holiday pay are all dismissed.

REASONS

1. The complaints before the Tribunal are of unfair constructive dismissal; wrongful dismissal (breach of contract in failing to pay notice pay); unlawful deduction from wages; and non-payment of holiday pay. The Respondent resists all of those complaints.

The issues

2. The issues were defined by EJ Walker in a Preliminary Hearing held on 1 May 2019. The matters in dispute have reduced somewhat since the date of that hearing, and I summarise the issues before me as follows.

3. With regard to the complaint of constructive unfair dismissal, the Respondent accepted that Mr Asare was an employee and raised no argument about his having sufficient length of service to qualify for the right not to be unfairly dismissed. The issues on liability were:
 - 3.1 Was Mr Asare dismissed? In other words, did the Respondent commit a fundamental breach of contract, and did Mr Asare resign in response to that without having affirmed the contract? In her closing submissions, Ms Badrick confirmed that the matters relied on as constituting the breach of contract were the events of 10 October 2018 and the failure to pay Mr Asare while he was suspended.
 - 3.2 If there was a dismissal, what was the reason or principal reason for it, and was it a potentially fair reason within sections 98(1) and (2) of the Employment Rights Act 1996?
 - 3.3 If so, was the dismissal fair or unfair under section 98(4) of the 1996 Act?
4. In relation to wrongful dismissal, the issues were:
 - 4.1 Was Mr Asare dismissed?
 - 4.2 If so, to what notice was he entitled?
5. In relation to unlawful deduction from wages, the issue at the time of the Preliminary Hearing was as to whether the Respondent was under an obligation to pay Mr Asare during the period of his suspension, which will be further explained below. The Respondent has since then made the payment.
6. The usual issues as to calculation of holiday pay would have arisen in relation to that complaint. However, as will be explained below, the case in this regard was put in such a way that it is not necessary for me to set out all of the issues here.

Evidence and findings of fact

7. I heard evidence from the following witnesses:
 - 7.1 The Claimant, Mr Robert Asare.
 - 7.2 Ms Allyson Coughlan, Services Manager for T & O and Pain Management.
 - 7.3 Ms Debbie Donnelly (who gave evidence via Skype), Compliance and Lead Nurse for Temporary Staffing.
 - 7.4 Mr Chris Pope, Head of Temporary Staffing.

8. I also read statements from 4 witnesses on behalf of Mr Asare, whose evidence was not challenged by the Respondent. These were Mr Nayema Khatun, Mr Solomon Agyeibi, Mr Mahul Desai and Ms Nadine Asare (Mr Asare's sister).
9. There was an agreed bundle of documents, to which some pages were added by Ms Badrick on behalf of Mr Asare, and page numbers that follow in these reasons refer to that bundle.
10. The Respondent is the Trust responsible for operating the Royal Free Hospital ("The Royal Free") in North London. Mr Asare began working at the Royal Free in January 2006. He joined the "bank" staff, meaning that he did not have a permanent position with regular hours, but that he worked such hours as were offered to him and as he was able to accept. Over the years he worked in various different departments, most recently in Pain Management (located in a building named The Grove) from November 2016, where his line manager was Ms Fitzgerald.
11. In January 2016 Mr Asare started doing extra shifts as a porter, again on the basis of being a bank worker. Both when working in the Pain Management department, and when working as a porter, Mr Asare filled out time sheets to record the hours that he had worked. There was, in addition, an electronic clocking in and out system. The system that was intended to operate was that the sheets would be checked by a supervisor or manager against the individual's clocking in and out record, and then passed on to another department for payment.
12. The evidence was that this system worked well in the Pain Management Department, but that the position in portering was different. Mr Asare and Mr Khatun described this as "chaotic", with shifts being changed and workers substituting for others at short notice. The Respondent did not challenge this evidence, which I accept.
13. An additional feature of the portering work was that it was possible to check retrospectively what work an individual had done over a particular period by use of an electronic system named teletracking, which recorded the jobs each porter was asked to do.
14. At least by the time of the events with which I am concerned, Mr Asare was working long hours at the Royal Free. He would work a full week on the Pain Management department, and additional portering shifts. He had experienced a number of adverse life events over a period, culminating in the death of his grandfather, to whom he had been particularly close and who had been the father-figure in his life.
15. During September 2018 Mr Asare continued to work full-time in Pain Management and to work additional shifts as a porter. On 2 October 2018 a manager in the portering department, SK, sent an email (at page 319) to Mr Pope and Ms Donnelly, copied to others, which was headed "Robert Asare-timesheet fraud" and read as follows:

“We have identified some suspicious behaviour from Robert Asare. He works for portering outside of his normal working hours in a department in the grove centre. The suggestion from the team is that Robert is writing his name on the Rota or extending his shift on the weekend when team leaders and supervisors are not normally working. He is then filing timesheets and it is evident that my team are not checking properly if these shifts have been authorised by other team leaders.

“There are concerns that he is entering and exiting the grove centre (his normal place of work at times outside his normal working pattern). Questions why is he in the building when he is not working. Timesheets have been entered for times he hasn't worked or been requested to work. Clock-in times have been made for times outside of shifts requested to work.

16. Following this, on 5 October 2019, Mr Pope sent an email (at page 321) to SK, copied to Ms Donnelly and others, headed “timesheet fraud”, which read as follows:

“Have spoken to RSM [the Trust's counter-fraud department]. They wouldn't usually as they don't like to alert people until they have been arrested but in this instance they are happy for us to cancel shifts, not pay for those from last weekend and get his access cards off him. Debbie will try and meet with him next week with regards to his statement and the potential removal from bank. Matt has requested if we can get information going back as far as we think this has been happening. We can request he voluntarily pays back any money he's acquired fraudulently (pretty unlikely), or we can end up going down the civil (unlikely due to cost) or criminal route (may be awarded costs back by a judge in a plea).....”

17. When cross-examined about this email, Mr Pope denied that it showed that he had decided at that point that Mr Asare had committed fraud. The words that he used suggested to me that if he had not conclusively decided that Mr Asare had committed fraud, he was at least of the view that it was likely that he had.
18. Mr Pope then asked Ms Donnelly to investigate the matter. She had not previously met Mr Asare. On 10 October Ms Donnelly went to the Pain Management Department in order to speak to Mr Asare. There was a dispute about what happened and what was said.
19. In her witness statement Ms Donnelly said that she arrived at the clinic (evidently at some point before 7.45 am) and spoke to Mr Asare on reception, not knowing who he was at the time. Mr Asare gave Ms Donnelly the contact details for the Clinical Nurse Specialist, whom she contacted in order to say that alternative cover would be needed for reception. Ms Donnelly said that she then returned to reception at about 7.45 am and asked to speak to Mr Asare. The only other person present

was Ms Fitzgerald. She continued that she and Mr Asare went into a private room, and she told him that she had received serious allegations with regard to submitting time sheets, claiming for hours that he had not worked, and entering The Grove at times when he was not scheduled to work there.

20. Ms Donnelly further stated that she told Mr Asare that she would provide details of the allegations and associated documentation by post and email. She asked whether Mr Asare was homeless and living at The Grove, and he replied that he was not, but came to The Grove to do odd bits of work during his portering shifts. Ms Donnelly continued that she told Mr Asare that he would not be able to work bank shifts during the investigation and that he handed over his name badge without question. Ms Donnelly stated that she recalled a number of things that Mr Asare said, because they seemed unusual to her. She said that he commented that “my sister is going to kill me”; that he completed her sentence about suspension, saying “yes, I know it’s a neutral act and all that”; and that he said “I guess I’ll just have to take whatever punishment is coming to me”. Ms Donnelly said that the meeting concluded, Mr Asare went to the locker area, and she left the building. She did not see Mr Asare leave, and there were no patients and hardly any staff present at the time.
21. In her oral evidence Ms Donnelly said that the point of her going to see Mr Asare was to advise him of the allegations. Like Mr Pope, Ms Donnelly denied that it had already been decided that Mr Asare was guilty. With regard to timings, she said that she arrived at work at about 7 am and so probably arrived at the Pain Management department at about 7.15 to 7.30, although she did not check the time or make any notes. Ms Badrick put to Ms Donnelly that her initial conversation with Mr Asare took place at around 8.20 am and the meeting at around 10.25, which she disputed.
22. Ms Coughlan’s evidence was that she was present as Mr Asare left, since Ms Fitzgerald had called her. Her evidence was that it was “quite early in the morning” and that there were “hardly any staff and no patients present”. She stated that Mr Asare more than once said things to her like “I have let you down” and that he was sorry.
23. Mr Asare’s case in his claim form was that Ms Donnelly approached him at about 10.30 am and said that an allegation of fraud had been made against him regarding his extra hours as a porter, and that she demanded his ID. The claim form continued that Ms Donnelly then escorted him from the building in front of work colleagues and patients. In a further document submitted by Ms Badrick on 17 March 2019 at pages 16-36, and largely reproduced in his witness statement, Mr Asare said that Ms Donnelly first spoke to him at about 8.20 and that the meeting took place after 10.15 am. He stated that Ms Donnelly said that a serious allegation had been made against him without giving any more details, leaving Mr Asare thinking that there might have been a complaint by a patient or a nurse. He said that he asked whether this was the case and Ms Donnelly said that she was unable to discuss it at that point. She required him to hand over his ID: as they

left, Mr Asare spoke to Ms Fitzgerald, who was at the reception desk. He was then escorted from the premises in full view of colleagues, patients and visitors.

24. In his oral evidence Mr Asare said that he first spoke to Ms Donnelly at 8.20 and that she came back at 10.30. He confirmed his evidence that she did not tell him the nature of the allegations. He agreed that he said that he knew that “suspension was a neutral act and all that”, although he disputed the other two comments Ms Donnelly attributed to him. He said that people were trying to speak to him as he left. His recollection was that he said to Ms Fitzgerald that he felt sorry and “I have let you down”, but he could not be sure that he did not say it to Ms Coughlan.

25. At 10.52 am Ms Donnelly sent an email to Mr Asare at page 280 which read as follows:

“Thank you for meeting with me this morning where I explained to you that due to some serious allegations raised by the portering service I was placing you on a restriction from working bank shifts within the trust whilst the allegations are investigation (sic).

The allegations are that:

- You have submitted time sheets to claims (sic) hours that you have not worked in the portering department.
- You have clocked in and out of the portering department at irregular times without previously being booked to work.
- You have entered The Grove building during portering shifts which is not relevant to portering work.
- You have entered The Grove at times not relevant to the running of the service in The Grove.

26. It is necessary for me to make findings of fact about what occurred on 10 October 2018, as this is one of the two matters that Mr Asare relies on as constituting a breach or breaches of contract. Although, as I will explain, there was further correspondence after 10 October, it shed little, if any light on the events that occurred on that date.

27. I should also say that I considered that all those who gave evidence on the point did so honestly, and gave their genuine recollections of the events. I have to assess what they told me, as a matter of probability.

28. The issue about timing is not very important in itself, but it has a bearing on the probability that other people were present as Mr Asare left the building. I could see no obvious reason why either Mr Asare or Ms Donnelly should be mistaken about the timing of their meeting by 2 hours or more either way. Ms Badrick was critical of Ms Donnelly for not keeping any note or record of the meeting: that criticism may have some merit, but it does not help me with the question as to when the meeting took place.

29. Ms Badrick argued that Ms Donnelly would have sent her email of 10.52 am sooner rather than later after meeting Mr Asare. That point has some force, although it is not conclusive, and it is possible that matters have worked the other way around: Mr Asare may have been encouraged in his belief about the time of the meeting by looking at the time of the email. In the event, I found the following matters more persuasive.
30. Mr Asare's shift was due to start at 8.30. It seems to me to be unlikely that Ms Donnelly would have expected to find him in the department as early as 7.15 or 7.30. Given that Mr Asare was to be suspended, she would have wanted the meeting to take place at the start of the shift and might have expected Mr Asare to be at work a few minutes before the start time, which is consistent, in my judgment, with the first conversation taking place as recalled by Mr Asare, at about 8.20. Ms Donnelly then went to speak to Ms Fitzgerald: this would have taken some minutes, but there would have been no reason for her to have then delayed returning in order to meet Mr Asare by something like 2 hours.
31. I therefore find, as a matter of probability, that the meeting took place at around 8.45, or perhaps a few minutes earlier. I appreciate that this does not accord with the recollection of either Ms Donnelly or Mr Asare, but I find it to be the most likely time. This is also consistent with Ms Coughlan's evidence that the meeting took place quite early in the morning: it seems to me that the period from around 7.15 to 7.45 would have been "early", if not "very early", and that 10.30 would not have been early at all. At about 8.45 there would have been some staff members present (Ms Coughlan did not say that there were none and self-evidently she and Ms Fitzgerald were present) and few, if any, patients.
32. I find it unlikely that Ms Donnelly would have told Mr Asare nothing about the allegation against him other than that it was serious. There was no need for her to keep the nature of the allegation from him. Furthermore, it would make little sense for Mr Asare to have said that he was sorry and that "I have let you down" if he had absolutely no idea what was alleged against him. Finally, in his claim form he stated that Ms Donnelly told him that the allegation was one of fraud regarding extra hours in his portering role. I find that this was essentially what Ms Donnelly said: she told Mr Asare the nature of the allegation and then put further detail in her email.
33. I find it probable that Mr Asare made the additional comments recalled by Ms Donnelly. They are broadly consistent with what he said to Ms Fitzgerald and/or Ms Coughlan, and are the sort of unusual comments that someone would be likely to remember.
34. As to whether or not Mr Asare was "escorted from the premises", this is not a precise term and can mean different things to different people. I accept that this is what Mr Asare felt had happened, and that this was not how Ms Donnelly interpreted what occurred. I find that, whatever it was that happened, it would have been apparent to anyone observing events that Mr

Asare had been required to leave, and that there were at least some staff members other than Ms Fitzgerald and Ms Coughlan who were present.

35. On 15 October 2018 Ms Donnelly sent an email to Mr Asare at pages 281-282 giving details of the allegations and attaching the supporting evidence. There were three allegations regarding timesheets and a request for an explanation of why Mr Asare was entering The Grove at weekends when there was no work-related activity at the time. The three allegations regarding timesheets were as follows:
 - 35.1 23 September 2018: the timesheet submitted by Mr Asare showed 14 hours worked from 07.30 to 22.30; the rota showed that he was scheduled to work from 14.00 to 22.30; and the clocking overview showed that he clocked in at 09.29.
 - 35.2 30 September 2018: the timesheet submitted showed 14 hours worked from 07.30 to 22.30; the rota showed that Mr Asare was not scheduled to work on that date; and the clocking overview showed that he clocked in at 07.20, out at 07.30 and in again at 22.37. Ms Donnelly added that she understood that Mr Asare had popped in on this date in order to see whether any shifts were available, and was told that none were.
 - 35.3 29 September 2018: the timesheet submitted showed 7.5 hours worked from 10.00 to 18.30; there was no record of Mr Asare being booked to work on that date; and the clocking overview showed that he did not clock in or out.
36. As I shall explain, little explanation was given by or on behalf of Mr Asare in response to the detailed allegations and evidence, whether before his resignation, or during the Respondent's investigation. It is convenient at this point, however, to record the explanations that Mr Asare gave in the course of his oral evidence.
37. Mr Asare accepted that the details about rotas and clocking in and out were accurate, and that he had submitted the timesheets in question: he accepted that these were, therefore, inaccurate. His explanation for 23 September was that he was due to start work at 7.30 but that an incident on the railway caused him to arrive 2 hours late. He had already completed the time sheet in advance and omitted to check it before submitting it. He said that this was the day before his grandfather's funeral, meaning that he was distracted by this.
38. With regard to 30 September, Mr Asare accepted that he came in at about 7.20 but did not recall asking if there were any shifts, although the supervisor said that there was probably something available in the evening. It would have taken too long to have gone home and come back again, so he chose to do some work in advance in the Pain Management department. He must have clocked in and out in error at 7.20 and 7.30 and

then clocked in at 22.37 when he meant to clock out. He said that he had essentially done a full day's work.

39. In relation to 29 September, Mr Asare said that he had not worked on that day. He stated that he had filled out the timesheet for 29 and 30 September (which also included 3 October) at page 285 in advance, and then had submitted it in error with the previous one on 27 September. He said that it was an accident, and that the later timesheet "was stuck under the one for the 27th". This was something that he realised after he received the evidence.
40. Mr Asare's explanation for entering The Grove outside of normal operational hours was that, during his portering shifts, he preferred to use any spare time carrying out work at The Grove rather than gossiping in the porters' room.
41. Returning to Ms Donnelly's email of 15 October, this included a request for a written explanation as soon as possible and no later than 22 October. Mr Asare's case, which I accept, is that for some reason he did not receive the email, and that he received a hard copy of that and the evidence by post on 20 October. On that date he sent an email to Ms Donnelly at page 327 stating that he would submit a response by 26 October.
42. Meanwhile, Mr Asare had consulted Ms Badrick, and she sent a response on his behalf on 26 October 2018. There was a one page letter at page 292 and a response to the allegations at pages 293-298. The letter stated that Ms Badrick was acting as Mr Asare's advocate "in his current grievance against the Royal Free". It continued that, if other temporary employees were not being correctly treated, then the Royal Free could be exposed to a class action. It referred to the prospect of appointing a solicitor and counsel and making a claim to the Employment Tribunal. The letter then read as follows:

"Robert Asare is prepared to attend one, and only one meeting to resolve this grievance. I will be representing him. The amount of compensation is non-negotiable and being set deliberately less than he is entitled to; so as to allow the Royal Free to benefit by agreeing a resolution and not proceeding to tribunal.

Should the Royal Free wish to make any resolution a full and final settlement, then they must be prepared to increase the compensation payment by £50,000 to compensate Robert Asare for relinquishing his right to return should his health break down in the future due to the failure of The Royal Free in its duty of care to him as an employee.

A further cost of 25% of the final settlement is payable as my fee. Costs must be paid by the Royal Free."
43. The attached response document contained 6 numbered sections. The first asserted that, given more than 2 years' service with the Royal Free, Mr

Asare had become entitled to be treated as an employee and so was owed backdated holiday pay and to be paid in full while suspended. Ms Badrick said that if the Royal Free were to terminate Mr Asare's employment, they would face a claim for unfair dismissal, including punitive damages, and exposure to negative publicity. The second section stated that Mr Asare had been deprived of holiday pay and access to sick or compassionate leave, had been paid at one of the lowest rates and not given access to annual increments, performance assessments or promotion. Ms Badrick further asserted that Mr Asare had been subjected to overwork, had been obliged to undertake portering shifts in order to live, and had been illegally suspended on spurious grounds and without pay; and that he had been escorted from the building in front of colleagues and patients.

44. Section 3 set out certain events in Mr Asare's life outside of work, including in particular bereavements that he had suffered. Section 4 set out the consequences said to have been suffered by him as a result of not being recognised as a permanent employee and not being able to take sick or compassionate leave.
45. Section 5 was headed "Response to the allegations alleged by Debbie Donnelly". This referred to the allegations about timesheets. Ms Badrick said that given the swiping in and teletracking systems, "to suggest that they rely on timesheets when calculating payment suggests that either the Royal Free payment systems belong in the dark ages or that they are negligent." The document continued that "to further suggest that an employee of twelve years is trying to fraudulently obtain money by the inaccurate filling in of time sheets is as ludicrous as it is laughable".
46. Ms Badrick made other points, including an assertion that Mr Asare was on automatic pilot at the time. She then wrote that "the allegations are completely without foundation and have the distinct flavour of a witch hunt and harassment. A correct approach would have been in the very first instance to have privately spoken to Robert Asare to query the discrepancies and to ascertain what had happened. At which point any reasonable employer would have immediately placed Robert Asare on compassionate or sick leave, given his personal circumstances." The document continued that "to have, firstly, made a spurious visit to the department...to ascertain his presence; to then only to return to have him escorted out of the building, is entrapment and harassment."
47. Section 6 made a number of points similar to those that had already been made, and sought redress and reinstatement. In particular, the document claimed full payment from the date of suspension until the grievance was resolved; compensation of £100,000 for the failure to recognise Mr Asare as an employee over 10 years; £25,000 for costs; reinstatement; and an apology. A deadline for agreement of 5 pm on 2 November was given.
48. It is not necessary for me to comment extensively on this letter and the attachment. However, I noted that neither contained a factual explanation of Mr Asare's position regarding the timesheets.

49. Ms Donnelly replied on 29 October 2018, stating that she was seeking advice. Ms Badrick wrote again on 31 October, making various points, including a reminder that the deadline for a binding agreement was 5 pm on 2 November, and stating that further damages would be sought for every week, or part thereof, by which the deadline was missed.
50. On 6 November Ms Badrick sent an email at page 303 to recipients including Ms Donnelly and Ms Coughlan, stating that Mr Asare was signed off sick for one month with stress and depression and that she had approached ACAS for Early Conciliation. On the same date, at pages 304-305, Ms Donnelly sent a letter to Ms Badrick inviting Mr Asare to an investigation meeting at the Enfield Civic Centre on 13 November. The letter stated that Mr Asare would not be offered further bank work pending the investigation, but would receive full pay, backdated to 10 March, and based on a 12-week reference period. It was also said that the investigation did not amount to disciplinary action and did not imply any assumption that Mr Asare was guilty of any misconduct.
51. Ms Badrick replied to Ms Donnelly on 9 November 2018, in an email at page 308. She said that the letter of 6 November had arrived after the deadline that she had given, and that she had instigated ACAS early conciliation, which took precedence over the proposed meeting. In paragraph 6 of the email, Ms Badrick wrote this:

“As you failed to contact me by 5.00pm, Friday, November 2nd and because of the way you initially chose to deal with this matter; and the way Robert Asare has been treated over his twelve years of service to The Royal Free NHS Hospital Trust; Robert Asare considers himself to have been constructively dismissed as of 5.00pm Friday, 2nd November. This will form the over arching grievance that Robert Asare is bringing against the Royal Free.”
52. On 4 December 2018 Ms Donnelly sent an email at page 340 to Ms Badrick stating that she intended to complete the investigation. Ms Donnelly produced a Management Statement of Case dated 30 January 2019 at pages 311-318. Her conclusion was that there was tangible evidence to suggest that Mr Asare had committed gross misconduct by fraudulently claiming for hours that he had not worked; and that there was evidence that he had accessed The Grove at times which were highly unusual, very frequent and without good reason.
53. Mr Pope wrote to Mr Asare on 1 February 2019 (page 343) inviting him to a formal disciplinary hearing on 20 February. Mr Asare did not attend, and Mr Pope wrote again on 21 February inviting him to a meeting on 6 March 2019. Ms Badrick responded on 26 February stating that tribunal proceedings had been commenced and that a disciplinary hearing was not therefore appropriate.

54. The hearing took place on 6 March 2019, chaired by Mr Pope. His evidence, which I accept, was that he took Ms Badrick's letter and attachments of 26 October 2018 as Mr Asare's case, as Ms Badrick had requested in her email of 5 March 2019 at page 352.
55. Mr Pope produced an outcome letter dated 6 March 2019 at pages 362-364. Mr Pope upheld the 3 allegations relating to timesheets; that of clocking in and out when not booked to work; that of entering The Grove at times that were not relevant to portering work; and that of entering The Grove at times that were not relevant to the running of services there.
56. Mr Pope concluded that the timesheet allegations amounted to gross misconduct; that the mitigation provided for the clocking in and out allegation did not explain or excuse it; that he accepted the mitigation with regard to entering The Grove at times not relevant to portering and would impose no sanction; and that it was unclear why Mr Asare entered The Grove on the other occasions, such that he was unable to reach a conclusion on the appropriate sanction.
57. The letter continued that there had been an irreparable breakdown in trust and confidence and that Mr Asare would be removed from the bank. In his witness statement Mr Pope said that, had he considered Mr Asare to be an employee of the Respondent, he would have dismissed him summarily for gross misconduct.
58. Mr Pope also gave evidence relevant to the complaints of failure to pay holiday pay and unlawful deduction from wages. With regard to the former, he stated that bank workers were paid holiday pay on a rolled-up basis at 12.07% of the hours worked. I could see from the payslips provided that this was the case. Payment for the period of Mr Asare's suspension was made in July 2019: why there was a delay in this has not been explained.

The applicable law and conclusions

59. I will deal first with the complaint of unfair (constructive) dismissal. The implied contractual term as to trust and confidence, on which Mr Asare relies, is generally defined as a term that the employer will not, without reasonable cause, act in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence with the employee. If the employer breaches that term, the employee may (by resigning) treat himself as dismissed. The breach of the term must be a reason for the resignation; it need not be the sole reason.
60. As recorded above, the matters relied upon by Mr Asare as breaches of the implied term were the events of 10 October 2018 and the failure to pay him while he was suspended.
61. I consider that the suspension itself was not calculated or likely to destroy or seriously damage the relationship of trust and confidence and that, in any event, the Respondent had reasonable cause to impose it. Mr Asare

knew, and stated at the time, that suspension was a neutral act. His comments about being sorry and having let people down showed that he realised that something was, or might be, wrong. It would be difficult for both employer and employee if the latter were to continue working against the background of an ongoing investigation into a potentially serious allegation: there would be a risk that either or both would lose confidence in the other.

62. I find that it was reasonable for the Respondent to investigate the anomalies in the timesheets. Ms Badrick argued, in effect, that the existence of the swiping in and out and teletracking systems meant that Mr Asare could not possibly have hoped to get away with presenting a false claim, and would not therefore have done it; that the Respondent should have realised that; and that, therefore, there was no need of an investigation. Ms Donnelly, or whoever, should just have asked Mr Asare informally to explain what had happened. In support of this, Ms Badrick pointed to the Respondent's disciplinary policy which (like many such policies) recommended informal action in the first instance in appropriate cases.
63. This suggestion was, I found, attractive at a certain level. It is not, however, how one could expect an employer to reasonably approach a situation of this nature. This was a potentially serious matter. Both employer and employee would expect a careful investigation in which the evidence would be gathered and the employee would be asked for, and would have the opportunity to give, an explanation in the light of that evidence. An informal discussion might lead to the employer reaching a conclusion that it would not have done following a full investigation, possibly to the detriment of the employee. I concluded that the Respondent did not act in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence in relation to the investigation, and had reasonable cause to investigate in the way that it did.
64. As I have found, Mr Asare was given an outline of the allegations at the meeting with Ms Donnelly. The latter gave him a fuller account of them in her email of 10 October 2018, and sent the full evidence on 15 October (received on 20 October). I consider that, in doing so, the Respondent did not act in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence; and further that the Respondent had reasonable cause to approach informing Mr Asare of the allegations and evidence in this way.
65. I also consider that the Respondent had reasonable cause to require Mr Asare to leave the premises immediately. This step is often taken when an employee is suspended. Among other things, it ensures that the suspended employee is not put in a difficult position by having colleagues asking him what is happening: it also means that the employer need not be concerned about the possibility that the employee may approach colleagues about the subject matter of the investigation. I consider that it was reasonable to address the matter during working hours, and that there

was therefore an inevitable risk that some other persons would witness Mr Asare leaving, and might realise that he was not doing so voluntarily.

66. I do not therefore consider that what occurred on 10 October 2018 amounted to, or contributed to, a breach of the implied term.
67. I turn then to the question of non-payment from the date of the suspension to the date of Mr Asare's resignation. Clause 15.2 of the terms and conditions for bank staff (at page 63) provides as follows:

“During an investigation or pending a decision (whether relating to your bank work or another job that you have with the Trust) it may not be appropriate to offer you engagements of a particular type or any engagements. No bank payments will be applicable during such a period (as is the case whenever no engagements are offered).”
68. Although this was not a point that was developed in argument before me, it seemed to me that this clause might not be applicable if, as has now been conceded, Mr Asare was correctly viewed as an employee. That question is, however, academic because on 6 November 2018 Mr Asare was informed that he would be paid, backdated to the day on which he was suspended. I find that the Respondent was not in breach of contract as at 6 November, because it had agreed to pay Mr Asare.
69. I consider it likely that an employer would destroy or seriously damage trust and confidence if it agreed to pay the employee in such circumstances and then failed to do so, in a way that could reasonably be interpreted as showing an intention not to pay, or to substantially delay payment. Mr Asare's resignation was communicated to the Respondent on 9 November 2018. I do not consider that a lapse of time of 3 days from the agreement to pay could reasonably be interpreted as showing an intention not to pay or to substantially delay payment.
70. Put another way, as of 9 November, Mr Asare could not have reasonably assumed that the Respondent was not going to pay him after all, or was going to substantially delay payment. In the event, there was a substantial (and unexplained) delay, but Mr Asare could not have foreseen that. I find that, by 9 November 2018, the Respondent had not breached the implied term by not paying Mr Asare.
71. I have therefore concluded that the Respondent did not breach the implied term of trust and confidence. This means that the complaint of unfair constructive dismissal fails.
72. My finding that there was no breach of the implied term means that there was no dismissal. The complaint of wrongful dismissal, or failure to pay notice pay, must also therefore fail.

73. In case I am wrong about there being no breach of the implied term, I have gone on to consider whether any breach caused Mr Asare's resignation, in the sense referred to above of being a cause of it.
74. In the document dated 17 March 2019, at page 30, Mr Asare's case as to the reason for his resignation was given as: "Because at this point the RF had failed to respond and because RA was not being paid his full pay and finally because of the breakdown of trust facilitated by DD's actions..." The "failure to respond" referred to the document of 26 October.
75. The email of 9 November 2018 communicating Mr Asare's resignation cited as the reasons for it the failure to contact Ms Badrick by the 5 November deadline (effectively the same as the failure to respond, above); the way in which the matter was initially dealt with; and the way in which Mr Asare had been treated over 12 years.
76. Ms Kennedy submitted that the email did not say that the resignation was because of the way in which Mr Asare was treated on 10 October. Although I did not raise this in the course of submissions, it now seems to me on re-reading the email that the reference to the way in which the matter was originally dealt with probably did mean what occurred on 10 October. I say this because of the exact words used, which were addressed to Ms Donnelly, being: "the way you initially chose to deal with this matter." It seems to me that the most likely meaning of this is the decision to investigate and suspend Mr Ansare, and the way in which Ms Donnelly approached this, as opposed to having an informal word about the matter.
77. In his oral evidence Mr Asare said that he had no reason to raise any grievance prior to October 2018. Later he said that if he had been treated as a human being and not as a fraudster, "none of this would have happened", which I took to mean the present proceedings; and that there should have been a discussion on 10 October like the one that took place in the Tribunal hearing, meaning his giving an explanation of the timesheets. Mr Asare also stated that part of the reason why he resigned was not getting a permanent role. He denied resigning because the Respondent did not pay him £50,000, and said that it was because of mistreatment and his name being tarnished by a mistake.
78. Ms Kennedy submitted that, if there was a breach of the implied term, Mr Asare did not resign in response to it and that there was a wider course of conduct involved. I agree with the latter point, and it was part of Mr Asare's own evidence that this was the case.
79. Having said that, I look again at the two matters relied upon as breaches, and ask myself whether either or both of them were a cause of Mr Asare's resignation, meaning in this case a substantial cause among a number of causes.

80. The issue as to not being paid was first raised as a cause of Mr Asare's resignation in the 17 March 2019 document. It did not appear in the resignation email. Had it been a cause of the resignation, I would have expected it to be mentioned there alongside the other factors. Furthermore, as I have already observed, by 9 November 2018 there was no reason for Mr Asare to assume that the Respondent would not pay him, contrary to what had been said, and from this I infer that he did not in fact suspect this at the time. I therefore find that not being paid was not a cause of Mr Asare's resignation.
81. As I have concluded above, the meeting on 10 October was included in the email of 9 November as a reason why Mr Asare resigned. It was clear from his evidence that he felt strongly about this. Had I concluded that this aspect amounted to a breach of the implied term, I would also have held that it was a cause of Mr Asare's resignation.
82. In that event, I would also have held that Mr Asare had not affirmed the contract by delaying his resignation. The lapse of time from 10 October to 9 November was not a long one, and it was clear from 26 October onwards that Mr Asare was dissatisfied with the situation.
83. Had I decided that there was a constructive dismissal, I would also have decided that it was unfair, not least because (almost by definition) there would have been procedural unfairness.
84. The issues as to the principle in **Polkey** and contributory conduct do not, in the event, arise for decision, as I have concluded that the complaint of unfair constructive dismissal fails. I will nonetheless give the conclusions I have reached on these.
85. The principle in **Polkey** requires me to assess what prospect there was that the Respondent would have dismissed Mr Asare fairly in any event. This is necessarily a hypothetical exercise. I consider that the correct assumption for me to make is that, had Mr Asare not resigned, he would have continued with the approach taken in the email of 26 October, and would have given nothing more by way of an explanation than appeared there. I assume that he would have continued to maintain the stance of seeking compensation for his grievances and that he would not have attended a purely "disciplinary" meeting. In these circumstances, I find that Mr Pope would inevitably have taken the same decision as he in fact took.
86. If that approach is incorrect, and I should assume that Mr Asare would have advanced the explanations about the timesheets to Mr Pope that he gave in the course of the hearing, then I would find the position to be a little, but not greatly, different. I am bound to say that, although I am not making a finding that the explanations were not true, I consider them to be unconvincing. They are all based on the practice of filling in the timesheets in advance, which seems a particularly hazardous practice given the unpredictable changes to the rota that occurred. The clocking errors on 30 September involve multiple errors on the same day. The explanation for 29

September, that one timesheet somehow became “stuck” under the other seemed to me to be something that Mr Asare has concluded happened some time after the event, when he was trying to think about how this might have happened. I regard this explanation as inherently unlikely. There is a possibility that Mr Pope might have been more impressed than I am by the explanations, but in my judgment it is a small one. On this alternative scenario, I consider that there was only a 25% chance that the outcome would have been other than dismissal.

- 87. Ms Kennedy also submitted that, if there was a dismissal, Mr Asare contributed to it by his own conduct in not engaging with the investigation and taking a combative approach in correspondence. Had I found that there was a dismissal, I would also have found that Mr Asare contributed to it by his own conduct in treating the matter as one where he had grievances, and taking a combative approach to the whole situation. This is a little different from Ms Kennedy’s submission, which was put in terms that would have been more applicable to a decision made by Mr Pope. It was Mr Asare who made the decision to resign: had I found that a breach of contract was a cause of that decision, I would also have found that his own combative approach also contributed, to the extent of 50%.
- 88. The complaint of unlawful deduction from wages relates to the period of suspension. At the time when the claim was presented, no payment had been made. Given the undertaking to pay Mr Asare during that period, I can well see why he made this complaint. Payment has, however, been made. The complaint must therefore be dismissed, as the failure to pay has been corrected.
- 89. In relation to the holiday pay claim, Ms Badrick accepted that rolled-up holiday pay was paid as stated by Mr Pope in his evidence. She said that she and Mr Asare had had no previous knowledge of this. There was no further explanation of the holiday pay complaint, and I concluded that Mr Asare had failed to establish that there was anything due to him in respect of this. That complaint is also, therefore, dismissed.
- 90. It follows from the above that all of Mr Asare’s complaints are unsuccessful, and should be dismissed. The remedy hearing listed on 5 June 2020 will therefore be vacated.

Employment Judge Glennie

Dated: ...29 May 2020.....

Judgment sent to the parties on:

29/5/2020.....

.....
For the Tribunal Office