EMPLOYMENT TRIBUNALS

Claimant: Mr Anthony Harmson

Respondent: Lancashire County Council

Heard at: Remotely (by Skype) **On:** 16 June 2020

Before: Employment Judge Holmes (sitting alone)

Representatives
For the claimant: In person
For the respondents: Mr D Bunting, Counsel

JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that:

The claimant's claim of unlawful deduction from wages has no reasonable prospects of success, and is struck out pursuant to rule 37(1) of the 2013 rules of procedure.

REASONS

1. This preliminary hearing was listed pursuant to a previous hearing of the claim on 17 October 2019, before Employment Judge Hoey . The claimant did not attend that hearing. Case management orders were made in relation to the claim, and for the claimant to confirm the reasons why the claimant did not attend on the day of the hearing.

2. The claimant was ordered to comply with those Orders by 22 November 2019. He did not do so, and consequently , by letter of 14 February 2020 the respondent made application to strike out the claim, on the basis of the non – compliance with the Tribunal's orders, and also on the basis that the claim, in any event, had no reasonable prospects of success. That application was listed for this hearing, at which, if the application was not successful, the Tribunal would then proceed to re-list the final hearing.

3. The "Code "V" in the heading indicates that this was a remote hearing by Skype conference call **,** to which the parties have consented. A face to face hearing was not held because both parties were able to deal with the application and case management issues remotely. The respondent had completed an agenda form, and the respondent

had provided the Tribunal with an electronic copy of the salient documents required for the purposes of the hearing.

A. Breach of the Tribunal's Orders.

4. The terms of the Tribunal's orders on 17 October 2019, sent to the parties on 8 November 2019 were as follows:

*1.The claimant is given until **22 November 2019** to advise the Tribunal (and the respondent), in writing, whether he disputes any of the material facts set out in the Note below (but only in relation to the facts which are necessary to determine the issue in dispute) and whether the claimant is content for matters to be considered (and the claim determined) in writing or whether the claimant seeks a Hearing to determine his claim.*

*2.By **22 November 2019** the claimant should set out in writing (to the Tribunal and copying same to the respondent) what, if any facts are in dispute, and why, and his response to the legal issues arising (including why he says he is entitled to full pay for the period in question).*

*3.The claimant must provide medical evidence (to the Tribunal copying same to the respondent) supporting his non-attendance at the Hearing on 17 October 2019 by **22 November 2019**.*

5. The respondent contends that the claimant did not comply with the orders, in one case, at all, and in the other two cases, in time, and in full. It is the third order that the respondent contends was not complied with at all.

6. The Employment Judge first explored with the claimant the extent to which he accepted that he had been in breach of the Tribunal's orders. In addition to the documents provided in the respondent's bundle , Employment Judge had also been provided, electronically, for he did not have access to the full file, with a copy of an email sent by the claimant to the Tribunal on 19 November 2019. The Tribunal's Orders made on 17 October 2019 were sent to the parties 8 November 2019. In his email to the Tribunal, the claimant complained that these had been sent to an old email address and that he had not received them until, it seems, 19 November 2019. In that email he sought an extension of time, from 22 November 2019, in which to reply.

7. The Tribunal it seems, unfortunately, whilst acknowledging that letter, and promising to investigate, did not refer the file back to an Employment Judge to consider the application for an extension of time.

8. The claimant did, by way of attachment to his email, provide the Tribunal copies of two letters confirming that he was booked to undergo surgical procedures at the Airedale General Hospital, firstly on 18 October 2019, and secondly on 13 November 2019.

9. It is unclear whether the claimant sent a copy of his email to the Tribunal , and of these letters, to the respondent, but Mr Bunting's instructions were that the respondent had not received them.

10. After some delay and examination of his papers and emails, the claimant agreed that he had not replied to paragraphs 1 and 2 of the orders until his email of 23 January 2020 , sent to the Tribunal and the respondent.

11. The claimant gave the Tribunal a further account of the events of the morning of 17 October 2019, and how he had had the telephone consultation with his GP. He believed that he had sent evidence of this to the Tribunal, and the respondent, on 23 November 2019, but was unable to locate a copy of this email.

12. In overall terms, the claimant explained how this period of his life involved frequent hospitalisation, treatments and procedures, for a serious kidney condition, and episodes of sepsis, and how this had impacted upon his ability to respond to the Tribunal's orders.

13. In the circumstances, the Employment Judge considered that the claimant had not, both in terms of time, and content, fully complied with the Tribunal's orders, and was therefore in breach of them.

14. The claimant, however, has given some explanation for this default, which the Employment Judge accepts was not deliberate, or meant to be obstructive. It was against this background, and these findings, that the hearing then proceeded to consider the respondent's application.

B.Strike out for no reasonable prospects of success.

15. Counsel for the respondent referred to , and effectively reiterated , the skeleton argument which had been before the Tribunal in the previous preliminary hearing, and had been included again in the bundle for this one. Whilst the respondent would dispute some of the key facts which the claimant would rely upon, the respondent contends that even on that basis the claim cannot succeed.

16. The claimant claims that he was entitled to be paid full pay for the period 4 to 31 October 2018, put as an unlawful deductions claim, the claimant continuing in employment. The claimant had been paid contractual sick pay, half pay, for the period in question. The claimant's argument was that he was due full pay for the entire period. He argued that he was , or should have been , subject to some form of medical suspension, or that the respondent's delay in finding him suitable other work had resulted in his entitlement to full pay arising.

11. The legal issue to determine was whether the claimant was entitled to full salary for the period in question or half salary (his contractual sick pay entitlement). The key facts that are necessary to determine the claim were not in dispute, and if they were , they are assumed in the claimant's favour for these purposes. The claimant accepted that he did not attend work for the period in question (4 to 31 October 2018).The claimant sent an email to the respondent on 4 October 2018 (page 72 of the bundle) in which he stated that he was not mentally fit to attend work. It was not in dispute that the claimant remained unfit to carry out the role that he was contracted to do until his return to work on 1 November 2018. The claimant's complaint, however, is that upon the expiry of his initial period of sickness absence, he was then redeployed from 1 October 2018 at the Haven children's home, which he contends was unsuitable for him in terms of his

physical and mental health, so that on 4 October 2018 he stated to the respondent that he was unable to return.

12. The respondent sought to identify alternative work for the respondent to do during the period in question. Alternative work was eventually identified on 31 October 2018 and the claimant carried out work with effect from 1 November 2018. The respondent was prepared to accept the work the claimant carried out, from 1 November 2018, as full performance of his contractual duties and accordingly paid the claimant full pay from 1 November 2018 on. The respondent's position was that , absent the claimant providing his services under his contract for the period in question, which was something he confirmed in writing he was unable to do, the claimant was not entitled to be paid full pay.

13. It did not appear to be in dispute that for the period in question (4 to 31 October 2018), the claimant did not attend work nor was he fit to carry out the work he was originally employed to do. He argued that he ought to have been medically suspended. This was not an option within the respondent's policies and procedures. While the claimant had not produced a fit note, they treated his absence as sickness and paid the claimant contractual sick pay, which, by then, because he had already received 6 months full pay, was at the reduced rate of half pay. From the payslips provided in the bundle one can see that the difference in net pay that this entailed was £274.50.

The respondent's submissions.

14. Mr Bunting's submissions were that the claimant's complaints about the respondent's various alleged failures to find the claimant suitable alternative employment sooner that it did , a period of about three weeks, do not afford the claimant a claim of unlawful deductions from wages in these circumstances. Whilst the claimant says that the respondent unreasonably delayed in finding alternative work, or carrying out other processes or procedures, that does not result in the claimant being entitled to full pay under his contract.

15. In his skeleton argument Mr Bunting refers to two decisions of the EAT. The first is ***Beveridge v KLM UK Ltd [2000] IRLR 765, EAT***. In that case, an employee who had been on sick leave had obtained a medical certificate pronouncing her fully fit and wished to return to work. However, she was prevented from returning for some six weeks by her employer whilst it waited for its own medical report. As her entitlement to contractual sick pay had run out by this stage the employer did not pay her any wages for this six-week waiting period. The contract was silent on the issue of whether wages could be withheld during this time so the EAT had to determine whether the employee had been ready and willing to work during the waiting period. The EAT held that in the absence of a contractual term to the contrary, wages were payable for the six-week period. The employee was willing to work and had done all she could to perform her part of the bargain.

16. The basic principle, the respondent submits, is that wages are payable if the employee is ready and willing to work is always subject to the terms of the contract. The analysis, however, is likely to be different if, unlike Mrs Beveridge, the employee is not fully fit after sick leave and can only perform light duties on his or her return. In the absence of any contractual provisions dealing with this situation, the employee may be

deemed to be offering part performance only, thereby allowing the employer to decline to accept the limited performance and pay nothing for the relevant period: see ***Miller v 5m (UK) Ltd UKEAT/0359/05 (1 December 2005, unreported)***, which is the second case referred to by Mr Bunting. He relies upon this case to distinguish the ***Beveridge*** judgment. The claimant here could only offer part performance, and so was not entitled to full payment of wages.

17. The provisional view of Employment Judge Hoey was that the authorities appeared to show that this principle would hold true in that even if the respondent breached the claimant's contract in the way it handled matters within the relevant period which led to the claimant not providing his services, the claimant would still not be entitled to full pay as he did not provide his services. Mr Bunting urged this view upon this Tribunal.

The claimant's submissions.

18. The claimant not being legally qualified, or represented, did not make any legal submissions. Rather he relied upon the matters set out in his, and James Rupa's witness statements, and the matters he had raised in his grievance , which was contained in the bundle. His case is perhaps best summed up by his document "Grievance Additional Information" at page 139 of the bundle before the Tribunal.

19. His first point was that he had not signed himself off sick, and had presented for work on 1 October 2018. The respondent, he said could not "force" him to take sickness absence because of the inability to facilitate his return to work. He went on:

"LCC should have placed me on some form of exceptional special leave on full pay such as medical suspension if they could not facilitate my return to work".

20. In the hearing he went on to say how there were three areas where the respondent had acted improperly, to his detriment, namely in breaching its own policies and procedures, breach of the duty of care it owed him, and breach of the implied term of trust and confidence.

21. The precise manner in which the respondent did so is set out in more detail in the documents, but in summary they included failure to carry out, at an early stage, a risk assessment, failure to obtain, again at an early stage, an occupational health assessment of not only his physical condition, but also his mental health, putting him into an unsuitable working environment , in the form of the children's home he was sent to work at, when it was dangerous to both his physical and mental health, and, finally, failing to consider allowing him to use annual leave, of which he had accrued a substantial amount, in this period, rather than suffer a reduction to half pay.

22. All these matters, the claimant argued , were breaches of contract on the part of the respondent that meant he should have been paid full sick pay in this period. In short, it was the respondent's fault that he was off sick between 10 and 31 October 2018, so he should be paid in full. The respondent also had a discretion to extend sick pay, but did not apply it to him.

23. In discussing how the claimant had put the claim solely as an unlawful deduction from wages claim, the claimant explained how he had relied upon the advice of Mr Rupa, his union Regional Organiser. He (quite unnecessarily, of course) apologised if he had not put his claim correctly.

24. In reply , briefly, Mr Bunting commented upon the extension of sick pay issue (page 43 of the bundle sets out the provisions) , pointing out that this was discretionary, and not contractual. Similarly, the possibility of allowing the claimant to use annual leave was a matter of discretion.

Discussion and ruling.

26. Dealing firstly with the breach of the Tribunal's Orders, whilst the Tribunal finds, and the claimant accepts, there was breach, the Tribunal does not consider, and Mr Bunting realistically did not seek to persuade it to, that striking out the claim for those breaches would be a proportionate sanction. The claimant did comply, or try to, with most of the Tribunal's requirements , if a little late, but for reasons that the Tribunal accepts as genuine, and to some extent, given his caring commitments for his father in Yorkshire, and his own ongoing serious health issues, as extenuating. A fair trail is clearly still possible.

27. The main issue, therefore, is whether the respondent's decision not to pay him at the rate of full pay for the period from 10 to 31 October 2018 was a breach of contract, which affords the claimant a right to claim that , in only doing so the respondent made unlawful deductions from his wages.

28. The respondent's case is that claimant was, at best, only fit for restricted duties during this period and did not perform the full services required of him (and partial performance was not accepted by the respondent). The claimant , whilst initially arguing that he was not on sick leave at that time, argues that the absence that led to his reduction in pay was caused by the failures of the respondent, which amounted to a breach (or breaches) of contract. The claimant's argument that he was not actually on sick leave, however, is a dangerous one, as, if he was not, then his absence was an unauthorised absence, for which he would not have been entitled to any pay.

The law

29. As set out in the previous Orders of the Tribunal, the relevant law is contained in section 23 of the Employment Rights Act 1996 , whereby failure to pay the sum due under the contract of employment would amount to an unlawful deduction of wages. A Tribunal can make a declaration and order payment if the sum paid was less than that which was "properly payable". What is properly payable depends upon the contractual position.

30. The condition precedent for payment of wages under a contract of employment is to be fit, ready and willing to work (see ***Miles v Wakefield Metropolitan District Council [1987] IRLR 193***). A worker who does not offer to carry out the services required under the contract of employment is not entitled to payment, unless the contract otherwise provides for payment. Ordinarily contracts will set out the position in respect of sickness by way of contractual sick pay.

31. Whilst they are not expressly stated to be contractual, the Tribunal does not understand the claimant (or indeed the respondent) to be arguing that the provisions as to sick pay set out at pages 30 to 44 in the "Management of sickness absence policy document" are not contractual. If they are not, the claimant would not even have had the entitlement to half pay, and his claim would fail on the basis that no sum was properly payable at all. For the purposes of this application, therefore, it will be assumed that these provisions are contractual.

32. If so, the claimant cannot, and does not seek to, point to an express term that he was entitled to be paid at full pay in October 2018 if he was then further absent from work by reason of sickness, having exhausted his entitlement to six months full pay at that stage.

33. Rather, his case is based upon the fact that his sickness absence at that stage, was caused by, or could have been avoided by, the respondent , which was itself in breach of contract in the manner it dealt with his sickness absence from April 2018 up until , and upon , his return to work on 1 October 2018, when it further failed in its contractual duties by not immediately finding him suitable alternative work, or by actually requiring him to work in conditions which were unsafe and which led to further sickness absence.

34. In doing so, the claimant , though not a lawyer, relies , and has to rely, upon implied terms. One of those is the implied term of trust and confidence, and, one can imagine, also, the implied term to provide a safe workplace. Adherence to policies is probably a facet of the implied term of trust and confidence. However these terms are put, however, they must be implied, as the claimant can point to no express contractual term whereby he would be entitled to full sick pay at the relevant time .

35. That then begs the question of whether, assuming the facts in his favour, and that the respondent did breach his contract as he alleges, that gives him to right to present this claim.

36. In terms of medical suspension, whilst that is doubtless something the respondent could have done, it had no contractual right to do so. As discussed in the previous hearing, it is a specific statutory right that arises in terms of section 64 of the Employment Rights Act 1996 that relates to the employer suspending employees in very limited circumstances, such as in connection with radiation. The circumstances under which that right arises , as previously indicated, do not apply in the instant case.

37. The respondent's position is that an employer is entitled to insist that a worker provides full performance under the contract in order for wages to be payable. Even if the employer is responsible for the employee being unable to work, provided the employee is unfit to work and does not present for work, no wages are due under the contract of employment (absent any express provision), since the condition precedent for payment – being fit, ready and willing to work – is absent. The employee may have other remedies, such as constructive unfair dismissal, (and others considered below) but the contractual principles underlying entitlement to wages requires the employee to be fit ready and willing to work (and provide service).

38. In the current case the claimant did not provide his services. He says that he was not mentally fit to do the work in question. It is not in dispute that he did not offer to carry out the services under his contract for the period in question.

39. In stating the law upon entitlement to wages it is sometimes asserted that 'no work means no pay' , and it is certainly possible to find statements in the case law to the effect that work and wages are co-dependent. The most well-known of these is the following passage from Lord Templeman's judgment in ***Miles v Wakefield Metropolitan District Council [1987] IRLR 193,*** where he stated as follows:

"In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work."

40. Applying that principle to the facts of the case before it, the House of Lords held that the district council had been entitled to reduce the pay of a registrar who had refused to conduct Saturday weddings as part of an industrial dispute. However, the ***Miles*** case involved a deliberate refusal to work normally. In other situations, for example where the employee is prevented from working because of a road accident or a commuter train breaking down or where he loses a licence which he needs to perform his role, the maxim 'no work no pay' is far too simplistic and is not an accurate statement of the legal position. There are a number of reasons for this. Firstly, as Lord Templeman acknowledged in ***Miles***, the co-dependency argument is always subject to the terms of the contract. As he explained, 'Different considerations apply to a failure to work by sickness or other circumstances which may be governed by express or implied terms or by custom.' The terms of the contract are therefore the starting point for any analysis and they may well – in and of themselves – determine whether the employer is entitled to withhold pay in a particular situation.

41. In his skeleton argument Mr Bunting refers to two decisions of the EAT. The first is ***Beveridge v KLM UK Ltd [2000] IRLR 765, EAT*** , the facts of which are set out above.

42. A number of points may be made about the ***Beveridge*** decision. Firstly, as already emphasised, the principle that wages are payable if the employee is ready and willing to work is always subject to the terms of the contract. So, for example, the position would no doubt have been different if Mrs Beveridge's contract had contained an express or implied requirement that after a period of sick leave she would undertake an occupational health assessment to determine her fitness to return. In that situation, although she would still have been ready and willing to work, she could not have insisted on returning – and so would not have been entitled to payment – until there had been a favourable assessment (see ***Agarwal v Cardiff University [2017] IRLR 600,*** EAT, at [50] where Mrs Justice Slade discusses this example). No doubt the same would have been true if there had been any other contractual pre-conditions for resuming her employment. Secondly, the analysis is likely to be different if, unlike Mrs Beveridge, the employee is not fully fit after sick leave and can only perform light duties on his or her return. In the absence of any contractual provisions dealing with this situation, the employee may be deemed to be offering part performance only, thereby allowing the

employer to decline to accept the limited performance and pay nothing for the relevant period: see ***Miller v 5m (UK) Ltd UKEAT/0359/05 (1 December 2005, unreported)***, which is the second case referred to by Mr Bunting.

43. What is meant by being 'ready and willing to work'? The doctrine of being 'ready and willing to work' first appears in the Court of Appeal's decision in ***Petrie v McFisheries Ltd [1940] 1 KB 258, [1939] 4 All ER 281*** where Atkinson J used the phrase when considering whether an employee was entitled to his wages whilst off sick. However, on the facts of ***Petrie*** there was no need to apply the principle because, in the court's view, the contract quite clearly excluded the right to wages during sickness absence, which therefore determined the matter.

44. The decision in ***Beveridge*** suggests that the employer remains under an obligation to pay the employee for periods in which the employee is prevented from working by factors beyond his control, provided of course that the employee remains ready and willing to serve the employer, and there is no contractual term to the contrary. There has been little judicial analysis of what the phrase 'ready and willing to work' actually means and it is difficult to extract clear principles from the few cases that do exist. In addition, judges have not always used the same terminology, which has added to the uncertainty.

45. That said, the claimant's arguments in this case really raise, although he would not probably put it this way himself, the issue of the effect of a conflict between express and implied terms. If, as is the case here, the claimant has been remunerated in accordance with the express terms of the contract , can he claim to have been underpaid because the respondent breached other, implied terms, which, had they been complied with, would have prevented the claimant from being in the situation whereby his express contractual sick pay entitlement was reduced?

46. That requires some consideration of the effect of such a conflict between terms. A Tribunal considering deduction from wages claims is entitled to construe the contract, and in appropriate cases make determinations as to entitlement, but this will always be on contractual principles. It may be necessary for the Tribunal to consider not just the construction of the individual contract but also *general* rules of contract law when determining whether an amount was 'properly payable'. This ability to consider and apply ordinary contract law principles was accepted by the EAT in ***Cleeve Link Ltd v Bryla [2014] IRLR 86***, where the EAT disapproved an argument that s.13 should be applied literally, as it stands, without recourse to the general law. That particular case concerned the law relating to penalty clauses.

47. It has long been a contractual principle that express terms take precedence over implied terms. An example, and expression of that principle, is to be found in the judgment of the Privy Council in ***Reda & another v Flag Ltd. (Bermuda) UKPC 38*** . Whilst a privy Council case, it is in an employment context, and considers some employment law caselaw.

48. The appeal arose out of a dispute about the payments and other benefits due to two senior executives of Flag Limited on the termination of their contracts of employment. The main issue was concerned with their claim to be entitled to stock options under a stock option plan which was introduced shortly after their employment

came to an end. The matter was governed by their contracts of employment. No statutory rights were involved. In the course of giving the judgment of the Privy Council Lord Millett had to consider the effect of an alleged implied term upon an express term. He said this, at a para. 44 of the judgment:

"44.*The appellants have presented a superficially more plausible argument to their Lordships, though one resting on the same factual foundation, that the decision to terminate their contracts in order to avoid having to grant them stock options was in breach of Flag's implied obligation of trust and confidence. Flag was duty bound to preserve the relationship of trust and confidence which ought to subsist between an employer and his employees and not to destroy that relationship by discriminating arbitrarily between its employees by granting some of them valuable financial entitlements and dismissing others in order to avoid having to do so.*

54.Their Lordships accept that the appellants' contracts of employment contained an implied term that Flag would not without reasonable and proper cause destroy the relationship of trust and confidence which should exist between employer and employee. The existence of such a term is now well established on the authorities: see Imperial Group Pensions Trust Limited v Imperial Tobacco Ltd. [1991] 1 WLR 589 at pp. 597-9; Malik v Bank of Credit and Commerce International S.A. [1998] AC 20; Johnson v Unisys [2001] 2 All ER 801. But in common with other implied terms, it must yield to the express provisions of the contract. As Lord Millett observed in Johnson v Unisys it cannot sensibly be used to extend the relationship beyond its agreed duration; and, their Lordships would add, it cannot sensibly be used to circumscribe an express power of dismissal without cause. This would run counter to the general principle that an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification: see Nelson v British Broadcasting Corporation [1977] IRLR 148 (where it was sought to imply a restriction of location into a contract which contained an unqualified mobility clause). Roskill LJ said at p. 151:

> *"... it is a basic principle of contract law that if a contract makes express provision ... in almost unrestricted language, it is impossible in the same breath to imply into that contract a restriction of the kind that the Industrial Tribunal sought to do."*

46.The appellants rely strongly on the decisions of the Employment Appeal Tribunal in BG plc v O'Brien [2001] IRLR 496 and Sedley J in Aspden v Webbs Poultry & Meat Group (Holding) Ltd [1996] IRLR 521, but in their Lordships' view neither of those cases supports the proposition for which they were cited.

47.In BG plc v O'Brien the employee complained that he had not been offered a revised contract of employment with enhanced redundancy terms, with the result that he did not receive the enhanced payment when he was eventually made redundant. It appeared that he was the only permanent employee to be excluded from the revised terms of employment. The Employment Appeal Tribunal found that the employer was in breach of the implied term of trust and confidence. The only reason for excluding the complainant from the opportunity of entering into the revised contract of employment was the fact that the employer did not realise that he was a permanent employee. If this had been appreciated, he would have been offered the same enhanced terms as his colleagues. The employer's mistake was not a reasonable and proper cause for singling the complainant out for different and less favourable treatment.

48.In Aspden v Webbs Poultry & Meat Group (Holding) Ltd the employer introduced a generous permanent health insurance scheme for directors and senior managers, including the complainant. After its introduction the complainant, who up to that point had no written contract of employment, entered into a written contract. Unfortunately the form used was one which had previously been used before the scheme was introduced, and it was mistakenly adopted without modification. The contract contained a specific power enabling the employer in the event of prolonged illness to dismiss an employee who was unfit for work and a general provision entitling either party to bring the contract to an end on three months' notice. Sedley J was satisfied on the evidence that it was not the employer's intention to exercise its contractual right of dismissal in circumstances where to do so would frustrate the employee's entitlement to income replacement insurance. The question was whether it was an implied term of the contract that it should not do so.

49.The problem was that the implication of the necessary term would contradict the express terms of the contract. Sedley J was able to overcome this difficulty because the contract as written was internally inconsistent in its provisions for sick pay and termination. Furthermore, the situation in which the contract was entered into was known to both parties to include an income insurance scheme which could only work if the employee whom it covered remained in employment for the duration of his incapacity or until some other determining event specified in the policy took place. The inconsistent terms of the contract were the result of using an inappropriate form without appreciating the consequences of doing so. These factors persuaded the judge to imply into the contract the term for which the complainant contended.

50.Their Lordships consider that neither case, properly understood, supports the proposition that Flag's express power of dismissal without cause was circumscribed in the manner for which the appellants contend. In BG plc v O'Brien the employee did not complain of his dismissal but of his treatment while he was still employed. He complained that by not being offered a revised contract he had been victimised or discriminated against in a manner which was calculated to destroy the relationship of trust and confidence between himself and his employer. The remedy was to award him damages by reference to the amount of the enhanced redundancy terms to which he would have become entitled if he had been offered the revised contract like his fellow permanent employees. These were not damages for wrongful dismissal (since his dismissal was not wrongful) but damages for breach of an implied term in his contract that he would not during the period of his employment and without reasonable and proper cause be treated less favourably than his fellow employees.

52.Aspden v Webbs Poultry & Meat Group (Holding) Ltd was not concerned with the implied term of trust and confidence at all. The question was whether the employer's express right of dismissal could be limited by implication arising from the unusual circumstances in which the contract had been entered into and the inherently contradictory terms which resulted. The better course might have been to rectify the contract to include the term contended for as an express term, an unusual course but one which would appear to have been justified by the evidence. But even if the case is taken as a rare example of a term being implied into a contract to qualify an express right, the justification for this course lay in the need to reconcile express terms of the contract which were mutually inconsistent. No such problem arises in the present case.

53.Their Lordships accordingly agree with the Court of Appeal that Flag's express and unrestricted power to terminate the appellants' contracts of employment without cause was not qualified in any way, whether by reference to the implied term of trust and confidence or otherwise. Not surprisingly, the Appellants have some difficulty in expressing the content of their contractual right which they allege has been broken. It was not a right to be offered participation in the Plan before being dismissed, for Flag was under no obligation to establish the Plan at all; nor was it a right not to be dismissed until after the Plan had been introduced, for Flag was entitled to dismiss them without cause at any time."

49. Para. 54 of the judgment sets out the crucial principle, that the implied term of trust and confidence, which was acknowledged , must yield to the express provisions of the contract. What that means, in the Tribunal's view, is that in this case the claimant cannot rely upon any implied terms to modify the express terms of his contract, and have it applied to him as if the respondent had not breached those terms. His remedy for those breaches , if established, would be damages, in the sum by which his sick pay was reduced, or compensation for any discrimination or detriment proved. It is not an award of full pay by way of an unlawful deductions claim.

50. That is not, however, to say he has, or would have no remedy. He can sue for breach of those terms. He cannot, however, do so in the Employment Tribunal , as it only has jurisdiction to award damages for breach of contract after the employment has ended. Similarly, the matters he complains of may have been acts of disability discrimination, or detriment for his union activities, which he has suggested, but his claim does not include any such a claim, and he has made no application to amend to add any such claims.

51. On this basis, whilst the Tribunal did consider whether, as an alternative, it should make a deposit order on the basis that the claim has little, but not no, reasonable prospect of success, as the facts have all been assumed in the claimant's favour, it is the legal analysis above that means his claim cannot succeed. That means that the claim cannot have even little reasonable prospects of success.

52. That does not mean that the Tribunal must strike it out, it still as a discretion under rule 37 whether to do so. Given, however, the modest amount claimed, the delay that has already occurred, and all the circumstances, the Tribunal can see no reason why the claim should not be struck out, and it will be.

A resolution?

53. Finally, and by way of postscript, in the hope that some resolution can nonetheless be achieved, the Tribunal notes that the claimant does still have a considerable amount of unused annual leave, which he was not allowed (as he puts it) to use in October 2018, so as to avoid the reduction in his pay. One would have thought, if that is still the case, to allow him to take that period as part of his annual leave, which would be a purely historical adjustment, even at this stage , and pay the claimant accordingly, reducing his accumulated holiday entitlement , would not be of any operational detriment for the respondent, and would resolve the issue. The Tribunal cannot, of course, force such a resolution upon the parties, and there may be reasons why this is not practicable, but it does invite them to consider this.

Employment Judge Holmes

DATE 17 June 2020

ORDER SENT TO THE PARTIES ON
18 June 2020

FOR THE TRIBUNAL OFFICE

All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.