



EMPLOYMENT TRIBUNALS

Claimant: Miss J Comber

Respondent: Bury Hospice

HELD AT: Manchester

ON: 3-5 January 2017
8 February 2017
(in Chambers)

BEFORE: Employment Judge Sherratt

REPRESENTATION:

Claimant: Mr D Flood, Counsel
Respondent: Mr R Carter, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed.
2. Any award of compensation to the claimant shall not be reduced whether under Polkey or for contributory conduct.
3. The claimant's claim in respect of outstanding holiday pay is dismissed.

REASONS

Introduction

1. The respondent has charitable status and is a company limited by guarantee. It provides palliative care and community focussed services from Bury Hospice. It receives an annual grant from the local Primary Care Trust and raises the remainder of its running costs through legacies and donations.
2. The claimant commenced her employment with the respondent on 10 October 2011 and at the time of her dismissal with payment in lieu of notice on 16 March 2016 the claimant held the role as Chief executive.

The Issues

3. The claimant brought claims of unfair dismissal and in respect of holiday pay. The holiday pay claim did not figure before the Tribunal and is dismissed.

4. According to the respondent's grounds of resistance, attached to form ET3, the reason for the claimant's dismissal was some other substantial reason, namely an irreparable loss of confidence in the claimant. At paragraph 11 it was admitted that the claimant's dismissal was procedurally unfair within the meaning of section 98 of the Employment Rights Act 1996. It was averred that a decision to dismiss the claimant would have been made following a fair procedure in any event. Further the respondent avers that given the time critical nature of the issues facing the respondent and the requirement that the respondent take urgent action to ameliorate its difficulties, any such process would have occupied no more than a period of four weeks. The respondent accordingly relies upon the principle adumbrated in **Polkey v Daynton (sic) Services** in support of its contention that any compensatory award otherwise payable to the claimant should be reduced accordingly. Further, the respondent will invite the Tribunal to make a finding of contributory conduct so as to reduce the basic and compensatory awards otherwise payable to the claimant.

The Evidence

5. The claimant gave evidence on her own behalf and called Michael Tansey who was employed by the respondent from March 2013 until 30 June 2016 latterly as Finance and Operations Manager.

6. The respondent called Peter Holliday, Paul Horrocks and Graham Yardley, who were trustees of the respondent, and Suzanne Carr who was instructed on behalf of the respondent to carry out an independent investigation into the affairs of the hospice and who by the time of the hearing was involved in the management of the hospice for reward but not as a trustee.

7. There were two lever arch files with printing on both sides of the paper containing in the region of 1,600 pages.

The Facts

8. Before the claimant started her employment with the respondent its then board of trustees had decided to build a new hospice following receipt of a substantial legacy. The new hospice would be a 12 bedded unit costing some £5million. When the build was commenced not all of the funding was in place for the building and no additional funding appeared to have been secured to meet the increased running costs, which were likely to double. Notwithstanding an appeal failing to generate all of the capital needed the build went ahead. When the new hospice opened the services provided by the respondent involved eight beds, three days of care and seven days of hospice at home rather than the maximum of 12 beds, five days of day care and seven days of hospice at home. This was due to concerns over lack of funding.

9. The lack of funding led to the need for substantial economies. The savings were made by removal of enhanced pay and then redundancies. This caused considerable employee dissatisfaction.

10. Although the claimant had not been involved in the decisions concerning the building of the new hospice premises she was involved in the introduction of the cost saving measures. There were rumours that the hospice would close due a lack of funding and the local newspapers showed a keen interest in what was going on there.

11. When the new hospice was opened the former premises were vacant and a decision was made to consider converting it to a hospice for children. An application for funding was made and was granted on the usual terms for such funding.

12. The new hospice for children was to be operated by a new Trust involving a form of partnership between Bury Hospice and a local Health Trust.

13. Towards the end of October 2015 troubles were being experienced by the respondent hospice and a local newspaper called for the claimant to be suspended. She went to her GP and was diagnosed with exhaustion and signed off for two weeks. She returned to the GP and was diagnosed with depression. She was signed off until 19 January 2016 and prescribed antidepressants.

14. In December 2015 the respondent's acting Chair of Trustees, Margaret Lloyd, spoke to the claimant on the telephone and according to the unchallenged evidence of the claimant (because Margaret Lloyd was not called) she was told:

“It is difficult here and if you come back, you will have to fight for your job and it is going to be tough for you and you will have to be strong if you come back.”

15. On 7 January 2016 Margaret Lloyd told the claimant:

“You cannot just come back. I have been told I need to arrange a care and concern visit for you and the Board has nominated Mr M Byrom to come on Wednesday 13 January. It must be that day as he is very busy and I am not coming as I need to be impartial...”

16. The claimant met with Mr Byrom on 13 January and then on 18 January Margaret Lloyd told the claimant she could not come back to work without an Occupational Health assessment. The claimant indicated that she would be able to come back on 26 January 2016 so any Occupational Health assessment could be completed by then, and the claimant could attend a Board meeting. The claimant recalls Margaret Lloyd telling her that she did not want her to come to the Board meeting. She insisted she should not come. According to the claimant she was told:

“No, you are not coming, other managers will see and I want you to return quietly.”

17. The claimant had an Occupational Health assessment on 21 January 2016 and the doctor told her she could return the following week on a phased return, however on Saturday 23 January Margaret Lloyd rang the claimant and said she could not come back without a risk assessment and until then the claimant had to work from home with a view to “protecting” her. The claimant was later left a message by Margaret Lloyd on 26 January 2016 stating that she was suspended. On 9 February 2016 the claimant received a letter stating she had been suspended following a Board meeting on Friday 4 February 2016.

18. The claimant learned from the press on 16 February 2016 that an acting chief executive was to be brought in.

19. At 10:57 on 16 March 2016 the claimant received a phone call from her solicitor to say he had been contacted by the respondent's solicitor to tell him that the claimant's employment had been terminated and that she would receive a letter. A few minutes later the claimant received a telephone call from a Manchester Evening News reporter followed by a request for comment from a Bury Times reporter. The claimant became aware that a staff and volunteer meeting had been held at 11.00am to inform them about her departure and to read out a press release.

20. The matters set out above look at things from the claimant's perspective as set out in Mr Flood's written submission.

21. From the respondent's perspective none of the trustees called were able to give any direct evidence as to the decision to build the new hospice or matters relating to the application for a grant to fund the conversion of the old building into a hospice for children and how those funds were dealt with. The trustees who gave evidence were involved in the decision to terminate the claimant's employment.

22. Suzanne Carr was instructed to carry out an investigation. Her terms of reference were:

- (a) Objective – to ensure that Bury Hospice can move forward with its business unhindered by public and key stakeholder perceptions of the events of the past two years.
- (b) Aim 1 – to review plans, decision making, communication and actions relating to key activities and events.
- (c) Key activity areas and events to be reviewed:-
 - (i) Overarching management of Bury Hospice.
 - (ii) Leadership and strategy including public relations/communication/managing reputation and risks.
 - (iii) Negotiations and discussions with the CCG regarding the expansion of Bury Hospice.
 - (iv) Plans for the additional costs e.g. CCG funding/income generation growth plans associated with the hospice expansion.
 - (v) To explore any impact of Grace's Place on Bury Hospice.
- (d) Aim 2 – to produce a report of the review's findings and any recommendations that may be required to assist the Board of Trustees to improve public and stakeholder confidence in Bury Hospice.

23. Although the letter of suspension does not appear in the bundle, Suzanne Carr refers to it in her statement with the reasons for suspension, including:

- (a) Stakeholder loss of confidence in management and a lack of credibility as CEO of the hospice.
- (b) Resulting reputational damage to the hospice and damage to finances as a result of adverse publicity.
- (c) Allegations of bullying.

24. Suzanne Carr confirmed that Stephen Greenhalgh was appointed acting Chief Executive following the claimant's suspension.

25. Suzanne Carr started her investigation on 1 February 2016 and as a part of it she interviewed internal staff within the hospice, trustees and key external stakeholders. She reviewed a great deal of documentation. She attended a Board meeting on 1 March 2016 and according to the Board meeting minutes she gave a verbal interim progress report that had included:

- Planning and building the new Bury Hospice;
- Infrastructure issues;
- Culture;
- Governance;
- Accountability including reporting of H & S;
- Grace's Place including grant funding;
- Cuts made when the new Bury Hospice infrastructure was deemed unaffordable;
- KPMG and other reports;
- Relationships with and reactions from stakeholders, staff, supporters etc;
- Community impact, media relationships, social media and deteriorating community support and confidence.

26. According to the minutes discussion took place around the content of the report, actions to be taken – short, medium and long-term – and how the report would be considered by stakeholders and presented publicly.

27. Ms Carr did not attend the Board meeting that took place on 7 March 2016 but from the minutes it is apparent that it was attended by Margaret Lloyd (ML), Peter Holliday, Graham Yardley, David Emery, Richard Parker and Paul Horrocks, all trustees. In attendance were the acting Chief Executive, Stephen Greenhalgh (SG); Kevin James (KJ), solicitor; and Edward Morgan (EM), barrister. The notes were taken by Kevin James.

28. According to the notes the question under discussion was the position of Jacqueline Comber (JC), the Chief Executive of Bury Hospice. Trustees were advised that:

Following receipt of various legal advice from KJ and EM this meeting had been convened at the request of SG so that trustees could consider further advice and determine a course of action accordingly.

The note of the meeting goes on that trustees were further advised that as a result of a grievance which had been lodged by JC alleging various actions taken by ML, that ML had been advised by KJ and SG that it would not be appropriate for her to act as Chairman of the meeting nor for her to continue in attendance. This would avoid any conflict of interest. This advice having been accepted by ML she indicated that she would not remain in the meeting during the course of discussions relating to the advice received. At this stage ML left the meeting and did not return.

The remaining trustees were then advised by KJ and EM in connection with a range of issues relating to JC in her role as the Chief Executive of the hospice. Further advice was received detailing the options available to the trustees in connection with the continued employment or dismissal of JC from her role as Chief Executive of the hospice.

Trustees were invited to consider this advice and to raise issues relating to the advice and the potential consequences for the hospice in determining any particular course of action.

29. Having received that advice and having discussed various aspects of the matter the trustees resolved to:-

Adjourn the meeting so as to receive a further report from KJ/EM/SG and to reconvene at 9.00am on Friday, 11 March 2016. Such meeting to be via a telephone conference with KJ to coordinate the appropriate conferencing facilities so as to enable all of the trustees to meet again to consider the report and the position further.

30. Following this meeting Suzanne Carr was informed that the trustees wanted a signed statement from Tracy Mort. Ms Mort was contacted and she agreed that she would sign the notes of interview that Suzanne Carr had prepared following their meeting on 2 March. Ms Mort might have been involved in the funding of the children's hospice but was not going to continue this due to what she says were comments made by the claimant.

31. The next Board meeting minutes are for 11 March 2016 when present were said to be Peter Holiday, Graham Yardley, David Emery and Richard Parker as trustees with, in attendance, Stephen Greenhalgh, Kevin James and Edward Morgan. Paul Horrocks had sent his apologies. Notes were again taken by Kevin James. As to the future employment of the claimant:

"Trustees had opportunity to consider a written report which had been provided as private and confidential and subject to legal privilege together with accompanying documents. The trustees having considered the contents of the report and the accompanying documents took further legal advice from KJ and EM in connection with the various options available to them, and in particular in relation to implications which arise out of the issues identified in the report. The Board of Trustees having considered the implications and

having received legal advice in connection with the matter determined that in their view that the issues raised in the report indicated that JC did not have the abilities to foster and maintain:-

- (i) A sound reputation in all aspects of governance, management and operation;
- (ii) Effective working relationships with external stakeholders including being trusted and respected locally;
- (iii) Funding from public donations, business or organisations;
- (iv) Operational safety transparency and accountability;
- (v) Financial organisation and good stewardship of funds to the best possible use;
- (vi) Partnerships with stakeholders including CCGs and NHS Trusts.

Accordingly the continued effect of all these matters led the trustees to resolve that:

- (a) The employment of JC as Chief Executive of Bury Hospice should be terminated on grounds of some other substantial reason; and
- (b) She should be given notice in accordance with the terms of her contract of employment, that being three months, but that she be paid in lieu of that notice period together with payment for untaken holidays and any expenses owing to her;
- (c) In determining to pay her in lieu of notice that the decision was without prejudice to any rights or claims which the hospice might have against JC and furthermore that it should not be seen as a concession on the part of the hospice that the trustees did not have grounds to terminate the contract of employment without notice;
- (d) KJ be instructed to draft the appropriate formal letter of termination to be sent to JC, which letter was to be approved and signed by SG on their behalf."

32. The private and confidential subject to legal privilege report to the Board of Trustees was included in the bundle of documents. It started with the background. There were issues leading to the appointment of Stephen Greenhalgh as acting Chief Executive following the claimant's suspension. Suzanne Carr had been appointed to carry out a review and as a result of her investigation certain information had been established in relation to the conduct of Jackie Comber. The Board resolved to receive the report and accompanying documentation to consider action that might be taken in relation to Jackie Comber's continued employment. Legal advice was given on 7 March to establish the extent of any liabilities which the hospice may incur as a result of taking a particular course of action, and the report and accompanying documents were for the Board to use in determining whether there were sufficient grounds to decide to terminate the employment of Jackie Comber "the basis of such termination being that there are various reasons which

would amount to some other substantial reason which would justify the dismissal and would be a potentially fair reason in accordance with the provisions of section 98(1)(b) of the Employment Rights Act 1996. That in turn would give the hospice the opportunity to defend any claim which might be made by Jackie Comber alleging that she had been unfairly dismissed”.

33. The report went on to set out the matters to be considered under the headings grant funding, naming of Grace’s Place, withdrawal of support in the form fundraising, commissioning and resignation of Trustees and lack of accountability. There was then a summary to the effect that continued employment of the claimant would perpetuate issues identified in the report leading to a continued refusal on the part of various stakeholders to support the hospice. Those stakeholders and supporters would include those referred to here in particular:-

- “(a) Significant financial supporters such as TM and MS/GC Limited.
- (b) Previous trustees in particular who have significant and substantial standing in the community, particularly those parts of the community which are likely to be the financial supporters of the hospice and organise fundraising activities etc.
- (c) The CCG who would otherwise commission the provision of palliative and end of life care services are refusing to do so because of their belief that there is a lack of understanding on the part of the Chief Executive to engage properly in an appropriate partnership for the provision of these services to the people of Bury.
- (d) There continue to be financial risks as a result of the actions taken by the Chief Executive in failing to deal properly with issues relating to the provision of the grant.
- (e) There are regulatory risks in relation to those matters which affect the perception of the hospice and which are the subject of regulation by external bodies, for example the charity commissioners.
- (f) There are significant operational risks that are being uncovered by the acting CEO, that are putting the survival of the organisation at risk of closure.
- (g) The huge and significant reputational risk to which the hospice has been exposed which now presents a threat to the continued existence of the hospice.

Underpinning all of these in relation to the perception and attitude of these stakeholders is the belief that the continued leadership of the hospice by the Chief Executive cannot and should not continue. Further, that until such time as that matter is addressed then that reputational risk may in turn lead to the financial collapse of the hospice.

In light of what is set out here, the Board of Trustees is asked to consider whether the implications which arise as a result of these issues are such as to amount to a basis upon which the hospice should not continue to employ the

Chief Executive. Accordingly if the implications of her continued employment are such as to amount to a threat to the continued existence of the hospice, that her employment should be terminated and that she should be given notice in accordance with her contractual entitlement. Such notice entitlement should be dealt with by way of a payment in lieu.

Trustees are invited to consider their decision in relation to the question of whether to continue with the employment of Jackie Comber as the Chief Executive of Bury Hospice.”

34. Appended to that report was a financial review of Grace’s Place by KPMG, a statement of Suzanne Carr dealing with her investigations to date and her involvement with Tracy Mort. The final attachment was her notes of interview signed by Tracy Mort.

35. In his witness statement Graham Yardley, trustee, said that in the circumstances they did not feel it appropriate for a lengthy disciplinary process to be followed given that the reputation of Bury Hospice with important stakeholders and the general public in Bury was at rock-bottom, and it was a consideration that any potential return to work via an appeal against her dismissal “could have potentially devastating effects on the ability of Bury Hospice to restore our reputation”.

36. Peter Holliday, trustee, in his statement said that they discussed matters and decided that given all the circumstances they could not follow the disciplinary process. Firstly the claimant had already been suspended for some time and taking her through another disciplinary process did not seem fair given that it was clear that the findings would be the same and as such the outcome the same. He referred to the fiasco in relation to the naming of Grace’s Place and the way in which that was done by the claimant although the Trustees did want a signed statement from Tracy Mort before making a final decision.

37. Mr Holliday gave the benefit of his experience as a Chief Executive of a large hospice from 2000 to September 2015 which was that such lengthy disciplinary processes did not always work when it involved a Chief Executive of a hospice. The Chief Executive role is pivotal and given the crisis of confidence both internally and with regard to stakeholders it was imperative to act quickly and not delay. He believed then and believed more firmly now that had they embarked on a disciplinary process it may have taken up to four weeks and there was the chance that the hospice would not have survived. It would have left them in a position where the hospice was leaderless and even more significantly the inevitable publicity would have brought Bury Hospice to its knees.

38. It is apparent from the minutes that the trustees resolved that the claimant's employment “as Chief Executive’s (sic) of Bury Hospice should be terminated on grounds of some other substantial reason” with Mr James drafting the formal letter of termination which would be approved and signed by Mr Greenhalgh on behalf of the trustees.

39. The trustees did not see the letter sent out on their behalf by Mr Greenhalgh but it was this letter that told the claimant the reason for the termination of her employment.

40. It is apparent that Suzanne Carr did not have any contact with the claimant in connection with the preparation of her report. She did ask those who commissioned her if she could contact the claimant but was told that she should not do so.

41. The dismissal letter dated 16 March 2016 was said to be sent by hand only. The contents were set out over some eight pages and it was signed by "Stephen Greenhalgh, Acting Chief Executive on behalf of the Board of Trustees of Bury Hospice".

42. The letter started by telling the claimant that a decision had been made to terminate her employment with the hospice with immediate effect and with payment in lieu of notice. The effective date of termination was said to be 16 March 2016. The reasons for the decision were detailed in the remainder of the letter.

43. The first section set out what was said to be the context and then the letter went on to deal with matters prompting the decision to dismiss. The matters were set out under four headings. The first was grant funding arrangements for Grace's Place; the second was matters relating to the naming of Grace's Place; the third was stakeholder and supporter concerns and issues; and the fourth was lack of accountability. The letter went on to tell the claimant that the trustees had carefully considered these issues and had concluded her continued employment could only perpetuate the issues identified and call into question the viability of the hospice. The trustees were concerned that her retention in post would lead to continued refusal on the part of various stakeholders to support the hospice and these were said to be significant financial supporters such as MS and TM/GC Limited, previous trustees and the CCG. There were then listed four further concerns, being financial risks in relation to the NHS grant, regulatory risks, significant operational risks and a huge and significant reputational risk which presented a threat to the continued existence of the hospice. The letter went on:

"Underpinning all of these is the belief that the continued leadership of the hospice by you as the Chief Executive cannot and should not continue. Further, that until such time as matters are addressed then the continued reputational risk can only lead to a further deterioration in the reputational standing of both the hospice and Grace's Place.

The trustees are mindful of the fact that you have not been provided with an opportunity to respond to these matters. However, the difficulties in which the hospice currently finds itself demand immediate and urgent action if operational stability is to be secured and further loss of reputation is to be averted. Despite this, the trustees are satisfied that the matters which have been brought to the attention of the trustees – on any view, display a profound lack of judgment and (in the case of the comments regarding the naming of Grace's Place) views from which the hospice must be seen to disassociate itself. These factors have caused the trustees to conclude that you do not possess qualities necessary to discharge the core obligations of Chief Executive of the hospice. These core duties include the ability to foster and maintain:

- (1) A sound reputation in all aspects of governance, management and operation.

- (2) Effective working relationships with external stakeholders; including being trusted and respected locally,
- (3) Funding from public donations, businesses and organisations.
- (4) Operational safety, transparency and accountability.
- (5) Financial organisation and good stewardship of funds to the best possible use.
- (6) Partnerships with stakeholders including CCGs and NHS Trusts.”

The letter continued with:

“THE GROUND/REASON FOR DISMISSAL

The continued affect of all these matters has resulted in the Trustees’ decision to terminate your employment on the grounds of some other substantial reason.

You should also be aware that further various issues continue to emerge from the ongoing investigation. The hospice reserves its position in relation to those issues. It may seek to rely upon those at some future time if necessary, as a basis on which to take or defend any future action.”

44. The letter went on to deal with notice pay with the claimant to be paid in lieu of three months’ notice less tax and national insurance. She would be paid normally in March and the notice pay and untaken holidays would be paid at the end of April:

“For the avoidance of doubt, it should be noted that the decision to pay you in respect of contractual notice is without prejudice to any rights or claims which the hospice may have against you in connection with the matters giving rise to the decision to terminate. Nor should the payment of notice in lieu be seen as any concession on the part of the trustees to the effect that it was not/would not be open to the trustees to terminate the contract of employment without notice by reason of the matters recited above.”

45. The claimant was not offered any right of appeal but the grievance submitted by her solicitor in writing on 19 February 2016 would be dealt with, if appropriate, in accordance with the grievance policy.

46. In cross examination the claimant gave her explanations in respect of the various allegations made against her in the dismissal letter. When it was put to her that there was pressure on the trustees from the media and supporters to take steps to solve the problem, that some trustees had gone and she should go too, she accepted that the board had to deal with the problem. If the board’s view was that to deal with it and to reassure the community she had to go to then it was not unreasonable but in her view what was unreasonable was not to have a conversation with her before reaching their conclusion.

The Relevant Law

47. Section 98 of the Employment Rights Act 1996 provides as follows:

- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it –
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c) ..
 - (d) ..
- (3) In subsection (2)(a) –
- (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
 - (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.”

48. Both counsel have in their submissions referred to the case of **Mr A Ezsias v North Glamorgan NHS Trust [2011] IRLR 550**, EAT, and the judgment given by the Honourable Mr Justice Keith on 18 March 2011. This was a case dealing with a dismissal for some other substantial reason and in the summary it states that:

“An employee who has been dismissed because of the breakdown of working relationships between himself and his colleagues (irrespective of whether he had

been responsible for, or had contributed to, that breakdown) had not had action taken against him because of his conduct. Accordingly, it had been open to the Employment Tribunal to rule that such disciplinary procedures as applied when allegations of misconduct were made did not have to be involved in his case.”

49. At paragraph 58 in the judgment it states:

“We have no reason to think that Employment Tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of ‘some other substantial reason’ as a pretext to conceal the real reason for the employee’s dismissal.”

Submissions

50. For the claimant Mr Flood very helpfully set out the factual background as he saw it and then he went on to the reason for the dismissal. He continued with reference to a line of authority culminating in **Ezsias** that:

“If an employee’s relationship with fellow employees and/or management has irretrievably broken to the point that they could no longer work with him, the employer could fairly dismiss that employee for some other substantial reason. Ironically, not only is a disciplinary procedure not required in such cases, one would be positively harmful to the employer’s case, in that it would suggest that the reason for the dismissal was in some way related to the conduct/capability of the employee, in which case, some other reason could not be utilised.”

51. He goes on to refer to **Ezsias** the effect of which, he says, allows an employer in cases where there has been a complete breakdown of working relationships to dismiss fairly, without a disciplinary procedure, for some other substantial reason, *provided that no allegation of culpable act or omission is made against the employee*. If such allegations are made, then, by definition, the real reason for the dismissal is conduct/capability and the normal rules of unfair dismissal apply.

52. Anticipating that the respondent would be likely to argue that the present case falls squarely within the ambit of **Ezsias**, the claimant submits that it does not for two reasons. Firstly, whilst **Ezsias** excuses the employer from having to conduct a disciplinary procedure, it does not excuse the employer from the requirement to hold an honest and reasonably held belief that there had been the complete breakdown in relations on which it wishes to rely. In the present case the Board carried out no reasonable investigation into either the claimant’s relationships with staff or the source of the press articles about her. Suzanne Carr’s investigation was in its foetal stages, was not an investigation into the claimant and had interviewed only a very small selection of staff and trustees. It has submitted that her input to the disciplinary panel could not be taken as a sound basis on which to conclude that staff did not wish the claimant to return to work. Further, no investigation or enquiry was made in the basis of the press or public “perception” of the claimant and hospice. Had any been made, it would have revealed the press coverage to have been driven by a small number of discontented agitators rather than the public at large. The respondent did not hold an honestly held and reasonable belief about the staff and public perception of the claimant. In **Ezsias** although there was no disciplinary procedure, the employer did commission an investigation by an external investigator into the issue and relied upon its stated conclusions that there had been an

irretrievable breakdown in relations. No such step was taken in this case. Suzanne Carr was in the early stages of her report on the changing of the public's perception of the respondent moving forward when she was asked to give her input to the Board.

53. Secondly, in Mr Flood's submission, the written report to the Board, the Board's minutes, the letter of dismissal and the evidence of the dismissing trustees is riddled with criticism of the claimant on matters relating to conduct and capability. The Board adjourned its 7 March meeting to get a statement from TM demonstrating the extent to which that allegation played on their minds in making the decision to dismiss. Mr Holliday was explicit in his evidence that the decision to dismiss was not just about perception, it was because of his belief that the claimant was culpable in the Tracy Mort incident, in negligently advising the Board on the issue of Grace's Place and in causing or permitting the respondent to reach a point of financial crisis as Chief Executive. The respondent, he submits, cannot seek to put itself within the remit of **Ezsias** when its case is riddled with allegations of capability and misconduct that were acting upon the minds of trustees when they made their decision to dismiss.

54. He goes on to submit that if the respondent is correct that this was an SOSR dismissal then their admission of unfairness for failing to follow a procedure makes no sense. It is fundamental to the respondent's pleaded case and admission that there should have been some procedure. If that is correct then the admission is a tacit admission that this case was in reality about conduct/capability and cannot therefore be an SOSR case. He submits that this case is the very type of case that the EAT urge Tribunals to be mindful of where SOSR is being used to mask the real reasons for the dismissal.

55. Noting that the respondent raises questions of **Polkey** and contributory fault Mr Flood goes on to deal with them.

56. In his submission under **Polkey** the respondent is arguing that the claimant would have been fairly dismissed for an SOSR in any event. This begs the question – what does the respondent say it should have done differently? If this is, as the respondent alleges, an SOSR case then the respondent may have been entitled to have dismissed as they did. If the respondent is seeking to argue that the claimant would have been dismissed in any event if there had been a disciplinary process, then its **Polkey** argument becomes an admission that this was not an SOSR dismissal and therefore the respondent could not fairly dismiss for an SOSR at some time in the future. He goes on to submit that a similar tautological circularity arises out of any argument for contributory fault. If this is an **Ezsias** type SOSR dismissal then its defining characteristic is that it is made with no consideration to the culpable acts or omissions of the claimant. The claimant is dismissed because relations have broken down, irrespective of the cause. The reason for the dismissal is the consequence, excluding any consideration of the cause. It is impossible then to argue that the claimant has contributed to their own dismissal by their own culpable conduct. If that was the case, an employer could dismiss on a plea of no fault SOSR and then defeat any claim for damages with a plea of contributory fault, relying upon behaviour that was neither investigated at the time nor relied upon as a reason for the dismissal. The only way, he submits, the respondent can make a valid plea of contributory fault is to admit this was not an SOSR dismissal but a flawed conduct/capability dismissal. There is no such admission. Before inviting the Tribunal

to dismiss the respondent's pleas in respect of **Polkey** and contributory fault in their entirety Mr Flood submits that if the respondent argues that if the respondent argues that the claimant could have been dismissed fairly for misconduct/capability then the claimant relies on the foregoing to show that the respondent has, even to date, produced no sufficient evidence by way of a disciplinary investigation upon which to found such an allegation. By contrast, the claimant in her evidence and through cross examination has provided a comprehensive answer and explanation to every allegation made against her in relation to conduct and capability. Lastly, the evidence of Mr Yardley was clear that the claimant's perceived problems stemmed from decisions made before she was employed. Accordingly, even on an alternative basis, the respondent has no sustainable argument on **Polkey** or contributory fault.

57. In his submissions on behalf of the respondent Mr Carter accepted that the fact of dismissal was admitted so it was for the respondent to demonstrate the reason for the dismissal and that it was for one of the potentially fair reasons set out in section 98(2). According to his submission:

"The respondent contends that the reason for dismissal was that there was some other substantial reason of a kind such as to justify the dismissal of the claimant, namely the need to be seen to be taking steps to regain the support and trust of the community that provides the majority of the funding for the respondent."

58. In normal circumstances the Tribunal would be considering the level of the investigation, the fairness of the hearing, the reasonableness of the conclusions and whether the dismissal was within the band of reasonable responses. The Tribunal should consider these issues but in the unusual circumstances applying here.

59. He accepts the admission that the dismissal was unfair because no process was followed and the dismissal was without any opportunity for the claimant to respond and was not aware her position was being considered. Nevertheless pursuant to the approach in **Polkey** it is submitted by the respondent that even if there had been a proper process followed (and it is the respondent's position that such a process was unrealistic) it would have made no difference to the outcome.

60. Mr Carter goes on to submit that it is well established that the breakdown of trust and confidence can be some other substantial reason justifying dismissal. Although it is generally the acts of the employee that lead to the breakdown, it can be the acts of another or the acts of the employee and another combined. An employer can rely on the fact of the breakdown (especially if it is having poisonous effects on working relationships) as the reason for dismissal, rather than concentrating on that employee's personal responsibility for it. Indeed it is well established that SOSR should not be used as an alternative to a dismissal for misconduct so as to avoid the need for a proper investigation. **Ezsias** is an example of such a situation. Over a period of time staff relations within the department in which Mr Ezsias worked deteriorated disastrously. Initially the employing trust intended to allege it was his fault but that would have involved an extensive misconduct procedure prescribed by the Department of Health. By changing their case to alleging simply that relations had broken down, that no other member of staff would ever work with him again and that the interests of the hospital and its patients meant that he had to go, they successfully changed the legal categorisation from misconduct to SOSR which meant that it was not unfair not to have gone through the misconduct procedures and on the facts the claim of unfair dismissal failed. Mr

Carter then goes on to quote from paragraph 58 of the judgment, including the sentence set out above as to Tribunals being on the lookout to see whether an employer is using SOSR as a pretext to conceal the real reason for the dismissal.

61. In this case the respondent says that the question of misconduct did not play any or any substantial part in the decision to dismiss. The evidence of the witnesses was clear as to the reason for the dismissal. Although there was an ongoing investigation by Ms Carr which raised that there could potentially have been misconduct that was not the reason. The evidence of Mr Holliday was particularly relevant. This was to the effect that there was an ongoing investigation and Ms Carr's report to the Board was only an interim one, the claimant had not been given the opportunity to respond to the complaints. The state of the hospice meant there had to be a change of leadership and it seemed to him fairer she should go as part of a turnaround process rather than gross misconduct. If there was an investigation and then a judgment that there was no misconduct then his view was that she still had to go. He was clear that the breakdown of trust in the respondent with external parties was a substantial factor and concerns about governance and potential liabilities for the respondent were such that there had to be a clearing out at the top of the respondent, not just the claimant but the previous trustees as well.

62. In the submission of Mr Carter it was clear that the reason for the dismissal was the breakdown in trust in the claimant as Chief Executive, not only within the hospice but also with external parties including those responsible for commissioning and actual and prospective financial supporters. Issues identified in Ms Carr's report were not decisive although they explained the concerns in the community and the hospice that resulted in the loss of trust. Whatever steps the respondent could have taken to investigate further it is the respondent's position that those taking the decision to dismiss, with the advice of their lawyers, concluded that the claimant should be dismissed. The outcome of Ms Carr's investigation or any separate disciplinary investigation was not a factor that weighed with the respondent, although the evidence of Ms Carr as to the current position and the perception (however erroneous) of the stakeholders was highly relevant.

63. Mr Carter noted that in cross examination the claimant was not prepared to accept she had acted in any way that constituted misconduct but she was prepared to accept that where there was a fundamental loss of trust in the Chief Executive by those who dealt with the respondent, the only practical outcome was that the Chief Executive would have to leave.

64. Mr Carter goes on to contend that although it is not determinative what view the claimant takes of the decision to dismiss it is important she accepted the importance of the external perception of the respondent and how it needed to be done to enable the respondent to move on. It may well be that views were unjustified and that the underlying problems should be laid at the door of the former trustees, but that does not affect the reasonableness of the decision taken.

65. In the light of the decision that the claimant should be dismissed for SOSR and the comments by the respondent's witnesses that the outcome of the investigation would have made no difference (this not being a misconduct dismissal) it is submitted that failure to dismiss the claimant in a procedurally fair way would have made no difference and that there should be no award as a result.

66. On the question of contributory fault Mr Carter accepted that in a situation where there has been no process to determine the validity of any suspected misconduct, and where the employee has not been given an opportunity to comment on the allegations, the Tribunal is unlikely to find that there has been any behaviour on the part of the claimant to justify the reduction of any award.

The reason for the dismissal

67. I remind myself that the reason for the dismissal was not simply stated to be because of the breakdown of working relationships between the claimant and her colleagues. The dismissal letter said that the ground/reason for the dismissal was that “The continued affect of all these matters has resulted in the Trustees’ decision to terminate your employment on the grounds of some other substantial reason”. The hospice went on to reserve its position in relation to further serious issues continuing to emerge from the ongoing investigation, and may seek to rely on them at some future time if necessary as a basis on which to take or defend any future action. The decision to pay contractual notice was without prejudice to any rights or claims the hospice may have against the claimant in connection with the matters giving rise to the decision to terminate. The payment of notice in lieu should not be seen as any concession that it would not be open to the trustees to terminate the contract of employment without notice by reason of the matters recited above.

68. The reason subsequently given in the ET3 for the claimant's dismissal was “some other substantial reason, namely: an irreparable loss of confidence in the claimant”.

69. Counsel for the respondent in his submissions contends that the reason for the dismissal was that there was some other substantial reason of a kind such as to justify the dismissal of the claimant, namely the need to be seen to be taking steps to regain the support and trust of the community that provides the majority of the funding for the respondent.

70. In closing submissions for the claimant Mr Flood submits that whilst the minutes of the meeting of trustees accurately reflected the reasons for the dismissal of the claimant, the trustees did not see the letter of dismissal drafted by solicitors on their behalf and signed by the Acting Chief Executive. In his submission this letter has to be taken as representing the respondent’s reason for dismissing the claimant.

71. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason or, if more than one, the principal reason for the dismissal. The potentially fair reasons are ones which relate to the capability or qualifications of the employee, to the conduct of the employee, that the employee was redundant or could not continue without contravening some statutory duty but if it is none of these section 98(1)(b) allows for it to be “some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held”.

72. A reason for dismissal involves a set of facts known to or beliefs held by the employer – in this case the facts known to or the beliefs held by the trustees who made the decision to dismiss the claimant. Their decision led to the sending of the dismissal letter on their behalf but they were not asked to approve the content of the letter before it was sent. This task was delegated to Mr Greenhalgh.

73. In a case where no allegations were levelled against the claimant and where there was no hearing at which she could put forward her own defence, I agree with the submission on behalf of the claimant that the reason for the dismissal must be that which was communicated to her by the respondent in its letter dated 16 March 2016. In my judgment the respondent cannot seek to add to the reason given in the dismissal letter on the basis of the matters set out above in paragraphs 68 and 69 in the particular circumstances of this case. The claimant when she received the letter of dismissal knew nothing of the discussion at the Board meetings which led to her dismissal or of the legal advice given to the trustees in connection with the making of the decision to dismiss. All that she had was the letter.

74. In my judgment the phrase “some other substantial reason” is a description of one of the categories of potentially fair reasons an employer can have to dismiss an employee but it is not of itself, without more, a reason.

75. The dismissal letter referred to “The continued affect of all these matters” resulting in the decision to dismiss for some other substantial reason.

76. The “matters” have been referred to above. The first two issues relate to Grace’s Place and allege misconduct on the part of the claimant. Issue three sets out concerns as to the claimant’s relationships with various third parties and alleges a lack of transparency and failure of leadership. These issues might also be said to relate to the conduct of the claimant. It does not state that because of the third issue the respondent has lost trust and confidence in the claimant. The fourth issue dealing with a lack of accountability also challenges the claimant’s conduct.

77. In the letter of dismissal the respondent reserved its position in relation to further serious issues that might emerge from the ongoing investigation and payment in lieu of notice was without prejudice to any rights or claims which the hospice may have against the claimant in connection with the matters giving rise to the decision to terminate.

78. Tribunals were warned by Mr Justice Keith sitting in the Employment Appeal Tribunal in **Ezsias** to be on the lookout for cases where an employer might be using the rubric of some other substantial reason as a pretext to conceal the real reason for the employee’s dismissal as stated by the employer. In that case the EAT looked at the distinction between dismissing the claimant for conduct in causing the breakdown of relationships and a dismissal for the fact that the relationships had broken down.

79. All of these matters taken together lead me to the conclusion that this is one of the cases where an employer has used the rubric of SOSR as a pretext to conceal the real reason for the employee’s dismissal which was in my judgment one related to the conduct of the claimant. The respondent employer has therefore not satisfied me that the reason for dismissal was some other substantial reason of a kind such as to justify the dismissal of the claimant holding the position of Chief Executive of Bury Hospice.

80. The respondent has conceded that the dismissal was procedurally unfair. Had this concession not been made then I would have found the dismissal unfair because the respondent has not satisfied me that the claimant was dismissed for a potentially fair reason under section 98.

81. As to **Polkey** I have set out above that the respondent pleads that it relies on the principle adumbrated in the case, without stating what it is, in support of its contention that any compensatory award should be reduced accordingly but without stating what is meant by accordingly.

82. In **Contract Bottling Ltd v Cave** **UKEAT/0100/14/DM** Mr Justice Langstaff, President, gave guidance on the question of a **Polkey** contribution. It has not been argued that the claimant would have voluntarily left her employment with the respondent or that the respondent did not continue to have a need for a chief executive going forward. In paragraph 17 Langstaff J. says “If not the employee’s choice, the choice might be that of the employer. This is likely to arise either because of the circumstances with which the employer is faced, or by reason of the decision of the employer to restructure, or to cease to use the services of the individual concerned for good reason. The question here is the prospect of there being a fair dismissal. The question of whether a deduction should be made, conventionally called a **Polkey** deduction, is limited to this last category. It is important to see its context as part, but part only, of the overall decision as to compensation.”

83. In paragraph 20 Langstaff J. refers to the aim of the assessment and “If a percentage, it will inevitably take account not only of the risk that, at some time during a period of weeks, months or years which would otherwise pass before a fresh job was obtained, the claimant would have lost her employment by fair dismissal, but also take account of when that would have occurred.”

84. I return to Mr Carter’s submissions which were made on the basis of an SOSR dismissal. He submits that in the light of the decision by the respondent that the claimant should be dismissed for SOSR and the comments by the respondent’s witnesses that the outcome of the investigation would have made no difference (this not being a misconduct dismissal) the failure to dismiss the claimant in a procedurally fair way would have made no difference and there should be no award as a result.

85. The respondent’s lengthy written reasons for dismissal following the minuted meeting of the trustees and the legal advice given to them seems to me to preclude this respondent fairly dismissing the claimant in the future for SOSR because of a breakdown in the working relationship between the claimant and her colleagues. They have clearly indicated that they considered a number of allegations related to her conduct as part of their reason to dismiss rather than dismissing because relationships had broken down.

86. Could the claimant have been fairly dismissed for a reason related to her conduct at some time in the future? According to her witness statement Suzanne Carr’s final report consisting of 115 pages was submitted to the trustees in or around June 2016. She never met the claimant because the respondent told her that she should not do so. The report could not be a fair or balanced report because it covered one side only. Disciplinary proceedings based on the report of an independent third party which only deals with one side of the case are in my judgment unlikely to lead to the fair dismissal of the party who has not been interviewed and who has not had the opportunity to explain to the investigator their perspective on the issues raised and to point the investigator towards documents, records and lines of enquiry that might show the case in a completely different light.

87. Mr Carter refers to the comments made by the respondent's witnesses that the outcome of the investigation would have made no difference. From this I think it reasonable to conclude that whatever the claimant might have said at any disciplinary hearing that might have been arranged she would have been dismissed by the trustees who had made up their minds that the claimant had to go regardless of the rights or wrongs of her conduct. In my judgment disciplinary proceedings where the decision makers have made up their minds that the employee has to go before hearing the employee's response to the allegations cannot lead to a fair dismissal.

88. In these circumstances I am unable to conclude that there was a chance that the claimant could have been fairly dismissed by the respondent and so I do not find it appropriate to reduce any award of compensation under **Polkey**.

89. In paragraph 66 above I have set out Mr Carter's submission that it is unlikely that the Tribunal will find contributory fault on the part of the claimant in a case where there has been no process to determine the validity of any suspected misconduct and where the employee has not been given an opportunity to comment on the allegations. In the light of this submission I do not find that there was contributory conduct on the part of the claimant.

90. I invite the parties to reach an agreement on the question of remedy but if they cannot do so the claimant can apply to have a remedy hearing listed.

Employment Judge Sherratt

20 February 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 February 2017

FOR THE TRIBUNAL OFFICE