Case Number: 2301863/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE NASH (Sitting Alone)**

BETWEEN:

Mrs I Reams **Claimant**

AND

Southwark Citizens Advice Service **Respondent**

ON: **20 June 2017**

APPEARANCES:

For the Claimant: **Ms G Leadbetter of Counsel**

For the Respondent: **Mr R Kohamzad of Counsel**

The judgment of the Employment Tribunal is as follows:

(1) The Claimant was unfairly dismissed.

(2) It is just and equitable to reduce the Claimants compensation by 75% on account of her blameworthy conduct.

Reasons

Hearing

1. The claim was presented on the 22nd September 2016. The Claimant applied on the 30th September to change the Respondent's name; that application was granted on the 5th October 2016. The original notice of hearing and directions were sent on the 5th October 2016.

The ET3 was received on the 25th October 2016.

2. At the hearing the Tribunal heard from the Claimant as her only witness. From the Respondent it heard: from Mr James Banks, the Respondent's director of development, from Mr Chris Green, the Claimant's former manager, from Ms Cordelia Richman, and from Ms Patricia Boyer its Vice chair of Trustees.

3. The Tribunal had sight of a main bundle, together with a short supplementary bundle. All references are to these bundles unless otherwise stated.

4. On the second day of the hearing, one document was added to the main bundle. The email concerned the start date of a volunteer coordinator.

The Claims

5. The only claim before the tribunal was that of unfair dismissal under section 98 of the Employment Rights Act 1996.

The Issues

6. With the parties the Tribunal identified the issues. The Claimant contended that she had been constructively dismissed.

7. The first issue was whether or not the Respondent had fundamentally breached the Claimant's contract of employment.

8. The Claimant relied upon a breach of the implied duty of mutual trust and confidence found in her employment contract. In the list of issues she set out the conduct which she contended amounted to a fundamental breach, either separately or together, as follows:

    - she was disciplined for areas not within her reasonability;
    - she was subjected to a biased investigation;
    - there was a failure to conduct a fair disciplinary or grievance process, which did not come to a reasonable conclusion; and
    - she was subjected to an unjustified disciplinary sanction.

9. The second issue was whether the Claimant had resigned in response to any such fundamental breach.

10. If the Tribunal found for the Claimant on both these issues, it was accepted that the Claimant was constructively dismissed. In these circumstances the Respondent contended that any such dismissal was fair.

11. Accordingly, the third issue was whether there was a potentially fair reason for any dismissal. The Respondent relied on the potentially fair reason of conduct.

12. The fourth issue was whether any such dismissal was procedurally unfair.

13. The fifth issues was, if any such dismissal was procedurally unfair, should there be a so called Polkey deduction, that is could and would the Respondent have dismissed had it followed a fair procedure in the circumstances.

14. The sixth issue was that of sanction.

15. The seventh and final issue was to what if any extent did the Claimant contribute to any such dismissal.

The Facts

16. The Respondent is a citizen's advice bureau. It is made up of a core of paid staff - about 44 people – and a large number of volunteers.

17. The relevant background to the complaint is as follows.

18. The funding situation and projects operating at the Southwark citizen's advice bureau change on a frequent basis. Staff often move post when funding and projects change. Accordingly, there is a complex movement of staff from one post to another; units and departments – and their responsibilities and head count – change frequently.

19. The Claimant started working for the Respondent on the 20th February 2009, originally as a volunteer supervisor. She saw many changes in her role, generally increasing her responsibility. By the time of the dismissal the Claimant was working full time as advice services manager. She was responsible for one of the Respondent's advice services – the generalist advice service. This operated out of the Respondent's Peckham and Bermondsey offices. It also provided staff for two outreach services including one at the Southwark Day Centre for Asylum Seekers ("the asylum seeker outreach").

20. There were emails going back to 2013-2014 showing that the Claimant's managers were involved in making decision as to which members of staff were providing the outreach services, but with significant involvement from the Claimant herself.

21. By late 2016 the Claimant's generalist advice team consisted of herself, 3 full time advisors, 2 part time advisors and a large team of volunteers.

22. A new director of services, the Claimant's line manager, was appointed in December 2015 - Ms Sharon Elliott. The Claimant had had a series of line managers and Mr Green had covered the gap until Ms Elliott took over the role.

23. There was no challenge to the Claimant's assertion that she had an unblemished record prior to the events material to this complaint.

24. The Tribunal now turns to the events that led to the termination of the Claimant's employment.

25. On 16th November the Claimant and Mr Green met. There was a detailed discussion about changes in the department and resources. However, the Claimant did not indicate that there would be a problem resourcing the asylum seeker outreach.

26. One of the Claimant's part-time advisors, Mr Wells, worked four days a week. He attended the asylum seeker outreach half a day every 2 weeks to provide advice. He took another half-day to do the paperwork. Accordingly, the Claimant's team provided resources to the asylum seeker outreach in the form of one day of one person every two weeks. In late 2016 Mr Wells was appointed to another job - internally. Ms Elliott and Mr Green were on the panel for this appointment. He left the Claimant's team in effect at the beginning of January 2016. Accordingly, the head count in the Claimant's team went down by one person, four days a week.

27. As a result the Claimant concluded that she no longer had the resources to cover the asylum seeker outreach. The Claimant believed that she did not have the power to change the responsibilities of her team so as to move one of them to asylum seeker outreach without management permission; further, this was not her responsibility. Therefore, the Claimant changed the manner of the delivery of the asylum seekers advice service in order to keep it functioning. The physical outreach service was suspended and advice was provided by telephone, email and by appointments at Peckham and Bermondsey where necessary. The day centre expressed itself as well pleased with this service. It was not disputed that the Claimant was not permitted to "close the doors" on the advice services sessions at Bermondsey or Peckham without clear authority

28. The Claimant's case was that she had informed management of this change at the time. However, Ms Elliott and Mr Green both denied that they had been informed and discovered this for themselves later on.

29. There was a further dispute between the parties – whose responsibility it was to ensure the outreach service continued. The

Respondents case was that the Claimant should have rota'd someone else from within her team to the outreach of her own initiative.

30. The Tribunal considered what the Claimant had told her managers. The Tribunal found that the Claimant had told her managers about the problem with staffing as a result of losing Mr Wells, but she did not specifically tell them about the effect on asylum seeker outreach. The reason for this finding was her remark in a later interview on the 10th March; she referred to her having told management about staffing issues but did not say that she had told them about the asylum seekers outreach specifically. Further, there was no written evidence of her mentioning asylum seeker outreach specifically whereas there was written evidence of her mentioning staff problems in general (including in the November meeting with Mr Green). Finally, when the Tribunal questioned her she was unable to state satisfactorily when she had told her managers.

31. The Tribunal then considered who had the responsibility for ensuring that the asylum seeker outreach was maintained. In effect, each party told the Tribunal that the other party was well aware that it had the responsibility. The Tribunal considered the evidence in the round and found that there was genuine confusion. However, the Tribunal found that the Claimant was not responsible for ensuring the staffing of outreach and did not have the power to delegate her staff to cover this. The Tribunal made this finding because the Respondent could not point to any documentary evidence – or other evidence – showing that it was the responsibility of the Claimant. The Respondent could not say when the Claimant was told that it was her responsibility. Further, there was nothing in her written contract of employment to suggest this. The Tribunal found that such a situation was the more plausible because of the numerous changes of role, project, funding and headcount at the CAB at this period and – it may be presumed - before. In these circumstances, who is responsible for what may become unclear over time, especially if it is not recorded in writing.

32. The Tribunal made a finding that the Claimant did genuinely think that she could not appoint anyone without management permission. Her position on this was consistent. On the 10th March on the first investigatory meeting she explained this in some detail, she said, "you both knew there would be no one there after Jude left there is no funding for outreach so I cannot put someone there without Mr Green's say so".

33. The events leading up to the termination started on the 7th March 2016 when Ms Elliott invited the Claimant to an investigation concerning two allegations: (1) failure to ensure a handover in respect of the Southwark day centre for asylum seekers and the departure of the team member Mr Wells; and (2) not monitoring

services provided by her team at the asylum outreach leading to the asylum outreach service being terminated.

34. The Tribunal found this a rather confusing way to frame the issue. The crux of the Respondent's complaint, the Tribunal ascertained, was that the Claimant had not made up for the loss of Mr Wells by covering the outreach from within her team; instead she had changed the way of providing the service; she had not informed or consulted management who remained unaware.

35. The Claimant emailed Ms Elliott in reply very quickly to say that these were not her responsibilities. She was distressed by these allegations. She attended an investigation meeting run by Ms Elliott on the 10th March. The Claimant objected in clear terms to Ms Elliott's having responsibility for the investigation. The Claimant believed that Ms Elliott was responsible for the outreach situation; although it was not put in these terms, she believed that Ms Elliott had a conflict of interest.

36. At the meeting, the Claimant also said that she did not need to tell her managers about the asylum seeker outreach, because both Ms Elliott and Mr Green knew there was no one doing the outreach because Mr Wells had left. She also said that management knew that she did not have enough staff and this had been discussed on many occasions. She said that generalist advice had responsibility for asylum seeker outreach, but this was in the context of her saying in terms that she did not have the power to delegate a new member of staff to cover the outreach and that she was waiting on management to make a decision.

37. The Claimant then attempted to hand in a letter on 14 March which asked for an apology, a letter of retraction, a reference and stated that she was going to resign. Essentially, Mr Green dissuaded her.

38. A new volunteer co-ordinator joined the generalist advice team on the 22nd February; she took over management of the (numerous) volunteers from the Claimant. Based on the Claimant's evidence the Tribunal found that after a few weeks, the co-ordinator freed up 2 to 4 days a week of the Claimant's time. Nevertheless, the Claimant did not then take the decision to reinstate the outreach at the asylum seeker centre or suggest to management that the head count was now sufficient to reinstate the service.

39. On the 1st April 2016 Ms Elliott invited the Claimant to a second investigatory meeting concerning two further allegations. The third allegation was that she had changed the asylum seeker outreach session from being weekly to biweekly without approval.

40. The fourth allegation was that the Claimant had failed to comply with

the appraisal and supervision procedures. It was agreed that the Respondent operates an appraisals and supervision policy relating to both its paid staff and to its many volunteers. According to the policy, volunteers receive one appraisal and one interim review a year. In addition, they have 2 supervisions a year. The same policy applies to the staff, save that they have 4 supervisions a year. The policy requires forms in respect to all of these to be emailed to the operations team and copied to the line manager.

41. The Respondent accepted that the Claimant had done some appraisals and reviews but was concerned that there was a complete absence of any record of supervision. The Claimant said she had done the supervision and had sent copies as required.

42. Following this meeting Ms Elliott drew up an investigatory report on the 12th April 2016. She reported that the first, second and forth allegations were supported and should go onto a disciplinary. The Claimant attended a disciplinary hearing on the 21st April 2016, heard by Mr James Banks. In evidence Mr Banks accepted that he understood the Claimant was objecting to Ms Elliott having been the investigating office because she was involved in the subject matter of the investigation.

43. Mr Banks made no comments about the Claimant's strongly voiced concerns about the conflict of interest and impartiality issue during the hearing. The Tribunal found that this was not a matter to which he had put his mind, although it was evident to the Respondent from the 10th March that this was the Claimant's position. In the event, Mr Banks simply adopted Ms Elliott's contention that the Claimant had responsibility for covering the asylum seeker outreach. This determined his decision, save for the supervision issue.

44. In respect of the allegation that the Claimant had failed to comply with the Respondent's supervision procedure, the Claimant was given a chance to provide evidence that she had carried out supervisions - but she did not do so. She firstly indicated that she had sent them to the operations team. However, when the operations team said that they had found nothing further, the Claimant did not provide further evidence concerning the supervisions.

45. On the 28th April 2016 Mr Banks informed the Claimant by way of a letter that he was subjecting her to a final written warning to last 12 months (page 137). The letter made no reference to the Claimant's concerns over impartiality and conflict.

46. The Claimant appealed the warning on the 4th May 2016 and also lodged a grievance essentially covering the same ground. Ms Richmond, the chair of trustees, heard the appeal and the grievance on the 19th May 2016 and rejected both on the 25th May 2016.

47. The Claimant appealed by way of a letter on the 2nd June against the rejection of her grievance. Ms Boyer, the Vice Chair of trustees, heard the grievance appeal on The 13th June 2016 and she rejected the appeal by way of a letter on the 19th June 2016.

48. The Claimant then resigned by way of a letter of the 27th June 2016.

The Applicable Law

49. The applicable law in this matter is found at s95 of the Employment Rights Act 1996 as follows

> ***95 Circumstances in which an employee is dismissed.***
>
> (1)For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—
>
> (a)the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> (b)he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
>
> (c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Submissions

50. Both parties represented by counsel made oral submissions.

Applying the Law to the Facts

51. The first issue was whether the Respondent was in fundamental breach of the Claimant's contract of employment. The Claimant relied on the duty of mutual trust and confidence that is implied into every employment contract.

52. The Tribunal considered the test for a fundamental breach of contract. If an employer is guilty of conduct which is a significant breach going to the root of the contract of employment which shows the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to resign. The Tribunal directed itself in line with the case of **BCCI v Malik 1997 UKHK 23** and in particular the comments of Lord Steyn:-

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

Since **Malik** it has been clarified that the test for a fundamental breach is conduct on the part of the employer that *is intended or likely* to undermine the relation. There is no need for the employer to have this intention; it is an objective test.

53. The question for the Tribunal was, essentially, whether the investigation and the warning constituted a fundamental breach. Tribunal had found that management, being Mr Green and Ms Elliott, were aware of Mr Wells's leaving and that accordingly the generalist advice headcount was down one person four days a week, a significant reduction in a small team. Inevitably, in the short term at least, something would have to be cut. Further, the Claimant could not limit the hours at Bermondsey or Peckham without authority - which had not been given. The Claimant took a decision that the way to make this work was to provide an alternative method of service delivery for the asylum centre outreach.

54. The Tribunal considered who was responsible for ensuring that the asylum seeker outreach was covered. The Tribunal had found that it was not the Claimant's responsibility. For the avoidance of doubt, the Tribunal did not accept the Respondent's contention that the Claimant admitted that she was responsible for outreach in the meeting of the 10th March (and which was thereafter relied upon by the Respondent as evidence that she was fully responsible). The Claimant had indeed said that general advice had responsibility, but sandwiched this between saying in terms that she did not have the power to send someone out on outreach and was waiting on management. The context demonstrated that the Claimant was not admitting that she personally had responsibility for covering outreach.

55. Further, the emails from the Claimant's previous manager were more consistent with her previous manager making the decisions as to staffing than the Claimant. This bolstered the Tribunal in finding that the Claimant had not previously been responsible for arranging staffing of asylum seeker outreach.

56. The Tribunal found that this was an unfortunate breakdown in communication; there was confusion between the Respondent and the Claimant as to responsibilities. Such confusion was more plausible and understandable in light of there being many changes in management culminating in Ms Elliott.

57. However, when the Respondent decided to investigate the Claimant about the asylum seeker outreach, the person who carried out the

investigation was the Claimant's manager. On the Claimant's case, and as a matter of logic, the Claimant's manager had an unavoidable conflict of interest because the Claimant contended that it was this manager (in concert with other managers) who was responsible for the fact that the outreach was not covered. This was a conflict between members of staff as to who was responsible and – in effect – each was blaming the other. However, because one member of staff was higher in the hierarchy, they carried out the investigation, and drafted the report.

58. Accordingly, as the Tribunal had found that the Claimant was not responsible for covering the outreach service and the investigation into this was flawed from the beginning, the Claimant was subjected to a warning over the outreach services for which she was not culpable.

59. The Tribunal considered the supervisions. The Tribunal noted that there was no explanation how the concerns about supervision came to light at the same time as the Claimant was being investigated in respect of outreach. The Tribunal could not find that this was a coincidence; the only logical explanation can be that Ms Elliott was investigating the Claimant more widely and found something.

60. The Tribunal noted that the Claimant was unable to provide any satisfactory explanation to the Tribunal to why she could not provide a training spreadsheet or any documents at all to show that supervision had happened.

61. Nevertheless, the Tribunal could not understand why, if this was such a serious concern for the Respondent, nothing had been done earlier. The Respondent would have been aware of the issue because all of these documents were required to be copied to the Claimant's line manager and the operations department. Despite, the records being incomplete, evidently no one had taken action for several years. There was no informal or formal warning. It was only relied upon when the Respondent was investigating the Claimant. Accordingly the Tribunal could not accept this was as important as the Respondent contended.

62. Taking all of these circumstances into account the Tribunal asked itself whether the Respondent's conduct in investigating the Claimant and giving her a final written warning amounted to a fundamental breach.

63. For the Tribunal, the most important factor was its finding that the Claimant never had been told it was her responsibility for maintaining the asylum seeker outreach and that she was not responsible for the department. It had also found that there was a crucially flawed investigation. This was compounded at the disciplinary hearing.

64. The Tribunal did not find the issue of the supervision records to be material.

65. In the circumstances the Tribunal found that the Respondents conduct did amount to a fundamental breach in subjecting the Claimant to a final written warning in these circumstances.

66. The Tribunal went on to consider whether or not the fundamental breach caused the Claimants resignation. The Tribunal found that the letter of resignation made it very clear that the investigation and disciplinary were the reason for the resignation. This was consistent with the Claimant's conduct throughout. She was considering resigning over this matter from March onwards. The Tribunal found that the Claimant had a consistent and strong sense of grievance concerning the allegations against her and had expressed this on many occasions.

67. Accordingly the Tribunal found that the Claimant was constructively dismissed.

68. The Tribunal went on to consider whether the dismissal was fair. The Respondent relied upon conduct as a potentially fair reason. The Tribunal accepted that the Respondent's conduct, which amounted to a constructive dismissal was genuinely based on its views on the Claimant's conduct.

69. The first issue therefore was whether there was a fair procedure. According to **BHS v Burchell** (with the caveat that the burden is not neutral) a Respondent needs to have a genuine and reasonable belief in the culpability of its employee following a fair investigation. The Tribunal must not substitute its view of what constitutes a fair investigation – or indeed procedure - for that of the employer. The question is whether the investigation and procedure fell within a reasonable range in the circumstances.

70. The Respondent attempted to adopt the disciplinary investigation and procedure as a dismissal procedure. However, the Tribunal found that this was not sufficient. The investigation was by a person with an unavoidable conflict of interest. The decision-maker was aware of this and continued in any event. The decision-maker adopted the conflicted investigator's conclusion. The procedure did not come within a reasonable range of procedures.

71. The Tribunal went on to consider **Polkey**, that is would and could the Respondent have dismissed the Claimant had it followed a fair procedure? The Tribunal directed itself in line with the well-known authority of **Software 2000 v Andrews.** Essentially, a Tribunal must attempt to reconstruct from the evidence before it what might have

been, had a fair procedure been followed.

72. The Tribunal found that this was one of the relatively rare cases when there is insufficient evidence to do this. The Tribunal considered the counterfactual of an independent investigation and its possible result. However, although the Tribunal might be tempted to conclude that an independent investigation would have come to the same conclusion as the Tribunal, this is not necessarily the case. It is not possible to know what a fair investigation might have found as to culpability. Then it is not possible to know what a fair disciplinary hearing would have made of any such culpability. For the Tribunal to produce a Polkey deduction, it would have to speculate based on insufficient evidence and it would have to pluck a figure out of the air. In these circumstances the Tribunal has no choice but to say it cannot make a Polkey deduction in these circumstances.

73. There was a second Polkey point – that the Claimant would have left promptly in any event. However, the Tribunal found that the Claimant would only have left had there been an unfair investigation – as there was. The Claimant's sense of grievance was inextricably linked to the identity of the investigating officer and she stated this in terms from the start. Again, it is not possible to predict what would have happened with a fair investigation, still less what the Claimant's reaction would have been.

74. The next issue was that of sanction. The question is not whether the Tribunal would have agreed with the sanction of dismissal but whether dismissal is outside of a range of reasonable sanctions available to the employer in the circumstances.

75. The Tribunals was conscious that the situation was artificial as the Respondent had not knowingly or expressly dismissed the Claimant. The Claimant had in effect been blamed for something that was not her fault (the outreach) but had also been blamed for something for which she appeared to be culpable (the supervisions). However, the Tribunal did not find that the supervision issue on its own could come within a reasonable range – the fact that the situation had gone on for so long persuaded the Tribunal that this was not a matter which was a significant priority for the Respondent; it was only discovered because the Respondent went looking.

76. The Tribunal reminded itself that it must not substitute its view that what is a fair and reasonable sanction for that of the employer. The question is whether it is outside the reasonable range. The Tribunal noted that the outreach centre was far from unhappy about the change in service. Management had taken, on the evidence before the Tribunal, few proactive steps to monitor the situation despite knowing of the resource problem. Whilst bearing in mind that it must not substitute its view, the Tribunal found that this sanction came

outside the reasonable range. It was particularly influenced in this by the fact the Claimant thought what she was doing for the asylum seeker outreach was on a temporary basis and in the best interests of the clients.

77. The final issue for the Tribunal was contribution. The Tribunal noted that in the case of **Frith Accountants Ltd v Law UKEAT0460/13/SM** the EAT considered the approach to reducing awards in constructive dismissal cases. It acknowledged that it would be unusual but not exceptional for constructive dismissal to be caused or contributed to by an employee's conduct. The Tribunal found that this employee has contributed to the dismissal.

78. It is trite law that the test for both compensatory and basic awards is whether the Claimant committed blameworthy conduct. The Claimant had made an important alteration to the provision of services without telling management when she had opportunities to do so. This was a long-standing relationship between the Respondent and the asylum seeker centre, and management did not know of the change. The Tribunal accepted Ms Elliott's statement that they had many meetings and the Claimant could have told her at these meetings. Although management should have known that no one was attending the outreach sessions, the Claimant should have been proactive in dealing with management. Specifically she did not tell management about the alternative service provision. This was further blameworthy when the Claimant's headcount was in effect reinstated following the appointment of the volunteer co-ordinator.

79. Accordingly the Tribunal found that the Claimant contributed to her dismissal in a figure of 75%.

Employment Judge Nash
Date: 8 August 2017