



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss S Reid

v

London Borough of Haringey

Heard at: Watford

On: 13 -15 September 2017

Before: Employment Judge Henry

Appearances

For the Claimant: Mr A Sendell, Counsel

For the Respondent: Mr J Chegwidden, Counsel

JUDGMENT

- I. The Decision of the tribunal is that the claimant has not been unfairly dismissed.
- II. On the respondent conceding the claimant's claim for breach of contract in respect of notice, the sole question for the tribunal's determination being one of quantum, the issue remaining will be determined at a hearing on remedy.

REASONS

1. The claimant by a claim form presented to the tribunal on 5 April 2017, presents complaints for unfair dismissal, and breach of contract in respect of notice, long service payment and optical costs. The claimant's claim for long service payment and optical costs have been settled between the parties and is not a matter for consideration by this tribunal.
2. With regards the claimant's claim for breach of contract in respect of notice, the respondent accepts that the claimant is entitled to the notice advanced by the claimant; the sole issue remaining for the tribunal's determination being one of quantum.

3. The claimant commenced employment with the respondent on 23 September 1996. The effective date of termination was 13 November 2016; the claimant then having been employed for 20 complete years.

The issues

Unfair dismissal

4. The issues for the tribunal's determination were agreed between the parties and presented to the tribunal as follows:
 - 4.1 What was the reason for the claimant's dismissal?
 - 4.2 In particular, was the reason for dismissal a reason relating to the claimant's capability under s.98(2)(a) ERA 1996, as contended by the respondent?
 - 4.3 In the circumstances, was the dismissal for the reason found, fair pursuant to s.98(4) ERA 1996?
 - 4.4 Was the dismissal both substantially and procedurally unfair?
 - 4.5 If the dismissal was only procedurally unfair, was there a chance that the claimant would have been dismissed in any event had a fair procedure been followed.
 - 4.6 If so, what is the percentage chance that this would have taken place?
 - 4.7 If the dismissal was unfair, what if any sum, would it be just and equitable to award to the claimant by way of compensation?
 - 4.8 Should the tribunal reduce any compensation otherwise owing to the claimant on the grounds of the claimant's own actions prior to the dismissal pursuant to s.122(2) and s.123(6) of the Employment Rights Act 1996 and if so, by what proportion?

Breach of contract – wrongful dismissal

5. Was the sum paid to the claimant by way of damages in lieu of notice correct?
6. In particular:
 - 6.1 Given that the respondent chose not to pay the pay in lieu of notice by deducting tax and National Insurance, was it entitled to deduct any sums from the claimant's gross pay amount?

- 6.2 In any event, was the figure that the respondent used for net pay the correct one, given that it had been applying a (BR) tax code for the claimant when paid her salary?
- 6.3 Was the respondent entitled to deduct a sum in respect of pension contributions if it was not going to pay that sum into the claimant's pension?
- 6.4 Should the claimant also have been compensated for the 12 weeks of employer's pension contributions that would have had to have been paid during the notice period?

Evidence

7. The tribunal heard evidence from the claimant and from the following witnesses on behalf of the respondent:

Ms Cleo Lawrence – team manager in the early help team – children and young people service;

Mr Gareth Morgan – head of service – early help and prevention in children's services;

Mr Nigel Wilson – senior HR business partner – children's services;

8. The witnesses' evidence in chief was received by written statements upon which they were then cross-examined. The tribunal had before it a bundle of documents exhibit R1.
9. From the documents seen and the evidence heard, the tribunal finds the following material facts.

Facts

10. This claim revolves around events within the respondent London Borough of Haringey's Children and Young People's Service Early Help Team. The service supports families to prevent the escalation of need with families, to reduce the demand on children's social care, and prevent statutory intervention and support.
11. The claimant was employed as a family support worker within the respondent's Early Help and Prevention Service within the Children and Young People's Service.
12. The objectives of the post are identified as:

“Improve outcomes for vulnerable children, young people and families in Haringey.

Prevent escalation of need and reduce demand for statutory service.

Ensure children and young people are safeguarded, by identifying and addressing child protection issues and concerns with colleagues as appropriate.”

13. The main duties, inter alia, are identified as:

“Addressing need and planning support

Jointly develop early help assessments with families and other professionals, which identify individual needs of all family members and family dynamics.

- Develop whole family multi-agency outcome focus support plans, which respond to the needs of families (and individual family members) and provide effective tailored, timely and sequenced interventions.

Working with families

- Act as a dedicated key worker for families – working with all family members and other professionals to develop, co-ordinate and deliver whole family support plans, including regular reviews of progress

...

- Engage families in development and evaluation of services and ensure feedback and views on services delivered are captured and acted on.

Managing a caseload

- Managing a caseload of between 12-20 families with additional needs and/or multiple and complex needs.

...

- Ensure cases are regularly reviewed, have their exit strategies, and are closed where appropriate.

Supporting locality teams

- ...

- Prepare high quality reports to strict deadlines when required for example risk of harm incidents or court proceedings, and maintain detailed case documentation files with evidence of decision making processes and statutory safeguarding actions.

- ...”

14. The claimant has worked for the respondent in a number of roles, being that of; African Caribbean Parental Outreach Worker, Parental and Community Involvement Officer, Family Support Worker, Parent Support Advisor, Family Support Worker and Family Support Worker for the Common Assessment Framework Team (CAF).

15. In April 2015, Ms Lawrence joined the London Borough of Haringey, and in May 2015, became the claimant’s line manager, at which time she observed that the claimant was not meeting the standard she expected of a Family Support Worker.

16. The claimant accepts that in respect of the objectives of the role above identified, these are central elements to her role, and that the failure in respect of any one of those elements would have an impact on her ability to perform her role.

17. The claimant also accepts that, her role as Family Support Worker had implications for the delivery of the local authority service to vulnerable people, the failure of which placed such persons at risk, and exposed the local authority in respect of its statutory functions.
18. It is also accepted by the claimant that, in respect of her work, she had a difference of perspective in respect of report writing, having previously worked in a culture where detailed records were required, to an environment where, concise and analytical reports were then required, for which she required training, and as a consequence, she was somewhat behind in closing cases, the significance of which was that it fed into the other service providers in the provision of support to vulnerable people.
19. It was the expectation within the Early Help and Prevention Service, that cases would be completed and closed within six months of first contact. It is here noted that in some instances, the claimant's cases remained unclosed for up to one year.
20. It is not in dispute that on Ms Lawrence taking over management of the claimant, she had made it known to the claimant that she was worried with the claimant's level of performance. The claimant challenges the circumstance that, she was at the initial stage not informed of the particular issues of concern had by Ms Lawrence, but accepts that within two months of Ms Lawrence's management of her, Ms Lawrence had particularised her concerns and had begun to offer her support and assistance informally, of which the following has been noted of Ms Lawrence; attending meetings with the claimant to model good practice and provide support, providing ad hoc case discussion and informal supervision, supporting the claimant to book administration days in her diary to allow her to complete written work as well as work from home on 28 May 2015, sign-posted the claimant to universal training, such as child sexual exploitation training on 15 May 2015 and early help assessment training on 5 October 2015, and further requested the claimant complete additional training such as assessing risk and report writing.
21. With regard the claimant performing below expected standards, whilst the claimant does not dispute this fact, she offers a number of explanations giving rise thereto, to include; her undertaking additional tasks on cases which took time away from time she then had in completing other assessments and reports, a period of ill health in July 2015 returning in August 2015, wherein it took her a couple of weeks to settle back into work juggling with, gaining full recovery and attending treatment, whilst trying to complete her daily tasks of work of catching up and completing reports and visiting families and attending professional meetings with families. The claimant further, advancing a poor working relationship with Ms Lawrence, states:

“At this time Cleo's and my working relationship took a further downturn when she requested me to complete a closure by 5pm that day on a family whose file was open

to me from October 2014 and was not completed. On the same day a social worker requested a social care report for a conference meeting on a family who was on the Child Protection Register. I took the decision to complete this report instead of finalising the closure for Cleo. Cleo was very cross that I had not followed her direction. She said she was expecting me to finish. I explained that before writing the closing summary, I had to write a complete chronology and cross-reference it to the closing summary. Writing the social care report had taken time away from this task.”

22. For completeness, it is here noted that in October 2015, on a restructure of the service, the Early Help Team was created replacing the CAF Team, whereby new ways of recording client reports and different forms were used. Equally, family support workers had to close existing cases in readiness for an electronic system to be introduced, and for which there was a period of consultation and training given. It is however, noted that the functions of the Family Support Worker did not change.

23. In respect of this change it is the claimant’s evidence that:

“I had six old cases running alongside the new system and this resulted in further complications and delay with old assessment forms abandoned for new ones. In retrospect, I should have completed the assessment on the old forms instead of requesting the new ones which demanded a timescale. Not fully understanding the flow chart, I put myself at a disadvantage by requesting six assessments to be issued to me. The six weeks’ timescale had lapsed for all of them, as corrections went backwards and forwards from managers to me. To make matters worse, one senior Family Support Worker told me to put some Team Around the Family “TAF” report written by the children’s school on the TAF forms in our system. This slowed down the process as the information given did not always follow the information required on the form...”

24. The consequence of the above, was that going into 2016, the claimant was experiencing difficulty in report writing and was behind in closing cases, for which the claimant states that in November 201, Ms Lawrence had informed her that she wanted to talk to her line manager about whether the claimant should be placed on capability, asking for the claimant’s thoughts. The claimant stating:

“I asked her to tell me what she was still worried about. She said she wanted me to change because she wasn’t getting through to me and she wanted a manager to look at it. She told me that I should challenge what she was saying. I found it difficult to do this because I was afraid of how she would react.”

25. On 18 January 2016, Ms Lawrence conducted a Standard Setting Meeting with the claimant, by which four areas of concerns relating to the claimant’s practice and professional conduct was highlighted, namely; not actioning case closures, not adhering to timescales when given case directions, work was not analytical or summarised where necessary, and her conduct with peers and other professionals.

26. An action plan was agreed for the claimant to be provided with training on assessment risk and report writing, that the claimant would have supervision every three weeks, it having been proposed for every two weeks but the

claimant preferring three, to allow her time to complete tasks as requested. The claimant undertook to complete actions by the deadline agreed in supervision, and agreed by email that she would email or discuss reasons why she could not stick to the agreed timeframes. Agreed strategies for the claimant's development were furnished to her by correspondence of 20 January 2016, the correspondence concluding:

“Please can you review you [sic] attach supervision note and make suggestion for changes or amendments by Monday 25 January 2016. Please note I have also included an additional copy of the Capability at Work procedure.”

27. With regards the notes of this meeting, the tribunal has been taken to the following, which is here recorded, as it better particularises the circumstance existing at the time.

“This is part one of a Standard Setting Meeting to address concerns previously recorded in supervision notes.

Cleo stated that she continued to have concerns about Selva's practice and thus now was going to enacting [sic] the Capability at Work procedure. Cleo provided Selva with a copy of the document and asked her to read through. Cleo stated that due to concerns around Selva's practice and no improvement being made, this framework was being used to encourage a positive change as Cleo still had significant concerns.

Cleo explained that this was part one of a Standard Setting Meeting – to highlight concerns and develop action plans to address them, the next step would be first formal meeting if not [sic] improvement were being made, the second step would [sic] intermediate meeting if concerns continued with change [sic] and the final step will be final meeting which could lead to dismissal.

Cleo also explained Selva had the right to appeal and she read the document provided in more detail at the end of the meeting.

Cleo stated that she wanted to use this as a mechanism to support and see change in Selva.

...

The outcome of the meeting is that we have agreed the below strategies and will continue with the Capability at Work procedure with the view to review your progress and development in supervision on 21 March 2016...”

28. The tribunal pauses here, as the claimant has at this hearing raised issue that, by the correspondence sent to her on 20 January 2016, it made reference to a “Standard Setting Meeting part 2” for Wednesday 27 January 2016, which meeting did not then take place; it being advanced that the claimant had been deprived of a meeting at which the standard setting would be complete.
29. By the respondent's Capability at Work procedure, there is no provision for a part 2, and indeed, it is Ms Lawrence's evidence that she had framed the meetings as part 1 and part 2, with part 2 being an opportunity afforded to the claimant for her to review and comment on the development plan, for which she was to have made her amendments by 25 January, the meeting

then to take place on 27 January. In the event however, this did not take place as the claimant sought to have the meeting moved; the claimant stating that she did not have enough time to prepare, whereon the meeting was then postponed to 21 March 2016.

30. On 21 March 2016, the review meeting was held at which it was noted that the claimant's performance had not improved to the requisite standard, notes of the meeting recording:

“Standard Setting Meeting took place on 18 January 2016. Since this date the concerns highlighted by Cleo have continued as well as the continuation of other concerns, it being identified that case closures had then been completed, but that the further criteria of adhering to timescales, work being analytical, professional conduct with families and professionals were still matters of concern.”

31. The tribunal pauses here, as during the course of this hearing the claimant had taken the tribunal to a note recording that:

“Cleo highlighted

Selva had been taken down capability and disciplinary process previously...”

32. It is here advanced that, Ms Lawrence had been influenced by the claimant having previously been disciplined when her employment was terminated, and subsequently reinstated on appeal. It is Ms Lawrence's evidence that the claimant's disciplinary history had not been a factor taken into consideration by her in operating the capability procedure against the claimant. On the evidence presented to the tribunal, it supports Ms Lawrence's evidence that action taken against the claimant was predicated solely on the claimant's performance. I accept the evidence of Ms Lawrence.

33. I further note at this juncture, as the respondent has been challenged as to appropriate training being given to the claimant whilst she was being taken through the capability process, identifying two elements of training which had been identified in January 2016, but which did not then take place until July and September 2016, and being at times just before further meetings under the capability procedure were had, being; assessing risk training and report writing training. The respondent has not been challenged further in respect of training and support offered the claimant. I address this issue briefly, in that, giving regard to the reasons for the claimant's termination of employment, that of capability, assessing risk and report writing were not matters upon which the claimant's capability was ultimately determined, and to this extent is immaterial to the issues for this tribunal's determination.

34. By correspondence of 28 April 2016, the claimant was invited to a first formal meeting for 23 May 2016, being advised:

“This is the first stage of formal action and you are entitled to be represented at this meeting by a Trade Union representative or workplace colleague...”

The purpose of the meeting is to discuss the following areas of your work performance:

During the informal stage of the Capability at Work procedure the following measures had been implemented to support you to achieve the required improvements...”

35. The letter thereon set out the issues of concern, being: three cases in respect of case closures not being actioned, those of PS, ZW and DP; not adhering to timescales when given case directions; work not analytical or summarised where necessary; and professional conduct with families and professionals. The claimant was further furnished with supervision notes of 21 March 2016 and 18 January 2016. The letter concluded asking the claimant to furnish any supporting documents which she wished to have considered at the meeting, which was to be furnished two working days before the meeting.
36. The first formal review meeting duly took place on 23 May 2016. The claimant was supported by Ms Simpson, education welfare officer. The concerns of Ms Lawrence were presented to the claimant addressing each concern in turn with the claimant, who was afforded the opportunity to give her account on each issue.
37. It was management’s case that the claimant had not met the set targets in respect of: Work not analytical or summarised where necessary, not actioning case closures, and not adhering to timescales when given case directions. The claimant in the main was in agreement that cases were completed out of timescale or otherwise still outstanding. It was here noted that, on there being new cases, the claimant had not closed cases and had fallen behind again despite having met this target at the review meeting on 21 March 2016, Ms Lawrence feeling that the claimant could not demonstrate a consistent improvement in her work. The claimant agreed with the case put forward by Ms Lawrence that, in relation to case closures, she had not met targets to improve, the claimant agreeing, based on the evidence, that she had not met the targets. It was however, noted that with respect professional conduct with families and staff, the claimant had met this target insofar as there had been no further incidents. It was the outcome of the meeting that *“as one of the four targets had been met, Selva would progress to the intermediate review in two months (July)”*.
38. The claimant was sent a copy of the minutes electronically on 27 May 2016.
39. By correspondence of 6 June 2016, the claimant was furnished with notice of the outcome of the first review meeting, being advised that a formal invite for an intermediate review would be sent five days before the meeting would take place.
40. By correspondence of 11 July 2016, the claimant was invited to a stage 2 Capability Intermediate Review meeting for 20 July, being advised that the purpose of the meeting was to discuss; not actioning case closures, not adhering to timescales when given case directions, work not analytical or

summarised where necessary and professional conduct with families/professionals being of concern, the correspondence setting out incidents of cases in respect of the above, and is more particularly set out at R1 page 571-580. The claimant was thereon asked to provide any supporting documentation that she would like considered at the meeting, to be furnished at least two working days before the scheduled meeting.

41. The meeting duly took place on 20 July. The tribunal has not seen notes of this meeting, however, it is not in dispute that there was evidence of the claimant having produced good work, albeit, it was Ms Lawrence's evidence to the tribunal that this good work was inconsistent, and had been achieved with significant support and guidance, but that there had not been enough improvement over all the objectives set which, is more particularly set out at paragraphs 25-35 of Ms Lawrence's written witness statement.
42. From a perusal of the supporting documents, the tribunal accepts Ms Lawrence's assessment. In accepting Ms Lawrence's assessment, the tribunal gives particular regard to Ms Lawrence's evidence in respect of the case of PS and the claimant's analysis of need; the claimant assessing need at tier 3, the respondent assessing need at the lower level of tier 2. The rationale for the assessment at tier 2, being a reasonable professional assessment, is an assessment which this tribunal is not sufficiently informed of, or otherwise qualified to challenge, it being Ms Lawrence's further evidence that the claimant had not taken the definition in context where support was being provided, mitigating risk, for it then to be assessed as a tier 3 risk.
43. Following the intermediate review, supervision was increased to every two weeks. The claimant further had her caseload reduced, which caseload did not then exceed more than nine cases, and she had the opportunity for peer support; where other family support workers worked with the claimant on cases for specific periods of time, sharing skills and specialisms in relation to specific pieces of work that the claimant needed to complete with families.
44. The tribunal pauses here, as the claimant has challenged the support which she received, referencing an instance where she sought input from her peer colleague, which input to a home visit report was not then forthcoming. The tribunal notes here that, with regard to peer support, the support to which the claimant references, was part of the team's workflow process, which was a separate process to the support offered the claimant as part of the capability process.
45. The claimant was also offered support being encouraged to attend peer supervision, where family support workers came together to discuss issues and concerns and feedback to management, as well as the claimant supported by joint home visits, having additional professionals attend TAF and professional meetings. The claimant was also encouraged to engage with training; corporate training, team focus training, being workshops done on the troubled families' agenda, and individual training based on special needs. The claimant was further offered the opportunity to work from home

to complete admin, to allow her to catch up on work that was outstanding. A full record of the support offered the claimant is at R1 page 593-596.

46. The claimant was absent on sick leave between 27 July and 8 August 2016, which, following the claimant's return to work, a case progression audit was undertaken on 11 August, identifying progress made on cases and further progress to be made.
47. On 13 September 2016, a "My Conversation Meeting" was held between the claimant and her then manager, Toni Sydney, by which performance and development objectives were set, setting out a time period to 28 October 2016, for their achievement, a copy of which is at R1 page 585, the parties to meet again on 28 October 2016.
48. On 14 October 2016, a review of home visits' data was carried out by Ms Lawrence, the audit showing that almost all of the claimant's home visits were out of date, most for over a year. It is here noted that, it was the claimant's explanation that some reports had been saved on her desktop, albeit not on the database, it being acknowledged that if it was not on the database, there was then no evidence of the visit having taken place. A record of cases uploaded on the database is at R1 page 589.
49. Equally on 14 October, in supervision with Toni Sydney, a review of a number of the claimant's cases were undertaken and action plans set out in respect of each, details of which are at R1 page 600-611, for which a schedule of outstanding actions for completion is set out at R1 page 612-617.
50. It was Ms Lawrence's determination that the evidence of the outstanding work, evidenced a continued failure of the claimant to reach and maintain an acceptable level of performance in her role of Family Support Worker. Ms Lawrence determined that the claimant had placed herself, the service and families at risk, and that despite her having a reduced caseload and received significant support, concerns remained as to the claimant's practice after 11 months in the formal process, and that even if the level of support was to continue, it had not and would not be enough to support the claimant to provide work at an acceptable level for the service, Ms Lawrence's evidence to the tribunal, being that:

"The families that the claimant worked with did not receive an acceptable service. They did not see important documents, closures were delayed, risks were not appropriately assessed and family support lasted for almost two years. The key principle of the service is for support to be short term, up to six months, at tier 2 level. This is in addition to concerns from key partners such as schools, the claimant's peers and line management.

This was a long process but in my view the claimant did not improve enough to reduce the risk that she presented as a worker...."

51. On 20 October 2016, the claimant was invited to a final review meeting under the respondent's Capability at Work procedure, for 4 November 2016, and furnished with a copy of the procedure for her reference.

52. The correspondence further set out the purpose of the meeting, being to discuss the claimant's work performance in the following areas, namely; not actioning case closures, not adhering to timescales when given case directions, work not analytical or summarised where necessary, and professional conduct with families/professionals being of concern, further setting out the specifics thereof, enclosing the following documents: Review of schedule of outstanding actions; review of home visit data; review of support offered; chronology of support; skills audit; reviewed my conversation; statistical data analysis; non-case supervision dated 13 September 2016; and case supervision dated 14 September 2016 and 13 September 2016.

53. In the event, and on the claimant unable to secure representation, the meeting of 4 November was postponed to 9 November; the claimant seeking the adjournment, advancing:

“... My efforts to find a companion to accompany me in the category of a trade union representative or a colleague have proved unsuccessful. I really do consider that it would be unfair for me to be asked to attend a meeting of the severity of a final hearing under the Capability Procedure without a companion present.”

54. On the hearing officer agreeing to the claimant being accompanied by a companion from outside the organisation, and who was not a union representative, the meeting was rearranged to 9 November 2016, the claimant being apprise thereof by correspondence of 3 November, further being advised:

“Furthermore, you have been notified that the purpose of the final review meeting will be to review the evidence supplied (which has been sent to you in advance) and the senior manager chairing the meeting will then decide on the appropriate course of action. As detailed in the policy, outcomes available are:

- (1) To dismiss the employee with notice on the grounds of capability. The appropriate notice will be paid in lieu rather than work.
- (2) To consider relegation as an alternative where it is a practical proposition.
- (3) To consider demotion for a specified period of permanently where it is a practical proposition.
- (4) To keep the situation under review for a defined period (no more than 12 months) at the end of which a decision will be taken on the appropriate course of action which could include dismissal.”

55. The claimant was further asked to provide any supporting documents on which she would rely no later than the close of business on 7 November.

56. The claimant was again written to on the 4 November 2016, further re-stating the above and advising that the hearing was to be recorded, a copy of which is at R1 page 637A-B.

57. The capability final review meeting duly took place on 9 November 2016, chaired by Mr Gareth Morgan, head of service – early help and prevention in children's services. Ms Lawrence presented the respondent's case. The

claimant attended supported by her friend, Yvonne Neequaye. A transcript of the hearing is at R1 page 638-692.

58. The meeting commenced by the procedure to be followed being explained, the basis upon which a decision would be made and the decisions open to the Chair to make, namely, to consider dismissal on the grounds of capability, relegation as an alternative where that is practical, demotion where practical, or otherwise to keep the matter under review for a defined period of not more than 12 months. Confirmation was then had that the claimant had received the bundle of documents for the hearing.
59. The hearing proceeded on Ms Lawrence setting out the management case, which the claimant questioned her thereon, following which the claimant presented her case and on which she was asked questions. The claimant has not challenged the conduct of the meeting, save that she maintains she was prevented from fully presenting that which she wished. However, this is not borne out from the transcript of the recorded hearing.
60. With regards this meeting, the tribunal notes the following from Ms Lawrence's presentation, that:

“Today is a final formal review and I think it is really important to stress that two cases identified in the first formal review which took place in May 2016 still have yet to be closed, in relation to adhering to the timescales in section 4.8, you can see a copy of all the outstanding work Selva has yet to complete for all of her cases, so again we go back to GS case which we discussed in the standard setting meeting in January, we have outstanding TAFs from April which she completed in August, we have the case closure which was not completed on 31 August which was the agreed date, we have two outstanding visits to be entered on MOSAIC during 2 and 5 September which were days that Selva had been agreed to work from home which were not done, we also have the cases on MOSAIC which were supposed to be updated that Selva did not do, and can also see that there's other cases such as the JK case, we have a February TAF which was completed in September on the 12th, we have a March TAF which was completed on 30 September, we have a May TAF which was supposed to be sent on 14 September, we have a July TAF that is still outstanding and you have outstanding home visits that were supposed to be updated on 2 September which were not complete, the outcome style is not complete, telephone calls are not concluded and the front sheet is not completed. If you turn over the page you can see the list goes on for all of the cases that Selva has open currently on her caseload and if we go down to the bottom such as the WL case or the ZW case you will find that nothing has been identified as outstanding has been completed and that goes on for the DP and DK cases as well.

In section 4.9, you can see a list of the outstanding home visits that Selva has yet to upload again the GS case which we talked about in standard setting meeting in January, this case was escalated on 15 April 2016, prior to case escalation no further home visits were added and that case has gone up to Children's Social Care or had gone up and Selva still hadn't updated the home visit from 26 February 2015, the same can be said for the DK case, a visit took place on 6 April 2016 and was recorded on 18 July 2016. There is still a gap from 23 April 2015 until 6 April 2016. There is a gap in terms of the home visits that are not on the system, the JK case, visits took place on 20 January 2016 and was recorded on 30 September, a visit took place on 27 September and was recorded on 30 September 2016 and it goes on for the rest of Selva's cases. ...”

61. The tribunal also particularly notes the claimant challenging the appropriateness of training received, relevant to her identified needs, which the tribunal finds was fully addressed, and the relevance to, and impact for the claimant's performance were fully explained by Ms Lawrence in the meeting. The tribunal also records that, there was a full discussion in respect of the claimant's explanation for why she had been unable to complete cases timeously, there being no challenge to the respondent's case that the claimant's performance was as alleged, or of the deficiencies there identified.
62. It was agreed at the conclusion of the hearing that, Mr Morgan would give the decision orally which would then be confirmed in writing. Mr Morgan subsequently met the claimant on 10 November 2016, whereon he informed her of his decision; that of the termination of employment with 12 weeks' notice, which decision was confirmed in writing on 15 November 2016 (R1 page 714).
63. It was Mr Morgan's findings that, in terms of not actioning case closures, evidence had been received detailing a number of cases which remained open on MOSAIC (the respondent's database) for extended periods, despite numerous episodes of advice and direction being given for the claimant to complete outstanding pieces of work and to close open cases, that there was evidence of cases remaining open for many months after the conclusion of casework contrary to management direction and service expectations for cases to be concluded and closed on an average within six months of commencement, and that at the meeting, the claimant had not denied at any time that she had failed to close the cases or that they had been subject to directions to close, which the claimant had not actioned. Mr Morgan conclude that the failure to complete the relevant process for families supported by the claimant, created avoidable risk, in addition to compromising the integrity of case records, to include safeguarding, where other professionals were un-sited and could therefore misjudge risks associated with children and young people, where they were unable to see the accurate and up to date details of work being undertaken to support families which put both the respondent and service at risk to vulnerable families.
64. In relation to work not being analytical or summarised, Mr Morgan found evidence to support this contention, that documentary evidence showed management annotations detailing errors and providing suggestions where effective summarising would make the document more relevant and beneficial to families and professionals, which lack of analytical skills was evidenced by the very annotations.
65. The tribunal here notes that Ms Lawrence had not pursued the claimant's failure herein, having accepted that there had been improvement in this regard and was therefore not a matter for Mr Morgan's consideration as part of the final review meeting.

66. The tribunal also here notes Mr Morgan's evidence that, one of the respondent's concerns with the claimant was that her work was so far behind "that the service was relying, unreasonably, on the claimant's memory alone to update significantly annotated work, which was also likely to result in either incomplete or inaccurate records".
67. With regards to professional conduct with families and professionals, Mr Morgan found that the claimant's incomplete records and drifting of cases, caused significant delay in supporting families to be moved forward, and subsequently voided one of the core principles of the role, which was to reduce demand on high cost statutory services and improve family resilience, and that this had a negative impact on the respondent's relationship with key partners and resulted in a negative image being presented of the service and the organisation.
68. In making his determination, Mr Morgan gave consideration to the claimant's presentation that; she had sought to take advantage of opportunities given to help her recover from the significant backlog of work that she accepted had built up, describing several factors which she had said contributed to the large amount of outstanding documentation associated with her caseload, a situation which she had never effectively recovered from in relation to record keeping, to include the claimant's transition from one service area into early help in October 2015 and being unfamiliar with the practice of completing family assessments by uploading documents onto MOSAIC, and further that exemplar work that had been offered to her, had not been provided in a timely fashion, and that she found her line managers sometimes intimidating, preventing her from fully engaging with them in effective dialogue about how best to address her issues.
69. In giving consideration to his determination, Mr Morgan further considered redeployment within the service, such as youth work, however, he determined that this was not a viable option as the skillset for this role was similar to that of the family support worker role, and there would be a very similar expectations for the claimant to complete key documents within specific timeframes, and that on the evidence before him, it had established that the claimant had failed to meet these expectations and was unlikely to do so.
70. It was Mr Morgan's determination that the claimant's employment be terminated for reasons of capability, notice to be paid in lieu, and the claimant not required to attend for duty during the notice period. Mr Morgan's decision letter is at R1 page 714-717.
71. The claimant was offered a right of appeal which right she availed herself of, presenting an appeal on 29 November 2016, identifying the reasons for her appeal as (1) against the basis on which the decision was made; (2) against the level of sanction imposed; and (3) that the process followed at the original hearing was incorrect, further advancing:

"The original hearing failed to adhere to prescribed timescales, evidence was admitted which should not have been admitted. In coming to a decision, the hearing

gave undue regard to factors which it should not have, and did not have due regard for evidence which should have been given greater consideration, or to the prevailing circumstances. I believe that the decision to dismiss me was incorrect and excessive.”

72. The claimant's appeal was acknowledged on 14 December 2016, and on 5 January 2017, the claimant was invited to a members level appeal hearing for 2 February 2017. In the circumstances, the hearing was rescheduled, on the claimant not being appeared to proceed on the scheduled date, and on further difficulties in arranging a date, the appeal meeting was subsequently arranged for 21 March 2017, with notice furnished to the claimant on 21 February 2017, which notice advised the claimant that the hearing was a review hearing of the case and not a re-hearing, and of the claimant's responsibility to arrange the attendance of representation and witnesses she wished to call; such witnesses to present new evidence material to the outcome, which evidence had come to light since the original hearing, or otherwise because of witnesses having been unavailable to attend the original hearing.
73. On 7 March 2017, the claimant furnished further grounds of appeal which are at R1 page 740-745.
74. The appeal hearing duly took place on 21 March 2017, presided over by council members, advised by Mr Jankowski, Legal Services, and Mr Wilson, Human Resources. The claimant attended unaccompanied. The management case was presented by Mr Morgan, advised by Ms Mohabeer of Human Resources. The hearing was recorded and a transcript of that recording is at R1 page 781-814.
75. By correspondence of 30 March 2017, the claimant was informed of the decision of the member level appeal panel not upholding her grounds of appeal, and upholding the decision of dismissal.
76. By correspondence of 5 April 2017, reasons for the appeal panel's decision were furnished to the claimant and are at R1 page 816-818, which in addressing the claimant's grounds of appeal found as follows: (1) In respect of the claimant not being afforded at least 10 working days' notice that the final review meeting could lead to dismissal in breach of paragraph 9.2 of the Council Capability at Work procedure, the panel accepted this was the case. However, it found that the claimant had been aware that her job was at risk at the final meeting and had been aware of such a position from the meeting with Ms Lawrence of 18 January 2016, where she had been informed that the final review meeting could lead to dismissal, that the claimant had been provided with the Capability at Work procedure in respect of the first formal, intermediate and final review meetings, which there set out the possible outcome of a final review meeting being dismissal with notice, which the claimant accepted she had read, the panel concluding that she was thereby fully aware of the possible outcome of the final meeting and had not thereby been prejudiced by a breach of paragraph 9.2 of the Council's Capability at Work procedure.

77. Of the claimant's second ground, that Mr Morgan had taken into account a lack of improvement in the claimant's work not being analytical or summarised where necessary, the panel found that this had not been pursued by Ms Lawrence at the final review meeting, and although the panel found that she had made significant and sustained improvement in relation to her work not being analytical or summarise where necessary, they did not feel that this was sufficient to disturb Mr Morgan's findings in respect of the claimant's performance remaining below an acceptable standard in respect of not actioning case closures, and not adhering to timescale when given clear directions, which were sufficient grounds upon which to uphold Mr Morgan's decision.
78. On the findings above stated, it was not then necessary for the panel to determine the claimant's grounds 3 and 4 of appeal being, that in respect of the claimant's work not being analytical and not summarised where necessary.
79. In respect of the claimant's grounds 5 and 6, the panel accepted that Mr Morgan had taken due account of the claimant's explanations for time spent on writing and re-writing reports impacting on her meeting timescales and consequential delays in case closures, and the claimant's submission in respect of conduct, which the panel was satisfied had been duly considered in Mr Morgan reaching his decision.
80. With regard to the claimant's final ground of appeal, in respect of training, development and support, the panel were satisfied that, considered as a whole, the claimant had been offered all relevant training, support and development that could be expected from management, and that after being offered such training, support and development, she had then had reasonable time; being three months from July 2016, if not longer, to improve her performance in the areas of; not actioning case closures, and not adhering to timescales when given clear directions. The panel agreed with Mr Morgan that the claimant also had a responsibility for ensuring she received training, support and development required to address her capability issues, finding that there had been occasions when the claimant had not taken up training opportunities as she felt they were not relevant for her, which contributed to the situation.
81. The claimant presented her complaint to the tribunal on 5 April 2017.

Submissions

82. Written submissions were presented by the parties which the tribunal read. The parties were then given the opportunity to address any issues arising and for the judge to ask any questions based on the submissions.
83. The submissions have been duly considered.

The law

84. The law relevant to the issues in this case can be found at section 98 of the Employment Rights Act 1996.
85. In an unfair dismissal claim, the burden is initially on the employer to identify a potentially fair reason for dismissal so as to satisfy section 98(1) or (2) of the Employment Rights Act 1996.
86. It then falls to be determined whether or not the dismissal was fair. The determination 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 the reason as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case
87. Where an employer seeks to dismiss on grounds of incapability, it is for the employer to show that this was the actual reason or principal reason for the dismissal. It is to be noted that this is not to say that the employer must objectively establish that the dismissed employee lacked capability, the relevant law having been expounded by Lord Denning MR in the case of Alidair Limited v Taylor [1978] ICR 445 Court of Appeal, that:

“Whenever a man is dismissed for incapacity or incompetence, it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.”
88. Where a member of staff is found to be performing below the relevant standard, the Employment Appeal Tribunal in Littlewoods Organisation Ltd v Egenti [1976] ICR 516, has provided that:

“The general concept of fair play inherent in the disciplinary procedures should also guide management in considering a dismissal for inefficiency that a member of staff should not be dismissed for incapability without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity of improving his performance”.
89. It is to be noted that the burden of proof in respect of reasonableness of the employer's belief, and whether the employer has conducted a reasonable investigation to verify that belief is neutral and neither lies on the claimant or the respondent. The tribunal has to determine whether there was material in front of the employer that satisfied the employer of the employee's inadequacy or unsuitability and on which it was reasonable to dismiss.
90. It is for the employer to set the standard to be asked of its employees. It is not for the tribunal to substitute their own view of the member of staff's competence. Although this is not total, and it will be for the tribunal to take into account all the surrounding circumstances, whether the target was

realistic, the reasons for the employee not attaining the targets, how other staff fared and the employee's length of service in determining whether the relevant standards have been met.

91. In establishing incapability, this would usually be determined over a period of time, during which the member of staff's incompetence or inability to meet reasonable standards become apparent. However, in rare cases, a one-off act can sometimes be all that is required to establish incapability, particularly where the act so undermines confidence in the member of staff that the employer is justified in dismissing for it; as would be the case of a pilot in not meeting the required standards for landing a plane puts the lives of passengers at risk: the gross incompetence here, with potentially calamitous consequences would be a sufficient reason to justify dismissal. (See Alidair Limited v Taylor.)
92. Once the reason for dismissal has been established, the question of whether the dismissal was fair or unfair will be determined giving consideration to all the circumstances of the case pursuant to section 98(4) of the Employment Rights Act 1996, as to reasonableness. It will be for the tribunal to consider not only what steps a reasonable employer would have taken when faced with a member of staff who does not meet the relevant standard, but also what steps the employer should have taken at the very start to minimise the risk of poor performance and to create the condition to enable that member of staff to carry out their duties satisfactorily. The tribunal will consider the concerns to ensure that proper training, supervision and encouragement have been given and that appropriate instruction, support and setting of realistic targets have been pursued.
93. Where, despite adequate training and support being provided, the member of staff still fails to meet the required standard, it is to be noted that there is no obligation on the employer to offer alternative employment. Any such duty to consider alternative employment is dependent on the circumstances of each particular case, consideration being given to the size and administrative resources of the business enterprise. It is further noted that, the employer is not required to create a post artificially.

Conclusion

94. The tribunal is satisfied that the respondent has established that the reason for dismissal was capability, and is a reason that can found a fair dismissal pursuant to section 98(2) of the Employment Rights Act 1996.
95. The tribunal finds, which is not in contention, that there were failings in the claimant's performance as a Family Support Worker in the respondent's early help and prevention services impacting on service delivery, which fell below the standards expected of a family support worker, and for which it was appropriate that efforts be made to improve the claimant's performance.
96. The tribunal finds that the claimant was appropriately brought within the respondent's capability procedure, which procedure the tribunal is satisfied was followed and the claimant afforded such reasonable opportunity for

improvement as was reasonable in the circumstances of this case; management clearly setting out the issues of concern, set reasonable timeframes for improvement, and offered such support to assist the claimant to achieve the targets set as was reasonable.

97. On the claimant having failed to meet the targets set at the first formal meeting and intermediate meeting, and on the audit in October 2016, evidencing the claimant's further shortcomings in performance, the tribunal finds that it was reasonable that the claimant be called to a final capability meeting.
98. The tribunal equally finds that, at the appeal hearing, the claimant was fully aware of the severity of the situation and that her continued employment was in jeopardy, being a position that she had been aware of from as early as January 2016, which fact is not disputed by the claimant.
99. The tribunal finds that the claimant was apprised of all the matters of concern arising in respect of her performance, and furnished with all particulars relating thereto, and had been so furnished in a reasonable time before the final capability meeting so as to enable her to be fully conversant therewith and prepare her case in defence.
100. The tribunal is satisfied, on the product of the transcript of the hearing, that the claimant was afforded a full opportunity to fully address the issues of performance raised, and indeed the tribunal specifically notes the claimant's submission at the final capability hearing on being questioned as to her progress as against the list of outstanding actions to 20 October 2016, as presented to the meeting, the claimant stating that she had not made "great progress on that in getting things up to date, there are at the moment there are only a few bits that are outstanding", it being qualified that "a few bits" was subjective, referencing back to the list of outstanding matters as presented, and in respect of which, the claimant was unable to show what matters were then outstanding so as to challenge the case presented by Ms Lawrence.
101. From the evidence presented to Mr Morgan at the final capability hearing, the tribunal finds that there was such evidence before him, from which he could reasonably have come to the conclusions he did in respect of not actioning case closures and not adhering to timescales when given case directions.
102. On the findings of Mr Morgan in respect of the claimant not actioning case closures and not adhering to timescales when given case directions, the tribunal finds that this fell below the standards expected of a family social worker, where vulnerable families were exposed to risk in respect of the level of care and support then offered by the local authority, which performance could not continue at that level, and which performance had not improved, despite the efforts of management through support and training to elevate the claimant's performance.

- 103. The tribunal further finds that reasonable consideration was given to the redeployment of the claimant, but where the skillset of which the claimant had been found lacking, was the skillset relevant to the further posts, the tribunal finds that redeployment was then not a viable option.
- 104. In giving consideration as to whether the option to further keep the situation under review for a defined period, and no more than 12 months, in circumstances where vulnerable families were being put at risk and where training and support had not produced the desired standard, between January and October 2016, the tribunal cannot say that it was then unreasonable for the respondent not to action this option.
- 105. The tribunal in all the circumstances of this case, cannot say that it was unreasonable of the respondent to terminate the claimant's employment on grounds of capability, when they did, on the claimant failing to meet the expected standards of a family support worker within the respondent's early help and prevention service.
- 106. The tribunal accordingly finds that the claimant has not been unfairly dismissed.
- 107. On the respondent conceding the claimant's claim for breach of contract in respect of notice, the sole question for the tribunal's determination being one of quantum, the issue remaining will be determined at a hearing on remedy.

Employment Judge Henry

Date: 12/3/18.....

Sent to the parties on:

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For the Tribunal Office