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# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Vary

**Respondent:** Barnardo's Trading Ltd

**Heard at:** East London Hearing Centre

**On:** 30-31 May & 1 June 2018

**Before:** Employment Judge Russell (sitting alone)

**Representation**  
**Claimant:** Mr G Graham (Counsel)  
**Respondent:** Mr P Powlesland (Counsel)

## RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

- (1) The claim for unfair dismissal succeeds.
- (2) The claim for breach of contract succeeds.
- (3) The Claimant's conduct contributed to her dismissal in the ways identified at paragraph 79 of the Reasons.
- (4) There is a chance that even if further investigation had taken place, the Claimant would have been fairly dismissed in any event.

## REASONS

1 By a claim form presented to the Employment Tribunal on 23 November 2017 the Claimant brings claims of unfair dismissal and breach of contract following her summary dismissal on 24 July 2017. The Respondent resists all claims.

2 The issues are as follows:-

### *Unfair dismissal*

2.1 What was the reason for dismissal? The Respondent relies upon

conduct, a potentially fair reason.

- 2.2 Was there a reasonable belief based upon reasonable investigation?
- 2.3 Was dismissal fair in all the circumstances of the case?
- 2.4 Should there be any reductions to reflect *Polkey* and/or contributory fault?
- 2.5 To what remedy is the Claimant entitled?

*Wrongful dismissal*

- 2.6 Has the Respondent showed that the Claimant acted in repudiatory breach of her contract? If not, it is agreed she is entitled to 12 weeks' notice of dismissal.

3 I heard evidence from the Claimant on her own behalf. For the Respondent I heard from Mr Roy Clark (Director of Retail and Trading); Ms Beverley Maylor (People Advisor); Mr Liam Duffy (Director of Commercial Services and Innovation) and Mr Richard Moore (Corporate Director of Finance and Resources). I was provided with an agreed bundle and I read those pages to which I was taken in evidence.

**Findings of fact**

4 The Respondent is a well-known charity raising money from fundraising initiatives and its network of shops to help children throughout the United Kingdom. Barnardo shops sell three types of goods: those donated by members of the public, surplus stock gifted from other retailers or companies and new goods. New goods are sourced and purchased wholesale through Barnardo's Trading Limited ("BTL") a separate legal entity registered at Companies House. These new goods are sold in the shops, on-line and through mail order catalogues. The profits generated by BTL are gifted to the Respondent. The sale of new goods in the Respondent's shops accounts for approximately 5% of its overall turnover. The principal new goods sourced by BTL were cards and fake flowers. The role of BTL was to commission the most popular designs, take delivery, distribute the products to the shops and ensure quality and product safety.

5 The Respondent's profit and loss account for the year ended 31 March 2016 stated that:

**"The company's principal activities continued to be the sale of cards and gift merchandise through the Barnardo's retail trade and its mail order catalogue, along with the wholesale of greeting cards to other charities."**

6 The Claimant commenced employment on 9 April 2002 initially as a buying coordinator prior to her promotion to marketing manager with effect from 1 April 2007. On her promotion all other conditions of service remained as set out in the letter of appointment and the staff handbook. The Claimant was managed by Ms Sarwar, the Head of BTL and statutory director of BTL. Ms Sarwar reported to the Director of Retail. Until January 2016, the Director of Retail was Mr Gerard Cousins, he was

replaced on an interim basis by Mr Chris Judd and then permanently by Mr Roy Clark from August 2016. Mr Cousins had given notice of his resignation in or around October 2015 and was leaving to work for Mencap, a mental health charity. Other members of the BTL team reporting to Ms Sarwar were Mr Jeffrey Anderson (Merchandise Manager) and Ms Sally White (Administrator). The BTL team were physically located at offices in Wickford whereas the other rest of the Respondent's retail team were located at its head office in Barkingside.

7 For some years BTL had been party to an exclusive supply contract with Creative Tomco Limited ("Tomco"), a Hong Kong based trading company which supplied most of the BTL goods. Tomco's representative was Mr Peter Taylor who had worked closely with BTL, including Mr Cousins and Ms Sarwar, for more than 15 years. It was a close working relationship and Mr Taylor enjoyed the use of an office at the Wickford premises and would accompany representatives of BTL on visits to Hong Kong. Mr Clark knew that Tomco supplied the majority of BTL's goods but not that there was an exclusivity agreement in place.

8 Throughout the course of 2014 to 2017 there had been a lot of changes in the Respondent's senior management. By contrast, the BTL was stable and each member had at least 10 years' service. By late 2016, the Claimant was unhappy about the conduct of Mr Clark in connection with a proposed relocation of BTL from Wickford to Barkingside and an outstanding salary evaluation exercise. I did not consider it necessary to make findings of fact on either as they are not relevant to the issues to be decided.

9 The Claimant's contract of employed contained no express terms dealing with matters such as non-competition or requirement to devote all working hours to the business of the Respondent. There is a term giving consent to processing her personal data but this does not refer to her duty of confidentiality. The employee handbook was divided into four sections: introductory information; contractual terms; discretionary benefits and policies, procedures and information. The section dealing with contractual terms included the following:

**"Voluntary roles/paid employment outside of Barnardo's**

**You are required to give details to your line manager prior to accepting a voluntary role or paid employment outside of Barnardo's. Whilst employed, you must not engage in any other work without the prior agreement of your line manager. For paid employment prior agreement must be obtained, via your line manager, by a member of the Corporate Leadership Group (CLG).**

**Barnardo's reserves the right to determine whether the voluntary activity or paid employment presents a conflict of interest within the employee's contract of employment."**

**For paid employment, the details will be considered by a member of the Corporate Leadership Group (CLG) and discussed with you. If it is deemed to present a conflict of interest, and you still decide to pursue the paid employment, then this may be dealt with under the disciplinary procedure, which could result in dismissal."**

10 I was not taken to any other policy or express term of the contract dealing with personal relationships, conflicts of interest and other employment. In evidence when

asked about the policies upon which he relied, Mr Moore identified only the above section in the handbook. The Respondent also relied upon the necessarily implied term of trust and confidence in respect of conduct falling outside of the term of the handbook above.

11 It was agreed between the parties that if absent due to sickness, the Claimant was contractually entitled to six months full pay, followed by six months half pay.

12 On 3 February 2017, Ms Sarwar resigned by email citing problems with her working relationship with Mr Clark. Ms Sarwar contacted ACAS on 10 February 2017, something Mr Clark accepted he would have known at the time. Ms Sarwar presented a claim for constructive dismissal which was heard in March 2018 by a Tribunal comprising myself and two lay members. At the time of hearing evidence and submissions in this case, and of dictating this Judgment, the Sarwar Judgment was not promulgated. The findings of fact in Sarwar were not relevant to the issues before me in this case other than possibly remedy. Accordingly, this Judgment deals with liability only and I have decided it based only on the evidence and submissions heard in these proceedings.

13 At the time of Ms Sarwar's resignation, the Claimant had been absent since 19 January 2017 following a stroke (although there was some initial uncertainty about the diagnosis). The Claimant's health difficulties persist today. She accepts that even if not dismissed for misconduct, she would still be absent from work due to sickness.

14 Upon Ms Sarwar's resignation, Mr Clark and Ms Smurti Amin (HR) went to Wickford to notify the BTL team. They found that Ms Sarwar's office was empty with documents removed, her email in-box had been cleared and folders on her computer had been deleted. I accept Mr Clark's evidence that this appeared suspicious. IT were able to restore Ms Sarwar's email account to a date just before Christmas 2015. Upon analysing her emails, the Respondent became aware that Ms Sarwar and the BTL team, including the Claimant, had undertaken some work for Mencap on the production of six Christmas cards and two lines of gift wrapping paper as part of their 2016 range. In the office, Mr Clark found a note written by the Claimant referring to Mencap, several packs of Christmas cards with Mencap's details on the back, in Mr Anderson's desk some invoices relating to Mencap products and on Ms White's desk invoices that she had used to record receipt of Mencap samples. Mr Clark was concerned that that there had been misconduct by Ms Sarwar and by implication the whole BTL team.

15 In evidence, Mr Clark accepted that the Respondent had previously produced wholesale cards for other charities; he had been told this by Ms Sarwar in their first meeting in August 2016. His concern in February 2017 was that there appeared to be no commercial agreement covering the work, not even a "heads of agreement" or email to confirm some commercial arrangement. Even if it would make sense to trial a small initial range with a view to developing a larger agreement, as the Claimant contended, there were no emails discovered to show that this was what was agreed and no such strategic plan had been discussed with him. On balance, I accept that his concerns were genuine and he believed that further investigation was required.

16 In or around mid-February 2017, Mr Clark also became concerned about the nature of the relationship between Ms Sarwar and Mr Taylor. Although the details

developed as his evidence progressed, on balance I accept that it was only at a roadshow event that he was made aware that Mr Taylor would attend BTL meetings and events. Upon further investigation, Mr Clark became aware that Mr Taylor had flown to Hong Kong with Ms Sarwar and the Claimant in April 2016, that all of the flights had been invoiced to Ms Sarwar's address (as were Mr Taylor's mobile phone bills) and that they all stayed in the same hotel. It later transpired that Mr Cousins, his predecessor as Director of Retail and Trading had travelled to Hong Kong at the same time and stayed in the same hotel.

17 Mr Clark was concerned at what appeared to be improper complicity in the relationship between Mr Cousins, Ms Sarwar and Mr Taylor. He believed that Ms Sarwar had been providing Mr Cousins with the services of her BTL team on the Mencap work without payment. In addition, he believed that the Claimant, Mr Anderson and Ms White should have told him that Ms Sarwar and Mr Taylor were a couple and that they must have been aware that the work for Mencap was inappropriate. This, he believed, was why the BTL team had been so reluctant to move to Barkingside. Mr Clark decided that Mr Anderson and Ms White should be suspended and the possible misconduct by the three remaining members of the BTL team further investigated. The Claimant was not suspended as she was still on sick leave.

18 On 28 February 2017, Mr Clark wrote to the Claimant advising her of the investigation into whether BTL had carried out work for another organisation and that there were a number of questions which they would like to ask her.

19 An Occupational Health report dated 22 February 2017 referred to a possible stroke but considered it too early to know the full effects upon the Claimant. It recommended a re-referral in three months to determine whether or not the Claimant was fit to return to work. Further Occupational Health advice was provided on 14 March 2017; whilst the Claimant reported some forgetfulness, she would be happy to assist with an investigation and was coherent but speaking slowly. Occupational Health recommended a web-based meeting, with questions provided in advance and that the duration of the meeting be minimised as she was likely to fatigue easily.

20 On 15 March 2017, the Respondent emailed the Claimant details of the meeting to take place the following day into whether BTL had carried out work for another organisation. Whilst the Claimant did not open the letter, she was aware from the previous letter and a discussion with Ms Amin (HR) that that was the conduct being investigated. The Claimant was not provided with questions in advance.

21 The investigation meeting took place by conference call on 16 March 2017 and lasted 50 minute. It was conducted by Ms Lee (Director of Fundraising). There are two sets of notes, with the Claimant's being more detailed. The Claimant confirmed that she had worked closely as a team with Ms Sarwar, Mr Anderson and Ms White. She was asked about BTL working for another organisation. I do not accept that the Claimant was asked about her own work for another organisation as she suggested; both sets of notes confirm that the question was about BTL as a team. The Claimant did not recognise the names of employees of Mencap mentioned in the emails discovered in Ms Sarwar's inbox. Both sets of notes show that the Claimant was asked whether she considered that working for competing charities was a conflict of

interest and that she responded “no”. The Claimant’s evidence that she understood the question to be whether she would consider doing such work for a competitor was not credible. The Claimant did not volunteer that BTL had helped Mencap with its 2016 range.

22 Ms Lee referred to specific emails which the Claimant had sent or received in connection with the Mencap work during the period from 1 March 2016 to 4 August 2016. The Claimant maintained that she had undertaken no design work on the cards but only produced some print proofs over the Easter holidays and had no direct contact with Mencap. One of the emails referred to a special project. The Claimant explained that this referred to a card range as part of the 1959 Charities Group, of which Ms Sarwar was a director. The Group is a consortium of charities collectively participating in the Cards for Good Causes scheme where Christmas cards are sold by a number of charities in town halls, libraries and churches. Ms Lee notes that the emails referred only to Mencap and not any other charities in the Group. The Claimant accepted that it was only Mencap that they were helping and that was under Ms Sarwar’s instruction as her manager and as a director of the Group. The Claimant did not accept that there was a conflict of interest with Mencap as a competitor as they had separate designs. She did not believe that she had to inform anybody more senior as they were only helping a smaller charity which had paid for its own cards.

23 As for the relationship with Mr Taylor, the Claimant stated that he had worked for Tomco for a long time; he attended BTL as a supplier, did not go to meetings on behalf of the Respondent but did have a use of an office at Wickford. She described his relationship with Ms Sarwar as business only. Ms Lee asked the Claimant for her reaction if told that Ms Sarwar and Mr Taylor had been partners for over 20 years. The Claimant said asked what that meant and, upon being told boyfriend and girlfriend, said that she would be shocked as he was married. The Claimant agreed that he had travelled to Hong Kong with her and Ms Sarwar and that they were staying in the same hotel but did not know if Mr Taylor and Ms Sarwar had shared a room. Mr Taylor was not with her and Ms Sarwar during the day when they were working on the card range.

24 The final part of the investigation meeting was about Mr Cousins. The Claimant confirmed that Mr Cousins had been Ms Sarwar’s line manager for 16 years and now worked for Mencap. When asked if there was a link between their working relationship and the work being done for Mencap by BTL, the Claimant maintained that there was no financial cost to the Respondent and BTL were only helping a smaller charity which was permitted. The Claimant maintained that there was no conflict of interest with Mr Cousins and that Ms Sarwar was not working for Mencap; the help provided was only a small part of what they did.

25 Mr Clark’s evidence to this Tribunal was that the Respondent had previously had the opportunity to wholesale cards for other charities, including producing cards for other charities in the 1959 Group in connection with Cards for Good Causes. This would be done under a commercial agreement and he was not aware of when this last occurred, but believed it to be before 2013. Mr Clark was not interviewed by Ms Lee nor did Ms Lee investigate further what work had previously been undertaken by BTL for other charities and on Cards for Good Causes and, if any had, when and how this occurred.

26 The Claimant was not well enough to attend a second, scheduled investigation meeting and provided written responses instead. The Claimant explained that it was hard for her to recall what help had been given to Mencap as it was minimal in comparison with the overall BTL workload, BTL had good relationships with various charitable forums and she had no reason to question the help to Mencap as such networking was not unusual. The Claimant did not believe that there had been a conflict of interest and she had been acting under the directions of her line manager at all times.

27 The Claimant sent a more detailed letter on 30 March 2017. She expressed unhappiness with the “relentless” questioning in the telephone meeting and was concerned that the questions had been predetermined. She regarded the disciplinary action as being without reasonable grounds and part of an attempt to discredit and dismantle the BTL business since Mr Clark had joined the organisation. As for the allegation, again the Claimant maintained that BTL had simply helped Mencap, there was no conflict of interest and samples and invoices had been processed with an audit trail. The Claimant stated that her involvement on these 8 or so products had been minimal by comparison to her overall busy workload of over 500 new products. Moreover, she had not been paid by Mencap, had not created or designed the Mencap products, ordered stock, arranged shipping or delivery; and had not initiated contact with Mencap or dealt with invoices. The Claimant added:

**“Did I think it wrong to action any of the above? I had no reason to think this was wrong. We have good relationships across charitable forums over a long period of time, some of which Tracey Sarwar was a director. Regarding the relationship between Gerard Cousins and Tracey Sarwar, as Barnardo’s will be fully aware Gerard was Tracey’s line manager for approx. 12 years. It is my understanding that both professionals are respected by both Barnardo’s and within the Third Sector. Given their senior rank within Barnardo’s, I had no reason to think the Organisation would have objected or have approached this in any negative way. I noted Barnardo’s had been networking with other charities, most recently, The Mind charity. Working with other charities is also part of Barnardo’s 10 Year Corporate Strategy.**

**The above was under the instruction of Tracey Sarwar, Director of Barnardo Trading Ltd, Tracey was my line manager for 15 years. Tracey would be able to clarify and verify all of the above for you, however as you are aware Tracey is no longer in the business and without this clarification this investigation cannot be concluded without all parties concerned and their participation.”**

28 The Respondent then sent the Claimant a set of 53 questions in lieu of a second investigation meeting. These covered the work for Mencap and the relationship between Ms Sarwar, Mr Taylor and Mr Cousins. The Claimant provided her responses on 7 April 2017. A central part of her case then, and now, was that new managers did not understand the history and background of BTL particularly on Cards for Good Causes. The Claimant referred to BTL helping other teams in the Respondent and similarly advising and helping other charities in their start up/testing period for a new product range. The Claimant did not give names of such charities as she believed that Ms Lee would investigate. The Claimant said that Ms Sarwar told her to print some proofs of the Mencap card designs as she (Ms Sarwar) had been asked to help. The Claimant had worked intermittently on the eight Mencap products from the Easter holidays until late April. The Claimant estimated that, at most, a day of her time had

been spent on the Mencap work. This was with the permission of Ms Sarwar. The Claimant said that she not helped any other charity in the same way for a long time but that in the past BTL had worked with many charities on card publishing.

29 The Claimant described a good and longstanding working relationship between Mr Cousins and Ms Sarwar. She had not been involved with flight or accommodation bookings for the Hong Kong trip. The Claimant believed that Ms Sarwar's address had been used so that there was one pick up point for the courtesy car but that the Respondent had not paid for Mr Taylor or Mr Cousins. Whereas Mr Taylor had travelled with them, Mr Cousins had not and she met him only briefly on his arrival in Hong Kong. In its questions, the Respondent stated that Mr Anderson had confirmed that there was a personal relationship between Mr Taylor and Ms Sarwar for 20 years and that either he or the Claimant was lying. The Claimant pointed out that she had been asked whether they were a couple and it depended on how one defined "personal"; she would describe it as a close relationship or companionship. In evidence, the Claimant stated that it was common knowledge at the Respondent that Mr Taylor would accompany Ms Sarwar on trips to Hong Kong. She named those knowing as Mr Cousins, Mr Judd and another senior manager called Paul Guest. The Claimant did not give those names to Ms Lee during the investigation.

30 On 6 April 2017, the Respondent's Audit and Inspection team produced a draft investigation report into suspicious activity in BTL. The report was sent to Mr Moore and Ms Parkes amongst others and set out the audit team's findings and conclusions about the relationship between Ms Sarwar and Mr Taylor and the Mencap work. It recommended possible disciplinary action against the Claimant, Mr Anderson and Ms White and included the following findings:

**"Sufficient evidence demonstrates that the team (CV, JA and SW) were aware of the personal relationship between TS and PT. The failure to report such a clear conflict of interest to senior management is of particular concern and damages the trust between these individuals and Barnardo's."**

...

**Evidence demonstrates that, under the leadership of TS, all four BTL employees (TS, CV, JA and SW) breached Barnardo's policies by working for another organisation (which is also a competitor) whilst under employment with Barnardo's with no formal, documented permission...**

**It is unclear why the team working for TS (JA, CV and SW) did not question the fact they were spending their time working for a competitor."**

31 Part of the evidence considered within the Audit Report were the notes of the investigation interviews with the Claimant and Mr Anderson held on 16 March 2017. In relation to the Claimant, the report concluded that she had knowingly worked for Mencap since November 2015 without formal documented permission in breach of the Respondent's policies and was aware of a significant conflict of interest due to the personal relationship between Ms Sarwar and Mr Taylor which had not been challenged or reported. A timeline of key events sets out the history of the trading relationship between Creative Tomco and the Respondent dating back over 10 years, including a proposal in 2008 by Ms Sarwar to replace as supplier with a new company owned 50% by her and 50% by Tomco's owner. This proposal was rejected by the Board. The report did not refer to the exclusivity agreement between BTL and Tomco.

32 Further Occupational Health advice dated 9 May 2017 confirmed that the Claimant had had a stroke in January 2017, that she continued to suffer minor limitations in particular with regard to balance, significant fatigue, exhaustion, poor concentration, short-term memory loss and mild confusion at times for complex higher function tasks and was not yet ready to return to work.

33 The Claimant was provided with a copy of Ms Lee's 225 page investigation report and appendices dated 7 June 2017. The appendices included the notes of the Claimant's investigation interview and written representations, the emails relating to the Mencap work, documents about the arrangements for the Hong Kong trip, a copy of a disciplinary policy and procedure which included examples of gross misconduct. Ms Lee did not interview Mr Clark or any other senior managers at the Respondent nor look for documents to clarify the extent to which the relationship between Ms Sarwar and Mr Taylor was common knowledge or what (if any) work had previously been undertaken for other charities.

34 Ms Lee found that the Claimant's role was to design new goods for the Respondent only, not other charities. She stated that that the Claimant had a duty to request written authorisation to do such work, should have challenged her line manager and realised that the work could damage or expose the Respondent. The Respondent was not paid for BTL time on Mencap work and the lost resource was a theft of the Respondent's time. Ms Lee referred to an upgrade of Ms Sarwar's hotel room in Hong Kong as a clear indication that Mr Taylor shared her room. This was a serious conflict of interest as Tomco were BTL's sole supplier of new goods. The Claimant was aware of the conflict of the personal relationship and conflict of interest. As such, there was a disciplinary case to answer.

35 On 12 June 2017, the Claimant was invited to a disciplinary hearing on 20 June 2017 to consider three potential gross misconduct allegations: (1) sharing competitive information with a competitor, Mencap, by using the Respondent's resources to complete proof, print and post samples; (2) breach of trust and confidence in processing work for Mencap in time paid by the Respondent; and (3) conflict of interest, by providing contradictory information about the nature of the relationship between Ms Sarwar and Mr Taylor and failing in her responsibility as an employee to escalate that and the conflict caused by Ms Sarwar's friendship with Mr Cousins.

36 Mr Duffy was appointed to hear the disciplinary. He was provided in advance with a copy of Ms Lee's investigation report. He had also been sent a copy of the draft Audit Report which he confirmed in evidence that he would have read.

37 The Claimant did not attend on 20 June 2017. The Respondent rescheduled the hearing for 13 July 2017. The Claimant was again unable to attend but instead provided written representations which the Respondent took into account. In essence, she repeated the points made during the investigation. She had been doing the Mencap work with the permission of Ms Sarwar, a director of BTL who had authority and autonomy in the BTL business. The initial contact from Mencap came before Mr Cousins resigned. She had undertaken minimal work for Mencap: her work producing prints was not in the Respondent's time but in unpaid time over the Easter bank holiday and she was included in only 14 emails over five months, many of which were as a

copied recipient only. No competitive information was shared.

38 The Claimant maintained in her letter that the Respondent was aware of the corporate agreement whereby Mr Taylor had use of an office at BTL, advised on new goods and went to Hong Kong with them. This had been in place well before the Claimant joined the Respondent and was signed off at corporate level year after year such that there was nothing that she regarded as unusual. The corporate agreement between the Respondent and Tomco had been in place for over 20 years and Mr Taylor gave talks at the Respondent's retail shows and had business relationships across the Respondent's corporate directorate. As the Claimant had no concerns about wrongdoing, she had no reason to ask for written authorisation or to whistle-blow via Audit. A large part of the Claimant's defence was that this was a misunderstanding caused by the arrival of new senior managers unfamiliar with the way in which BTL had always operated. Finally, the Claimant expressed concern that the allegations appeared pre-concluded, the investigation report had failed to take into account the information that she had provided and that the effect of her stroke was that she had difficulty with speech, memory, recall and quick thinking.

39 The disciplinary hearing took place in the Claimant's absence on 13 July 2017. Notes were taken although these are summary rather than verbatim. Mr Duffy sought to clarify a number of conclusions in the investigation report. He asked about the Claimant's assertion that she was working on her manager's instruction; Ms Lee answered that the question had been asked at the investigation meeting. Mr Duffy asked about Ms Lee's belief that Ms Sarwar and Mr Taylor had shared a room in Hong Kong; Ms Lee said that the Claimant would have known because they checked into the hotel at the same time. No further investigation was carried out into the points raised by the Claimant, for example the broader knowledge of the relationship between Mr Taylor, Ms Sarwar, Tomco and the Respondent.

40 By letter dated 24 July 2017, Mr Duffy informed the Claimant that she was summarily dismissed for gross misconduct. In the letter Mr Duffy gave his reasons for partially upholding the first allegation. Whilst he accepted that the Claimant had not directly provided competitive information to Mencap, he believed that she had complicitly done so by sending information to Ms Sarwar knowing that she in turn would provide it to Mencap.

41 I accepted Mr Duffy's evidence that he considered the second allegation about breach of trust and confidence to be the most serious of the three. In his letter, Mr Duffy upheld the allegation based upon his finding that the Claimant had undertaken work for Mencap whilst working for and being paid by Barnardo's. Even if some was done during the Bank Holiday weekend, other work was during standard working hours, on the Respondents' premises and with their equipment. The fact that the email referred to a "special project" led Mr Duffy to believe that the Claimant knew that the work was not part of her usual activity, that the Respondent would not have authorised it and that she knew that she should not have done it. Mr Duffy concluded that Ms Sarwar did not have authority to authorise the Claimant to undertake the work for Mencap, the Claimant should have been well aware of the clear expectation that she had to devote all of her working time and attention to the Respondent and that, as a manager, she should have challenged Ms Sarwar.

42 In evidence, Mr Duffy accepted that when he reached this decision he was aware that the Claimant relied upon the 'principal activities' permitting work for other charities and that the Respondent had worked for other charities in the past. However, both were on a wholesale basis, sourcing and reselling cards, which the work for Mencap was not and the Claimant had not being able to give the names of any other charities for whom BTL had worked in the recent past. Mr Duffy was an honest witness and I accepted that for him the significant issue was the absence of a commercial agreement with Mencap and his genuine belief that, given her seniority and experience, the Claimant should have known not to do the work without an underpinning agreement. Mr Duffy genuinely believed that, at her level of seniority, the Claimant was not entitled to take Ms Sarwar's instruction at face value and had failed to question the scope of the project and payment arrangements. I find on balance that the real breach of trust and confidence in Mr Duffy's mind was the very fact of the Claimant doing work for a competitor charity, rather than the extent or cost of that work. I accept Mr Duffy's evidence that he genuinely believed the Claimant to have committed an act of gross misconduct in this regard.

43 For reasons given in his letter, Mr Duffy also upheld the third allegation. He found that the Claimant was aware that Ms Sarwar and Mr Taylor had more than a business relationship and that this was a conflict of interest. I accepted Mr Duffy's oral evidence that he did not consider it necessary to make a finding of whether or not they were a couple or intimate to decide that the relationship went beyond a normal working one. He did however take into account the different answers given by Mr Anderson and the Claimant which he considered had changed as the process progressed. Mr Duffy also found that there was a conflict of interest in the relationship between Ms Sarwar and Mr Cousins and, as the Claimant was aware from at least March 2016 that BTL was undertaking work for Mencap, she had a responsibility to raise the matter with senior management, HR or the internal Audit Unit. The Claimant did not do so and, therefore, colluded with Ms Sarwar.

44 At the time he reached this decision, Mr Duffy was not aware of the exclusivity agreement between Tomco and BTL or whether (and to what extent) previous Directors had known and condoned the relationship. Nevertheless, Mr Duffy's evidence was that the Claimant should have disclosed the overly "cosy" relationship between Ms Sarwar and Tomco as early as 2008 when the joint venture proposal was advanced. Whilst he accepted that the exclusivity agreement was relevant information to explain why the relationship was close, nevertheless the degree of closeness and the exclusivity agreement were all the more reason why matters should have been brought to the attention of new senior management.

45 Mr Duffy's letter stated that he had considered the surrounding circumstances, the Claimant's comments and alternatives to dismissal but had decided to dismiss her without notice. The letter states that an alternative sanction to dismissal would not be appropriate because the actions were serious breach of the implied duty of trust and confidence and had destroyed the employment relationship.

46 In cross-examination, when asked whether he had taken into account the Claimant's representations and the effect of her illness upon her ability to give clear, precise answers, Mr Duffy said that he did. I find that Mr Duffy did not reach his decision due to any adverse finding on the Claimant's credibility. For him, the facts at

the heart of the most serious allegation were not in dispute: the Claimant had done work for Mencap, without an underpinning agreement which she should have known was required. Even accepting that the work had been undertaken at Ms Sarwar's instruction, Mr Duffy believed that the Claimant should nevertheless have known it was not permitted and should not have agreed.

47 Mr Duffy also heard the disciplinary cases against Mr Anderson and Ms White. Before he notified the Claimant of his decision in her case, Mr Duffy had dismissed Mr Anderson by letter dated 1 July 2017 for *inter alia* breach of trust and confidence and conflict of interest arising out of the work for Mencap and the conflict of interest between Ms Sarwar, Mr Taylor and Mr Cousins. Ms White was notified of Mr Duffy's decision to dismiss her by letter dated 26 July 2017, again after he upheld allegations of breach of trust and confidence and conflict of interest in the same matters.

48 The Claimant appealed against her dismissal, repeating the points made in her disciplinary hearing. Mr Moore was appointed to decide the appeal. The Claimant was not able to attend the hearing due to ill-health. Notes of the hearing which was conducted in the Claimant's absence are entirely inadequate; just over one page of A4 paper in large font is said to represent discussions in a meeting said to have lasted an hour and a quarter. In fact, the notes record only that some points were discussed, not the content of what that discussion was.

49 By a letter dated 21 August 2017, the Claimant was informed that her appeal had not been successful. In finding wrongdoing in relation to the work for Mencap, Mr Moore relied upon what he regarded as the Claimant's changing position during the disciplinary process. He could not accept that the Claimant believed that Ms Sarwar had the authority and autonomy to permit the Mencap work. Mr Moore believed that the Respondent's policy about working for another organisation was very clear: work even in one's own time was not permissible without line manager permission; such permission could only be given where there was no conflict of interest and not for work during hours for which the Respondent was paying. He concluded that there was no evidence to demonstrate that it was custom and practice for BTL to undertake work for other charities and that in her position, the Claimant must have known that this was not just networking. As such, he believed that the Claimant knew that her work for Mencap was wrong and it was for that reason that she sought to minimise the amount of work undertaken.

50 As for the conflict of interest allegation, Mr Moore believed that there had been clear collusion between BTL staff, Mr Cousins and Ms Sarwar. The Claimant was part of that collusion. He considered that BTL had operated as an independent entity outside of the Respondent's values. Mr Moore believed that the Claimant should have been aware of the conflict of interest in the relationship between Mr Taylor and Ms Sarwar. As a senior member of the BTL team, the Claimant should have raised the conflict with more senior managers or the Audit team. If the relationship had been above board, the Claimant would have been more open in the investigation meetings. Overall, Mr Moore was satisfied that summary dismissal was the appropriate sanction as this was theft of Barnardo's time, resources and intellectual property and the Claimant's conduct was such that they could have no trust and confidence in her.

51 Mr Moore's evidence was less impressive than that of Mr Duffy. He carried out

no independent investigation of the points raised by the Claimant and relied instead upon the investigation already undertaken by Audit and Ms Lee. The notes of the meeting do not suggest that he gave any independent consideration to the Claimant's case, an impression reinforced by his evidence at Tribunal. He accepted that he did not consider whether work for other charities fell within the primary purposes of BTL or whether Mr Clark or Mr Judd were aware of the exclusivity agreement with Tomco. In each case, however, he maintained that it would not have changed his view and that the Claimant ought to have asked for details of how the work was being charged to Mencap or to have known that the relationship with Mr Taylor and Mr Cousins was not appropriate. From his oral evidence, it was clear that Mr Moore believed that the BTL team worked very closely, like a family, in a small office and would all have known what was going on. The relationship between Ms Sarwar and Mr Taylor, even if not intimate, gave rise to a conflict of interest because it was not at arm's length. From his evidence, it was clear that Mr Moore did not approve of the exclusivity agreement with Tomco as he believed that the relationship with a supplier should be following a proper tendering process. Mr Moore accepted that he did not investigate what Mr Judd or Mr Clark had known about the exclusivity agreement as he considered both to have insufficient time in the role to make it reasonable to expect them to know. I find that both on appeal and in his evidence to this Tribunal, Mr Moore sought to justify the decision to dismiss rather than consider the Claimant's defence in an even-handed manner.

52 Ms White's appeal was heard by Mr Moore and rejected. In evidence, Mr Moore was adamant that he had not heard Ms White's appeal. From this I infer that it was not a task to which he devoted much attention.

53 Alongside the disciplinary process, Mr Clark was conducting a capability process due to the Claimant's ill-health absence. The Claimant accepts that even if not dismissed for misconduct, she not have been fit to return to work even at the date of the Tribunal hearing.

54 In or around April 2017, a replacement for Ms Sarwar was recruited. Although the Claimant remained employed at the time, she was not informed of the recruitment of what would be a new line manager nor that the BTL team had relocated to Barkingside in her absence. From this I infer that Mr Clark did not expect that the Claimant would return to work.

## Law

55 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

- (1) did the employer genuinely believe that the employee had committed the act of misconduct?
- (2) was such a belief held on reasonable grounds? And
- (3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

56 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

57 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

58 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. There is a spectrum of gravity of misconduct which needs to be taken into account in deciding what fairness requires in any particular case, also relevant will be the extent to which the employee disputes the factual basis of the allegations concerned and the nature of the defence advanced. The duty of investigation is not strictly limited to guilt or innocence, but may include points raised in mitigation. The reasonableness of the investigation should be looked at as a whole and it is not necessary for the employer to investigate every point made by the employee in his defence, **Shrestha v Genesis Housing Association Ltd** [2015] IRLR 399.

59 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the range of reasonable responses test is not a test of irrationality; nor is it infinitely wide. It is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

60 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall:

60.1 the conduct of an employee in the course of a disciplinary process, including whether they admit wrongdoing and are contrite or whether they deny everything and go on the offensive. This includes whether an employer acting reasonably and fairly in the circumstances of the evidence during the disciplinary hearing could properly have reached a particular assessment of a

witness' credibility, **Linfood Cash & Carry Ltd v Thomson** [1989] ICR 518.

60.2 disparity which may arise (i) where an employer has led an employee to believe that certain categories of conduct will either be overlooked or at least not be dealt with by the sanction of dismissal; (ii) where evidence about decisions made in relation to other cases supports an inference that the purported reason for dismissal is not the real or genuine reason; and/or (iii) decisions made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable to adopt the penalty of dismissal that some lesser penalty would have been appropriate in the circumstances, **Hadjiannou v Coral Casinos Ltd** [1981] IRLR 352.

60.3 A finding of gross misconduct does not automatically justify a finding that dismissal was within the range of reasonable responses, **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854.

60.4 Mitigating factors. These include length of service and disciplinary record, although length of service will not save an employee from dismissal in cases of serious misconduct, **London Borough of Harrow v Cunningham** [1996] IRLR 734. Another mitigating factor may be whether the employee believed or had reason to believe that what they did was permitted and, therefore, whether they were doing something wrong.

61 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

62 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

63 If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event.

64 A basic and/or compensatory award may be reduced pursuant to s.122(2) and s.123(6) ERA respectively. In **Steen v ASP Packaging Ltd** [2014] ICR 65, the EAT advised Tribunals to address (i) the relevant conduct; (ii) whether it was blameworthy; (iii) whether it caused or contributed to the dismissal (for the compensatory award) and (iv) to what extent should any award be reduced.

#### *Breach of Contract*

65 The Claimant's claim for notice pay is brought under the Employment Tribunals

Extension of Jurisdiction (England and Wales) Order 1994, article 3. It is, in general, for the Respondent to show on the balance of probabilities that the Claimant was in fact guilty of the misconduct alleged to amount to a repudiatory breach of contract entitling it to dismissal without notice or pay in lieu. To be sufficient, the conduct must so undermine the trust and confidence inherent in that particular contract of employment that the employer should no longer be required to retain the employee, **Neary v Dean of Westminster** [1999] IRLR 288. Relevant to this determination will be the nature of the employer, the role of the employee and the degree of trust required.

66 It is necessary to distinguish between the duties owed by directors of a company and its employees. A director owes fiduciary duties whereas an employee ordinarily does not, absent an express term, his duties being instead governed by the implied terms of trust and confidence and of fidelity. In this regard there is no general duty upon an employee to report the misconduct of colleagues unless such an obligation arises out of the terms of his particular contract of employment, see **Ranson v Customer Systems plc** [2012] EWCA Civ 841.

## Conclusions

### *Unfair Dismissal*

67 I have found as a fact that Mr Duffy held a genuine belief that the Claimant had committed acts of misconduct both in respect of the work for Mencap and in not disclosing the relationship between Ms Sarwar and Mr Taylor.

68 The nature of the BTL team and its previous conduct was at the heart of the Claimant's defence to the allegations. She maintained that the relationship with Mr Taylor was a long-standing arrangement, with the knowledge of the Respondent's corporate directorate. None of Ms Lee, Mr Duffy or Mr Moore investigated whether Mr Taylor had previously accompanied BTL on trips to Hong Kong or whether these trips had been signed off a directorate level with clear disclosure of Mr Taylor's attendance. Nor did any of them interview members of the retail and trading team with longer service to confirm or deny the Claimant's case that the close relationship and Mr Taylor's attendance at retail and trading events was longstanding and well known. The investigation to be carried out in order for a dismissal to be fair does not need to be perfect but it does need to be within the range of what is reasonably required. Here, the Claimant had been absent from work since January 2017 due to serious ill health, she did not have access to information which could confirm her assertions and, by the date of dismissal, it was known to the Respondent that her ill health affected her memory.

69 This was not a peripheral issue which the Respondent could reasonably have decided not to investigate: if, as the Claimant said, the close relationship between Ms Sarwar and Mr Taylor was openly known and approved by previous directors, it was not reasonable to have expected the Claimant to have reported it as a conflict of interest. If, as it appears, there was closer scrutiny of BTL's manner of operation after the appointment of Mr Clark, then it was relevant also to consider the position in April 2016 when Mr Taylor travelled to Hong Kong. If Mr Clark believed the relationship to be inappropriate where his predecessors had not, the reasonable course was to issue a clear instruction; not to dismiss for gross misconduct due to a change of opinion in

senior management. In such circumstances, I do not accept that either Mr Duffy or Mr Moore formed a reasonable belief based upon reasonable investigation on this allegation.

70 As for Mr Cousins' presence in Hong Kong, I have found that he did not fly with the Claimant and their paths crossed only briefly. Again, there was no investigation of what was known to Mr Judd in April 2016 when the trip occurred. Whilst it would have been sensible for the Claimant to have questioned the presence of a former Director on the trip, I do not accept that there was a reasonable belief of misconduct based upon a reasonable investigation in the circumstances of this case.

71 I have also taken into account that as far as Mr Duffy was concerned, the most serious misconduct was the work undertaken by the Claimant on the Mencap product range. The Claimant's case on previous work undertaken for other charities was not detailed and she did not give a clear list of other charities for whom BTL had previously produced cards, either during the internal process or even at Tribunal. However, I take into account that the Claimant had been absent from the workplace since January 2017, had limited access to relevant documents to support her defence and had a health condition which affected her ability to attend hearings. Whilst she said in evidence that she could provide a list of names, she expected the Respondent to investigate. The Respondent did not undertake any reasonable investigation into the work previously undertaken by BTL for other charities. From Mr Clark's evidence, there is some support for the Claimant's assertion that BTL had previously produced cards for other charities, either wholesale or as part of Cards for Good Causes. Whether such work did always take place pursuant to a commercial agreement and when it last occurred were relevant to the allegation of misconduct. Neither point was investigated further by Ms Lee, Mr Duffy or Mr Moore. Mr Clark was not interviewed.

72 The Claimant gave one example of work for a named charity, Mind. None of Ms Lee, Mr Duffy or Mr Moore investigated what, if any, work BTL had carried out for Mind, when that occurred, whether it was formally recorded in a commercial agreement and whether it differed in nature from the type of work done for Mencap. For all of these reasons, I do not consider that the beliefs of either Mr Duffy or Mr Moore were reasonable based upon a reasonable investigation.

73 Furthermore, section 98(4) requires consideration of whether the conduct is sufficient to merit dismissal in all of the circumstances of the case. It was not in dispute that Ms Sarwar knew about the work for Mencap but had instructed the Claimant to do it. The Claimant was not only acting with her manager's permission but in fact following an instruction given by that manager. Mr Duffy said that the Claimant should have been aware of the duty to devote all of her working time to the Respondent but did not say why, for example in reliance on which policy or contractual term. Mr Moore relied upon the provisions of the handbook as part of its case that the Claimant must have realised that what she was being asked to do was wrong. That handbook, however, requires Corporate Leadership Group approval for volunteer or paid outside work. The Claimant's work on the Mencap cards was not paid outside work but an instruction given to her in her work for BTL. The handbook provides that it is the line manager who is authorised to give approval for any other work, in other words Ms Sarwar. At times during the evidence and submissions, the Respondent relied upon the lack of written authority to the Claimant. The handbook does not require written

authority. The Claimant had a long, unblemished working history for the Respondent. Whilst the Claimant was foolish in not questioning the commercial basis for the work and keeping a proper record of the time she spent on it, her conduct in all of the circumstances was not such that a reasonable employer could regard it as sufficient to dismiss.

74 As for procedural matters, the Claimant had not wanted the investigation postponed and accepts that the Respondent made a number of adjustments to assist her in the process. The investigation was inadequate for the reasons set out above but was not biased or otherwise unfair.

75 Nor do I accept, as was suggested, that the decision to dismiss the Claimant was predetermined. Mr Duffy considered the allegations in light of the evidence available to him and reached conclusions which he believed correct on that evidence. As a result, he did not uphold part of the first allegation.

76 The Respondent denied deciding to dismiss the Claimant based upon the conduct of Ms Sarwar or of the BTL team as a whole. Whilst Mr Duffy did consider the individual conduct of the Claimant, I conclude that Ms Lee, Mr Duffy and Mr Moore also considered whether she had committed an act of misconduct in the context of the entire BTL team. The evidence of Mr Anderson was used in the case against the Claimant; contemporaneous references in the investigation report and the audit report refer to the BTL team as "close knit" and a belief that they had colluded. To that extent, I accept Mr Graham's submission that once Mr Anderson was found to have committed acts of misconduct in relation to the Mencap work and the failure to report the close relationship with Mr Taylor and Mr Cousins, it was almost inevitable that the Claimant would be too. Looked at overall, the internal process suggests that the Respondent regarded the BTL team as problematic insofar as it had operated almost autonomously under the leadership of Ms Sarwar and was not integrated into the broader retail and trading team. This led to Mr Duffy and Mr Moore deciding that the staff had colluded together and had acted in knowing breach of their obligations without fully investigating the previous practice in BTL and whether directors more senior to Ms Sarwar had known and either approved or condoned such practice.

77 In reaching these conclusions, I bear in mind that the Tribunal must not substitute its own views for those of the employer. I had the benefit of hearing detailed questioning of the Claimant and of Mr Clark, but the fairness of the decisions of Mr Duffy and Mr Moore must be considered on the evidence available to them at the time or the evidence which they would have obtained had there been a reasonable investigation. At times in evidence, the Claimant gave answers which were not clear and it was difficult to tell whether it was because of the effects of her illness or because she being evasive or even because the question had not been fully understood. However, I considered this not to be relevant to the decision on the unfair dismissal claim as the Claimant did not attend a disciplinary hearing with either Mr Duffy or Mr Moore and, therefore, neither formed any view on the Claimant's credibility based upon her oral answers to questions.

78 The claim for unfair dismissal succeeds.

79 I am satisfied that the Claimant has conducted herself in a way which was

foolish or otherwise blameworthy. As set out above, the Claimant was foolish in not questioning the commercial basis of the Mencap work and in not keeping a proper record of her time spent. The Claimant was also foolish in failing to provide a more detailed list of charities for whom BTL had previously worked during the course of the disciplinary process. Whilst the Respondent failed to investigate, the Claimant's lack of detail caused or contributed to the belief that there was no substance to her defence. I am also satisfied that the Claimant's initial response that the relationship between Ms Sarwar and Mr Taylor was "business only" was not as open as it could and should have been. Whether or not intimate, they were clearly closer than a business only relationship and more akin to friends or companions (as the Claimant later described it). This foolish failure to be more transparent and the contradiction with the answers of Mr Anderson contributed to Mr Duffy and Mr Moore's belief that the Claimant was hiding something that she knew was wrong. The extent of any reduction to the basic and/or compensatory awards will be considered further at a remedy hearing.

80 As to whether or not there should be a deduction to reflect the possibility of a fair dismissal in any event, this will turn on what difference a proper investigation would have made. On the evidence before me, and had Mr Clark been interviewed, there would have been some support for the Claimant's case that work had previously been undertaken by BTL for other charities. On the other hand, his evidence was that it had not been recent. It is unknown to me whether or not there would have been any evidence of commercial agreements for earlier work. Nor can I know what the Mind networking work entailed. In principle, I consider that there is some possibility that there could have been a fair dismissal in any event but the extent of any reduction must be considered with further evidence and submission at a final hearing.

#### *Wrongful Dismissal*

81 In deciding whether or not the claim for wrongful dismissal succeeds, it is for the Respondent to show that the Claimant committed a repudiatory breach of contract. The Respondent's case is essentially that the Claimant's failure to disclose the wrongdoing of Ms Sarwar, of the BTL team as a whole or her own wrongdoing amounted to a breach of the contract. The Claimant as an employee was not subject to a general duty to report the misconduct of colleagues and there was no contractual term requiring her to do so, see **Ranson**. Although a senior manager, the Claimant was subordinate to Ms Sarwar and I am not satisfied that the Respondent has established any aspect of her particular job which imposes a higher duty of fidelity. It is therefore the obligations set out in the handbook and the implied term of trust and confidence which apply.

82 Overall, I considered the Claimant to be an honest witness. Whilst there were some inconsistencies in her evidence, I considered these to be the product of ordinary frailties of human memory exacerbated by the after effects of her stroke. For example, the Claimant initially appeared evasive when asked about whether Ms Sarwar and Mr Taylor were in a relationship, her reply was to ask what was meant by a relationship. When the question was put again in a more straightforward manner, were they friends outside of work, she immediately replied that they were. Observing the Claimant as she gave evidence, I found her to be a witness who tried to give honest and open answers but who at times struggled to understand what was being asked of her. I do not find that there was any inconsistency sufficient for me to infer that the Claimant was

aware of her alleged wrongdoing.

83 As for the allegations of misconduct, I accepted the Claimant's evidence that she believed that there was no conflict interest in the closeness of the relationship between Ms Sarwar and Mr Taylor because it had been happening for so long and was known to so many people. For example, the travelling together to Hong Kong, staying in the same hotel and eating together had happened every year since the Claimant joined. Nor was the short overlap in the visit of Mr Cousins and the Claimant in Hong Kong sufficient to demonstrate a repudiatory breach of contract.

84 The handbook requires an employee to give their line manager details of voluntary work or of paid external employment prior to acceptance. The authority of a member of the Corporate Leadership Group was only required for paid employment outside of the Respondent. The Claimant was not paid by Mencap for her work on their products nor was she 'volunteering'. This is not a case of unauthorised external paid work which required CLG approval. At its highest, the handbook states that whilst employed the employee must not engage in any other work without the prior agreement of the line manager. As set out in paragraph 73 above, there is no requirement that the agreement be in writing. On the facts of this case, it was Ms Sarwar as the line manager who instructed the Claimant to undertake the Mencap work. There was no breach of the requirements of the handbook by the Claimant.

85 As for the implied term of trust and confidence, I am satisfied that the help provided by the Claimant was on the instruction of Ms Sarwar. Even if Ms Sarwar was keen to assist her previous manager and with whom she maintained a friendly relationship, the instruction to the Claimant was given to the Claimant by a person with authority to act on behalf of BTL and by consequence the employer. The work was relatively minimal in extent and its financial implication to the Respondent. Work had previously been done by BTL for other charities. I have found above that it was foolish of the Claimant not to have questioned the commercial basis of the arrangement or to have kept a record of her work but I am not satisfied that this was of such a magnitude as to amount to a repudiatory breach of contract. The Claimant's conduct did not so undermine the trust and confidence inherent in her contract of employment that the Respondent should no longer be required to retain her. The wrongful dismissal claim succeeds and the Claimant is entitled to notice pay.

### **Next steps**

86 The case will now be listed for a remedies hearing. Within 28 days of receipt of this Judgment, the parties must:

- 86.1 provide dates to avoid for a one day hearing between November 2018 and February 2019.
- 86.2 Exchange documents no later than 28 days prior to the hearing, specifically all documents relevant to the assessment of any reduction for contributory fault and/or **Polkey**.
- 86.3 Exchange any additional witness statements upon which they intend to rely no less than 14 days before the remedy hearing.

87 If any further case management orders are required, the parties should write to the Tribunal and a telephone Preliminary Hearing will be listed.

Employment Judge Russell

31 August 2018