Case Number: 3202382/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Miss L Tubero**

Respondent: **Redbridge Citizens Advice Bureau**

Heard at: **East London Hearing Centre**

On: **10 & 11 April 2019**

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

Representation

Claimant: Mr Hammond (Solicitor)

Respondent: Mr Davies (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

(1) The Claimant was unfairly dismissed.

(2) The Claimant is entitled to a remedy for her successful claim.

Remedy:

The Respondent shall pay the Claimant: -

Notice pay -	**£341.22 (weekly gross pay) x 8**	**=**	**£2,729.76**
Basic Award -	**£341.22 x 23.5**	**=**	**£8,018.67**
Compensatory Award -	**£1,287.00 (monthly net pay) x 6**	**=**	**£7,722.00**

(3) The Respondent is ordered to pay the Claimant the total of = £18,470.43

(4) The Tribunal makes no Order on the Claimant's application for costs.

REASONS

1 The Claimant brought complaints of constructive unfair dismissal and breach of the ACAS Code on grievance and disciplinary procedures. The Respondent resisted the claim. There was an agreed list of issues which is referred to in the decision section of these reasons.

2 The Tribunal apologies to the parties for the delay in the promulgation of the judgment and reasons in this case. This is regretted and was due to pressure of work on the Judge and her ill health.

Evidence

3 At the hearing, the Tribunal had live evidence from the Claimant and from Vanessa Guthrie former Chief Executive Officers of the CAB. There was a witness statement from Mark Kirk who had also been a CEO at the CAB and who had been unable to attend the hearing as he was abroad. The Respondent's witnesses were Barbara Adams, Macmillan Support Officer and staff representative on Trustee Board; Diana Middleditch, Trustee, Honorary Treasurer; and Bernard Hunter, Chair of the Board of Trustees.

4 The Tribunal had signed witness statements from the witnesses and an agreed bundle of documents.

5 From the evidence at the hearing, the Tribunal make the following findings of fact. The Tribunal only made findings of fact on those matters that relate to the issues in the case.

Findings of Fact

6 The Claimant began volunteering at the Respondent in 1998. The Claimant was employed by the Respondent from February 1999. During her employment with the Respondent the Claimant had been Office and Finance Manager and at the time of her resignation, she was the Office Manager. Her hours were increased to 35 hours a week and she signed a new contract of employment on 29 January 2002 which stated that her hours were full-time. In May 2004, the Claimant became Bureau Administration Manager. The initial appointment was for a period of six months. That position was extended to March 2005 and then made permanent.

7 In May 2005, the Claimant took over responsibility for managing the Respondent's finances from the finance manager. This was for 35 hours per week and was confirmed in writing in July 2005. In July 2011, Alan Jeffery, Vice Chair of the Respondent's Trustee Board wrote to the Claimant to inform her that her hours were going to be reduced. The letter set out that this was happening following conversations between her and

management at the beginning of the year, that the restructuring the organisation was likely to involve a reduction in hours for the office manager's post. The letter stated that the Respondent needed to restructure the way it operated as its funding had reduced and it wanted to devote significantly more resources to improve and maintain the quality of advice provided to users. There had been further detailed discussion on 14 July on the Claimant's current duties and how those would be altered following the change in hours.

8 The letter stated that the Claimant's contractual hours would be reduced from 35 hours per week to 21 hours from 1 August 2011 and there would be a concurrent reduction in her pay and holiday entitlement as a result. The Claimant's job description was revised in agreement with the Board and the revisions were confirmed in that letter. The Claimant had to sign a copy of that letter and return it to the Board by the end of July. The letter recorded that there was also an agreement between the Claimant and the Board that she would be entitled, on signing the letter to a payment of £2,000 calculated and paid on the same basis as a redundancy payment for the reduction of her post by two fifths. On 29 July 2011, the Claimant signed a copy of the letter confirming her agreement to the change in hours.

9 On 1 September 2015 the Claimant's hours were increased from 21 to 28. This was stated to be until 31 March 2016. On 4 May 2016 the then CEO, Vanessa Guthrie wrote to the Claimant as follows:

> *"I am conscious that there is nothing in writing about your current hours, so for clarity I am sending this now. For some time you have been helping the Bureau by working more than your contracted hours and for that I am very grateful. Your current contracted hours are 21 hours/week, current (temporary): 28 hours/week.*
>
> *It would not be sensible to formalise the current hours now, just as we are to embark on a consultation about changes associated with the proposed new way of working, which will have budgetary and staffing implications. Therefore, I would be very pleased if you could continue as at present until after that exercise, when we will formalise all contractual matters.*
>
> *Thank you once again."*

10 Ms Guthrie's live evidence was that the Claimant had been contracted to work 21 hours. She stated that when she wrote this letter, she was aware of the July 2011 letter to the Claimant, referred to above. Her clear evidence to the Tribunal was that she did not give the Claimant a written contract for 28 hours whilst she was CEO although the Claimant was working 28 hours at that time. Her belief was that to keep the organisation running and to sustain the work that was needed for the future, the Respondent would have needed the Claimant to continue to work 28 hours. Part of the recovery plan was to regularise the situation so that the Claimant would be contracted to work 28 hours in the future. She was also aware that the Claimant had given up income elsewhere in order to work 28 hours for the Respondent, as requested but that it had not been formalised.

11 Ms Guthrie's evidence was that her intention in writing the letter was to inform the Claimant that she would like her to continue to work 28 hours and that these would be her contractual hours in the future, provided that the Respondent got the funding to continue. She confirmed that she was acting on behalf of the Respondent when she wrote the letter.

12 There was no further correspondence between the Claimant and the Respondent about her working hours. The Claimant continued to work 28 hours per week until she received the next document, which was the Respondent's notice to the Claimant dated 27 February 2018 that her hours would be reduced from 28 to 21 hours per week.

13 The Citizens Advice Bureau (CAB) provides advice to residents on various matters including their legal rights, welfare benefits, health and benefits, housing rights and employment rights. Each adviser post was focussed on a different area of law/rights and was separately funded. For instance, the Macmillan post was funded by a hospital Trust and according to Mr Hunter, at least 90 percent of that funding had to be spent on the direct work of the Macmillan project, which was the provision of advice on health and benefits. Similarly, the other funders of the other projects are likely to have required their funding to be spent on the particular post which they had agreed to fund.

14 There was no direct funding for the Claimant's post. Each funding stream contributed a small element which went to making up the funding for various administrative posts, including that of the Claimant's post and the CEO and the costs of the central function of the Bureau; i.e. rent and other running costs. The Respondent's evidence was that it was not allowed to spend more than 10% to 15% of each funding stream towards covering central costs such as premises, office costs, the cost of having a CEO, the finance/office manager and supervisors.

15 The Respondent's pay structure was not organised or streamlined. There was no pay parity between members of staff or a recognised pay structure. Some staff who had been recruited or appointed many years before 2018 were paid less than their peers. Wages were not necessarily related to qualifications or experience or length of service although some were aligned to local authority pay scales. Mr Hunter and the Board were conscious that if it wanted to be fair to all employees, this was an issue that had to be addressed. Ms Guthrie confirmed in her evidence that the issue of pay parity was one of the issues that the Respondent had to tackle. Two additional factors contributed to the situation. The CAB was a place where an individual could start to work as a volunteer and then transition between various jobs as a paid employee and as one became qualified or more experienced in different areas of work. There were opportunities for learning and growth. At the same time, funding was frequently precarious and staff often had to work under threats of funding cuts or of funding ceasing for one area of work and being diverted to another area of work or from another provider, depending on the priorities/agenda/budgets of external funders.

16 Ms Guthrie identified the need to regularise the Claimant's situation although the Respondent could not afford to change her contract to 28 hours at the time. There was a need to regularise pay among advisors doing essentially the same work on different projects and the Tribunal finds that this was the reason behind the Respondent's decision to adjust wages for two members of staff at the end of 2017/beginning of 2018.

17 One member of staff, Ms Choudhary, had started work with the Respondent as an unpaid volunteer and had then been appointed as a junior adviser. She went on to secure qualifications and built her expertise over the years. The Respondent acknowledged that her wage was on scale point 25 when her job was indistinguishable to that of another adviser who on scale point 27. The Finance Sub Committee decided to increase her wage to reflect the level at which she was working and it is likely that the decision was taken before there was an awareness of the financial situation that later developed.

18 The other individual, Ms Adams, was on a scale point 23 and was the other lowest paid adviser within the Bureau. Scale point 23 was very low considering her job. The Finance Sub Committee proposed that her wages should be increased to a scale point 25 and this was accepted by the Board.

19 The Respondent's evidence was that these two advisors were on the lowest advisor grades within the CAB and that even after these increases they continued to be so. The Respondent was trying to get closer to parity of pay for the advisor staff in the Bureau. That was the reason for the pay rises. There was no evidence that these pay rises were done because of favouritism from Mr Hunter. The pay rises were approved by the Board and were not done solely by Mr Hunter. Mr Kirk in his witness statement confirmed that the pay rises were done in recognition of the success of their individual projects, which meant that the increases could be funded from their project funding and not from central funds.

20 Mr Kirk and Ms Guthrie's evidence was there needed to be a whole root and branch review of the paid staff structure which needed to be conducted in an open and transparent way. The Board did not get around to doing so before the next financial crises occurred.

21 The Claimant assisted the CEO, Vanessa Guthrie the CEO in putting together a recovery plan for the CAB and in her attempts to get it organised and on a firm financial footing.

22 Ms Guthrie's evidence was that during her time at the Bureau she tried to rescue what she considered to be a failing organisation by putting together a recovery plan which was accepted by the Board and which she took to the council for increased core funding. She recalled Mr Hunter commenting that all the Claimant did was order paper clips and staples and that he was not clear what she did within the organisation. Ms Guthrie was clear that the Claimant's role within the organisation was crucial. Her evidence was that Mr Hunter had not understood how crucial the Claimant's role had been to the organisation. The Claimant was the company secretary, she prepared the management's accounts, the end of year accounts and assisted the running of the organisation. Ms Guthrie the Claimant's assistance in helping her to put together the recovery plan.

23 Her evidence was that at the time she came in to work with the Respondent it was an organisation on its knees. It was insolvent and the quality of the work it produced was poor. She carried out an audit to assess the skillset of the membership and the Board level. She recognised that there were gaps in knowledge and expertise and arranged training. Governance of the organisation was one of the things highlighted as needing some attention. The Council was the Respondent's largest funder at the time and a business case was made to the Council for money to implement the recovery plan.

24 Her evidence was also that Mr Hunter overstepped his boundaries as the Chair of the organisation. He frequently treated the Claimant and other members of staff as his personal assistants and asked them to carry out tasks for him which sometimes conflicted with what she had asked them to do or with their jobs. She stated that he treated the Claimant poorly and that she sometimes had to ask him to stop doing so. Mr Hunter could not recall an instance when he had been asked to stop.

25 Ms Guthrie confirmed that she enjoyed working for the Respondent and that she bore no ill will towards it, even though she had not been paid the last payment that she had been expecting because of extending her contract with it. She believed that she had an agreement with the Respondent for her to be paid a performance payment but the Respondent had not honoured that agreement.

26 The Respondent had agreed disciplinary and grievance procedures, a copy of which was in the bundle of documents. The grievance procedure was contained in the staff handbook.

27 The grievance procedure stated that where a member of the staff has a grievance, they should in the first instance discuss it with the Bureau Manager who would note details of the grievance. The Bureau Manager would then consider it and if necessary, investigate the matter. The Manager should reply to the member of staff as soon as possible and in any event, not later than ten working days after the grievance had been raised, stating what action s/he intends to take, if any. If the matter is not resolved or if the employee is not satisfied with the reply given or if the grievance concerns the Bureau Manager, the employee can within five working days raise the matter with the Board's Personnel Sub Committee. At that stage, the grievance should be put in writing and should inform the Sub Committee who the initial grievance had been referred to. The Personnel Sub Committee would then have ten working days to arrange a meeting to resolve the grievance which would be attended by the employee, a trade union representative or work colleague if requested and, if applicable, the Bureau Manager. As soon as possible after that meeting and in any event not later than five working days thereafter, the Sub Committee will ensure that the employee receives in writing its response to the grievance.

28 If the employee still feels aggrieved, he must write to the Chair of Bureau Trustee Board within five working days of receiving the letter arising out of the meeting. Where practicable, the Bureau Trustee will then arrange for a panel of up to three members of the Board, excluding Bureau volunteer staff, to consider the matter and that panel will meet within 15 working days of receipt of the letter from the employee. Arrangements will be made for all those who attended the Personnel Sub Committee meeting to attend this meeting.

29 The decision of that panel would be final and would be communicated to the employee within five working days.

30 The handbook also dealt with the Respondent's sickness scheme. The Bureau would pay Statutory Sick Pay in accordance with the relevant government regulations when an employee is absent from work due to sickness or injury and if they satisfied the necessary conditions.

31 If an employee is sick, they are to advise their immediate supervisor immediately of any absence due to sickness or injury by 10.00am on the first day of sickness/injury. That employee must complete a self-certification statement if they are sick for up to seven days. If they are sick for more than seven days, they must obtain and submit to the Respondent's manager, a doctor's certificate covering the period of absence. If the absence due to sickness or injury continues after that certificate has expired, then a further certificate must be obtained.

32 Both parties confirmed that Redbridge Citizens Advice Bureau had gone through many financial crises over the years. By January 2018, it was apparent that there were serious financial issues with the continuation of the organisation in the way that it was constructed. There was a strong possibility that the Respondent could potentially close. A meeting between the board and staff was arranged for the evening of 23 January 2018 to discuss the financial situation.

33 The Claimant having worked for the Respondent for 19 years was aware that there had been frequent financial crises over the years and that it had gone through the threat of closure/redundancy in the past. The Tribunal was not told that the Claimant's role had been identified as possibly redundant in earlier financial crises but it is likely that she had experienced financial uncertainty within the organisation before this time.

34 There was a dispute between the Respondent and Mr Kirk's witness statement over a few matters. He stated that on the day before the meeting, he had advised Mr Hunter not to give out to staff a letter which included details of each member of staff's possible position in the restructure and which indicated which individuals were at risk of redundancy. Mr Kirk's evidence was that he believed that prior to the letter being given out, there ought to be individual consultation with the members of staff who were at risk. Mr Hunter denied having such a conversation with Mr Kirk.

35 Mr Kirk's evidence was that he had drafted individual letters for each member of staff in line with his recommendations. Also, that he advised Mr Hunter that the proposed course of action of sending out one letter to all staff that included the names and positions of everyone involved; would be open to criticism. Mr Hunter did not recall seeing any draft individual letters.

36 The Tribunal finds that Mr Kirk was one of the staff members whose posts were at risk at the time. Although he stated in his witness statement that he had drafted individual letters for each member of staff his witness statement did not say that he showed the letters to Mr Hunter or that he gave them to Mr Hunter to give to staff. It is unlikely that he did.

37 Mr Hunter attended the Respondent office on 22 January to have conversations with the four individuals who had been identified as being at risk of redundancy. He had separate conversations with Mark Kirk, the Claimant, Stephen Young and Joy Paul. Those were the four individuals identified in the letter dated 23 January as people who are at risk of redundancy in the initial stages of any redundancy process. He agreed in live evidence that it might have been because of Mr Kirk's suggestion that individual consultation meetings should be held that he came into the office on 22 January and spoke to individual members of staff.

38 Mr Hunter categorised those conversations at meetings but the Tribunal finds it likely that as the Claimant did not appreciate that she was in a redundancy consultation meeting, he simply came over to her desk and spoke with her about what was going to happen at the meeting on the following evening. At the time, he did not categorise their discussion as a meeting and did not inform her that she was at individual risk of redundancy. He agreed that he did not go into details when he spoke to members of staff and that it was unlikely that he mentioned the word redundancy when he had these individual discussions with them. He was not aware that the Claimant will not be at the

meeting on 23 January, until he spoke to her that day. The Claimant was unable to come to the meeting as her partner was having surgery.

39 Mr Hunter explained to the Claimant that the meeting would confirm the Board's plan. He told the Claimant that he did not expect the Respondent to close but that it was obliged to consult with staff regarding the possible consequences. He spoke to her in general terms and did not tell her how it was proposed that any individual post might be affected. He did not tell her that her post had been identified as one of those that would be affected in the first wave of redundancies should the financial situation not be resolved.

40 It is likely that having had those conversations with the identified members of staff, Mr Hunter may well have considered that he had followed Mr Kirk's advice.

41 Mr Kirk attended the Board meeting on 23 January 2018 along with the other members of staff. Mr Hunter chaired the meeting. In the meeting, Mr Hunter presented his plan to the Board. During the meeting Mr Hunter referred to the Claimant and the possibility that she could be made redundant as part of his plan to keep the Bureau open if there was no additional funding. Mr Kirk later described to the Claimant that Mr Hunter had referred to her in a flippant manner and had suggested that the Respondent could get along without her and that all it would need to do was to hire a book-keeper to do its finances. The Respondent denied that Mr Hunter had been flippant. Ms Adams who had also attended the meeting as the staff representative on the Board, stated that Mr Hunter had not referred to the Claimant in a flippant manner but had informed the meeting that all roles were at risk of redundancy and that in the event of no further funding being secured, the Respondent would close.

42 Her perception was that the general message was that it was a closure budget that were being put to staff and that staff were told that you would all be at risk and that legally, we must inform you of that at this stage. It may be that because Ms Adams' role was not discussed as potentially redundant, she did not take note of the discussion concerning the Claimant. She also recalled that Mr Kirk talked about the proposed reduction in his role and that he would have expected a larger reduction as the priority would be to focus the money on those giving advice. She remembered that everyone was in shock as they were talking about closure and that what was being discussed was the worst-case scenario rather than an imminent proposal.

43 Although the Tribunal did not have live evidence from Mr Kirk, Mr Hunter's evidence was that Mr Kirk was unlikely to be lying as he knew him to be an honourable man and that he would have stated it as he saw it. Mr Hunter confirmed that it is likely that he did mentioned the Claimant's name in the meeting although he denied that did so pointedly.

44 Members of staff were also given a letter, which appeared at page 68 – 69 of the bundle. That letter stated that despite the best efforts of the board and Mr Kirk, the Respondent still did not have confirmation from the local authority for the following year's funding. The Respondent had eaten into its reserves by choosing to maintain staff and activity levels over the past two years. It had expected that its income would increase, which had not happened and instead it was expected that by the end of the financial year the reserves would have been reduced to the point where they would just be able to cover the costs of closure, should that be necessary. The Respondent therefore had to make provisional plans for redundancies.

45 The letter contained a table setting out the '*At risk Status'* for each member of staff. The CEO (Mark Kirk), Office Manager (the Claimant) and Senior ASS roles were at the top of the list as roles for which funds would be severely restricted or reduced from April i.e. the beginning of the next financial year. Next to their names it stated that they were on the list as their posts were paid for from unrestricted income, including overheads from projects, which might be severely reduced from April. There was then a statement next to each of the 4 posts with suggestions as to how the Respondent would manage without them. Against the Claimant's name, there was a statement that the Respondent would need a book-keeping service as a minimum, which could in theory be provided externally. This was similar to what the Claimant was told that Mr Hunter had said during the meeting.

46 The Claimant had not been given this letter prior to the meeting. She had not been aware that her name would appear in any document given to other members of staff or that the Respondent was going to discuss its opinion that her job could be done by engaging an external book-keeper.

47 The letter went on to refer to all the other post within the organisation and set out the possible reason for them being at risk. The adviser posts were last on the list, which indicated that they would only be at risk if the particular funding for those posts did not continue. The letter then went on to say:

> *"For at risk posts, before redundancy is considered we would energetically seek to have other providers (probably CABs) take over our work, and our staff under TUPE, and our income."*

48 The letter suggested that discussions could be held with staff in any way they wished, either on a one-to-one basis and/or groups, in writing or in person with whomever they would like to discuss these matters. The letter stated that it was all open to discussion and change and that all staff views would be central to the Board's final decisions. The letter stated that any member of staff who wished could be shown the financial and budget planning details and have them explained to them. It stated that the Board's priorities were to continue to secure the healthy future of the Respondent, to support members of staff and work with them to achieve what was best for them in the circumstances, to retain a CEO to see the Respondent through difficult times; to fulfil contractual commitments to funders and to maintain whatever level of drop-in advice service as could be afforded within the budget.

49 The letter then summarised the worst-case scenario if further funding was not forthcoming. In that scenario, the organisation would have to wind down and close the Bureau in a structured, planned a way, starting in April. Although closure was not expected, the Board considered that it was necessary to plan for it. The structured closure would begin with the CEO position being reduced from 21 to 18 per week, making the office manager position redundant and using a book-keeping service on one day a week, reducing the senior ASS and ASS post and securing the other adviser post while the organisation continued to exist, with possible TUPE transfers to another provider or until the individual funding ran out.

50 Members of staff were advised to contribute any ideas that they had for achieving budgets and keeping the organisation open and the letter informed staff that it would keep

them informed of any significant developments. It is likely that this letter was handed out to members of staff and discussed at the meeting on 23 January. The Claimant did not get her copy of the letter until later as it was posted to her.

51 When she arrived at work the next day, Mr Kirk asked to speak to her in his office and told her what had happened at the meeting on the previous evening. He told her that Mr Hunter had explained that the Claimant would be made redundant and that in future, the Respondent would be using an outside book-keeping company to carry out her role. He told her that Mr Hunter had been flippant in his statement that the Respondent did not need her and that it could do without an office and finance manager. The Claimant was horrified.

52 Following her conversation with Mr Hunter on 22 January the Claimant believed that the meeting was to update all members of staff on the Respondent's financial situation. She had not expected there to be discussion about hers or anyone else's personal situation. When she finally received the letter, she saw how it had been outlined but until then, from the reports she had about the meeting from Mr Kirk and later in the day from other members of staff, she believed that she was going to be made redundant.

53 The Claimant was also upset that her personal situation had been discussed at the meeting in this way. She was upset to find out that Mr Hunter was prepared to publicly state that he did not consider that her role was required within the organisation and that she could be replaced by a one day a week book-keeper. She was also upset that she had no prior notice that she was going to be discussed in the meeting and had not had an opportunity to prepare for that. The Claimant believed that her right to confidentiality about her individual situation had been breached. She was approached by several members of staff during the day who wanted to tell her how upset they were by the way in which she had been discussed during the meeting on the previous evening.

54 The Claimant was upset after she spoke to Mark Kirk and other colleagues about the meeting on 23 January. In his witness statement Mr Kirk described her as being '*beyond distraught'*. It is likely that the way in which Mr Kirk told her what happened in the meeting was unhelpful in that he spared no details. The Claimant was so upset that she wanted to go home. Mr Kirk released her to go home and advised her to see her GP. The Claimant did so. She self-certified her sickness absence from Monday 29 January until Thursday 1 February and then sent the Respondent a sick note from her GP for the period 5 February until 7 March inclusive.

55 While the Claimant was off sick she was asked to provide password details to enable work to continue in the office. She also helped the Respondent to find missing documents and answered other queries from Mr Kirk and other members of staff. It was clear from the hearing that the Claimant was committed to the Respondent. She had worked there for 19 years.

56 During the Board meeting on 23 January, it had been proposed that there would another meeting with all staff in about four weeks' time. However, staff preferred to have individual discussions with the Board and Ms Adams as the staff rep wrote to the trustees to let them know of staff members' preference.

57 Shortly after that meeting, there was a proposal that the Respondent could relocate the Citizens Advice Bureau to the library on a rent-free basis. This would dramatically cut costs as they would no longer need to pay rent for premises, which had been a significant overhead. This would make a big difference to the Respondent's finances. Once the Board decided that it would take up the offer of space at the library, its financial situation changed again and the risk of redundancy was lifted.

58 There were copies of emails in the bundle which showed that Mr Kirk kept in touch with the Claimant while she was off sick. By email dated 8 February he asked whether he could copy her into notes of meetings that were happening regarding the negotiations with Redbridge Council and the Respondent's funders as there was a lot going on and he wanted her to be kept up-to-date. The Claimant replied to confirm that any updates would be welcome.

59 On 23 February, Ms Adams emailed the Claimant to forward information from Mr Hunter which advised her that there would no longer be any redundancies but that her working hours may be reduced with a corresponding reduction in salary.

60 On 27 February 2018, Mr Hunter wrote a note to all members of staff. The Claimant's copy was in the bundle. In that note, he indicated that the Respondent had a recent proposal to move to the library and having informed staff about it, it had not received and feedback or questions from them on that proposal. He stated that the Board were now committed to moving the Respondent's base to the library and was confident that it would not close. The Board intended to draw up a balanced budget for 2018/2019 which would secure its future, albeit with reductions in some staff hours. He stated that that as things stand, the Claimant's hours would need to be reduced from 28 – 21 per week. He indicated that this will take effect after a notice period of 12 weeks starting from 27 February 2018. He asked her to consider the letter as formal notification of the above reduction in hours. He indicated that the Claimant's hours would be reinstated if and when it was possible to do so. The letter ended with a statement that the Board was very grateful to the Claimant for her continued support and commitment to the organisation at this difficult time and that it looked forward to working with her in what should be an exciting future.

61 An email dated 5 March 2018 from Mr Kirk to the Claimant confirmed that the letter from Mr Hunter was enclosed with it and that Mr Kirk had advised Mr Hunter that he should send an individual letter to all paid staff to notify them of the change in the Respondent's finances and their positions. The Claimant confirmed in her reply email dated 6 March that she had received the email dated 23 February from Mr Hunter which had been forwarded to her by Ms Adams.

62 On 7 March, Mr Kirk emailed the Claimant to confirm that he was glad that she was returning to work on the following day; her sick certificate having expired. Mr Kirk informed her that there was going to be a staff meeting on 8 March which would be chaired by Mr Hunter.

63 Mr Kirk intended to conduct a return to work interview with the Claimant when she returned to work on 8 March. However, he noticed that although she was back to work she was still upset and he described '*not up to it'*. The Claimant indicated to Mr Kirk that she wanted to be made redundant and that she could not continue to work for the

Respondent. She asked him to discuss her request for redundancy with the Board. She considered that the Respondent's handling of the redundancy situation had made her position untenable.

64 Mr Kirk raised the Claimant's request to be made redundant at the Finance Sub Committee meeting. The Board did not understand the Claimant's position as there was no redundancy situation. She was asked why she wanted to be made redundant. The Claimant felt that she had been belittled and humiliated in the meeting of 23 January.

65 The Board decided that as there was no longer a redundancy situation, they could not pay the Claimant a redundancy payment as this would eat into the Respondent's reserves and the Respondent would have to recruit another office manager as the post was not redundant. The Board discussed how much money the Respondent could offer the Claimant if she wished to resign and whether that offer would be of two or three months' salary. Mr Kirk fed back the Finance Sub Committee's decision to the Claimant on or around 5 April. She was told that the Directors did not want to make her redundant as the costs of redundancy had not been included in 2018/2019 budget but they recognised how she felt and could offer her around two months wages, if she wanted to leave. Mr Hunter's evidence was that neither he nor the Board wanted her to resign. On 11 April Mr Kirk spoke to her again and told her that the Board wanted to know why she wanted to leave.

66 On 19 April, the Claimant asked to speak to Mr Hunter. She asked him when she could expect to hear about her request for redundancy. Mr Hunter confirmed that the Respondent could not offer her redundancy as the Respondent was no longer closing down and that Mark Kirk ought to have told her. The Claimant told Mr Hunter how hurt, embarrassed and humiliated his actions in January had left her feeling. Mr Hunter apologised for how his words had affected her. In her witness statement the Claimant stated that he also told her that as far as he was concerned, she could leave the next day and all that he needed was her passwords and access to her computer files. She felt that this was consistent with his previous statements and showed how little he thought of her as an employee. Mr Hunter did not refer to that part of conversation in his witness statements or in his live evidence. It is likely that whatever words Mr Hunter used in the conversation with the Claimant on 19 April did not help the situation. At the end of their conversation, the Claimant was not reassured of her position within the organisation or her value to the Board and had not changed her mind about wanting to leave.

67 On 16 May, Mr Hunter arranged to meet the Claimant in the library café. The Citizens Advice Bureau had by then moved to share space in the library. The Claimant had organised the move.

68 The Claimant and Mr Hunter met in the coffee bar at Ilford library. Mr Hunter advised the Claimant that Mark Kirk had resigned from his post as the Respondent's CEO. The Respondent's position on this conversation was that Mr Hunter's sole objective was to welcome the Claimant back to work and offer her an opportunity to promote her career. The Claimant was the first to be told that Mr Kirk had resigned although she already knew about it. The Board wanted her to know that there were opportunities for her to develop her career. The Claimant was told that she could take on some of the tasks previously done by Mr Kirk but that there was no funding to increase her salary to pay her to do so. She was told that she would gain valuable experience which would afford her the

opportunity to apply for more senior roles in future. The Claimant later told Mr Kirk that Mr Hunter had said to her that she could be the Chief Executive if she wanted. It is likely then that he did say to her that taking on these extra tasks could assist in her career. However, the Claimant considered that she was being asked to take up more tasks as an unpaid '*volunteer'*. She was unhappy about that. She felt that the Respondent should pay her to do so.

69 As Mr Hunter admits in his witness statement, the meeting went badly wrong. The Claimant pressed him about being paid for doing additional tasks. She was aware that the Respondent had increased Ms Adams' and Ms Choudhary's pay. Mr Hunter's live evidence was that this occurred just before the Respondent became aware of the seriousness of the financial situation it faced at the beginning of 2018. The Claimant felt that the pay increases for those advisors happened because of favouritism from Mr Hunter. She was also aware of the notice she had received that her hours were about to be reduced. That was due to take effect on 22 May and was going to result in a reduction in her salary. In that context she felt that the Respondent's attempt to off load some of the CEO's tasks on to her without additional pay while others got pay increases was humiliating and degrading to her. Money was of particular concern to her at the time as her partner had lost his job because of his ill-health, which meant that she was the only breadwinner in the family.

70 As already stated, it was not unusual for someone to work at the Respondent as a volunteer and then move between jobs or gain employment using their newly acquired skills. Ms Choudhary among others had started work with the Respondent as a volunteer and then became a junior advisor and later, after acquiring more experience/qualifications had gone on to become a more senior advisor. The Claimant herself had started at the Respondent as a volunteer and then applied for the administrative manager's post. The Respondent had a history of promoting and encouraging individuals to volunteer in various capacities which could lead on to jobs or increased responsibilities within the organisation.

71 The Claimant's recollection of the meeting on 16 May was that she referred to the pay rises that had been given to Ms Choudhary and Ms Adams and Mr Hunter stated that the Respondent could not afford to give everyone a pay rise. He then leaned in towards her and said that he believed that she was already overpaid for what she did. Mr Hunter denied leaning in. His evidence was that he stated that she was well paid for what she did. He also agreed that he stated that if the Respondent was to replace her it would be at a lower grade and for a lower salary. The Claimant's evidence was that she distinctly recalled the word '*overpaid'* being used and that she was prepared to take a lie detector test about it. Even though there is a dispute over whether he said that she was overpaid, the Tribunal concludes that it is highly likely that he did say it, from what he agreed that he did say and from how strongly the Claimant reacted to it.

72 On 23 May the Claimant wrote a long email to Mr Hunter which she copied in to the CEO and Alan Jeffrey who was also on the Board. She addressed it '*To Bernard'* and stated that she felt demoralised and unhappy after the meeting and that it left her feeling humiliated and undervalued. There was a dispute between the parties over whether this letter was a grievance letter. It was not titled a grievance letter and there were references in it to '*you'*, meaning Mr Hunter.

73 In the letter the Claimant confirmed that she was offered the opportunity to take on additional tasks and told that she did not have to do so. She was told that if she did not want to take them on, her role would stay the same. She was also asked for her opinion on what type of person the Respondent should recruit to the CEO position. Mr Hunter told her that Ms Guthrie had mentioned to him that she had the potential to one day be the Respondent's CEO. She considered that he had belittled her in public by telling her that she was overpaid and that the effect of the reduction in her hours to 21 was that she would lose approximately £6,000 per annum. She complained about the changes to her job and the reductions in hours she had experienced over the years. She referred to the 23 January meeting and that the reports she had of the discussion had upset her so much that she had become ill with work-related stress and needed to be off sick for a month. Although she had been told that her hours would reduce, there had been no discussion with her as to what days she would work. The Claimant informed Mr Hunter that she had decided that she was going to work Monday to Wednesday.

74 The Claimant stated in the letter that she had struggled to come to work and that despite being a hard-working and reliable employee over the years she was saddened and disappointed that she had been treated with what she considered to be disrespect. She felt self-conscious that Mr Hunter and others thought that she was not worth the money she was paid. She stated that her self-confidence was shattered and her enthusiasm had been crushed by what had occurred. She complained that having to organise the office move to the library had been hard work and stressful given the short timescale and had aggravated her sciatica. She stated that although she had spoken to Mr Kirk about all of this it had not helped the way she was feeling. She was going to speak to her GP and get back to the Respondent.

75 The Claimant did not ask for any action to be taken on this letter but it would have been clear to the Respondent that this was a very unhappy employee. There were allegations of mistreatment and mishandling of situations which the Respondent could have investigated and addressed. After discussing his response with other members of the Board, Mr Hunter responded to the Claimant's email on 30 May to state that he regretted that he had not got his message across and that she had misunderstood what he said. That upset the Claimant further as set out in her further email dated 6 June. She was adamant that she had not misunderstood or misheard what he had said and that she knew exactly what had occurred in the meeting and any claims that this did not happen in the way she stated was untrue. On 7 June Mr Hunter responded to apologise further and to reiterate that what the Claimant heard was not what he intended. He admitted that he might have been clumsy in the way he expressed matters to her. He promised that in future he would not approach her informally about her role again and if a conversation was required, he would leave it to the CEO.

76 Mr Hunter did not see this as a grievance and there was no evidence that he had passed it on to anyone else to investigate it or address it. He treated it as correspondence with the Claimant. He made no decision on her grievance as he did not consider it a grievance or that there was a decision to be made. The Claimant engaged in that correspondence with him and did not ask him to pass it to the Board or to the CEO for investigation. Her only comment in her first email was that as her workload was an operational matter the conversation in the library should have been taken by the CEO rather than Mr Hunter.

77 The Claimant was signed off with work-related stress from 29 May to 25 August 2018. The Claimant resigned on 26 July giving one month's notice. She attached a sick note to her resignation email which covered the period 26 July to 31 August. There was no reason for her resignation given in the email. In her witness statement she stated that she resigned because of everything that had happened and because Mr Hunter lied to her in his email of 30 May when he denied saying to her that she was overpaid. She stated that she could not continue to work for someone who lied in emails to her.

78 The Claimant's evidence was that she gave a month's notice because she wanted to be of assistance to her colleagues during that period if there were any queries on payroll or if there was any administrative or financial information that was needed from her. She did not give the contractual 3 months' notice.

79 The Claimant's evidence was that from 5 July she was referred by her GP to Newham Talking Therapies for counselling for anxiety and depression. She has been looking for new employment since October 2018 in finance and administration but although she had applied for several jobs, by the date of the hearing she had not yet been shortlisted or interviewed for any jobs.

80 On 29 July, Jan Knight the interim CEO wrote to the Claimant to express her sorrow that the Claimant had decided to resign. She asked whether it was possible to have an exit interview or conversation with the Claimant to find out the reason for her resignation, when the Claimant felt able to do so.

81 It is likely that subsequently, on 14 August, Ms Knight wrote again to the Claimant to say that the Respondent had thought further about her notice period and decided to account for it as '*gardening leave'* rather than as sick absence, which meant that she would be paid full pay for that period. The email was not in the bundle but was referred to by the Claimant at the end of the hearing.

Law

82 The Tribunal applied the following law to the facts in this case.

83 The Claimant makes a claim for constructive dismissal. It was her claim that the Respondent had breached an express term of her contract in that it reduced her working hours and pay unilaterally, which she had not accepted. It was also her case that the Respondent had breached the implied term of mutual trust and confidence which entitled her to resign. Lastly, she claimed that the Respondent had breached the ACAS Code on Grievance and Disciplinary procedures.

84 Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states as follows: -

> "*The employee terminates a contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employers' conduct".*

85 The circumstances in which an employee would be entitled to terminate her contract would be where the employers' conduct amounted to a repudiatory breach of contract. In determining whether there has been a fundamental breach, the tribunal is not

to apply the range of reasonable responses test but must consider objectively whether there was a breach of a fundamental term of the contract by the employer.

86 The range of reasonable responses test applies at the final stage of determining whether the dismissal was unfair.

87 The Claimant's complaint is that the Respondent breached the implied term of trust and confidence which is in each employment contract. The tribunal needs to conclude that the employer had acted without reasonable cause in such a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the employee. Also, the tribunal needs to assess whether the employee had or had not affirmed the contract under which she was employed after such a breach and before she resigned, or that if she had affirmed the contract there was subsequently a "*final straw"* capable of contributing to a series of earlier acts which cumulatively amounted to a repudiatory breach of contract and that she had resigned in response to the repudiatory breach.

88 The leading case of constructive dismissal remains the case of *Western Excavating Ltd v Sharp [1978] ICR 221 (CA)* in which Lord Denning stated: -

> "*If the employer is guilty of conduct which is a significant breach going to the root of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminated the contract by reason of the employer's conduct. He is constructively dismissed"*.

89 The test that must be applied in determining whether or not this has occurred, is an objective test and this is summarised above and set out in the case of *Mahmud v BCCI [1997] IRLR 462* in which Lord Nicholls stated that: -

> "*The conduct must…impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances"*.

90 The Tribunal was also aware of the case of *Post Office v Roberts [1980] IRLR 347* where it was held by the EAT that the conduct by the Respondent which amounted to a repudiatory breach of contract need not be deliberate or intentional or prompted by bad faith.

91 The Tribunal is aware that unreasonable behaviour by the employer is not enough and that the bar is set much higher. The employer has to be guilty of what would be, in effect, the equivalent of gross misconduct from an employee leading to summary dismissal.

92 In the Court of Appeal decision in *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445 the test to be applied in a constructive dismissal case was set out as follows:-

a. In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applies:

1. What was the employer's conduct that was complained of?

2. Was the conduct complained of calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties;

3. Did the employer have reasonable and proper cause for that conduct?

b. If acceptance of that breach entitled the employee to leave, has s/he been constructively dismissed?

c. It is open to the employer to show that such dismissal was for a potentially fair reason;

d. If he does so, it will then be for the employment tribunal to decide whether the dismissal for the reason, both substantively and procedurally, fell within the range of reasonable responses, and was fair.

It was also confirmed in *Buckland* that an employer cannot 'cure' a repudiatory breach of contract.

93 In the case of *Kaur v Leeds Teaching Hospitals NHS Trust [*2018] EWCA Civ. 978 the Court of Appeal held that an employee who was the victim of a continuing cumulative breach was entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation, provided that the later act formed part of the series. Cases of cumulative breach of the implied term of trust and confidence fell within the well-recognised qualification to that principle that the victim of a repudiatory breach who had affirmed the contract could nevertheless terminate if the breach continued thereafter. In such a case, the victim was not going back on the affirmation and relying on the earlier repudiation. The right to termination depended on the employer's post-affirmation conduct.

94 The Claimant also claimed constructive dismissal based on breach of an express term i.e. the reduction of her hours from 28 to 21. She relied on the case of *Industrial Rubber Products v C. Gillon* [1977] IRLR 389 in which the EAT held that a unilateral reduction in the basic rate of pay, even for good reasons and to a relatively small extent, is a material breach of a fundamental element in the contract of employment. It does not however, mean that the dismissal was automatically unfair.

95 Mrs Justice Laing in the case of *Mostyn v S and P Casuals Ltd* UKEAT/0158/17 (22 February 2018, unreported) took a firmer view. She stated that no employer can have a reasonable and probable cause for breaching the implied term where that breach consists of the unilateral proposition of a significant pay cut on the employee. *Harvey* urged caution in relation to those comments. It is possible for a pay cut to amount to fundamental breach of an express term but not constitute a breach of the implied term of trust and confidence. LJ Sedley in *Buckland* gave the example of an employer who had a major customer default on payment where not paying wages to employees may be a reasonable response to the situation. What was important was the materiality or significance of the breach and all the relevant circumstances.

96 An employee would have difficulty in succeeding with a claim of constructive unfair dismissal if he had affirmed the contract and waived the breach. An employee will be held to have affirmed a contract where (with knowledge of the breach) s/he acts in a manner inconsistent with treating the contract as at an end. The employee would actually need to do the job for a period of time without leaving, or some other act which can be said to affirm the contract as varied.

97 The Claimant referred to the case of *Chindove v William Morrison Supermarkets Ltd* UKEAT/0201/13 (26 June 2014, unreported) in which the court stated that there was no fixed time within which the employee must make up their mind following a breach and that a delay per se would not amount to affirmation of the contract in law, albeit that it will often be an important factor. (See also *Bashir v Brillo Manufacturing Co [1979] IRLR 295*). A reasonable period is allowed and how long that will be depends on the facts of the case. Where an employee is faced with a choice between unemployment if they give up their job or waiving the breach then it is not surprising that the courts are sometimes reluctant to conclude that they have lost the right to treat themselves as discharged by the employer merely by working at the job for a further period. This is even more so where the employee was long-serving and had serious financial commitments and more uncertain prospects of alternative employment.

98 The Claimant relied on the ACAS Code of Practice on Disciplinary and Grievance Procedures, a copy of which was in the bundle. The Code states that it provides practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace. A failure to follow the guide does not, in itself make a person or organisation liable to proceedings.

99 Grievances are defined in the Code as concerns, problems or complaints that employees raise with their employers. The Code states that if it is not possible to resolve a grievance informally, employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.

100 Once a grievance is received, the employer should arrange for a formal meeting to be held without unreasonable delay. At the meeting the employee should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting to conduct further investigations into a grievance as necessary. The decision on the grievance should be communicated to the employee in writing, without unreasonable delay and where appropriate should set out what action the employer intends to take to resolve the grievance. The employee should be allowed to take it further if they feel that it has not been satisfactorily resolved.

101 Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 states that it applies to unfair dismissal proceedings before an employment tribunal. It states that if, in these proceedings it appears to the employment tribunal that -

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with the Code in relation to that matter, and the failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

Applying law to facts

102 The Tribunal will now go through the agreed list of issues in this matter and set out its judgment.

103 *Did the Respondent, acting through its employee Bernard Hunter, breach the implied term of mutual trust and confidence by a) being generally neglectful and careless in his attitude towards the Claimant in dealing with her potential redundancy situation; b) being flippant and disrespectful about the Claimant who had 19 years' service in the meeting of 23 January and breaching her confidentiality; d) being disrespectful in the meeting on 16 May by saying that she was overpaid; and by the Respondent as an organisation c) failing to properly manage the Claimant's reduction in hours, discuss with her the days she would be working or how it would affect her job description; and e) failing to properly address her grievance?*

104 The Tribunal notes that 3 out of the 5 allegations listed above relate to Mr Hunter and his actions towards the Claimant. Dealing with those allegations first.

105 Mr Hunter's position was that of Chair of the Board of Governors, which was the Claimant's employer as well as the body charged with ensuring continuation of the advice service. It is this Tribunal's judgment that at the meeting on 23 January, Mr Hunter spoke about the Claimant in a very practical, matter-of-fact manner in his capacity as a Board member and not as a colleague. That was reported back to her as him being '*flippant'*. Her colleagues considered that he had been insensitive in the way that he discussed her role. On 23 January there was no proposal to make the Claimant's post redundant. This discussion was all in the context of what would have to happen if funding ceased or was significantly reduced. The discussion had not just been about the Claimant. The proposal to reduce Mark Kirk's post was also discussed at the meeting and he expressed his opinion that he expected his salary to go towards the provision of advice services rather than retaining his post. It is likely that the other two (the Senior ASS) roles were also discussed as they were discussed in the letter. The context of the discussion was that this was a plan for there being no funds to continue the Bureau in the way it was then organised and having to scale down the operation to a skeleton service. These four roles did not have their own funding. They were dependant on the Respondent being able to direct 10 – 15% of the funding for projects towards central costs. It was appropriate in those circumstances to consider which services could be provided through other avenues such as hiring a book-keeper or some other way. This was not a judgment on the Claimant's capabilities but on what the Respondent needed to do to keep the service going in the face of no/reduced funding. It is also this Tribunal's judgment that the evidence does not support a conclusion that the Respondent breached the Claimant's confidentiality in the discussion at the meeting. The discussion was not on the Claimant's confidential matters but on her post and how that could be managed if there were a redundancy situation.

106 However, it is also this Tribunal's judgment that the Respondent handled the potential redundancy situation poorly and carelessly. The Respondent's staff had no prior warning of the discussion and Ms Adams' evidence confirmed that they were all in shock in the meeting. That affected their reaction to the information presented in the meeting. In relation to the Claimant, it is this Tribunal's judgment that the Respondent should have given her a copy of the letter before the meeting - once it found out that she was not going to be able to attend – given that she was named in the letter as someone who could be made redundant if the funding situation did not improve. The Respondent should also have had a proper individual consultation meeting with her on 22 January instead of the short chat that Mr Hunter had with her. That conversation was not an adequate redundancy consultation meeting as he did not make it clear that she was highlighted in the letter and would feature in the discussion that evening, as someone who would be likely to be made redundant if a redundancy situation arose. His own evidence was that he spoke to her in general terms. He could have gone through the letter with her on 22 January but did not. He did not inform her that he considered that her role could be filled by engaging the services of an occasional book-keeper. He did not give her an indication as to if and when all of this was likely to occur or invite proposals from her to avoid redundancy. These failures created the situation on the following day where she was taken by surprise and devastated by what she was told had been discussed.

107 The Respondent was also careless in the way that it handled the reduction in the Claimant's hours in February 2018. By way of contrast, in 2011 when the Respondent proposed a reduction in the Claimant's hours it consulted her about it and about how the proposed reduction would affect her workload. It also explained to her the reasons for doing so. The Respondent followed a process. The Claimant agreed to the reduction and only then did Mr Jeffrey write to her to confirm their agreement. The Claimant was not happy about having her hours reduced in 2011 and she referred to that in her email of 6 June but at the time she accepted it.

108 In February 2018 the Respondent failed to follow any process in coming to a decision to reduce her hours. There was no discussion with her. No consideration as to how the reduction would affect her work or the rest of the team. This decision was taken while the Claimant was off sick and was communicated to her in a letter informing her that the Respondent was no longer in a redundancy situation. The Respondent was careless and negligent in the way it decided that the Claimant's hours would be reduced and the way it communicated that decision to her.

109 Lastly, it is this Tribunal's judgment that it is highly likely that Mr Hunter did tell the Claimant that she was overpaid during their meeting on 16 May. It was a poor choice of words especially as at the time - her wage was about to be reduced, two colleagues had recently had their wage increased and he was asking her to consider taking on more tasks. Although there were explanations for all these factors, it was insensitive to tell her that she was overpaid. It was also likely to have been an untrue statement. He reinforced it by telling her that the Respondent would be able to replace her with someone on a lower grade. She had recently been upset about his statement that she could be replaced by a one day a week book-keeper. Added to that were his comments in the conversation they had in April where he was dismissive about her role. It is likely that he did say to her words to the effect that all he required from her were her passwords and access to her files.

110 In this Tribunal's judgment the Claimant did not consider that she was raising a grievance at the time she wrote the email on 23 May. She was simply expressing her feelings about the conversation she had with Mr Hunter on 16 May. She may well consider with hindsight that it should have been treated as a grievance but at the time that was not her intention. The Tribunal has no doubt, given the Claimant's robust responses to Mr Hunter during that exchange that if she had considered that this was a grievance and that the Respondent had not treated it as such that she would have asked that it be treated as such in her emails. She did not do so.

111 This was also not a grievance in accordance with the Respondent's grievance policy. The letter was not headed '*grievance'*. According to the Respondent's policy, the grievance would have had to be raised with the CEO initially and then referred to the Board if she was not happy with the outcome. The Claimant did not do so although she did copy it to Mr Kirk and Mr Jeffrey. The tenor of the letter was personal and in this Tribunal's judgment the Claimant was essentially expressing her frustrations, disappointment and real upset about the way in which she had been treated by the organisation and by Mr Hunter in particular.

112 In this Tribunal's judgment that was no express term of the Claimant's contract that she should work 28 hours per week. Her contractual hours were 21 hours per week. She was asked to work 28 as a temporary arrangement in in September 2015 and Ms Guthrie asked her, in the 4 May 2016 letter to continue to do so until the situation could be regularised. If it were already part of her contract then there would have been no need for the letter. Ms Guthrie was clear in the hearing that she had not given the Claimant a contract for 28 hours. She hoped that she could do so in the future but had not done so by the time she left.

113 In the Respondent's notice of reduction in the letter of 27 February the Respondent referred to giving her notice that her hours would reduce. The Respondent was unclear about the situation with the Claimant's hours and the letter had been couched in these terms to be safe and just in case she had a contract for 28 hours. The Respondent was being cautious in its decision to give her 12 weeks' notice of a potential reduction in her working hours. There was no express term in the Claimant's contract that she was employed to work 28 hours per week.

114 The Claimant submitted that the proof that her contractual hours were 28 was that if she had decided to stick to a 21-hour week it was highly likely that she would have faced disciplinary proceedings. In this Tribunal's judgment the only clear document that referred to a change in her contractual hours was the letter dated July 2011 when they were reduced to 21. The letter from Ms Guthrie specifically referred to 21 hours being the contractual position and 28 hours as being the temporary position. The letter was to hold the place with the intention of returning to this matter once the organisation was put on a firmer financial footing. This never happened. If she had unilaterally decided to start working 21 hours a week when she had agreed to work 28 until further notice then it is likely that there would have been some questions to her from the CEO/Board because there was an expectation that she would keep to the arrangement that been made – not because it was her contractual hours – but because there was an arrangement and an expectation that she would be present in the office for that number of hours. This does not prove that she had a contract for 28 hours per week.

115 It is this Tribunal's judgment that the Respondent breached the implied terms of mutual trust and confidence in the way that it handled the Claimant's redundancy consultation, the reduction in the Claimant's hours and in the discussions about the Claimant's employment on 19 April, 16 May and in the email correspondence thereafter. Mr Hunter conducted his responsibilities as the Claimant's employer in a way that was more than unreasonable.

116 The next question for the Tribunal was whether any of these breaches were repudiatory breaches of contract. Did they go to the root of the contract or were they simply examples of unreasonable behaviour by the employer?

117 In this Tribunal's judgment, these breaches taken separately may not have constituted repudiatory breach of contract but when viewed cumulatively, they did amount to a repudiatory breach of contract. They went to the root of the Claimant's contract of employment. The Respondent breached the implied term of mutual trust and confidence in relation to fundamental parts of the Claimant's contract – in relation to employment by failing to consult her properly and inform her of the redundancy situation prior to it being announced in public; in relation to her wages – by unilaterally reducing her hours and her wages without first discussing it with her as had been done in 2011; and by telling her that she was not needed and was overpaid and lying about the latter when challenged about it.

118 In this Tribunal's judgment these acts were part of a course of conduct from the Respondent to the Claimant that impinged on their relationship and were likely to destroy or seriously damage the degree of trust and confidence that the Claimant was reasonably entitled to have in her employer. The Respondent did not deliberately set out to breach her contract but because of its focus on the service to users and possibly because Mr Hunter did not understand/value what the Claimant did for the Respondent; he was dismissive, rude and reckless in the way he spoke to her and treated her, which in the context of the potential redundancy situation (and even after that ended) was likely to destroy or seriously damage their working relationship.

119 Did the Respondent have reasonable and proper cause for that conduct? The Respondent had the responsibility of running the organisation and employing the Claimant and her colleagues. It was right that the Board should consider how it would continue to run the service in the event of funding ceasing or reducing.

120 Mr Kirk's evidence was that he advised Mr Hunter that what was required were individual meetings with affected staff before the group meeting and for them to be given individual letters. The Board did not follow that advice. It was not necessary for the Board to have handled matters in the way that it did. The letter dated 23 January was not wrong in that it was appropriate for the Board to demonstrate that it had turned its mind to how the service was going to be managed if funding ceased or significantly reduced and how redundancies would be handled. What amounted to a fundamental breach of contract was the failure to consult the Claimant beforehand and to inform her that she would be named in the letter and what was being proposed.

121 The Respondent did not have reasonable and proper cause for the way in which it handled the redundancy consultation with the Claimant or in the way it handled the reduction in hours. The Tribunal was not given a reason why the Claimant was not invited to a meeting – whether conducted on the telephone or otherwise – about the proposal that

her hours should be reduced. She was off sick but the Respondent should still have notified her what it was thinking so that she could have an opportunity to comment before a final decision was made. The surrounding circumstances add to the fact that the Claimant was one of the members of staff whose pay needed to be addressed. She should have been given a contract for 28 hours and this still had not been done. She had been working 28 hours for 2 years and so even though she was not contracted to work those hours it would still have been in keeping with the implied term of trust and confidence to consult with her on the reduction as well as give her appropriate notice.

122 The evidence was that the Respondent did not have reasonable and proper cause for its decision to notify her of the change in hours by letter without any prior consultation or notification. The letter from Ms Adams was not adequate in that regard. The Respondent did not have reasonable or proper cause to speak to the Claimant on 19 April and 16 May in a way which left her feeling humiliated, belittled and insulted and then to lie about it in the email of 23 May. The Claimant had done nothing to warrant being treated in this way.

123 Did the Claimant resign in response to the repudiatory breach?

124 One of the issues in this case was whether the Claimant had left it too long after the breaches to resign and whether in giving a month's notice she had accepted any breach and affirmed her contract.

125 The Respondent's poor redundancy consultation with the Claimant occurred on 22 January. It was not until 27 February that the Claimant was formally informed that there was no longer redundancy situation. At the same time, she was told that her working hours would be reduced and that she would have to accept a reduction in her salary. Her attempts to talk to Mr Hunter about these matters on 19 April and 16 May failed and instead, he spoke to her in a way which left her feeling that she could no longer trust the Respondent to be a fair employer towards her. The final straw for the Claimant was Mr Hunter's reframing of what he said to her on 16 May. He stated the email of 30 May that he had said that she was well paid for what she did. Her clear recollection was that he said that she was overpaid and that word caused her distress and caused her to feel let down after all the years of service. It was reasonable that she should have received what he said in this way given the history of their relationship. He had previously stated that she could be replaced by a one day a week book-keeper and it is likely that he stated in April that all he needed from her were her passwords and access to her computer. The comment on 16 May and the related lie on 30 May were part of a cumulative series of comments which, together with the poor redundancy consultation process and the reduction in her hours destroyed her trust and confidence in the Respondent.

126 The Claimant was off sick from the end of May. She did not return to work. She gave a month's notice to assist her colleagues and as part of her commitment to the organisation and the service it provides to residents. She did not give 3 months' notice as was her contractual obligation. She gave just enough notice to be able to assist her colleagues. It was the Respondent who decided to change her notice from sick leave to gardening leave so that she could be paid full pay rather than the statutory sick pay that she would otherwise have been entitled to.

127 In those circumstances, it is this Tribunal's judgment that the Claimant did not wait too long before submitting her letter of resignation. All her correspondence with the Respondent following the meeting on 16 May was to complain about her treatment and Mr Hunter's conduct and to submit her resignation. She did not affirm or continue to rely on her contract but considered that it was at an end.

128 It is this Tribunal's judgment that the Claimant terminated her contract of employment because of the Respondent's continuing cumulative breach, the final straw of which was Mr Hunter lying in his email of 30 May about what he had said in their meeting of 16 May.

Breach of the ACAS Code

129 It is this Tribunal's judgment that the Claimant had not brought a grievance in accordance with the Respondent's procedures. She had not addressed it to the Bureau manager although Mr Kirk had been sent a copy. She had also not addressed it to the Board. It was copied to Mr Jeffrey and addressed personally to Mr Hunter.

130 The Claimant conducted personal email correspondence with Mr Hunter after the meeting on 16 May. At no time did she use the word grievance or ask him to deal with it as a grievance or show that she expected it to be treated as such.

131 In this Tribunal's judgment in her email of 23 May the Claimant was making a complaint about the way in which Mr Hunter spoke to her at their meeting in the library café on 16 May. However, she only relied on it as a grievance when she issued these proceedings.

132 The Respondent could be said to be in breach of the Code – although not in breach of its internal procedure – in its failure to arrange a meeting to consider her grievance. However, because of the surrounding circumstances which were that the Claimant did not treat it like a grievance at the time, did not express any expectation that it would be treated like a grievance in her further email correspondence with Mr Hunter and only copied it to Mr Kirk and Mr Jeffrey; it is this Tribunal's judgment that it would not be just and equitable to uplift the Claimant's compensation for unfair dismissal in accordance with section 207A of TULR(C)A.

133 The Claimant is successful in her claim of constructive unfair dismissal. The Respondent breached the implied term of mutual trust and confidence and the Respondent had no reasonable and proper cause for that conduct. The dismissal was unfair.

134 The Claimant is entitled to a remedy for her successful complaint of constructive unfair dismissal.

Remedy - Law

135 In a successful unfair dismissal claim where it is agreed by all parties that neither reinstatement nor re-engagement would be an appropriate remedy for the claimant, any award by the tribunal will be monetary. A remedy award in an unfair dismissal case is made up of two main elements: a basic award and a compensatory award.

Basic award

136 This is set out in ***Section 119 of the Employment Rights Act (ERA)*** and is calculated using a formula that relates to the age and length of service of the successful claimant. It is calculated in units of a week's pay up to a ceiling. If the amount of a claimant's week's pay exceeded that ceiling then the amount of the award is restricted to it. The Tribunal can reduce the basic award in certain circumstances where it is expressly permitted by statute but it was not submitted that it should be reduced in this case.

137 Section 207A(2) provides that an employment tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the ACAS Code on Disciplinary and Grievance Procedures.

Compensatory award

138 This is set out in ***Section 123 of the ERA***. This is intended to compensate the claimant for losses arising out of the dismissal, so far as that loss is attributable to action taken by the respondent. It is not to be used to punish the respondent. Such losses as can be compensated would include not just wages lost due to being unfairly dismissed but also any additional benefits attached to the employment that had been lost. There is no claim for additional benefits in this case. The compensatory award can take into account losses extending into the future. The Tribunal has to make findings of fact based on the evidence before it, in order to determine how much and for how long it would be just and equitable to award to the claimant compensation for such future losses.

139 The claimant is under a duty to mitigate her loss and the tribunal would need to consider whether this has been done in deciding on which losses will be compensated. This refers in particular to the duty on the claimant to make diligent searches for alternative employment following dismissal.

Remedy - decision

140 The Claimant submitted a Schedule of Loss in the bundle of documents and the Tribunal heard evidence and submissions on the issue of remedy. The Tribunal make the following judgment.

141 The Claimant is entitled to a basic award. She was entitled to 12 weeks' pay. She has already and 4 weeks' pay and is therefore entitled to 8 additional weeks' pay. £341.22 x 8 = £2,729.76 gross pay.

142 The Claimant was born on 20 October 1968. She started her employment with the Respondent February 1999 and her effective date of termination was 25 August 2018. She was 30 at the start of her employment and 49 at the end. Her basic award is calculated as follows: - (11 years under 41) x 10 and (9 years over 41) x 1.5 weeks = 23.5 x £341.22 = £8,018.67.

143 The Claimant claims 6 months compensatory award. The Claimant had been in this job for 19 years. She had not in that time had to seek employment which meant that she would be unfamiliar with the present job market and will need support to do practical things like update her CV and become familiar with using online job search facilities. The

circumstances in which she left the Respondent included her having to seek counselling and therapy for the effect that the Respondent's treatment had on her. She would have required some time to heal and to adjust before being expected to secure alternative employment. The Tribunal considers that a period of 6 months is appropriate.

144 The Tribunal awards the Claimant 6 months compensatory award.

145 The Tribunal does not award the Claimant an uplift because of any breach of the ACAS Code. For the reasons stated above it is this Tribunal's judgment that it is not just and equitable to uplift her award because of any breach of the ACAS Code. The Tribunal makes this judgment because the Tribunal does not consider that the Code was breached but even if it was, given that the Claimant herself does not appear to have considered that this was a grievance in the way she conducted personal correspondence with Mr Hunter after she sent the email on 23 May; she did not address it to management as set out in the Code and did not attempt to resolve in informally first with Mr Kirk; it is not just and equitable to consider it so.

146 The Respondent is ordered to pay the Claimant compensation for her constructive unfair dismissal in the sum of £2,729.76 + £8,018.67 + 7,722.00 = £18,470.43 forthwith.

Costs

147 The Tribunal reminds itself of the costs regime in the employment tribunal. Rule 76 of the Employment Tribunal Rules 2013 says as follows:

> 147.1 A tribunal may make a costs order and shall consider whether to do so where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing of the proceedings or the way that the proceedings had been conducted; or any claim or response had no reasonable prospect of success.

148 The Claimant based her application on the basis that there had been no prospects of success of the Respondent's defence.

149 The Tribunal reminded itself of the relevant case law, some of which the Claimant referred to in her submissions. In the case of *Gee –v- Shell UK Limited* [2003] IRLR 82 Sedley LJ said:

> *"It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction for ordinary litigation in the United Kingdom, losing does not ordinarily mean paying the other side's costs".*

150 In the case of *Power –v- Panasonic UK Limited EAT* 0439/04 Clarke J succinctly described the exercise to be undertaken by the Tribunal as, (referring to an earlier set of rules), a two-stage exercise. First, has the paying party acted unreasonably, vexatiously, abusively, disruptively, or brought a claim that was misconceived? If so, the second stage is that the Tribunal must ask itself whether to exercise its discretion by awarding costs against that party.

151 In considering the law on whether there were no prospects of success when the Respondent decided to defend this case, the Tribunal is aware that the law is that the key question for us is not whether the party thought it was in the right, but whether he had reasonable grounds for doing so. *(Scott v Commissioners of Inland Revenue* [2004] IRLR 713 CA*).*

152 The Tribunal also noted Mummery LJ's comments in the case of *McPherson v BNP Paribas* [2004] EWCA Civ. 569*:*

> *"Although employment tribunals are under a duty to consider making an order for costs in the circumstances specified in rule 14(1) in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is not only more restricted than the power of the ordinary courts under the CPR, it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of ETs"*

153 The Tribunal has a discretion to award costs as costs do not follow the event in the employment tribunal. The Claimant has to persuade the Tribunal that it should use its discretion to award costs against the Respondent.

154 The Claimant did not submit that the Respondent had conducted its defence of this claim in an unreasonable manner. The only basis for the costs application was that the defence had no reasonable prospects of success. The Claimant had not made this application before the hearing or on receipt of the Respondent's Grounds of Resistance.

155 This was a complaint of constructive unfair dismissal. In such a case the burden is on the Claimant to prove the circumstances outlined in section 95(1)(C) of the ERA. It would then be for the Respondent to prove that the dismissal was fair under section 98(4) ERA.

156 In this case the Tribunal had to consider whether the Respondent's actions – principally done by Mr Hunter – breached the Claimant's contract in a fundamental way. That was not a straightforward matter even though the Claimant had clearly been upset by what had happened. The evidence on what the Claimant believed to be an express term of her contract did not prove that it was so. Ms Guthrie's evidence was that the Claimant continued to be contracted to work 21 hours up to the time she left the Respondent. She wanted to give her a contract for 28 hours but was unable to do so because of a lack of funds. This continued to be the situation up to the end of the Claimant's employment. The Respondent had handled the redundancy situation poorly and had breached the Claimant's contract in the way it which it bungled the redundancy consultation but it was not a foregone conclusion that the Tribunal would have come to that conclusion before the hearing. The Tribunal's conclusions on the comments made in conversations between the Claimant and Mr Hunter on 19 April and 16 May were open to it but it would not have been possible for the parties to know what conclusions the Tribunal would draw from that evidence until the hearing as it there was a conflict of evidence between the parties and only those two individuals were present for those conversations. The Claimant believed in her case but that is not the same as there being no reasonable prospects of success.

157 In this Tribunal's judgment this was not a case where there had been no reasonable prospects of success.

158 The Tribunal makes no order on the Claimant's application for costs.

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Employment Judge Jones
Date: 26 February 2020