EMPLOYMENT TRIBUNALS

Claimant: **Ms M. Brown**

Respondent: **Tender Heart Support Services Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **17 July 2020**

Before: **Employment Judge Massarella**

Representation
Claimant: Mr C. Toms (Counsel)
Respondent: Ms S. Praisoody (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. **the Claimant was unfairly dismissed; and**
2. **she did not contribute to her dismissal by any blameworthy conduct.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. By a claim form presented on 19 February 2020, after an ACAS early conciliation period between 16 and 23 January 2020 the Claimant, Ms Marvalyn Brown, complained of unfair dismissal. She was employed by the Respondent between November 2016 and 21 October 2020, in the role of

Team Leader. In her particulars of claim, prepared when she was unrepresented, she alleged that she was summoned to a meeting at one day's notice and summarily dismissed; she further alleged that she was dismissed for raising concerns.

2. A notice of hearing was sent to the parties on 28 February 2020, and standard case management orders given. On 26 April 2020, the Respondent wrote to the Tribunal, applying for the Claimant's claim to be struck out, on the basis of an alleged failure to comply with directions for disclosure. That application was refused by the Regional Employment Judge on 4 May 2020 as being disproportionate.

3. On 3 June 2020, Thompsons solicitors went on the record as the Claimant's representatives. On 26 June 2020, Thompsons wrote to the Tribunal, asserting that the claim form disclosed a claim of automatically unfair dismissal by reason of protected disclosures. An application was made for the final hearing on 17 July 2020 to be converted to a preliminary hearing, to consider the matter further. An undertaking was given to draft further and better particulars of the alleged protected disclosures, as well as a proposed list of issues. By letter dated 29 June 2020, the Respondent resisted the application on the grounds that it was made too late. The proposed list of issues was submitted on 15 July 2020.

4. On 14 July 2020, the Regional Employment Judge converted the hearing to a hearing by video (CVP); she directed that the judge dealing with the case should consider at the start of the hearing what the issues were and, if appropriate, whether the Claimant should be permitted to amend her claim. She also directed that case management orders may be made at the hearing, by implication leaving open the possibility that the full hearing might not go ahead.

The hearing

5. In the event, the application to amend the claim was not pursued. Mr Toms (Counsel for the Claimant) explained that the Claimant took the view that an automatically unfair dismissal claim would add little. The Respondent says that the reason for the dismissal was reorganisation; the Claimant says that she was dismissed because she raised concerns. If the Tribunal prefers the Claimant's case over that of the Respondent, the claim will succeed, whether or not the raising of concerns amounted to the making of protected disclosures. Ms Praisoody (Counsel for the Respondent) agreed, and confirmed that her client was ready to proceed.

6. I had a bundle running to some 200 pages. I heard evidence from the Claimant herself, and from Mr Isaac Akano, one of the Directors of the Respondent company.

Findings of fact

<u>The Claimant's appointment</u>

7. The Respondent provides supported living, out of four units, for clients with mental health problems, who have been referred to it by London Borough of

Newham ('Newham'). At the time the Claimant was employed, there were two Directors, Mr Akano and Ms Joy Namata. Mr Akano was also the Service Manager and the Claimant's line manager.

8. The Claimant's employment began on 3 November 2016. She was employed as Team Leader for two days a week. Her responsibilities included leading a team of six support workers.

The alleged reorganisation

9. Mr Akano's evidence was that in April 2019, Newham made changes to its tender bidding system. The only document in the bundle relating to these changes was a Newham 'Specification for Supported Living Services or Customer Groups'. It provides for service specification between 1 June 2020 and 31 May 2025. Only extracts from this document were included in the bundle. Mr Akano's evidence in his witness statement (at paragraphs 10-12) was that:

> 'As a result of the change in the tender building system set by the council, it became apparent that the only way forward to be successful in the bids to meet the organisation needs according to Newham Council's staffing requirement ratio of staff to client based on low medium service provision.
>
> This is because the business model was such that the company was reliant on work received from Newham council which accordingly and our revenue were dependent on our successful bids to provide the service needed.
>
> Based on this skills set requirements, the job description for Team Leader and that of the Manager in the organisation was performed by the same person' [*original format retained*].

10. I understood Mr Akano to be saying in this passage that there was a requirement to reduce the number of managerial roles from two to one, although there was no clear explanation as to why this was a necessary response to Newham's tendering process. That understanding is consistent with subsequent paragraphs in his statement, in which he asserts that he told the Claimant (and other staff) in January 2019 that he planned to reorganise the company, and that the Claimant's Team Leader role would be merged with the role of Service Manager, which up to that point had been carried out by him.

11. There were no documents before me of the kind one would expect if a reorganisation of that sort was proposed: no business plan; no structure chart (pre- and post-reorganisation); and no contemporaneous evidence of Mr Akano notifying the Claimant, or other staff, of a business reorganisation, or a reduction of managerial roles from two to one.

12. I find that that he did not announce a business reorganisation. As I shall go on to explain, the Claimant submitted an application for the role of Service Manager. In that application, she expressly referred to the role of Team Leader in the future structure of the organisation. In my judgment, it is

inherently unlikely that she would have done so, had Mr Akano told her that the Team Leader role was to be abolished.

13. Moreover, in the course of cross-examination, Mr Akano contradicted the evidence in his sworn statement as to the purported merger of the roles: he was adamant there was no suggestion that any changes would lead to a reduction in roles. He said:

> 'there was no need to reduce staff; what was needed was someone who was competent, with the right skills to bid for the tender […] when I said reorganisation I didn't mean reorganisation in terms of staff reduction or increase.'

The Service Manager role

14. In January 2019, Mr Akano met with the Claimant, and asked her if she would be interested in taking on the role of Service Manager. In the course of their discussion, the Claimant raised a number of concerns about the service, and identified some improvements which she thought were necessary, including ensuring that minimum staffing levels were met, that staff were paid on time, and that adequate induction and training was maintained. Mr Akano asked the Claimant to submit a written application for the role, if she was interested in pursuing the opportunity.

15. The Claimant was not appointed to the Service Manager role. Mr Akano gave a number of different explanations for this: that she did not submit an application for the role; alternatively that, if she did submit an application, he did not have sight of it; alternatively that, although he received a 'proposal' from her, it did not amount to an application; alternatively, that she did not submit a CV, despite being asked by him to do so.

16. I find that, by an email dated 1 February 2019, the Claimant submitted a written application directly by email to Mr Akano and to Ms Namata. Mr Akano was obliged to accept in cross-examination that he did receive this document, when taken to that contemporaneous evidence.

17. Mr Akano sought to characterise this document as an attempt by the Claimant to 'dictate' to him how the role should be carried out. I reject that evidence: it is nothing more than a well-presented, thoughtful and thorough application, in which the applicant set out, in the usual way, what she thought she could bring to the role, and how she would use her experience to effect improvements to the service. It continues to raise, in an appropriate and professional manner, aspects of the business which she believed required improvement, including in relation to staffing levels and training.

18. I reject Mr Akano's evidence that he asked the Claimant to submit a CV: there is no correspondence asking her to do so; the Claimant denied that he did. Asked why he would need a CV from a current employee, whose skills and experience were well-known to him, Mr Akano said that he needed it 'to demonstrate that the recruitment process had been fair'. I found that an implausible explanation, given that Mr Akano also accepted that he subsequently appointed someone else to the role without advertising it, and without any form of competitive process. This was not a recruitment process guided by the usual considerations of transparency or equal opportunities.

The supervision meeting on 18 April 2019

19. On 18 April 2019, a supervision meeting took place between the Claimant and Mr Akano. The notes of that meeting confirm that the Claimant again raised issues (on her own behalf, and on behalf of other staff) about minimum staffing levels; she also said that she was struggling to recruit new staff. They discussed the Service Manager role. The notes conclude: 'further discussion by mid-May 2019'. Mr Akano accepted in oral evidence that the Claimant subsequently pressed him for a decision. He did nothing to progress her application.

The appointment of Ms Pulle

20. Without informing the Claimant that he intended to do so, Mr Akano then appointed Ms Sarah Pulle to a role described as 'Service Manager'. Mr Akano explained in his witness statement that he decided to seek an external candidate 'as I could not want to [sic] waste time waiting for [the Claimant] to apply and risk losing the tenders from the council'. Given my findings above that Mr Akano knew that the Claimant had already applied, I reject that evidence as false.

21. As for the role to which Ms Pulle was appointed, Mr Akano accepted that the job description for the role was identical to the job description for the Claimant's Team Leader role, in every respect except the job title.

22. Ms Pulle was employed around three months before the termination of the Claimant's contract.

Concerns raised by the Claimant after the appointment of Ms Pulle

23. After Ms Pulle's appointment, the Claimant continued to raise serious concerns with her and with Mr Akano, in relation to working conditions and working practices within the Respondent organisation (on her own behalf, and on behalf of other staff). Much of the evidence as to this in her witness statement went unchallenged in cross-examination. I found it to be detailed and credible, and I accept it.

24. The issues that the Claimant raised included: the fact that clients' care plans were being breached; the delays in getting money to staff for shopping, in breach of the clients care plans; the absence of staff workplace pensions; the delays in paying staff; staff being paid by cheque, rather than by bank transfer; and maintenance issues, such as broken toilet doors. She also raised issues relating to pest control, which she had been consistently raising over the previous year.

25. At a staff meeting on 4 September 2019, at which both Mr Akano and Ms Pulle were present, the Claimant continued to raise issues, including the ongoing pest issues and changes to clients' daily record log (the Claimant believed that a new format, which was being proposed, would not be suitable for some clients).

26. At a supervision meeting on 5 September 2019, Mr Akano informed the Claimant that this would be the last time he conducted a supervision meeting with her, and that he would be handing that task over to Ms Pulle. I accept the Claimant's evidence that, at that meeting, Mr Akano told the Claimant that she sometimes came across as 'behaving like a union person'. The Claimant's account of that meeting in her statement is detailed and coherent; she recorded that remark in her subsequent letter of appeal, just over a month later; Mr Akano did not deny saying it in his response.

27. At the meeting the Claimant asked for an explanation of this remark, and he gave the example of the issues relating to pest control. She also informed Mr Akano that staff had told her that Ms Pulle had been making mistakes with clients' medication. She observed that she did not know whether Ms Pulle was properly trained. She said that she would continue to support Ms Pulle, but that it was not her responsibility to train her, or indeed to do her job for her.

28. It was put to the Claimant in cross-examination that she was told that her role was to be abolished at this final supervision meeting with Mr Akano. I reject that suggestion: there was no evidence for it, including in Mr Akano's own witness statement, which is silent as to the content of that meeting.

29. On or around 19 September 2019, the Claimant discovered that a new member of staff, who worked weekends (whom the Claimant had never met) had wrongly entered daily support records for three other clients in one client's log book. She told Ms Pulle about this, and also raised with her other concerns about mistakes with patient medication, and with the recording of medication.

30. I find that the concerns the Claimant raised were serious, genuine concerns, which she raised in good faith, solely with a view to improving the quality of the Respondent's service to its clients. They were raised in an appropriate, professional manner.

The termination of the Claimant's employment

31. Mr Akano's evidence was that he 'decided to offer the letter of termination of service to the Claimant on 3 October 2019'. I reject that evidence. The letter of termination is dated 1 October 2019. I find that the decision had already been taken by that date, at the very latest, and probably some time before.

32. The letter read:

> 'RE: NOTICE OF TERMINATION OF CONTRACT
>
> It will be three years on 2 November 2019 since you joined Tender Heart Support Services Ltd, during which time you contributed immensely to the growth of the organisation.
>
> Based on organisation needs, recent compelling requirements from our contractors with great impact on business growth, cost-effective skill mix and budget constraints, your services are no longer required.
>
> In line with your employment contract, Tender Heart is required to give you notice of one week each year continuous employment, when your services are no longer required. We hereby give you three weeks' notice

> from the date of this letter and your contract of employment will terminate on 21 October 2019.
>
> As a goodwill gesture, the organisation is prepared to give you one month, *ex gratia* pay in lieu of notice.
>
> Tender Heart Support Services will provide a reference when one is requested.
>
> I thank you for your service and wish you all the best in your future endeavours.'

33. On 3 October 2019, at the end of the Claimant's shift, Mr Akano told her that he and Ms Namata would like to have meeting with her the following day at 4:30 p.m. He did not say what the meeting would be about. The Claimant was worried, and telephoned him that evening; he reassured her that there was nothing to worry about. In saying that, he actively misled the Claimant: the purpose of the meeting was to dismiss her.

34. Because the Claimant did not know that, she had no opportunity to arrange for someone to accompany her. In his statement Mr Akano explained that 'as the meeting was not a disciplinary one, the company policy did not expect the Claimant to be accompanied to an exit interview by a third party'.

35. The Claimant attended work as usual on 4 October 2019. At the end of the day, she joined Mr Akano for the meeting, as arranged. He told her that Ms Namata was running late. He then gave the Claimant the pre-prepared letter of dismissal. It was obvious to the Claimant that this was a settled decision, and that there was no room for further discussion.

36. The notes of that meeting are headed 'exit interview'. As I have already recorded, that is how Mr Akano described it in his witness statement and, I find, that is how he conducted it. Mr Akano agreed that there is no reference in those notes to his suggesting to the Claimant that she must have anticipated dismissal, because he had told about the alleged reorganisation and the merging of two roles. Nor do those notes record him saying that he had invited her to apply for the role, but that she had failed to do so. There was no discussion about alternatives to dismissal.

37. The notes say:

> 'appointing the new manager was about continuity of the business. If business collapses, even she (MB) would not have work. IA said action was in the best interest of all. IA also said that if TH is able to be back on its feet, MB could be re-employed.'

<u>The Claimant appeal against dismissal</u>

38. The termination letter made no reference to a right of appeal, and Mr Akano did not tell the Claimant of her right to appeal at the meeting. Nonetheless, on 18 October 2019, the Claimant wrote a detailed letter of appeal to Mr Akano.

39. There was no appeal meeting. Instead Mr Akano wrote to the Claimant on 25 October 2019:

> 'I write to acknowledge receipt of your letter dated 18 October 2019, the contents of which I have read and noted. Having read the points you raised in your letter, I maintain the decision to terminate your contract of employment, due to the reasons stated in my letter dated 1 October 2019. Further correspondence should be addressed to Ms Joy Namata at [*address provided*].'

The law to be applied

40. S.94 Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by her employer.

41. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it—**
>
> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
>
> **(b) relates to the conduct of the employee,**
>
> **(c) is that the employee was redundant, or**
>
> **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
>
> **(3) […]**
>
> **(4) [...] where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(e) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(f) shall be determined in accordance with equity and the substantial merits of the case.**

<u>The reason for dismissal: some other substantial reason ('SOSR')</u>

42. In *Orr v Milton Keynes Council* [2011] ICR 704, Aikens LJ summarised (at [78]) the correct approach to the application of s.98 ERA.

> **'(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.**

> **(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.**
>
> **(3) Once the employer has established before an employment Tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), i.e. that it was a "valid reason", the Tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).**
>
> **(4) In applying that subsection, the employment Tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. […]**
>
> **(5) In doing the exercise set out at (4), the employment Tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.**
>
> **(6) The employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.**
>
> **(7) A particular application of (5) and (6) is that an employment Tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.**
>
> **(8) An employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.'**

43. A dismissal is potentially fair if it is for 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held' (s.98(1)(b) ERA) ('SOSR'). A business reorganisation may, in appropriate circumstances constitute SOSR. To establish SOSR as the reason for dismissal, an employer does not have to show that a reorganisation was essential. In *Hollister v National Farmers' Union* [1979] ICR 542, the Court of Appeal held that a 'sound, good business reason' for reorganisation was sufficient to establish SOSR for dismissing an employee who refused to accept a change in his or her terms and conditions. The reason is not one the Tribunal considers sound, but one 'which management thinks on reasonable grounds is sound' (*Scott and Co v Richardson*, EAT 0074/04 at para 14). Only if the Claimant can show that the commercial reason advanced by the employer either was one which the employer did not have or was one that was whimsical, unworthy or trivial can the Tribunal find that it did not amount to an SOSR (at para 23).

Polkey

44. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated the employment in any event, had there been no unfairness (the Polkey issue).

45. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 the EAT (Langstaff P presiding) noted that a *Polkey* reduction has the following features:

> **'First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) … The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.'**

Contribution

46. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy, in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish, perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110).

Submissions

47. Because there was insufficient time to deal with submissions on the day, and with the agreement of the parties, both Counsel provided detailed written submissions. I also gave them permission to lodge replies, which they both did. Those submissions are a matter of record, and I will not summarise them in this judgment. I had regard to all four documents in reaching my conclusions.

48. I do, however, record that I agree with Mr Toms' submissions (in reply) that a number of the submission made by Ms Praisoody either do not accord with the Respondent's pleaded case, or bear little relation to the evidence presented at trial.

Conclusions

The reason for the dismissal

49. The starting-point is usually the reason given in the dismissal letter, here: 'organisation needs, recent compelling requirements from our contractors with great impact on business growth, cost-effective skill mix and budget constraints'. I find that those reasons to be generalised and opaque.

50. In its ET3 the Respondent pleaded the reason for dismissal as follows:

> 'The meeting was conducted to terminate the Claimant's contract due to business organisation needs. The positions of Team Leader and Manager in the company was [*sic*] merged and the Claimant's role was combined and absorbed to formed [*sic*] into one role.'

51. I understood this to mean an SOSR business reorganisation. As I have recorded, there was also evidence in Mr Akano's witness statement that he had decided to reduce the number of roles by merging the Team Leader and Service Manager roles in his statement. As I have also recorded (see para 13), Mr Akano contradicted that case in his oral evidence.

52. Even if that were not fatal to the Respondent's pleaded case of SOSR (which, in my judgment, it is), I am not satisfied that there was any evidence of a reorganisation of the Respondent's business: there were no documents in the bundle showing the Respondent considering a business reorganisation; and no documents communicating such a proposal to staff, including the Claimant.

53. Moreover, Mr Akano failed to explain to the Tribunal with any degree of clarity why proposed changes to Newham's tendering process led to the Claimant's dismissal. As I have already found, the document he relied on relates to the period from 1 June 2020 onwards. Mr Akano gave no coherent explanation as to why there was a need to dismiss the Claimant in October 2019, when these requirements did not come into force until June 2020.

54. Consequently, I conclude that business reorganisation was not the true reason for dismissal. If I am wrong about that, the Respondent has failed to meet even the relatively low threshold of showing that there was a 'sound, good business reason' for any reorganisation of the workforce.

55. In her written closing submissions, Ms Praisoody submitted (at paragraph 12):

> 'The burden of proof is on the employers but they do not have to prove that the employee was incapable of doing their job, just that they honestly believed they could not do it, and had reasonable grounds for that belief.'

56. Insofar as Ms Praisoody appeared to be advancing capability as the reason for dismissal, that was a surprising submission, given that it was never part of the Respondent's pleaded case. In any event, I reject it. There was no contemporaneous evidence before me that the Respondent dismissed the Claimant for capability. There is no reference to poor performance in the contemporaneous documents, or in the dismissal letter. Capability was not the reason for dismissal.

57. If it was being suggested that the Claimant was dismissed because she was not capable of performing the Service Manager role, again that was not the Respondent's case at trial. On the contrary, Mr Akano said that the only reason the Claimant was not given that role was because she did not apply for it and/or submit a CV, not that she lacked the skills or experience to do it.

58. For the avoidance of doubt, any dismissal for capability would have been an unfair dismissal: there was no evidence of any failings in the Claimant's performance; and no evidence of any kind of performance management procedure, let alone a fair procedure.

59. In her reply submissions, Ms Praisoody then submitted (at paragraph 26) that the Claimant was dismissed 'for her failure to comply with the recruitment requirements'. Ms Praisoody developed that point (at paragraph 28 onwards), submitting that the Claimant was dismissed because she did not apply for the Service Manager role, or submit her CV. I reject those submissions: there was no 'recruitment requirement' when the Claimant was dismissed; she had already effectively been replaced by Ms Pulle, albeit she did not know that. Moreover, I have found as a fact that she did apply for the Service Manager role, and that she was not asked to submit a CV.

60. The Respondent having failed to advance a potentially fair reason for the dismissal, the Claimant's claim of unfair dismissal succeeds.

61. I conclude that the sole reason for the Claimant's dismissal was that she consistently raised concerns and issues about the Respondent's service with Mr Akano. Although he considered for a while promoting her to the role of Service Manager, he came to the conclusion that she would continue to raise these issues, which he found troublesome and inconvenient, and that in a more senior role she would be better placed to pursue them. That is why he did not pursue her application.

62. He then set out on a different course, and resolved simply to replace the Claimant with someone else. He brought in Ms Pulle as Service Manager, and allowed the Claimant to remain in employment for a period of around three months, before dismissing her. I conclude that the reason that he did so was to enable the Claimant to do a handover to Ms Pulle, without it ever being explained to the Claimant (and perhaps even to Ms Pulle) that that was what was happening. Once the handover was complete, and the Claimant was no longer needed, he dismissed her.

<u>The reasonableness of the dismissal</u>

63. Although strictly speaking there is no need for me to go on to decide whether the dismissal fell within the band of reasonable responses, absent a potentially fair reason for dismissal, it may assist the parties if I give my conclusions on that issue as well.

64. I conclude that the dismissal fell outside the band of reasonable responses in the following respects.

    64.1. Mr Akano concealed from the Claimant his intention to replace her by Ms Pulle, after a handover period.

    64.2. Mr Akano gave the Claimant no advance warning that she might be dismissed at the meeting on 4 October 2019, indeed he positively misled her by saying that she had nothing to worry about.

    64.3. Consequently, the Claimant had no opportunity to prepare for the meeting.

    64.4. Mr Akano did not tell her that she was entitled to be accompanied to the meeting.

    64.5. The decision was predetermined: Mr Akano had decided at the latest on 1 October 2019 to dismiss the Claimant.

64.6. Mr Akano did not inform the Claimant that she had a right of appeal against dismissal.

64.7. The Claimant's appeal was dealt with by the same person who took the decision to dismiss, i.e. Mr Akano.

64.8. Mr Akano dealt with the appeal summarily, and without any attempt to address its substance.

65. In light of the above, I consider that the appeal was grossly unfair, both substantively and procedurally. No reasonable employer would have acted as the Respondent did.

Contribution

66. I explained to the parties at the beginning of the hearing that I would hear evidence and submission on contribution as part of the liability hearing.

67. If the Respondent contends that the Claimant contributed to her dismissal by her own blameworthy conduct, the burden is on it to make good that contention. In the section of her closing submissions headed 'Contribution' the only matter raised by Ms Praisoody was the fact that the Claimant walked out of the dismissal meeting, bringing it to an early conclusion. As the decision to dismiss had been taken several days earlier, self-evidently that cannot have contributed to it.

68. For the sake of clarity, I find that she did do so, but that there was nothing blameworthy in her conduct: her frustration was entirely justified in the circumstances; the meeting was a sham, and there was not practical purpose in her remaining; she was understandably shocked and upset by the dismissal; and she wanted to leave to collect her child from nursery.

Credibility

69. I found the Claimant to be a straightforward, consistent and credible witness. She gave her evidence carefully, thoughtfully and reflectively. Although there was the occasional inconsistency, I regarded that as a natural consequence of the passing of time and the fallibility of memory. I also noted that the Claimant was willing to make concessions against her own interest, where appropriate.

70. By contrast, I found Mr Akano to be an unreliable witness. By way of example, he contradicted his own, sworn witness statement in relation to his intention to reduce the number of roles by way of a reorganisation (above at para 13); he gave shifting, and contradictory, evidence as to whether the Claimant applied for the Service Manager role (above at para 15); his evidence as to why he decided to appoint Ms Pulle (above at para 20), and as to when he decided to dismiss the Claimant (above at para 31) was, in my judgment, simply false.

71. I had regard to my assessment of the two witnesses' respective credibility in deciding between their competing accounts of events, when there was no corroborative, contemporaneous evidence to assist me.

Remedy

72. There will be a remedy hearing to determine the amount of compensation to which the Claimant is entitled. Any *Polkey* argument will be considered at that hearing.

73. By no later than 14 days from the date on which this judgment is sent to the parties, they shall provide their dates to avoid for a one-day remedy hearing (by CVP) in the six months from January 2021 onwards, which is realistically the earliest it might be listed, having regard to the restrictions arising out of the Covid-19 pandemic.

74. The hearing will then be listed and directions given. If the parties consider that one day is not sufficient, they should explain why when providing their dates to avoid.

75. If the parties are able to resolve the question of compensation by agreement, they are asked to notify the Tribunal as soon as possible.

Employment Judge Massarella
Date:11 November 2020