EMPLOYMENT TRIBUNALS

Claimant: **Carly Whelpley**

Respondent: **Cardiff Mind Limited**

Heard at: **Cardiff** **On: 7 and 8 December 2023**

Before: **Employment Judge S Moore (sitting alone)**

Representation:
Claimant: Mr Toms (Counsel)
Respondent: Mr Hoyle, Consultant

JUDGMENT having been sent to the parties on 13 December 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Introduction

1. The ET1 was presented on 9 August 2023 following a period of Early Conciliation with ACAS being contacted on 30 May 2023 and a certificate being issued on 11 July 2023. The claim was heard at Cardiff Employment Tribunal on 7 and 8 December 2023 before Judge Moore sitting alone. The Claimant was represented by Mr Toms of Counsel. The Respondent was represented by Mr Hoyle, Consultant. There was an agreed bundle before me which had a number of documents added by both parties. The Tribunal heard witness evidence from the Chief Executive of the Respondent, Mr Bone, Mr Padbury, Project Manager (Respondent) and from the Claimant.

Issues arising during the hearing

2. A number of issues arose during the hearing that are necessary to record in these written reasons.

3. Mr Toms had produced a list of issues which was discussed at the beginning of the hearing. The first issue on the list was whether the claimant was employed under a fixed term contract and / or was a permanent employee pursuant to Regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Judge Moore's note of the hearing confirms that Mr Hoyle not only agreed to the list of issues but he also agreed that the Respondent was ready to deal with the issue of objective justification.

4. On the second day of the hearing during submissions Mr Hoyle denied the list of issues had been agreed the day before.

Allegations by the respondent regarding the claimant's GP Fit notes.

5. On 1 December 2023 the Respondent's representatives wrote to the Tribunal seeking a postponement of the hearing. In summary the reasons were:

- There were a number of documents in the bundle that had caused "very real concern in respect to a duty to report to Care Inspectorate Wales ("CIW") where there is a risk to patients or fraud or criminality or public safety is at risk;

- The respondent had reported these concerns to CIW and an investigation was likely that would overlap with the evidence to be heard at the Tribunal hearing that would result in the need for a reconsideration should the CIW investigation conclude what the Respondent alleged.

6. Subsequent correspondence confirmed that the concerns were regarding the private GP who had signed the claimant's fit notes during her sickness absence when in the employ of the respondent.

7. The claimant's comments were sought and in summary they contended that any issues over the GP fit notes were irrelevant to the issues in the claim.

8. On 2 December 2023 the respondent repeated their allegations against the claimant's GP asserting that the bundle may contain "falsified or stolen official documents or that the health professional who had supplied them may have seriously departed from clinical practice". Mr Hoyle explained that it was he who had alerted the Respondent to these concerns as he had relevant knowledge from when he had been a health practitioner.

9. On 4 December 2023 Judge Sharp refused the respondent's application to postpone the hearing on the basis the Respondent had not explained the relevance and was not persuaded the hearing could not fairly proceed.

10. On the first morning of the hearing these allegations were repeated. The basis of the allegations was that the GP does not operate from premises that were a surgery and therefore was not permitted to perform GP activities. Further it was allegedly inconceivable that the claimant would not have been referred to a hospital due to the period she had been signed off for a neurological condition. Further the fit notes were handwritten and some had different stickers and the GP was not the claimant's registered NHS GP. The Respondent had now also reported the GP to the General medical Council.

11. I asked Mr Hoyle to explain why the status of the claimant's fit notes was relevant to the issues in the claim, given that the claimant was dismissed for redundancy and it was an unfair dismissal claim. I further warned Mr Hoyle that these were extremely serious allegations to be making at a public hearing and sought an assurance he had advised his client of the potential consequences of such allegations against this GP. Mr Hoyle maintained they were relevant to the issue of remedy.

12. After a break Mr Toms advised he had spoken to the claimant's GP who had authored the fit notes and that GP had sent him an email which was produced to the Tribunal with permission of the claimant. The email stated:

- The GP was a registered medical doctor, fully licensed by the GMC and gave his GMC licence number and status on the GP register both of which could be checked online;

- The clinic is fully licensed by the Healthcare Inspectorate for Wales and provided the registration number;

- The Fit notes (MED3's) are issued by the DWP who check the status of the clinic before issuing the packs and these are kept securely;

- The MED3's can be issued by any healthcare professional (not solely doctors) responsible for the care plan of the individual;

- Following changes to legislation from July 2022, any registered practicing doctor, nurse, occupational therapist, pharmacist or physiotherapist can legally certify the fit note.

13. Following production of this email, I required the respondent to confirm whether they maintained the position in respect of the fit notes given they were extremely serious allegations that had been made against both the claimant and the GP; namely procuring and issuing the notes on a fraudulent basis. Mr Hoyle stated that having seen the email from the GP he accepted that the GP says he issued the fit notes. His explanation for

not making enquiries of the GP before raising the allegations was that the respondent was not in position to challenge them and had raised it with the regulated body as was their duty. Mr Hoyle agreed that the proceedings were no longer interfered with by the allegations.

Questions from the respondent during cross examination of the claimant

14. Mr Hoyle wanted to ask the claimant about her conduct and advice she had received from her union after she was informed of her dismissal by a letter dated 8 March 2023. Mr Hoyle was asked to explain why this was relevant to the issues, as the respondent had dismissed the claimant by this point. Mr Hoyle submitted it was relevant as it was a "two-way process" and was relevant to Polkey and contributory fault. I was unable to understand this explanation as it had been conceded by the Respondent that they refused to permit the Claimant to appeal her dismissal and asked how the Claimant's conduct, after dismissal could be relevant to Polkey or contributory fault I considered exploring this issue was wasting Tribunal time. Mr Hoyle objected to not being permitted to ask this line of questions and this was noted.

15. Mr Hoyle attempted to revisit this line of questioning on the second day of the hearing. It was put to the claimant that there was a 17 day window between being advised she was being dismissed and the end of the employment and she could have written to the respondent and told them she did not want to be dismissed and ask for a lower paid job. As this was essentially the same line that had been refused the day before Mr Hoyle was asked to move on to the next topic.

16. Mr Hoyle also wanted to cross examine the claimant about a meeting in early October 2022 where he said that options were discussed. It transpired that the Respondent had not led any evidence about this meeting and there were no supporting documents to evidence that meeting in the bundle. Mr Hoyle submitted he should be permitted to cross examine the Claimant about this meeting on the basis Counsel had not challenged that the meeting had not happened and it was referenced in the response. It was unsurprising that Mr Toms had not challenged anything about this meeting given that there was no evidence about the meeting anywhere in the bundle or witness statements. I decided on this basis this question would not be permitted. Mr Hoyle then made an application for Mr Bone to be recalled to give evidence about this meeting. I refused this application as it would not be fair on the claimant to adduce new evidence about a meeting for which there was no evidence other than to recall Mr Bone to give new oral evidence.

17. At this stage Mr Hoyle wanted to take a break to take instructions from the Respondent about the above exchange. I asked Mr Hoyle to move on to the next topic and he would be able to take instructions at the end of the hearing as there was only ten minutes left until the end of the day. Mr Hoyle asked me to formally record that I was refusing to permit him to take instructions. It is noted that the decision was that Mr Hoyle would be permitted to take instructions at 16.30 and not at 16.20 when he requested and it is accordingly recorded in these reasons.

18. On 8 December 2023 during the claimant's cross examination Mr Hoyle wanted to put to the claimant that "burnout" was not in the DSM (Diagnostic and Statistical Manual of mental disorders) and that Benign Paroxysmal Vertigo ("BPV") is not a mental health condition that can be caused by stress. I reminded Mr Hoyle that evidence cannot be adduced in cross examination questions. There was no medical evidence to support these contentions in the bundle. The claimant's evidence was that vertigo can be exacerbated by stress.

19. It was also put to the claimant that it was now the Respondent's case that she had falsely been claiming sick pay. This had not been a case advanced in the response or the Respondent's witness statements.

Questions from Judge Moore to Mr Hoyle during submissions

20. During submissions and after Mr Hoyle told the Tribunal the list of issues was not agreed, I asked Mr Hoyle to therefore confirm what the Respondent's reason for dismissal that was being advanced. Mr Hoyle complained that I was interrupting his submissions and throwing him off. I explained that judges needed to be able to ask representatives questions about their case and after a discussion suggested that I could keep all of her questions until the end of the submissions rather than when they were raised by Mr Hoyle to which Mr Hoyle agreed.

Findings of fact

21. The Claimant has a BSC in Psychology which she gained in 2011 and since 2008 has worked in a range of support worker and mental health roles and has been a mental health practitioner since at least January 2015. She has fifteen years' experience in working in the mental health sector.

22. The Claimant commenced employment with a TUPE predecessor called ACE on a fixed term contract on 2 February 2015. Thereafter she was employed on a series of fixed term contracts issued by ACE, the last of which recorded her title as Mental Health Coordinator, which was issued for the period 1 April 2022 signed on 4 April 2022 and due to expire on 31 March 2023. The Claimant was solely responsible for managing a Tier 0

service which was a mental health service supporting GP surgeries. She line managed six members of staff and had usual managerial responsibilities including budget, monitoring and reporting to the University Health Board. During the time the Claimant worked for ACE in which they had the Tier 0 contract, the Claimant was responsible for overseeing 4 of the 6 clusters across the city of Cardiff.

23. The Tier 0 service went out for retendering in September 2021 and there was a delay in the eventual arrangements which meant that ACE continued to deliver the service beyond the end of the contract date which was due to be 31 March 2022.

24. The Respondent is an independent mental health charity and a company limited by guarantee. Mr Bone is the Chief Executive. The Respondent submitted a tender for the Tier 0 service which was due to commence on 1 April 2022. As part of that process they were provided with a list of staff who were currently allocated to the contract and the information on the ACE staff showed Mr Bone that the staff were on fixed term contracts due to terminate on 31 March 2023.

25. In December 2021 the Respondent appointed Mr Padbury to assist with the tendering process. He was appointed as a Project Manager and was also responsible for managing Tier 0 services in one of the regions not operated by ACE at that time.

26. The outcome of the tendering process was communicated to ACE and the Respondent in mid-May 2022 and the Respondent had successfully gained the tender for all six clusters for a three year period.

27. The first meeting between the parties was on 14 June 2022 where the Claimant met with Mr Bone and Mr Padbury. Mr Bone informed the Claimant that her ACE role was in effect redundant and that Mr Padbury had been appointed as the manager from 1 January 2022. The file note dated 15 June 2022 recorded that the claimant had stated she would never accept a Mental Health Practitioner (“MHP”) role due to a loss of status and career prospects. Mr Bone informed the Claimant that she would not be managing the service moving forward and offered the Claimant an alternative role, Senior Mental Health Practitioner (SMHP”). During this discussion other possibilities were explored, namely redundancy and / or whether she could be offered a role of Mental Health Practitioner, with a protected salary until 31 March 2023.

28. On 22 June 2023 Mr Padbury emailed the Claimant thanking her for expressing an interest in transferring to the Respondent under the TUPE transfer. Mr Padbury referenced having the MHP role in mind and said this

role would have to apply to her for the time being and invited her to a meeting on 1 July 2022. It ended on a positive note where Mr Padbury expressed how much they were looking forward to working with her.

29. On 27 June 2022 the Claimant replied informing him she had taken advice from HR and ACAS who had informed her that under the TUPE Regulations she reserved the right to TUPE across with all her current terms and conditions of employment either matched or more favourable. On 27 June 2022 Mr Padbury replied and informed the Claimant that her role was redundant, the organisational restructure of the Respondent did not provide for her role as these duties were undertaken by Mr Padbury. He asserted that this position was permitted under TUPE for economic and organisational reasons. He stated that they were required to look for suitable alternative employment which is why they were offering the Claimant the Practitioner post (MHP post) on a protected salary.

30. On 28 June 2022 Mr Bone emailed Mr Padbury in what was evidently intended to be a private discussion between them at that time about the Claimant. Mr Bone stated there was "an alternative way of thinking about Carly" namely:

"She TUPE's over in her current role,

the role is made redundant on transfer for permitted organisational reasons,

She takes a redundancy payment plus notice,

Or accepts a practitioner role at protected salary noting they could leave this option on the table for 4 weeks for her to trigger redundancy option.

I am disinclined to designate her as your nominal deputy."

31. The Claimant then met Mr Padbury again on 7 July 2022 following which he sent the Claimant an email in which he informed the Claimant that technically on 1 August 2022 her existing post of Project Coordinator was made redundant. This presented two options; option one was to take redundancy payment and option two was to take a suitable alternative employment of Senior Practitioner role in which case the pay would be protected until 31 March 2023.

32. Evidently the Claimant's concerns about where she would stand as of 31 March 2023 had been discussed with Mr Padbury as the email goes on to reference them and says he discussed them with Mr Bone. He told the Claimant that Mr Bone said he was *"hopeful ahead of 31 March 2023 that something could be established that would minimise any reduction in her*

salary and allow the Claimant to continue working with them and contribute to the experience in the project."

33. There was a further meeting that then took place on 27 July 2022 and on 28 July 2022 a further email exchange. It should be noted this was only two days before the Claimant was due to TUPE transfer her employment to the Respondent. Mr Bone sent the Claimant an email on 28 July at 14:30 referencing that he had hoped the Claimant would recall when they had previously met he had asked the Claimant to provide an indication and thoughts as to what her role might be. He said that he was thinking about establishing a hybrid role where they utilised the Claimant's expertise within the new service against a backdrop of creating and filling admin and statistical reported roles and went on to say we already have James, that is Mr Padbury, as a Scheme Manager. He said that if the Senior Practitioner role could be firmed up to include caseload moderated by other agreed commitments that would be what they could offer until 31 March (2023) as per TUPE. He also went on to say that he was intending to review the way the service was operating and decide on a new structure from 1 April (2023) next year. Mr Bone went on to mention that Mr Padbury had mentioned that she had financial commitments that would be heightened if she was to revert to a practitioner role when the current protection expires.

34. This does not reference the asserted position that the Claimant had said that she would never accept an MHP role. In my judgment if such an assertion had been made by the claimant, this email would not have been written in the way it was. I do find that at this time the claimant had communicated to the respondent that accepting a lesser salary would cause her financial difficulties.

35. Mr Bone goes on to say that he was optimistic that the Senior Practitioner role could work well and become part of the permanent structure and he was additionally hopeful he could create one at a salary level that is there or thereabouts at the current level without "blowing apart" the Respondents salary structure.

36. On 8 August 2022 the claimant was provided with a contract which specified that the Claimant's employment would be on fixed term until 31 March 2023. The job title was "Senior Primary Mental Health Worker". The contract provided that the job description would be "particular duties set out in the current job description for the post". The Respondent's position was that the claimant's duties and role would be an ongoing situation to be discussed and formulated as the months progressed after the transfer. The contract stated if this could not be agreed she would retain the option of seeking redundancy which would remain available for three months. Mr Bone's witness statement confirmed that whilst he had determined the respondent did not need the role of Senior Practitioner, he was not so single minded to

discount the possibility such a role may add value. The Claimant's employment then TUPE transferred on 1 August 2022. Thereafter, the Claimant attended two weeks training and took three weeks annual leave as she had not been able to take any annual leave that year because of the work involved in preparing the contract for transfer.

37. When the Claimant was working for the Respondent she was predominantly, almost wholly, undertaking work as a Mental Health Practitioner. She had a caseload and she was also having proposed observations of her work as a Mental Health Practitioner by Mr Padbury.

38. The Claimant's supervision notes dated 30 September 2022 acknowledged that work still needed to be done to define the Claimant's role and that needed to be a joint effort. It also noted, (these were notes prepared by Mr Padbury but agreed by the Claimant), that the Claimant made it clear that a pay reduction of any kind would not be viable and Mr Padbury reported as much to Mr Bone in an email sent shortly after. Mr Padbury in that email also criticised the Claimant for her eating lunch at a meeting and failing to find venues for training as he had asked. Both of these matters were repeated in Mr Padbury's witness statement. It was evident from this email that Mr Padbury could not envisage an ongoing need for a Senior Practitioner role and he said as much very clearly in his email to Mr Bone.

39. The Claimant was asked about this during her evidence. She told the Tribunal that she had sought permission to eat her lunch as she had been in another meeting which had run over and that she had not had the time to find the training venues due to other work she was undertaking and being off sick.

40. Following that the Claimant went off sick from 11 October 2022 and she self-certified for the first week and then saw her GP who issued her with Fit Notes thereafter. The reason for the absence was initially Benign Paroxysmal Positional Vertigo ("BPPV") later becoming chronic vertigo.

41. The Claimant was asked why she had not seen an NHS GP for the Fit Notes and she explained that she had had previous issues with the practice and that she had chosen to see a private GP who became her GP moving forwards.

42. Following the Claimant being off sick in October 2022, she stayed off sick until her dismissal on 8 March 2023.

43. The Respondent had a wellbeing policy which was financially generous and a well thought out policy providing for managing employees who were off sick. The respondent did not follow their own policy when dealing with the Claimant's sickness absence. There was no contact with the Claimant

whatsoever during her long term absence other than to request Fit Notes, there was no welfare check and no referral to Occupational Health. Mr Bone accepted he could have referred the claimant to Occupational Health but did not do so.

44. On 10 March 2023 (a Friday) the Claimant contacted Mr Padbury via text message in response to Mr Padbury asking the Claimant for a Fit Note. The Respondent had to chase the Claimant on occasions for her Fit Notes and took no action to stop her pay or anything of that nature.

45. The Claimant apologised for not sending the note and went onto say as follows:

"I've been signed off for another 4 weeks but I was going to see how you would feel about me coming back without being 100% or maybe trying to do some telephone appointments from home in order to try and get back a bit sooner than having to wait to get back to normal as it is taking so long and the waiting list to be seen are at least 6 to 8 months, is that a possibility at all or no?"

46. She then clarified in a further message as follows:

"*Sorry just re-read that message – that's not to say I'm going to be off for 6 to 8 months, I'm continuing to get better so dr doesn't think I need to be referred & should be back to normal soon I am just thinking if it is possible to come back before I am 100% but feel ok to be back at work or if I have to wait to be completely clear of it before I do?"*

47. It is my finding that this was plainly a request from the Claimant to see if the Respondent could consider a phased return to work. Mr Padbury replied also on 10 March 2023. He advised the claimant he was off work at the moment and said, "let's talk on Wednesday".

48. On 13 March 2023 the claimant sent her fit note to Mr Padbury via message. The claimant's fit notes at this time said she was unfit for work. They did not say she may be fit taking into account advice. She was signed off from 7 March 2023 to 4 April 2023.

49. Mr Bone's evidence about the decision to dismiss the claimant did not set out details of when he reached the decision. He stated that he remained open minded about the claimant's role until he prepared the 2023/24 budget and had delayed the preparation to give the best opportunity to consider if there could be a Senior Practitioner role but had been unable to do so given the claimant's sickness absence. He went onto say that he was facing capacity pressure and accordingly sanctioned filling the vacancy **they had been holding** (my emphasis). Mr Bone stated *"we naturally considered the suggestion contained in the text message dated 10 March. The suggestion*

did not have any traction as it did not suit our operational requirements". He was asked about this during cross examination. It was put to Mr Bone that his response to the claimant's suggestion of a phased return was to dismiss the claimant. In response Mr Bone told the Tribunal that the fit note took the claimant beyond 31 March2023, the date the contract was coming to end and he was anxious to avoid inference the respondent was accepting employment would continue. He therefore decided it best to write to her and tell her as a result of a lack of a business case for the SPR the post would terminate.

50. On the basis of this evidence I find that the decision to dismiss must have been reached on either 13 or 14 March 2023. This is because the claimant had not sent her fit note dated 7 March 2023, which signed her off until 4 April 2023 until 13 March 2023. Therefore Mr Bone could only have reached the conclusions relayed in the above paragraph after receipt of that fit note.

51. On 14 March 2023 the Claimant received a letter from the Respondent which was dated 8 March 2023, so prior to this text exchange on 10 March, which was a letter of dismissal. For the reasons set out above this letter was erroneously dated 8 March 2023 as the decision had not been taken until 13th or 14th March. Mr Hoyle suggested that the letter was not a dismissal letter but set out an intention to dismiss the Claimant, I have no hesitation in rejecting that contention. The contents of letter could not be plainer; this letter dismissed the Claimant. The letter opened with the statement that the fixed term contract ran until 31 March. It went onto say that Mr Bone had considered the performance of the Tier 0 team and was of the view they should concentrate on practitioners, there was no need or justification for James to have a deputy and *"accordingly I would advise you your contract will not be renewed and your employment will come to an end on 31 March."*

52. The dismissal letter informed the Claimant that her contract would not be renewed and her employment would come to an end on 31 March 2023. It did not contain the right to an appeal. The respondent did not follow the processes laid out in their Redundancy Policy. Again this is a well thought out, comprehensive policy designed to thoroughly comply with what one would expect to see in a redundancy situation a reasonable employer would follow. There were multiple breaches of the policy. Where staff had been employed on fixed term contracts that extended beyond 2 years they would be treated as permanent staff for the purposes of the redundancy policy. It provided for redeployment, consultation and in particular it provided that there should be a period of 30 days during which there would be redundancy consultations. None of this happened with the claimant. There was no consultation whatsoever. She was dismissed by letter whilst on long term sickness absence.

53. On 7 April 2023 the claimant raised a grievance letter. This was limited to complaints about not receiving notice pay and did not complain about the process or decision. The claimant was not paid the 8 weeks' notice she was entitled too. On 20 April 2023 Mr Bone wrote back in response and said that the Claimant could not bring a grievance in any event as she was not an employee and she would not be paid notice beyond 31 March 2023. He stated it was arguable she had already been given notice under the ACE contract carried over and therefore notice was already given.

54. Following this the Claimant was signed off with work related stress, sleep disturbance and it also triggered her vertigo. It should be noted that the Claimant had been ready to explore returning to work in a phased way in March 2023 and I find that but for the dismissal, given that contemporaneous evidence and what the Claimant told Mr Padbury in the text message that she would have been back in work in or around April 2023. In the event she was eventually signed off until September 2023 following the dismissal. By July 2023 the claimant began to look for alternative work. Her experience with the respondent meant that she decided not to continue in the mental health environment and she decided to retrain as a rental agent. The claimant obtained a Rent Smart Wales Agent License in October 2023 and is currently managing a student HMO property. She is aiming to build up a portfolio.

55. Turning now briefly to the roles that were available within the Respondent around the time the Claimant was dismissed. On 19 January 2023 they had advertised for a Primary Mental Health Worker, closing dated 6 February 2023. Mr Bone's witness statement confirmed this was the role of MHP which I have found was the role the Claimant had been briefly undertaking before she had gone off sick and more than qualified to fulfill. The Respondent did not lead any evidence as to who, other than the Claimant, this vacancy might have been replacing. Mr Bone told the Tribunal that the Respondent was facing capacity pressures and that they had to "fill the vacancy they had been holding." I particularly took into account the use of that word "holding" in my conclusion that that vacancy was a vacancy that was there because the Claimant was off sick and not undertaking the Mental Health Practitioner activities. Mr Bone told the Tribunal the claimant was not invited for an interview for this role as she had stated previously it would not be financially viable and she was absent on long term sickness. He also told the Tribunal that he had formed the view that the Claimant was off sick to maximise her sick pay to a point to which she would then be able to take her redundancy. As noted above the Respondent does have generous sick pay terms. This was set out in Mr Bone's witness statement and the case was maintained and advanced at the hearing before this Tribunal. It was put to the Claimant she had not been genuinely ill and I also note the allegations I have dealt with above that initially the Claimant and her GP, although it

appears to have been abandoned that the Claimant was in some way engaged in fraud in relation to the Fit Notes were producing fraudulent Fit Notes.

56. The Respondent filled the Mental Health Practitioner vacancy, they did not inform the Claimant about the vacancy, they did not invite her to apply or draw it to her attention. In addition, there was evidence that they had recruited support workers and a further recruitment round in May 2023 replacing a Mental Health Practitioner.

57. I had regard lastly to the job description of Mr Padbury in his role as the Community Connector and Tier 0 Manager and I find the duties within that role were closely aligned to those performed by the Claimant prior to the TUPE transfer which is unsurprising given that they were both concerned with managing the delivery of the service.

58. It was put to the Claimant that she would not have taken the Mental Health Practitioner role due to the drop in salary. Indeed it was put that it was simply not credible given her financial commitments, that she would have been unable to take such a cut in salary. The Claimant told the Tribunal that she would have taken the role even with a £10,000 p.a pay cut and had previously had to take a reduced role from full time to a part time job, indeed 3 days per week, for financial reasons when the budget had been cut and that she had done this to stay in work. The claimant was unable to remember whether she had informed Mr Bone and Mr Padbury that she would never take an MHP role during the discussion in the summer of 2022. She did dispute that she refused an MHP role on the basis she was never offered the role in the first place.

59. Mr Bone sensibly conceded that Claimant has more relevant experience than Mr Padbury who prior to his current role with the Respondent was engaged in sales type roles for about 5 years with one year's experience of running one cluster. Both have a BSc in psychology but the Claimant had run four clusters under the project as opposed to Mr Padbury's one. The Claimant had much more experience in running those services and in the mental health sector.

The Law

Unfair dismissal

60. Redundancy is a potentially fair reason for dismissal under S98 (2) ERA 1996.

61. The reasonableness requirements arising from S98 (4) ERA 1996 were set out in a redundancy case of **Williams v Compair Maxim Ltd [1982] IRLR 83** (per Browne-Wilkinson J) **:**

Reasonable employers will seek to act in accordance with the following principles:

The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

62. Regarding consultation, the EAT in **Mugford v Midland Bank [1997] IRLR 208** summarised the position as follows:

Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

57. Fixed Term Employees

Regulation 8 of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("FTE" Regulations") provides:

8 Successive fixed-term contracts

(1) This regulation applies where—

(a) an employee is employed under a contract purporting to be a fixed-term contract, and
(b) the contract mentioned in sub-paragraph (a) has previously been renewed, or the employee has previously been employed on a fixed-term contract before the start of the contract mentioned in sub-paragraph (a).

(2) Where this regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if—

(a) the employee has been continuously employed under the contract mentioned in paragraph 1(a), or under that contract taken with a previous fixed-term contract, for a period of four years or more, and
(b) the employment of the employee under a fixed-term contract was not justified on objective grounds—
(ii) (i) where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;
(iii) (ii) where that contract has not been renewed, at the time when it was entered into.

(3) The date referred to in paragraph (2) is whichever is the later of—

(a) the date on which the contract mentioned in paragraph (1)(a) was entered into or last renewed, and
(b) the date on which the employee acquired four years' continuous employment.

61. In **Adeneler v Ellinikos Organismos Galaktos C-212/04 [2006] IRLR 716**, the ECJ held that the use of successive fixed-term contracts was precluded where the justification advanced for their use is solely that it is provided for by a general provision of statute or secondary legislation of a Member State. On the contrary, the concept of 'objective reasons' within the meaning of that clause requires recourse to this particular type of employment relationship, as provided for by national legislation, to be justified by the presence of specific factors relating in particular to the activity in question and the conditions under which it is carried out.

62. If the fixed term contract is deemed to be a genuine fixed term contract, the Tribunal must still consider whether the dismissal was fair within the meaning of Section 98 (4) ERA 1996.

Conclusions

Fixed term contract status

63. I have concluded that the Claimant was a permanent employee under the Fixed Term Contract Worker Regulations. At the time of her dismissal she had 8 year's continuous service. The contract was last renewed on 8 August 2022 (see paragraph 36 above) accordingly this is the relevant date for assessing whether the employment of the claimant on a fixed term was objectively justified. Mr Hoyle confirmed that the respondent was in a position to deal with this issue on the morning of the first date but made no submissions as to what the objective justification might be. I have therefore considered what the objective justification might have been based on the facts of the case applying **Adeneler.**

64. As at 8 August 2022, the contract was renewed with the intention the claimant would be undertaking MHP work and also with a view to developing the role. See paragraphs 32,33 and 35 above. The claimant was told her contract was based on MHP work and this is the work she was predominantly doing. There was no evidence led by the respondent that the requirement for MHP work needed to be on a fixed term basis. I have taken into account that on winning the contract, this was for a fixed term of three years. However the fact that the contract may have been up for re tender does not automatically mean the employees assigned to that contract should be placed on fixed term contracts. TUPE provides generally in such circumstances employees in those circumstances would transfer in any event so this does not assist the respondent. I have noted that Mr Padbury was not on a fixed term contract. There was no evidence that the other MHPs recruited in January and May 2023 were recruited on fixed term contracts. Further the respondent envisaged at the time the contract was renewed that the contract would not be temporary. For these reasons the

respondent has not shown the use of the fixed term contract was objectively justified.

Dismissal

65. I firstly have considered what was the reason for the claimant's dismissal. The respondent submitted it was redundancy or some other substantial reason namely the expiry of a fixed term contract. This is a case where there were a number of reasons that could have been the reason for the Claimant's dismissal and I am required to find, or to conclude, what was the set of facts known to the employer or beliefs that caused him to dismiss.

66. I do not find there was a redundancy situation. I do not consider that the appropriate role for consideration is a Senior Mental Health Practitioner as that is not what the claimant had bene doing before she went off sick and further the respondent had made it crystal clear that there was one role and that would be fulfilled by Mr Padbury. At the time the claimant was dismissed the respondent has not shown that the need for Mental Health Practitioners had diminished or ceased indeed the evidence was quite the contrary on the basis the respondent were recruiting for a replacement for the claimant's MHP work in January 2023. Mr Bone said as much in his witness statement (see paragraph 49). I accepted the Respondents position that they did not need two managers to run the service but that does not help the Respondent because the Claimant was not undertaking management functions. It had been made plain to the claimant even before she started that role would be undertaken by Mr Padbury.

67. I do not find that she was dismissed because of the expiry of the fixed term contract. The fact that the contract was due to expire was not the cause of dismissal. In my judgment the Claimant was dismissed because she was off sick and the respondent did not want her to obtain permanent status. The reason I have formed that decision was based on Mr Bones witness evidence. Mr Bone told the Tribunal that he had formed the view that the Claimant's intention was to maximise her sick pay entitlement. This position was pursued at the Tribunal along with the allegations that the claimant and / or her GP were fraudulently conspiring to falsify fit notes. In my judgment the evidence showed that the respondent did not want the Claimant to go beyond the date of 31 March 2023 fearing she would be deemed to be a permanent employee. This is supported by the timing of the dismissal. There had been no contact between the Respondent and the Claimant between October 2022 and March 2023 and it was only when the Claimant contacted the Respondent to suggest a phased return does the Respondent decide that the Claimant must be dismissed. I find that the Respondent has not shown a potentially fair reason for the dismissal.

Section 98(4).

68. Notwithstanding that I have found the dismissal to be substantively unfair I consider it appropriate to set out my conclusions regarding the reasonableness test under s98 (4) ERA.

69. It is, in my judgment, difficult to envisage a more unfair process than what I have seen before me during these proceedings. There was absolutely no consultation with the Claimant before she was told she was being dismissed by letter whilst off sick. The Respondent completely breached their own redundancy policy and procedure. There was no selection, pool or otherwise. There was no consideration of suitable alternative employment. The suggestion that there had been some form of notice or consultation in earlier correspondence or meetings was particularly unmeritorious. This was not supported by the contemporaneous documentation that was before me. Even if that had been the case the Respondent was still obliged to act reasonably on the expiry of the fixed term contract and they did not do so.

70. To a degree, the claimant's status as a fixed term employee should not have been a material factor in treating that as a reason for her dismissal as the respondent's own policy provided that she should have been treated as a permanent employee during the redundancy procedure in any event. See paragraph 52. The Respondent's own policy provided that alternative employment should have bene considered even if the employee is on a fixed term contract. It cannot be reasonable for a respondent to ignore their own procedures and policies.

71. There was no right of appeal afforded. When the claimant raised a grievance about her short notice pay she was not permitted to pursue that grievance.

72. This was not a TUPE case but I also observed the significant shortcomings around the decision on transfer to demote the claimant on transfer, in preference to Mr Padbury with no consultation or selection process. This continued to the point of dismissal. A reasonable employer would have placed the claimant and Mr Padbury in a selection pool.

73. I do not accept the respondent's position that they knew, from discussions the summer before that the claimant would never have accepted the MHP position. Even if the claimant had said that, they still should have consulted with her about that before the dismissal as her position may have changed.

74. Mr Hoyle submitted that if a finding of unfair dismissal was reached, that I should consider the percentage chance the claimant would have been fairly dismissed (Polkey) and contributory fault.

Polkey

75. I am required to assess for how long the claimant would have been employed but for the dismissal. I have had regard to all of the evidence before me. However in this case, the respondent has not shown a fair reason for dismissal. Even if they had, the likely outcomes would have been that the claimant would either have been appointed as the manager in place of Mr Padbury or been offered the vacant MHP role. In this case, the process was so unfair I agree with Mr Toms that a Polkey reduction is not appropriate as the exercise is so riddled with uncertainly given the wholescale lack of any process, that a reduction is not appropriate.

Contributory fault

76. I have found this to be the most extraordinary submission. I did not allow questions pursuing this line and the respondent still maintained the position in submissions. This was a wholly unreasonable position to have taken. It was suggested that because the Claimant did not "push back" on her dismissal in some way or contact the Respondent after she had received the letter of dismissal, that this somehow meant that she contributed towards the dismissal. Apart from the fact that contributory fault normally denotes blameworthy conduct by the employee before the decision to dismiss is taken, this is a particularly difficult argument given that when the Claimant did raise a grievance on 7 April 2023, she was told she had no right to do so. There was no right of appeal afforded.

Employment Judge S Moore
Dated: 11 January 2024

REASONS SENT TO THE PARTIES ON 15 January 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS MR N Roche