EMPLOYMENT TRIBUNALS

Claimant: Mr Adu

Respondent: ABM Facility Services Limited

Heard at: London South **On: 9 December 2019**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: in person
For the respondent: Mr Chambers, Solicitor

RESERVED JUDGMENT WITH REASONS

Decision

(1) The claimant was constructively unfairly dismissed.

(2) The claimant's compensatory award is subject to a 40% *Polkey* reduction.

(3) The claimant's compensatory award is also subject to a 30% reduction for contributory fault in relation to his dismissal pursuant to S.123 (6) of the Employment Rights Act 1996.

(4) The basic award is subject to a 40 % reduction on account of the claimant's conduct pursuant to S.122 (2) of the Employment Rights Act 1996

Reasons

Claims and appearances

1. By a claim form presented on 24th of July 2019 following ACAS conciliation between 19 June 2019 and 16 July 2019, the claimant made a claim for unfair dismissal.

2. The claimant appeared in person and the respondent was represented by Mr Chambers, Solicitor.

3. The Tribunal had one bundle of documents and a few supplementary documents from the claimant. The claimant gave evidence and had prepared a witness statement and the respondent had a witness statement from one witness Mr James Okolomba, the respondent's senior operations manager.

4. Although the evidence was completed on 9 December 2019 there was insufficient time for the parties to provide submissions. The Tribunal wished to hear submissions on liability and on the issue of contribution and ***Polkey*** to the extent the parties considered relevant. Accordingly, The Tribunal invited the parties to provide written submissions by 20th of January by sending to each other and to the Tribunal at the same time. The Tribunal explained to the claimant who was a litigant in person what was meant by submissions and what the Tribunal was asking the parties to address. These were received.

5. At the outset of the hearing the Tribunal had spent some time with the parties to identify the issues which were agreed as follows:

- When did the claimant's employment end?
- What was the reason for the termination of the claimant's employment? Was he dismissed by the respondent, if not did he resign?
- If he resigned, was his resignation in response to a fundamental breach of contract by the respondent?

6. The claimant relies upon a breach of the implied term of trust and confidence because of the following assertions:

    a. The claimant says he was bullied into moving to work on the Piccadilly line from the Jubilee line
    b. Although the claimant says that the respondent could in principle ask him to work on a different line, they did so without due process and thus his complaint is about the manner of the change
    c. The claimant asserts that his contract says he is to work on the Jubilee line
    d. Following the investigation meetings on 11 April, 28 April and 2 May 2019, he was not informed of the outcome at all or next steps
    e. The claimant says he informed the respondent that he was stressed with high blood pressure and therefore he could not move to a new line because he would be stressed by working at a new location. He says this was ignored.

7. If the claimant was dismissed expressly or constructively to what extent did the claimant contribute to his own dismissal and is it just and equitable to reduce compensation accordingly?

8. Would the respondent have dismissed the claimant in any event following a fair/due disciplinary process.

Relevant findings of fact

9. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

10. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken too in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

11. The claimant was employed as a night supervisor on the Jubilee line. His employment with the respondent began on 4 February 2018 following a TUPE transfer. His continuous employment was from 27th of February 2002.

12. The respondent is a provider of cleaning, security, building maintenance, waste and facilities management services. The respondent provides the services to various clients including transport for London ('TfL'). The TfL contract is for cleaning services only. This is the contract on which the claimant worked.

13. The claimant's duties were to ensure the supervision of cleaning staff, ensuring that there was sufficient cover and materials, health and safety checks including safety briefings, carry out regular inspections on the stations, attend and close all faults and to issue a report to management at the end of the day. Insofar as the aforementioned duties were concerned these were not in dispute between the parties.

14. Mr Okolomba was the senior operations manager on JNP Nights. 'JNP' means the Jubilee Northern and Piccadilly line. Mr Okolomba was the claimant's line manager.

15. The respondent issued a terms and conditions document to the claimant in which he was described as a Jubilee night supervisor and his place of work was Jubilee line. This was at page 30 of the bundle. There was also a job description at page 35 of the bundle. The terms and conditions document was signed by the claimant and so was the acknowledgement of his job description. His acknowledgement was in relation to his supervisory duties on the Jubilee line.

16. In the first quarter of 2019, there were concerns about the respondent's quality of cleaning service to TfL on the JNP contract. Mr Okolomba believed there had been a drop in standards and some complacency amongst the supervisors on all three lines not just the Jubilee line. As a result, it was proposed to reshuffle the site management including supervisors and also the fault and periodic team members. Whilst the Tribunal accepts and finds that the claimant was issued with and received his job description on 2 March 2019, the Tribunal did not find that there was a consultation or presentation meeting on this day. There was no evidence before the Tribunal, for example a copy of the slides or other documents or any email traffic explaining what was to take place.

17. A supervisors meeting was called for 5 April. There were approximately eight supervisors in attendance. It was proposed that the lead supervisors on the three lines would stay on their existing line but would have new accountabilities. In addition:

- one supervisor was to move from the Northern line to the Piccadilly line
- another was to move from the Piccadilly line to the Jubilee line
- another was to move from the Piccadilly line to the Jubilee line
- another was to move from the Jubilee line to the Piccadilly line
- another was to move from the Northern line to the Jubilee line
- another was to remain on the Northern line
- the claimant was to move from the Jubilee line to the Piccadilly line

18. The claimant left this meeting before it had ended. The claimant says that the main agenda was over and the respondent said he left before the meeting was over and without permission. The Tribunal finds that the claimant left the meeting before it was over and without permission. In his witness statement paragraph 5 he says he "took the opportunity" to go out to his van to resolve some issues with some operatives on the line and did not return to the office afterwards. The claimant also agreed in his investigation meeting which followed that he was not told the meeting was over (page 46 & 47 or of the bundle). The Tribunal concludes from this that the claimant decided unilaterally that the meeting was over.

19. Thereafter there was a further conversation between the claimant and Mr Okolomba and it was agreed between the parties that the claimant was asked to come back to the meeting because the meeting was not over. It was not in dispute that the claimant did not return to the meeting.

20. The Tribunal was referred to statements, which were undated but the Tribunal concludes were taken at some point before 19 April 2019, when they were sent to HR (page 61), from individuals who were present at the supervisors' meeting (pages 56-60). These statements supported that the conversation took place, that the claimant was asked to return to the meeting and that he

did not return to the meeting. They did not however provide a consistent picture of what the claimant said to the respondent. Mr Alabi, (page 56) said the claimant said he would be there in the next 15 minutes, whilst 'Michael E' (page 59) said the claimant stated he was not coming back. The claimant himself accepted he had said he could return in 15 minutes (his email of 8 April at page 39 of the bundle).

21. The Tribunal finds that there were some raised tones during this conversation from both parties. Michael E (page 59) referred to the claimant shouting, but the Tribunal has regard to the inevitable frustration of Mr Okolomba and because the conversation was on speakerphone from which the Tribunal finds that the conversation was not cordial.

22. Mr Okolomba emailed the claimant some four hours later (6 April 2019) setting out his concern about the claimant's conduct and inviting him to an investigation meeting on 8 April 2019 at 11.00pm with Mr Gani Taiwo, Senior Contract Manager, to consider whether the claimant had acted in an insubordinate way. The claimant was also informed that he should present himself for work at the Piccadilly line on Monday 8 April 2019. This was at page 40 of the bundle.

23. The claimant responded to this email on 8 April 2019 at 8.20am, which email was at page 39 of the bundle. In this email the claimant apologised for the delay in responding and stated he was having problems with this tablet. He further explained that he had left the meeting after the lectures and information had been given and to deal with a call from an operative who had been calling him repetitively. In relation to moving to the Piccadilly line, the claimant stated that he could not go. He made reference to the pressures of the job and having high blood pressure and the taking of daily medicine. He stated that he could not go to a completely new location which would involve familiarising himself with the structures and facilities in the new location. He stated this would exacerbate his stress levels and its associated problems. He concluded by stating he would rather be made redundant than stress himself out. He confirmed he would attend the investigation meeting.

24. Mr Okolomba responded to the claimant's email at 9:57 am. He asked the claimant to provide medical evidence in support of his medical history. Within embedded comments, he also stated that this was the first occasion he was learning of the claimant's high blood pressure. The Tribunal accepts his evidence about his lack of prior knowledge. He also stated as follows:

"Since it cannot allow you to do your job we will wait further directives from HR"

25. Mr Okolomba also stated that there was nowhere else for the claimant to work except moving back to station and further that considering the claimant's response, a replacement would need to be found for the claimant. Within his embedded comments he had also made reference to moving the claimant to

a station if there was an opportunity but that this did not include the Jubilee line either. The Tribunal finds that Mr Okolomba did not have the Northern line in mind either thus in his mind there was no other option other than the Piccadilly line.

26. The claimant was also asked to explain where he had been working between Friday 5 April and Sunday 7 April 2019.

27. Thereafter, Mr Okolomba made HR aware of the escalation (page 37 of the bundle).

28. The investigation meeting was postponed to 11 April 2019. This was confirmed in an email dated 10th of April at pages 61 to 62 of the bundle. The claimant was reminded to bring medical reports of his health condition and his daily reports 5th to 10th of April 2019, to state where he had worked, his timings and at which stations/locations.

29. An Investigation meeting took place on 11 April 2019 before two senior contract managers, Mr Taiwo and Mr Wilfrid Watson. A note taker was present too. The minutes were at all pages 42 to 55 of the bundle.

30. At this meeting, the claimant explained his reasons for leaving the meeting which were consistent with what he had set out in his email of 8 April and he reiterated that he was stressed with high blood pressure for which he was taking medication and that was the reason he could not take the stress of going to another location.

31. There was discussion at this investigation meeting about the claimant's terms and conditions and/or his contract of employment and reference to management discretion to move employees from one line to another but the Tribunal was not provided with a copy of the contract. The claimant was also asked to provide medical evidence relating to his blood pressure and presented a document regarding hypertension. Mr Okolomba agreed in evidence that the document 'at pages 88 and 89 of the bundle was the document presented by the claimant and which provided evidence of his hypertension. This showed that this had been an active issue since 24 September 2015.

32. The claimant stated that he had made his previous employer ISS aware of his hypertension and had completed forms prior to the transfer to the respondent stating this to be the case. The Tribunal accepts the claimant's evidence in this regard.

33. The claimant was asked about his daily reports which he said he had not done so because of the problems with his tablet and charging it. Regarding the work he had undertaken from 5 April to 10th April, the claimant stated that he had no other document or evidence to offer and claimed the request to be

a witch-hunt against him. The claimant was asked about health and safety tool box talk forms and agreed that he was aware of these but said he did not have these with him. It was put to the claimant that he had not been working on the Jubilee line where the respondent had positioned another supervisor and there was no evidence of the claimant's attendance from 5 April 2019, but the claimant disputed this. The Tribunal will return to its conclusions in relation to the claimant's activity in this period.

34. There was an exchange of emails on 16 & 17 April 2019 about the claimant's delay in reporting a Health and safety incident. An email from Mr Okolomba dated 17 April referred to the claimant being AWOL, being under investigation and that disciplinary action would ensue. The Health and safety Manager, the claimant and two other employees were copied in on this email.

35. On 19 April 2019, Mr Okolomba sent to HR copies of the notes from the investigation meeting and the statements from the supervisors present at the meeting on 5 April 2019. He also instructed HR not to pay the claimant since 5 April as he considered the claimant had not provided any tangible reason for not presenting for work since 5 April 2019.

36. Thereafter on 28 April 2019, the claimant met with Mr Salih Salih, senior operations manager. There were no notes of this meeting or any evidence about how this had been set up. The Tribunal finds the emails at pages 62 D and 62 E summarised the purpose of the discussion. The claimant was asked what the reason for his continuing absence was and he explained his hypertension would prevent him from moving to the Piccadilly line and that he had been informed he had been replaced on the Jubilee line. He said nothing further had happened since his investigation meeting. He offered to step down from being a supervisor and work with the fault team on the Jubilee line.

37. A further investigation meeting took place on 2 May 2019.

38. During this meeting, the claimant said if the situation occurred again, he would have returned to the meeting and let the manager tell him when it was finished. He stated his rest night was Sunday (7 April 2019) and he had worked on Saturday night at North Greenwich and mentioned some employees he had spoken to. He said he did not sign in, and the same happened at West Ham and Canary Wharf. The claimant also maintained he had been working on the Jubilee line since Monday night (8 April 2019). The claimant was also asked in this meeting if he liked his job. Also, the claimant repeated his offer to stand down from being a supervisor and work with the fault team. Mr Salih explained that the restructure meant that employees working in the fault team could work across the different lines and the claimant stated he would be happy to do that as well as the drop in rate or alternatively work as a station cleaner. The claimant further confirmed that since his investigation meeting on 11 April 2019, he had not attended work because he was told there was no supervisor role for him on the Jubilee line

and he been awaiting further direction from HR. He said he had no sick note because he had not been sick and he was ready to work/join the fault team. He claimant queried why it had taken a further 3 weeks to have a meeting whilst he had been at home not working and asked if he would be paid.

39. There was no dispute between the parties about the minutes of this meeting at pages 63-72, the pages were signed by the claimant and Mr Salih and the Tribunal finds the notes to be an accurate account of the matters discussed.

40. There was an exchange of emails between Mr Salih and Mr Okolomba as Mr Salih asked some further questions. In response to one question, Mr Oklomba stated that there were no vacancies in the fault team. He also referred to the claimant not having provide details about where he has worked since his "blood pressure excuse".

41. There followed an exchange of emails (pages 75 to 80) with the claimant as Mr Okolomba had asked him to return his Company van for reallocation. There was reference to a policy in this regard by reference to an employee's time off but no evidence of the policy was produced. He also referred to the claimant being on "self-induced AWOL". He also stated that the claimant should ensure that the van is not used against company policy. No evidence was provided to the Tribunal about the private use of a company van. Ultimately, in his email of 9 May 2019, the claimant made the van available for collection.

42. In an email from HR to Mr Taiwo, an update was sought about which manager could/would preside over a disciplinary hearing. In an email dated 24 May, Mr Okolomba also asked HR for an update on the outcome of the disciplinary investigation. Lisa Bagwell (HR) responded that a disciplinary hearing had not yet taken place. She also confirmed:

    "*If we need to move Kwaku to a different location there will need to follow the correct process for this, however whilst we do that he must remain at its current site "*

43. Another HR colleague (Byrony Thorp) was copied into this email and was asked for her views too, to which she responded as follows (page 81):

    "I agree that if he is refusing to attend work then he is effectively AWOL. He is Kwaku is noted as a Jubilee Line night supervisor on the ELI, therefore we cannot simply remove him from the Jubilee line without formal consultation, unless otherwise informally agreed as I understand other supervisors have"

44. The claimant wrote to Lisa Bagwell (HR) on 24th of May 2019 explaining that he had been waiting to find out next steps in relation to the investigation since 11th of April 2019 and objecting that he was on self-induced absence and to the taking away of his van. He said he had been told there was no place for

him on Jubilee line and if that was not the case he should have his van returned and be allowed to resume his duties as supervisor on the Jubilee line. He also maintained that he continued to be without pay. No reply was received to this email and the claimant wrote a further email on 30 May requesting a response. The claimant also wrote to Mr Salih on 31st of May to see if he could find out what was happening. These emails were at pages 85A to 85C the bundle. The claimant also said in his witness statement that he had tried to call Lisa Bagwell on her mobile without success. This evidence was not challenged by the respondent and the Tribunal accepts the claimant's evidence in this regard.

45. The claimant made a further request of the HR helpdesk and wrote his email at page 85D to 85E of the bundle. In paragraph 12 of his witness statement the claimant said he also contacted the HR helpdesk by telephone and asked to book an appointment to see somebody from HR but he was told to submit his query in an email. This evidence was not challenged by the respondent and the Tribunal accepts the claimant's evidence in this regard. The claimant says he followed this email up with a further call on 7 June when he was told that his email had been received but because there was a shortage of staff it had not yet been responded to. This evidence was not challenged by the respondent and the Tribunal accepts the claimant's evidence in this regard. The Tribunal also takes into account Mr Okolomba's evidence in response to Tribunal's questions that Lisa Bagwell had left the organisation around this time.

46. Thereafter, the claimant approached ACAS 19th of June 2019. In his witness statement at paragraph 14, he stated that he did so when it became obvious to him that the respondent no longer wished to deal with him and his reason for contacting ACAS was because of his intention to pursue a claim for constructive dismissal. The Tribunal finds that in so doing, the claimant was resigning from his employment. There was no further communication with the respondent thereafter and he did not return to work.

Applicable Law

47. Under S. 95 Employment Rights Act 1996 ('ERA'), an employer is treated to have dismissed an employee in circumstances where he is entitled to terminate the contract by reason of the employer's conduct.

48. The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee ***Malik v BCCI 1997 ICR 606.***

49. The correct test for constructive dismissal was set out and established in ***Western Excavating v Sharp 1978 ICR 221*** as follows:

    - Was the employer in fundamental breach of contract?
    - Did the employee resign in response to the breach?
    - Did the employee delay too long in resigning i.e. did he affirm the contract?

50. By s.98 (2) ERA an employer needs to have a potentially fair reason for an employee's dismissal and by S.98 (4) the employer must act reasonably in treating that reason as a sufficient for the employee's dismissal.

51. Where a dismissal is unfair the Tribunal and can have regard to the well-established principle from of ***Polkey v AE Dayton Services 1987 UKHL 8*** to assess what would have happened had the respondent followed a fair process or procedure in its assessment of compensation under S.123 (1) ERA.

52. Further, pursuant to S. 122 (2 ERA), the Tribunal can also have regard to the claimant's conduct before the dismissal to assess if it would be just and equitable to reduce the basic award.

53. Pursuant to S. 123 (6) ERA, the Tribunal can have regard to the extent to which it considers the claimant caused or contributed to his dismissal in its assessment of what is a just and equitable compensatory award.

Conclusions and analysis

54. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

55. The Tribunal concludes that the claimant's employment came to an end on 19 June 2019 when the claimant having exhausted attempts to ascertain what was happening in relation to his employment and the outstanding investigation, decided to approach ACAS but also considered that the respondent no longer wished to deal with him anymore and thus was acting in a way inconsistent with an employer trying to sustain an employment relationship.

56. The Tribunal concludes that the claimant's resignation was in response to a breach of the implied term of trust and confidence on a cumulative basis; that the claimant resigned in response to the breach and he did not delay and thus he did not affirm the contract of employment.

57. The Tribunal concludes that the cumulative breach of the implied term of trust and confidence was as a result of the following:

- Whilst the claimant was being investigated for alleged insubordination in relation to leaving the supervisors meeting on 5 April 2019 and not presenting for work on days between 5 April and 10th of April 2019, the investigation meetings had taken place on 11 April 2019, 28 April 2019 and 2 May 2019 and thereafter despite multiple efforts of the claimant, he knew nothing of the next steps. He had not been called to a disciplinary hearing. He had remained at home without pay since 12th of April 2019.

- In relation to the claimant's objection to transferring to the Piccadilly line, it was not in dispute by the parties that the reason the claimant had given was because of his hypertension. He had been requested to provide medical evidence in relation to his hypertension which he did do. The Tribunal concludes that there was no enquiry whatsoever in relation to whether and if so to what extent the claimant's hypertension would provide a reasonable basis for the claimant not to be moved from the Jubilee line to Piccadilly or alternatively whether this could be facilitated with some adjustments/accommodation. The claimant's assertion in relation to his hypertension did not mean that the respondent could not or should not require the claimant to move from the Jubilee line to the Piccadilly line but it did mean that the respondent should have made proper enquiries in relation to the claimant's medical condition and thereafter form a properly informed and considered opinion. Mr Okolomba said in evidence that this was an HR responsibility, he also explained that Lisa Bagwell had resigned. The Tribunal concludes that the Mr Okolomba did not see the claimant's reason put forward as a legitimate one from the time he was made aware of the claimant's position. He referred to the claimant's hypertension as an excuse. He also stated that out of 10 supervisors the claimant was the only one that had high blood pressure and thus was saying he could not be moved to any other location. The Tribunal concludes that Mr Okolomba also used sarcastic language. He opened his email of 8 April 2019:

  "*We are now privileged to receive your response after three days since the meeting*".

  Accordingly, the Tribunal concludes that the claimant's welfare was never at the forefront of Mr Okolomba's mind or as a genuine consideration. It is possible that Mr Okolomba's judgement was clouded by the claimant's decision to leave the supervisors meeting on 5 April 2019 and a suspicion about the claimant's non-attendance for work on some of the days thereafter up to 10th April, but as a senior operations manager he would be expected to behave reasonably and professionally at all times. He did not do so.

- Further, the Tribunal concludes that in addition to no proper enquiries being made of the claimant's medical situation there was no reasonable process followed in relation to the transfer of the claimant's supervisory work from

the Jubilee line to the Piccadilly line in circumstances where the claimant was objecting. The Tribunal was not satisfied that there was evidence before it which established a contractual right for the respondent to move the claimant between lines. There was no contract of employment in the bundle. On the contrary, the other documentation the Tribunal did see referred to the claimant's job by reference to the line on which he worked. At page 30 there was reference to some terms and conditions describing the claimant's job title as Jubilee night supervisor and his place of work was Jubilee line supervisors. Further, a document titled 'Night responsibilities of supervisors' which was signed by the claimant referred to him as a supervisor on the Jubilee line. The absence of express contractual authority does not mean change was not permissible, however, both of the HR personnel whose views were sought- Lisa Bagwell and Byrony Thorp, confirmed that in order for claimant to be asked to move, a proper process needed to be followed first. Lisa Bagwell referred to the need to follow the correct process and until that happens he was to remain at its current site and Byronny Thorp stated:

" we cannot simply remove him from the Jubilee line without formal consultation unless otherwise informally agreed as I understand other supervisors have".

The Tribunal noted that the claimant had accepted that in principle he could be asked to work on another line but his complaint was about the manner of the change.

- The claimant's company van was also taken away from him. The Tribunal did not see any evidence of the company's policies in this regard which might show when and in what circumstances this could happen. In addition, no evidence was provided to the Tribunal about whether the claimant was entitled to private use of the company van. There was some reference to this by Mr Okolomba when he told the claimant to ensure that the van was not in use against the company policy whilst he was not on duty from which the Tribunal concludes that some reasonable private usage of the vehicle was permitted. There was also inconsistent evidence from the respondent about why the vehicle was being removed from him. Mr Okolomba 's's email of 9 May 2019 stated that the respondent had other use for the van on the Jubilee line. However, on 10 May 2019, Lisa Bagwell and HR informed the claimant that it had to be returned because it was a lease vehicle which needed to be returned (to the lease company).

- The claimant's absence since his investigation meeting on 11 April 2019 to 19 June 2019, when he resigned, was essentially labelled as self-induced absence by Mr Okolomba. The Tribunal concludes that this was not the case. The claimant had provided a legitimate reason for enquiry as to why he was not able to transfer to the Piccadilly line which was not explored. Mr Okolomba had himself stated in his email of 8 April 2019 about the claimant's hypertension:

"since it cannot allow you to do your job we will await further directives from HR".

Other than what the Tribunal has referred to above about HR's view that a proper process and consultation needed to happen, there was no further direction from HR in this regard. Mr Okolomba had also made it clear to the claimant that returning to work as a supervisor on the Jubilee line was not an option in this email of 8 April 2019. During the course of the investigation meetings, the claimant had also offered to stand down as a supervisor and work with the fault team or as a station cleaner, with consequential reduction in pay but neither of these options were explored further. Although Mr Okolomba said to Mr Salih in his email of 3 May 2019 that there was no vacancy in the fault team, the Tribunal does not consider that this was a final or absolute position or one which could not have been reviewed given that the changes and restructuring was very new. The Tribunal also gave consideration to the claimant's stated willingness to work across lines if he was in the fault team and concludes that this was a request to be based on the Jubilee line albeit with an occasional/adhoc requirement to work on other lines which the Tribunal concludes was different and the job, without supervision responsibilities, was also not the same.

Polkey

58. The Tribunal concludes that if the respondent had continued with its disciplinary process in a fair and reasonable way there was a chance that the claimant would have been dismissed.

59. The Tribunal concludes that there was a chance that the respondent could have determined that the claimant was guilty of misconduct by reason of insubordination by his decision to leave an important supervisors meeting without permission and his refusal to attend/non-attendance at the meeting thereafter having been instructed to return. In addition, the respondent might have decided that the claimant was unable to provide evidence that he had worked on 6 of April or 8-10 April. The respondent did not have evidence that he had issued his daily reports to management or alternative evidence of his attendance for work.

60. The Tribunal also has regard to the claimant's delay in submitting his health and safety incident report on 16 April 2019 in relation to an incident on 14 March 2019 which the senior health and safety manager described as a blatant disregard for health and safety procedure. However, this was not raised formally as part of any investigation against the claimant.

61. Taking all of the above into consideration, the Tribunal concludes that there was a 20% chance that the claimant may have faced disciplinary proceedings for misconduct which could have resulted in a sanction of dismissal. The assessment is not higher as certainly, from 8 April, the Tribunal concludes it was not clear what the expectations of the claimant were regarding work and

the act of insubordination would have been more serious if he had challenged a direct instruction not to leave a meeting in progress with his peers present. The Tribunal notes the claimant had long service and no previous disciplinary issues.

62. The Tribunal also considered what might have happened had the respondent followed a proper process/consultation in relation to transferring the claimant from the Jubilee line to the Piccadilly line including, obtaining and considering occupational health medical guidance. The Tribunal concludes that there was some chance the respondent may have facilitated the claimant to remain as a supervisor on the Jubilee line. Alternatively, the respondent may have been able to redeploy the claimant into the fault team. Alternatively, the respondent may have been able to facilitate the claimant's transfer to the Piccadilly line with appropriate support and arrangements having regard to his medical situation rather than simply its ordinary familiarisation process with a new line. Alternatively, the Tribunal concludes that the respondent may have been able to fairly dismiss the claimant for capability if the claimant was unable to transfer to the Piccadilly line for medical reasons and was unable to find an alternative for the claimant, or, fairly dismiss the claimant for conduct or another substantial reason, if the medical evidence did not support the claimant's assertion that he could not work on the Piccadilly line and he maintained his refusal to do so.

63. There are a number of imponderables above however the Tribunal does recognise that there was a chance that the claimant would have been dismissed based on at least two of the above scenarios and assesses that further chance at 20%.

64. The *Polkey* reduction is thus 40% in total.

Contribution

65. The claimant had accepted in evidence that he was to issue daily reports to management which had not happened. The claimant explained he had problems with his tablet and it was not charging and thus he had not produced the reports. This would not however be an answer to why the claimant had not subsequently done so as he had been asked to do or any other evidence.

66. In the investigation meeting on 2 May 2019, the claimant stated in relation to 6 April 2019, that he had not signed in when he had gone to North Greenwich because he saw the cleaners working and the same thing happened at West Ham and Canary Wharf. In addition, no evidence was produced by the claimant at either investigation meeting from employees who could confirmed his attendance at various stations. The Tribunal does note the claimant's reference to some staff in the investigation meeting notes of 2 May (page 66)

and that this may have formed a line of enquiry for the respondent had the matter proceeded to a disciplinary hearing.

67. On the evidence before it, the Tribunal concludes that the claimant was guilty of conduct which was culpable and blameworthy in relation to insubordination regarding the supervisors meeting of 5 April and non-attendance for work on 6 April and between 8-10 April 2019, which the Tribunal concludes misled the respondent. As a result, a further reduction is made to the compensatory award. The conduct of the claimant contributed to his dismissal and was sufficiently connected to it.

68. The Tribunal has regard to the *Polkey* reduction already made and to avoid any excessive impact of a further reduction, this has been assessed at 30%.

69. For the same reasons, the Tribunal applies a reduction to the claimant's basic award under S. 122 (2) ERA, but as that award is not subject to any *Polkey* reduction, the percentage reduction is assessed at 40%.

70. Having regard to the findings and conclusions above the case will be listed for a remedy hearing.

Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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Employment Judge Khalil

30 January 2020