THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **EMPLOYMENT JUDGE WEBSTER**

BETWEEN:

Ms M Vasan **Claimant**

AND

Priory Healthcare Ltd

Respondent

ON: **9-10 February 2017**

Appearances:

For the Claimant: **Mr A Peck (Counsel)**

For the Respondent: **Mr N Caiden (Counsel)**

JUDGMENT

1. The Claimant does not satisfy s280(1) Employment Rights Act 1996 in that she was not continuously employed for 2 years. Therefore the Tribunal does not have jurisdiction to hear her claim for unfair dismissal.

2. The claimant was wrongfully dismissed.

3. The claimant is awarded the equivalent of her contractual notice pay, namely one month's earnings which were £2,730.56.

REASONS

Claim

4. By a claim form dated 15 April 2016 the claimant brought a claim for unfair dismissal that she had been unfairly dismissed by the respondent from her role as an Occupational Therapist. The claimant's brother was arrested for alleged online child exploitation and she did not inform the respondent of his arrest. The respondent defended that claim by an ET3 submitted on 13 May 2016 saying that she had been fairly dismissed for gross misconduct and that the decision fell within the range of reasonable responses.

5. Subsequently the matter was listed for hearing in 2016. At the hearing the respondent asserted that there was a jurisdictional point namely that the claimant did not have the requisite period of service under s280(1) ERA to bring an unfair dismissal claim. This had not been included in their defence in the ET3. At the same time the claimant was given permission to amend her claim to include a wrongful dismissal claim. The matter was adjourned until today.

6. It was for the Tribunal to decide today whether the claimant had requisite service and if so, whether she was unfairly dismissed. The claimant's breach of contract claim had to be decided regardless of the continuity of service.

7. Respondent's counsel requested that the matter of jurisdiction be considered in isolation first saying that it was a discrete point. Claimant's counsel wanted all matters dealt with together on the basis that relevant evidence would have to be heard from all three witnesses regarding continuity of employment and that they would provide evidence relevant to all issues at the same time. Having heard submissions on the matter I concluded that it was in the interests of the overriding objective to hear all the evidence. I needed to hear the substantive evidence as well as the technical submissions to determine the breach of contract claim in any event and one of the respondent's witnesses was only available on day one of the hearing. I did not want to hear and determine one point only to be potentially unable to hear evidence regarding the second point the following day.

8. I was provided with an agreed bundle of documents. Both counsel gave me written submissions regarding continuity of employment. Respondent's counsel gave me written submissions regarding the breach of contract and unfair dismissal claims.

9. I heard from three witnesses; the claimant, Ms A Pleszak and Mr Nicholson. The witness Mr R Skipp who made the original decision to dismiss the claimant provided a written witness statement but was not able to attend to give evidence. I therefore gave his evidence very little weight.

Issues

10. The List of Issues was agreed at the outset as that submitted by the respondent at the beginning of the adjourned hearing. One additional matter was added which was the question regarding breach of contract.

A) Prior to 17 February 2016, had the Claimant been continuously employed for a period of at least 2 years pursuant to s108(1) ERA so as to acquire the right not to be unfairly dismissed?

B) If the Claimant had the relevant continuity of employment, whether the Respondent's dismissal of the claimant on 17 February 2016 amounted to an unfair dismissal contrary to s94(1) ERA, having regard to the following:

a) Did the Respondent's reason for dismissing the Claimant
   (i) Relate to conduct; or
   (ii) Relate to some other substantial reason, namely a breakdown of trust and confidence?
b) If so, in the circumstances was dismissal for this reason within the range of reasonable responses available to a reasonable employer in accordance with equity and the substantial merits of the case, pursuant to s98(4)?

C) In approaching the issue at paragraph B(b) above the following considerations are relevant:
   a) Had the Respondent carried out a reasonable investigation within the range of reasonable responses in all the circumstance of the case?
   b) Was the decision to dismiss the claimant and the procedure followed to reach that decision within the range of reasonable response open to the Respondent?

D) Did the claimant do anything which constituted a fundamental breach of her contract of employment entitling the respondent to dismiss her without notice for gross misconduct?

Findings of Fact

Continuity of employment

11. It was agreed by the parties that the claimant was employed from 10 November 2008 to 1 September 2011 as a health care assistant ("HCA") and then from 18 August 2014 to 17 February 2016 as an Occupational Therapist. It is not in dispute that she was an employee during these periods. Her working status is only in dispute for the period from 16 September 2012 – 17 July 2014 when it is agreed, the claimant was called a bank worker. This period will be referred to as the bank working period.

12. There was a dispute as to the contract that governed this period of time. The respondent asserted that it was covered by the contract and cover letter at page 175-180 of the bundle. The claimant stated that she did not recall seeing that document. The claimant appeared to contend that she never received a written contract and she said this was supported by the respondent having difficulty in locating the contract for the purposes of these proceedings and the fact that it remained unsigned. Whilst I have no reason to disbelieve the claimant that she does not recall seeing this document, I find that it is more likely than not that she was issued with the contract and its covering letter (p 178).

13. I also find, based on the facts set out below regarding the claimant's working patterns and how she was offered and accepted work, that even if she did not receive the written document, it fairly reflects the understanding that the parties had during the bank work period.

14. The claimant knew that she was changing her status from that of a full time employee to a bank worker and this change was not simply a reduction in her hours but also a change in status even if she did not know that it had any legal significance or knew the label that would be applied to it.

15. In evidence she told the tribunal that she had a leaving party at the end of her time as an HCA, and that the ability to be flexible regarding her hours was something she actively wanted and suited her circumstances. She was about to engage in full time studies and would

need flexibility to allow her to attend classes, revise for exams and go on placements to different organisations.

16. The claimant agreed in cross examination that she knew she was different from her employee colleagues as she could take time off as and when she liked and did not need to seek permission. I clarified this with her in evidence and she confirmed that she informed the respondent of when she was taking time off – she did not seek permission; and she knew that this was different from how she had previously worked and how her employee colleagues worked.

17. The claimant, by her own evidence, was able to turn down shifts at any time provided she undertook some work within a 6 month period. Whilst I accept that she regularly worked weekends and was in high demand because she was very good at her job - there is no evidence before me that suggests she could not have changed her mind about which shifts she worked and decided to, for example, only work once a month. It is clear from her working pattern that she did not get penalised if she decided to take longer breaks for whatever reason.

18. I do accept that once the claimant had accepted a shift she was expected to personally work that shift and could not send a substitute. Mr Nicholson's evidence on this point was vague. His witness statement said that she could send a substitute but in evidence to the tribunal he said that she would have to notify the person organising the shifts in advance and that she would have to have nominated someone else on their bank scheme. I do not view this as a genuine ability to send a substitute. This was her informing them that she could no longer work and possible indicating that someone she knew was free and could fill the shift if needs be. This was not her sending a substitute.

19. However I accept Mr Nicholson's evidence that if the claimant changed her mind once she had agreed to take on a shift, she would not have been penalised and she could have notified them almost at the last minute that she would not be attending.

20. The claimant asserted that there was a continuing expectation that she would return to work for the respondent during periods when she did not carry out any work. It was the claimant's case that there were two levels of expectation.

(i) Firstly she asserted that at the point that she resigned as an HCA, there was an understanding and expectation that, on completion of her studies, she would return to work as a full time member of staff in a role commensurate with her new qualifications.

(ii) Secondly she asserted that during her time as a bank worker, there was an expectation that she worked the weekends and that whenever there were gaps of time longer than a week between shifts, she was absent for specific study related reasons (e.g. placements or revision) and was expected to return afterwards and indeed had shifts booked in for when she was due to return.

21. Mr Nicholson and the claimant gave evidence regarding the first assertion. The claimant relied on three conversations she had with Mr Nicholson. She stated that one took place when she handed in her notice from the HCA role and he discovered that she was going to be studying. She states that during this conversation Mr Nicholson promised her a role when she completed her studies. She says that there were then 2 further conversations whilst she was a bank worker where Mr Nicholson reiterated his promise and that she should come and find him when she had completed her qualifications and he would ensure she was given a job. The claimant was very clear in evidence that she wanted to return to working at the Priory and expected to do so.

22. Mr Nicholson clearly liked and valued the work of the claimant. I accept that he spoke to her on several occasions about her career development and that he encouraged the claimant to contact him when she qualified. I have no doubt that he wanted to keep her on if he could. But crucially there was always an 'if' in the situation from his point of view; "if" she qualified and more importantly "if" there was a vacancy when she qualified. Mr Nicholson clearly encouraged the claimant and was interested in her studies and her aspirations and I believe that he undertook these conversations in that context.

23. I accept Mr Nicholson's evidence that he was not powerful enough to have created or held a position for the claimant as and when she qualified and therefore he would never have promised her a job to return to when she qualified. He agreed that he would have encouraged her to do so. I base this conclusion on the fact that the claimant agreed in evidence that there were only 4 or 5 Occupational Therapist roles at this site and I believe Mr Nicholson's evidence that it was luck that a role did become available at the right time.

24. Claimant's counsel made much of the fact that the role was offered without a formal interview or subsequent formal HR checks. He stated that this indicated continuity of employment and showed that her status did not change between roles. I do not agree. I am sure she was offered the role without a formal interview because of her proven record over the previous few years. It was not in dispute that the claimant was well liked and good at her job. The lack of subsequent

HR checks merely indicate that she was already on their books and I accept that the same checks applied to bank workers as they did to employees.

25. I do not believe that there was anything other than an aspiration by the claimant that a role would become available to her on qualification. She was probably right in thinking that if there was a suitable role she was well placed to be offered it because she had done all the right things to prove herself to the respondent in terms of reliability, dedication and skills.

26. The claimant's evidence clearly demonstrates that she had a firm belief that if she did everything right she was likely, and more likely than most, to get a job with the respondent because they liked her and wanted to keep her. However even on cross examination she could not say that she was told she would definitely have a role at the time that she qualified. Her evidence on these conversations and their content have, in my view, been altered by her aspirations to make it work and the reality of what happened i.e. that she did indeed get lucky and get a job. However, had there been no Occupational Therapist or other suitable role available she did not expect the respondent to create or put one 'on hold' for her. It would not have been commercially possible for the respondent to do this or for Mr Nicholson to promise this. There was therefore no reasonable expectation by the claimant that from the point she resigned as an HCA, she was definitely going to be employed by the respondent at the end of her studies some 3 years later.

27. I do not find that there was the promise of a job merely assurances that she would be actively considered for a job if it came up at the right time and that she was well placed to get one because of her skills, dedication and qualifications.

28. Turning to the second type of expectation the claimant relied upon namely that whilst she was a bank worker there were no gaps caused by her absences of longer than a week because she was always expected to return.

29. I was presented with no evidence that the claimant would have had to return had she changed her mind nor that she would have to have notified the respondent when she was not going to return. Had she, for example, been offered another role by one of the organisations where she did placements, she said in evidence that she would have turned it down because she wanted to go back to Priory but crucially not because she had to or was expected to by anybody else apart from herself. I am aware of no evidence to show that she felt obligated towards the respondent. Instead I find that her returns were motivated

by her desire to work for them and felt that the best way to do that on a long term basis was to work for them as much as possible. I accept that she frequently had shifts booked in for dates after her various study leave periods, but this was at her request and not because the respondent expected or required her to return.

Dismissal

30. On 29 September the claimant's brother was arrested for sexual exploitation of children using webcams. The claimant lived with her brother and parents. During the arrest the claimant's phone was downloaded by the police and her car, which she shared with her brother, was taken away. The claimant was told during that process that she was not being investigated herself.

31. During that time the claimant told the police what she did and where she worked. She states that she asked the police whether she was under any obligation to inform her employer. It was disputed as to whether the police had then told her to tell her employer what had happened or whether they told her that it had nothing to do with her and that she had no obligation to tell them. I find that at this stage the claimant was not under any suspicion by the police and that on balance it is more likely than not that they told her this had nothing to do with her. I think that this version of events is supported by the fact that the police never formally questioned the claimant and that they saw no reason to inform the employer themselves at that time which they would have done had they had any significant concerns.

32. On 13 January 2016 the police contacted the respondent to inform them of the brother's arrest and to inform them that the claimant was under investigation of money laundering, that one of the potential victims was a patient or user at the respondent and they had concerns that the claimant was in some way involved with the brother's criminal behaviour. The fact that 3 months had lapsed since the brother's initial arrest demonstrates to me that they contacted the respondent as and when they had concerns about the claimant's potential involvement not because they were surprised the claimant had not told her employer about her brother's arrest. The respondent stated that police told them they had given the claimant 6 months to inform her employer and were surprised that she had not. As the police contacted the respondent after only three months this submission does not, in my view, make sense. The claimant had had little or no contact with the police during that three month period. Had they had concerns about her they would no doubt have contacted the respondent sooner.

33. The police told the respondent that save for challenging the claimant's failure to inform them of her brother's arrest, the respondent could not divulge to the claimant that they were investigating her for money laundering or other areas of involvement. Nor could they tell her about the potential victim who had also been a user of the respondent's services.

34. On the same day the claimant was called to a meeting at which she was suspended pending an investigation into her failure to inform the respondent of her brother's arrest. Subsequently there was an investigation meeting and then a disciplinary meeting and then an appeal hearing. Ms Pleszak gave evidence to the tribunal regarding her decision on the appeal as the person who made the original decision to dismiss (Roger Skipp) was not able to attend the tribunal hearing.

35. The investigation was carried out by Mark Taylor and Mr Nicholson was also present. The only area of concern put to the claimant was her failure to inform anyone about her brother's arrest. The information regarding any other involvement was not put to the claimant.

36. The respondent argued throughout the disciplinary process and before the tribunal that the claimant's failure to inform them of her brother's arrest was a breach of the relevant clause in her contract which read as follows:

"It is also a condition of your employment that you notify your manager immediately if you are questioned or arrested by the police, or charged, cautioned, convicted in connection with any criminal matter."

Further, the employee handbook states:

"You must notify your manager immediately if you are under caution for any questioning or arrested by the police, or charged, cautioned or convicted in connection with any criminal matter. Failure to do so could result in disciplinary action up to and including dismissal."

37. The claimant stated that she read the clause in her contract carefully and asked other people's opinions on them and that she and those she asked, confirmed that they did not feel it covered a situation where you were not part of the investigation. It is also clear that the two paragraphs are slightly different. The claimant was only really concerned at the time with her contractual statement and this is the paragraph the respondent are relying on. However the handbook paragraph is relevant because it shows that the responsibility to report had clearly been interpreted differently by different people in the

respondent, thus demonstrating that it was possible to view the obligation in different ways.

38. The claimant was never formally interviewed or cautioned. The respondent stated that the fact that she was at the house when her brother was arrested and that her phone and car were investigated was sufficient to be questioning and that they were clearly in connection with a criminal matter.

39. I do not agree that a plain reading of either the clause in the contract or the handbook would imply that you had to report any occasion when you spoke to the police but were not yourself involved or alleged to be involved with the criminal matter. The claimant went to some lengths to check with the police as to whether she was considered involved and I accept that they told her she was not. I accept the claimant's assertion that the respondent's assertion would mean that you would have to report any occasion when you were a witness to a criminal matter or simply questioned as part of any investigation.

40. There is also a clear discrepancy between the handbook and the contract. The handbook clause is very clear that someone only need report where they have been questioned under caution. It is also, as discussed above, an entirely plausible and valid interpretation of the clause in the contract.

41. Where a clause is unclear or vague then it should be given its natural meaning and interpreted in favour of the 'weaker' of the parties. In this case that is clearly the claimant and I accept that the claimant did not unreasonably interpret the contract as meaning that she did not have to disclose her brother's arrest.

42. Even if I am wrong in that, I find that her actions were not a fundamental breach of this clause as she was not, to the best of her knowledge, a suspect in the criminal matter. I consider that had the respondent not been aware of the police's later suspicions about the claimant's involvement they would not have viewed her actions as a serious breach of this clause. I believe that they either needed a reason to dismiss the claimant because of the other concerns raised by the police, or that they viewed her decision as calculated to avoid suspicion as opposed to calculated to avoid embarrassment and shame.

43. They stated that she deliberately breached the clause as demonstrated by her consulting friends about the impact of the clause. Again I believe

that this interpretation was skewed by the knowledge they thought they had at the time they made the decision.

44. Further, the respondent argues that her behaviour in failing to tell them breached the implied term of mutual trust and confidence and that she further breached mutual trust and confidence due to her behaviour in the disciplinary process because she did not apologise for her behaviour and refuted throughout that she should have reported it.

45. Ms Pleszak's evidence was helpful but demonstrated clearly that at the time that both the original decision to dismiss and the appeal were made at a time when the respondent was being given lots more information by the police than they could divulge to the claimant. Even before the tribunal Ms Pleszak was not sure what she could and could not rely on as being the reason for her strong feelings about the claimant's behaviour.

46. I do not find it plausible that subsequent to being informed by the police that one of their users was a possible victim and that the claimant was potentially involved, that the respondent could view the situation in an artificial bubble where that information did not influence them.

47. The respondent relied on several aspects of the claimant's behaviour to support the breach of mutual trust and confidence. Firstly they said that her failure to report her brother's arrest was a breach of mutual trust and confidence because she knew that this situation posed a clear safe guarding risk. They asserted that anybody with the claimant's level of training and experience should have known that if in doubt you should report any possible risk and let the specialist safeguarding team deal with the situation.

48. Ms Pleszak also stated that the claimant's attitude during the disciplinary process was key to undermining her trust and confidence. She stated that the claimant refused to apologise and/or acknowledge that there was a risk to the respondent during the disciplinary process. The respondent was concerned that if the press became aware of the link between the claimant's brother and the respondent and the respondent had not been told of the situation, then they could easily be blind-sided by press attention. During the appeal Ms Pleszak stated that she felt the claimant failed to acknowledge the potential seriousness of the situation and it was this that crystallised her feelings that the claimant could not be trusted in the future to report risks or potential risks and that her trust and confidence in the claimant was undermined.

49. Nonetheless it is clear from the notes of the meeting that the claimant did apologise. She did recognise in hind sight that she ought to have reported the matter. I find that the fact that she did not show the level of contrition expected by Ms Pleszak was because she did not know of the link between her work and her brother whilst the respondent did. Ms Pleszak was expecting contrition for something the claimant was wholly unaware of.

50. Whilst I accept the respondent's evidence that the threshold for reporting risk is very low, it is difficult to see what risk the claimant was meant to be reporting given that she had no knowledge that one of her brother's alleged victims was a user of the respondent. I accept that she had been told by the police that the situation had nothing to do with her. After that the police would not speak to her about her involvement or otherwise.

51. The respondent witnesses stated that the claimant obviously knew there was a potential risk because she had checked her contract to decide whether she needed to tell them about the arrest or not and that she should have been better safe than sorry in accordance with the safeguarding principles. I do not accept that there is a direct correlation between the two issues. Checking to see if you are complying with your contract is not the same as realising that there is a potential safeguarding risk or implying that you should know that there is a risk. I find that the respondent's belief that there was a risk that needed reporting was based on their knowledge that a user was identified as a potential victim. The claimant did not have that knowledge. She did not breach the safeguarding policy by failing to report a risk she was not aware of.

52. Much was made of the claimant's close relationship with Mr Nicholson and her failure to tell him. Mr Nicholson expressed surprise that she had not told him about her brother's arrest. However at the point at which Mr Nicholson was told about the arrest, he given far more detail about the allegations and the claimant's potential involvement than the claimant was herself either at that point in time or at the time when her brother was arrested. It would have been surprising if the claimant had withheld that information from Mr Nicholson – but she had not. She simply did not tell the respondent that her brother had been arrested whilst she was present.

Submissions on continuity of employment

53. Both parties provided written submissions regarding continuity of employment.

54. The Claimant submitted that the claimant's continuity of employment was preserved by the existence of an arrangement under s212(3)(c) namely that she was told she would be provided with a job on completion of her studies. This was relied upon whether or not she was an employee during the bank working period.

55. The claimant argued that the umbrella arrangement bridged the gaps caused by the claimant's exams and placements or that the arrangement bridged the entire 3 year bank working period. The claimant averred that she had not seen the written bank workers contract and that it did not apply to her situation because she had a different arrangement namely that she was undertaking bank work for the purposes of taking up employment at the end of her studies.

56. In summary, the Respondent submitted that the claimant was not an employee during the bank work period largely due to a lack of mutuality of obligation. Further it was argued and that even if she was an employee she still couldn't establish the relevant 2 years of employment because there were significant gaps of employment during the bank work period. The respondent relied upon the lack of mutuality of obligation either across the entire 3 year period or between each period of work during the bank work period.

The law

57. S 108 Employment Rights Act 1996 ("ERA") sets out that the qualifying period for bringing an unfair dismissal claim is 2 years ending with her EDT.

58. S212 ERA states that:

(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment

…

(3) Subject to subsection (4) any week during the whole or part of which an employee is

(c) absent from work in circumstances such that by arrangement or custom he is regarded as continuing in the employment of his employer for any purpose.

59. There is a presumption of continuity and the burden is on R to show the contrary – s210(5) ERA. S230 ERA does not define a contact of employment.

60. The definition of employee has been largely defined by case law. The starting point is the case of Ready Mixed Concrete. That case established the following key questions:
    - An agreement exists to provide the servant's own work or skill in the performance of service for the master (**'personal service'**) in return for a wage or remuneration.
    - There is control of the servant by the master (**'control'**).
    - The other provisions are consistent with a contract of service (**'other factors'**).

61. The issues to be considered regarding mutuality of obligation and the establishment of an umbrella arrangement covering separate periods of employment are discussed in Nethermere (St Neots) Ltd v Gardiner and Another (CA), Curr v Marks and Spencer plc ([2002] EWCA Civ 1852, St Ives Plymouth Ltd v Haggerty (EAT) and Clark v Oxfordshire Health Authority [1998] IRLR 125 (CA).

62. To determine whether the claimant breached her contract, I must find as a matter of fact whether she had committed an act of gross misconduct and/or fundamentally breached mutual trust and confidence to the extent that it constituted gross misconduct and the respondent was entitled to dismiss without notice.

Conclusion

63. Although the parties did not focus on the claimant's status during the bank work period, I consider that it is a fundamental part of the decision regarding the existence or otherwise of an umbrella arrangement and whether the claimant had continuity of employment.

64. I conclude that there was a clear agreement for the claimant to provide her services. I also conclude that she had to provide those services personally during the bank work period.

65. There was some question between the parties as to what the agreement was but on balance I conclude that the agreement was that set out by the written contract and letter at pages 45-50 to be a bank worker. I also conclude that this written contract accurately reflects the actual working arrangement between the parties during the bank work period.

66. The evidence provided by Mr Nicholson was that there was no obligation for the claimant to provide work personally. I find that there was no genuine ability for the claimant to send a substitute once she had agreed to do the shifts because she could not choose her substitute or make arrangements for someone else to do her shift for her. She had to notify the respondent that she could not make a shift and they would arrange cover.

67. No submissions were made to me about 'control'. I do not think it is in dispute that whilst at work the claimant was told what work to do and how to do it. I therefore find that there were significant levels of control whilst she was at work during the bank work period.

68. For the purposes of the hearing and determining both employment status and an umbrella arrangement both parties focussed on the issue of mutuality of obligation. It was the respondent's case that if mutuality of obligation could not be found during the bank work period then the claimant was not an employee and there was no umbrella arrangement. Relied upon by both parties were the cases of Haggerty, Curr and Netheremere. I have also considered the cases of Ready Mixed Concrete and Clark.

69. As stated above I find that the bank working contract was both an express written contract that both parties were aware of but that it also reflected the true position for the parties. This is important for the purposes of determining mutuality of obligation as it clearly states that there was no obligation on either party to offer or accept work.

70. The claimant in evidence stated that she informed the respondent when she could not work but that otherwise she was expected to work every weekend. The claimant was offered work in several ways but she either booked her own shifts in whilst she was at work or she accepted offers of work via text messages which were sent out to all bank workers to accept or reject as they chose.

71. I find that although the respondent offered the claimant work most of the time, it did not offer her every possible shift. They did allow her to book in the shifts that she wanted in advance but I do not find that this means they were obliged to offer her work.

72. In evidence today the claimant said that if she was going to be off for a period of time e.g. 3 week study leave she would book in her next shift so there was always the expectation during any absence that she would return. However she frequently turned down shifts and felt no obligation to respond to the texts offering work.

73. I accept that sometimes the respondent would approach her if they could not find anyone else to fill in a shift because they were 'pushed' but I don't think that this means they were obliged to offer it to her nor that had she said she couldn't, for whatever reason, she would have suffered any penalty as a result.

74. I therefore conclude that the claimant was a worker not an employee during the bank working period. There was an express contract confirming that she was a worker and I find that there was no mutuality of obligation as neither party was obliged to offer or accept work. Although the claimant did work regularly at weekends, she also frequently changed her working pattern and for significant periods of time she worked elsewhere or concentrated on her studies. I do not find that the fact that someone at the respondent knew the reason for these gaps, necessarily infers that there was a mutuality of obligation. These significant and relatively frequent gaps mean that the express contractual situation was not altered by custom and practice. She was a worker,

75. Therefore I have to consider whether there was a sufficient umbrella arrangement to bridge the entire three year bank work period between her recognised periods of employment.

76. In *Clark v Oxfordshire Health Authority [1998] IRLR 125 (CA)*, it was held that the minimum requirement for such a contract is that the employee has an obligation to accept and perform work when it is offered and the employer must pay a retainer for the periods when work is not offered. In *Nethermere (St Neots) Ltd v Taverna & Gardiner [1984] ICR 612, CA*, the tribunal held that a well-founded expectation of continuing work could become refined into an enforceable contract by regular offering and acceptance of work over periods of a year or more. In *St Ives Plymouth Ltd v Haggerty UKEAT/0107/08*, the EAT held that a tribunal had been entitled to find that there was sufficient mutuality of obligation in the gaps when no work was performed to infer the existence of an umbrella contract.

77. The claimant relied on the Haggerty case stating that there was a mutuality of obligation overarching firstly the entire three years and if I was not persuaded by that, between the gaps in 'employment' whilst she was a bank worker. As stated above given that I have concluded that she was a worker during the bank work period and not an employee, the gaps between her bank work periods are largely irrelevant because she has to establish an umbrella arrangement between her resignation as an HCA and her re-employment as an Occupational Therapist 3 years later.

78. I believe that the facts of this case can be easily distinguished from Haggerty because no sufficient pattern of working was established. In Haggerty the claimant in that case had for a significant period of time worked the same shifts and been offered the same amount of work without turning it down or ever re-organising. Therefore, by custom and practice the relationship had evolved beyond convenience and mutual co-operation.

79. In this case I find that the contract was operated expressly on the grounds of convenience and mutual co-operation. The claimant resigned from her HCA role as opposed to just asking to perform that role part time. The claimant clearly decided as and when she wanted to work to suit her studies and other obligations during this period and was not an employee. I accept that she clearly wanted to work at the Priory during the bank work period and she hoped that this would increase her chances of ultimately finding full time employment there once she finished her studies.

80. I find that her aspirations were based on the conversations she had with Mr Nicholson and the generally high regard she was clearly held in by her colleagues. However, her career goals and aspirations do not necessarily amount to a practice that has taken on a legally binding nature. I do not find that her aspirations were based on her working practices and her being offered employment once she finished her studies. Her aspirations were based on her goals to obtain employment at a higher level once her studies were finished.

81. I do not find that Mr Nicholson made her a promise of a job when she qualified. There was no objectively reasonable expectation on the part of the claimant that such a promise could be made given how long a period she was going to be potentially absent for, the commercial reality of the respondent's operation and the fact that Mr Nicholson could not have created or reserved a role for her in the hope that she might at some point qualify and nothing would have changed in the interim. This is simply not plausible whatever her aspirations or hopes.

82. I therefore conclude that the claimant did not have two years continuous employment required to bring a claim under s108 ERA and have not considered her claim for unfair dismissal as she was a worker for the entirety of the bank work period and there was no umbrella arrangement across this period.

83. I conclude that the claimant did not fundamentally breach the express clause in her contract. I find that the clause in the contract can fairly be interpreted as only requiring disclosure where the claimant herself had been questioned in relation to a criminal matter which she herself was under suspicion for. To interpret it otherwise is to give it too wide a meaning. The existence of a different clause in the employee handbook confirms that even those within the respondent had interpreted the clause in the same way as the claimant. The claimant was therefore under no express contractual obligation to tell the respondent about her brother's arrest.

84. Even if I am wrong in my interpretation of the meaning of the clause, I find that the claimant's failure to tell the respondent of her brother's arrest was not a fundamental breach of the express contractual clause or of the implied clause of mutual trust and confidence, or of her

obligation to report safeguarding concerns in any event. The respondent's view that it was a serious breach of contract or their safeguarding policy was informed by their knowledge that the claimant was, at the time that they dismissed the claimant, under suspicion of being involved with the brother's criminal activities and that there was a link to her place of work. They conflated their view of the seriousness of their concerns regarding the serious allegations against the claimant with what the claimant actually did and what she knew. The claimant was not involved with her brother's activities and when she decided not to tell the respondent about his arrest she had no idea that she was under suspicion or that one of the respondent's users was a potential victim. Had she withheld that information she would have been in serious breach of both the express and implied clauses of her contract. But this is not what happened. Throughout the disciplinary process and appeal she was unaware that anyone thought she was somehow involved.

85. The respondent's belief that she was (i) deliberately withholding her involvement with her brother's activities, or (ii) was being defensive because she was guilty, or (iii) her apparent failure to appreciate the seriousness of the situation, were why the respondent made the decision that they did. I have not considered whether that decision lay within the range of reasonable responses in all the circumstances as it is beyond my remit in this judgment but it is clear that the respondent had great difficulties separating what it thought it knew about the claimant from what she actually did at the relevant time.

86. I therefore conclude that the claimant did not fundamentally breach her contract of employment by committing an act of gross misconduct and I uphold her claim for wrongful dismissal.

87. I award the claimant one month's contractual notice pay as compensation for the respondent's breach of her contract.

Employment Judge Webster

Date: 3 March 2017