



# EMPLOYMENT TRIBUNALS

**Claimant** Miss T Hurford

**Respondent** North Petherwin Parish Council

**Heard at :** Exeter **On:** 3, 5, 6 April & 12 May 2017

**Employment Judge** Goraj

## Representation

For the Claimant: in person (accompanied by her mother)

For the Respondent: Mrs B Huggins, Counsel

# RESERVED JUDGMENT

## The Judgment of the Tribunal is that:-

1. The claimant's complaint of unfair dismissal by the respondent contrary to section 103 A of the Employment Rights Act 1996 is dismissed.
2. The claimant was unfairly dismissed by the respondent in breach of section 98 of the Employment Rights Act 1996.
3. Any basic award awarded to the claimant in respect of her unfair dismissal shall be reduced by 25% pursuant to section 122 (2) of the Employment Rights Act 1996.
4. Any compensatory award awarded to the claimant in respect of her unfair dismissal for the period after 31 December 2016 shall be reduced by 75% pursuant to section 123 (6) of the Employment Rights Act 1996 to reflect the chance that if she had not been unfairly dismissed the claimant's employment with the respondent would, in any event, have terminated fairly by that date.

5. The claimant's claim for outstanding holiday pay is dismissed.

## REASONS

1. The claimant was employed by the respondent as the Parish Clerk and Responsible Financial officer from 1 May 2013 until the termination of her employment, by dismissal, on 31 May 2016.
2. By a claim form which was presented to the tribunals on 5 September 2016, the claimant contended that she had been subjected to detrimental treatment (discipline) and/or unfairly dismissed contrary to sections 98 and/or 103A of the Employment Rights Act 1996 ("the Act") for making an alleged protected public interest disclosure. The claimant also claimed alleged outstanding holiday pay (10 hours). The claimant's claim form is at pages 1-12 of the bundle.
3. The claimant's claims are denied by the respondent. The respondent's response form is at pages 16-30 of the bundle. In summary, the respondent denied that the claimant had made any protected public interest disclosures. The respondent contended that the claimant was fairly dismissed by reason of misconduct and/or some other substantial reason (because of the breakdown of the relationship between the claimant and the respondent). The respondent also denied that the claimant was entitled to any outstanding holiday pay.

### Documents and associated matters

4. There was a dispute between the parties regarding the contents of the bundle of documents including in respect of outstanding documents. These issues were addressed by the tribunal (save for the outstanding matter referred to below) at the commencement of the hearing and the tribunal was therefore able to utilise an agreed bundle of documents ("the bundle"). The outstanding matter related to the respondent's Financial Regulations ("the Regulations") which were understood by the parties to have been adopted by the respondent in or around 2015. The respondent was however unable to locate the Regulations notwithstanding further searches which were undertaken by the respondent at the direction of the tribunal during the course of the hearing. The tribunal was satisfied, in the light in particular of the oral evidence of Mr Gunby, that the respondent had used its best endeavours to locate the Regulations. In the absence of the Regulations the claimant pursued her claim regarding the alleged breaches of the Regulations by reference to the "model financial regulations issued by the National Association of Local Councils ("NALC") upon which it was believed that the Regulations were closely based.

## Witnesses

5. The tribunal was provided with witness statements and heard oral evidence from the witnesses referred to below.

## The claimant

6. The tribunal heard evidence from the following witnesses on behalf of the claimant:-

- (1) The claimant
- (2) Mrs Christine Mason, ("Mrs Christine Mason") a family friend.

7. The tribunal has also had regard to the bundle of written statements dated May 2016 from a number of parishioners which were submitted by the claimant in support of her case. The tribunal has however, placed limited weight on such statements as there has been no opportunity for the respondent to challenge such evidence by way of cross examination.

8. The tribunal heard evidence from the following witnesses on behalf of the respondent:-

- (1) Mr Terrence Roy Faull, member of the respondent and former Chairman.
- (2) Councillor Robert George Drew, Executive Member of the Cornwall Association of Local Councils ("CALC") and the Chairman of Carn Brea Parish Council. Cllr Drew was the chairman of the panel which determined the claimant's appeal.
- (3) Mrs Sarah Louise Mason, ("Mrs Mason"), County Officer of CALC. Mrs Mason was the investigating officer in this case.
- (4) Mr Bob Gunby, member of the respondent and Chairman of the respondent's Employment Committee.
- (5) Mr Craig Richard Rowland, member of the respondent and appointed Chairman on 25 March 2015
- (6) Some of the councillors preferred to be referred as Mr and are referred to as such below.

9. The tribunal did not receive any witness statements and/or any oral evidence from any of the dismissing officers in this case. The disciplinary panel consisted of Cllr Linda Higgins (an external Cllr) and Messrs Bellamy and Greene from the respondent. The tribunal raised with the respondent its concerns regarding the absence of any evidence from the dismissing officers particularly as the claimant's allegations related to her dismissal. The respondent did not however make any application to adjourn the hearing to adduce such evidence/make any application for such evidence to be heard at the restored hearing on 12 May 2017. The tribunal was informed that Messrs Bellamy and Greene were not being called as witnesses

because of personal/ work commitments and no explanation was given in respect of Cllr Higgins.

### The issues

10. The issues which the tribunal is required to determine in this case were recorded at paragraphs 4 and 5 of the case management order dated 23 December 2016 ("the Order") (subject to the provision of further and better particulars relating to disclosures).
11. The issues were further clarified by the tribunal at the commencement of the hearing. The tribunal has attached to this Judgment a list of the issues which were produced by the respondent following discussion with the parties at the commencement of the hearing and which have been further amended in manuscript by the tribunal to incorporate the claimant's comments. The tribunal is satisfied that the attached list identifies the principal issues which it is required to determine together with the further matters referred to below ("the List of Issues").
12. In summary, the claimant contended that she had been unfairly dismissed contrary to section 103A of the Act for making protected interest disclosures and/or that she was, in any event, unfairly dismissed contrary to section 98 of the Act. The claimant relies on 3 alleged protected interest disclosures namely:-
  - (1) Alleged oral disclosures to the respondent at a council meeting on 27 January 2016.
  - (2) An alleged written disclosure to Mr Simon Mansell Corporate and Information Governance Manager at Cornwall Council dated 29 January 2016 (pages 164- 166 of the bundle) , and
  - (3) An oral and/or written disclosure to Mr Barrie Morris external auditor on 1 May 2016 (pages 247-249 the bundle).
13. The claimant further contended that she had a reasonable belief that the alleged disclosures were in the public interest and tended to show one or more of the following namely :- that a criminal offence had been committed and/or was likely to be committed and/or that a person had failed/was likely to fail to comply with any legal obligation to which they were subject and/or that information relating to the above had been or was likely to be deliberately concealed (sections 43 B (1) (a) and/or (b) and /or (f) of the Act.
14. The claimant relied in respect of the alleged breaches referred to above on (a) The Code of Conduct for Members ("the Code") (b) the respondent's Standing Orders dated 2016 ("the Standing Orders") and (c) the Regulations referred to above.
15. The tribunal is also required to determine the following additional matters :

- (1) The List of Issues does not contain details of the alleged breaches of the Regulations upon which the claimant relies. These alleged breaches are identified further below.
  - (2) It was agreed that the tribunal would also determine (if appropriate) any issues relating to (a) any reduction in any compensatory award pursuant to section 123 (1) of the Act and/or (b) any reduction in any basic or further reduction in any compensatory award pursuant to sections 122 (2) and /or 123(6) of the Act (c) any reduction to any compensatory award pursuant to section 123 (6A) and (c) any adjustments to any compensatory award for any failures to comply with the ACAS Code of Practice 1 - Disciplinary and Grievance Procedures 2015 pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 (“the 1992 Act”).
16. For the avoidance of doubt, the claimant confirmed at the commencement of the hearing that her protected public interest disclosure claims relate only to her dismissal (in respect of which she contended she had been unfairly dismissed pursuant to section 103 A of the Act) and that she is not also pursuing any claims of alleged detrimental treatment.
17. The claimant accepted in evidence that she had not informed the respondent of the alleged disclosures to Cornwall Council and/or to the external auditor. Further, there was no evidence before the tribunal to suggest that the respondent was aware of any such alleged disclosures prior to the claimant's dismissal.
18. All of the allegations are denied by the respondent (including that the claimant has made any qualifying and/or protected disclosures for the purposes of sections 43 B, C – H of the Act). The respondent further contended that if any of the claimant's dismissal claims were succeeded any compensation should in any event be reduced/extinguished pursuant to the provisions identified at paragraph 15 (2) above (and including on the grounds that any protected public interest disclosures were, in any event, made by the claimant in bad faith)

## **FINDINGS OF FACT**

### **The claimant**

19. The claimant commenced her employment with the respondent on 1 May 2013. The claimant was employed by the respondent as its Parish Clerk and Responsible Financial Officer. The claimant was the respondent's only employee. The claimant also undertook unrelated substantive employment elsewhere.

20. The claimant's contract of employment dated 1 May 2013 is at pages 78-96 of the bundle ("the contract"). The tribunal has noted in particular the following provisions:-
- (1) The claimant was required to work for 20 hours per month (paragraph 13 of the contract).
  - (2) The claimant was expected to perform the duties required of her as set out in the job description attached to the contract (page 93 of the bundle) including that, "The Clerk will be totally responsible for ensuring that the instructions of the Council in connection with its function as a Local Authority are carried out. The Clerk is expected to advise the Council on, and assist in the formation of, overall policies to be followed in respect of the Authority's activities and in particular to produce all the information required for making effective decisions and to implement constructively all decisions..... The Clerk will be the Responsible Financial Officer and responsible for all financial records of the Council and the careful administration of its finances".
  - (3) The provisions of paragraph 15 of the contract relating to the entitlement to and payment for annual leave (page 86 of the bundle).
  - (4) The provisions at paragraph 22 of the contract relating to dispute resolution including that (a) as the respondent did not (until January 2016) have a formal grievance and disciplinary procedure the respondent would refer such matters to the chief executive of CALC and (b) that any grievance should be raised with the chairman of the respondent.

21. The claimant worked from home. The claimant had day-to-day responsibility for the preparation and safe keeping of the records and associated documents of the respondent. The respondent was not provided with a copy of the contract by the claimant until the course of the appeal hearing and prior to that time the respondent proceeded on the basis that the claimant was employed on the terms of the model contract of the national association of local councils (which is in similar terms to the contract) which is at pages 58 – 73 of the bundle.

### **The respondent**

22. The respondent is a parish council. The respondent's members are local parishioners who provide their services on a voluntary basis and none of the councillors involved in this matter had any specialised training in human resources or employment law. The respondent had an Employment Committee which was, subject to the terms of

reference and resolutions of the respondent from time to time, responsible for employment matters relating to the Clerk.

23. The respondent had the benefit of a service level agreement for the provision of services by CALC. A copy of the service level agreement for 2014/2015 is at pages 335b – 335i of the bundle. The tribunal has noted in particular the provisions relating to employment support at page 335e of the bundle including that CALC would offer support and guidance on matters relating to the recruitment and employment of staff (and further including low-level mediation support in the breakdown of working relationships at council level subject to a charge which would be agreed in advance). Mrs Sarah Mason was employed at the relevant time as the County Officer of CALC. CALC is affiliated to the National Association of Local Councils (“NALC”) and works with partners to provide support, training and legal advice to local councils in Cornwall.
24. Mr Faull was the Chairman of the respondent between May 2013 and February 2015 at which time he resigned his position and became Vice chairman. Mr Faull was appointed as a member of the respondent's Employment Committee in September 2015. Mr Rowland became a member of the respondent on 1 July 2013 and was appointed as Chairman of the respondent on 25 March 2015. Mr Gunby became a member of the respondent in September 2015 and was elected as the Chairman of the Employment Committee shortly afterwards.

#### **The policies and procedures of the respondent and associated matters**

25. The respondent was subject to the Code of Conduct and the Standing Orders referred to above. The respondent also adopted financial regulations in around 2015 which were in broadly similar terms to the Regulations referred to above.
26. The respondent's disciplinary procedure, which was adopted at its meeting on 27 January 2016 (the minutes at page 161 of the bundle), is at pages 54-57 of the bundle. The tribunal has noted in particular the stated examples of misconduct and gross misconduct and the procedure for formal action contained at paragraph 3 of the disciplinary procedure. The examples of misconduct included a failure to perform the job to the standard expected in accordance with the job description /objectives, disruptive behaviour and the refusal to carry out reasonable requests or instructions. The examples of gross misconduct included gross incompetence, serious acts of insubordination and serious negligence which caused or might cause significant lost or damage to the respondent.
27. The claimant was not the subject of any disciplinary action by the respondent prior to the events in question.

28. The respondent contended that it had raised concerns with the Clerk regarding her conduct/ performance during her annual appraisals. This was denied by the claimant who contended that she was not aware of any such concerns until February 2016. The tribunal has not been provided with any documents relating to any appraisals. The tribunal is not satisfied, having regard to the absence of any supporting documentation and the conflicting oral evidence between the parties that the respondent raised any concerns with the claimant regarding her conduct or performance until February 2016. The claimant raised a matter of concern with Mr Faull in or around December 2015 (of which the tribunal does not have further details) however this was not pursued further by the claimant (page 131 of the bundle).

### **The background events to the matters in issue**

29. Mr Gunby lives with his family in a hamlet within the parish. At the time of the events in question the hamlet had been experiencing difficulties with the passage of large vehicles which had caused damage to local properties (including that of Mr Gunby) and which had given rise to safety concerns by the residents.
30. Prior to Mr Gunby's election as a councillor with the respondent his wife had made an unsuccessful application to the respondent for funding for a road sign warning that the access to the hamlet was unsuitable for large vehicles. This application was refused because of a lack of funds.
31. On 4 January 2016 Mr Gunby's wife wrote to the claimant to update her on the position regarding the need for highway advisory signs regulating the movement of large vehicles through their hamlet including that their cottage had been hit by a large vehicle on New Year's Eve causing damage. This e-mail is at page 135 bundle. Mr Gunby's wife also described to the claimant the attempts which had been made by her and a neighbour to secure the installation of appropriate signs including that she had spoken to Mr Adam Paynter of Cornwall Council and English Heritage about the matter and that she would be writing to the highways agency to seek to persuade them to prioritise the matter and to contribute funding from their budget.
32. The claimant replied to the e-mail advising Mr Gunby's wife that the respondent did not have sufficient financial reserves to fund such signs and that the necessary monies should come from a highway budget. The claimant also advised Mr Gunby's wife that her family had experienced similar issues and had also been unable to secure the installation of highway signs. The claimant asked Mr Gunby's wife to advise her of the outcome of her correspondence with the highways department.



### **The meeting of the Employment Committee on 14 January 2016**

33. There was a meeting of the respondent's Employment Committee on 14 January 2016 which was convened to discuss the employment and duties of the claimant. The respondent's record of that meeting is at page 142 a bundle. This meeting was attended by Messrs Colwill, Faull, Gunby and Rowland. It was agreed at that meeting that it was necessary to clarify the way in which the duties of the Clerk were being carried out by the claimant and that this should be achieved by way of a review of the current job description together with a meeting with the claimant to discuss any changes. It was also agreed that Mr Rowland would contact CALC to arrange a discussion between the Employment Committee and CALC regarding the claimant's employment.
34. The tribunal is satisfied that this meeting took place against a background of increasing concerns regarding the claimant's conduct, performance and attitude (with regard to such matters as the preparation of agendas and council minutes and the execution of instructions given by the respondent's councillors) including the perceived difficulties in the relationship between the claimant and the Chairman of the respondent (Mr Faull and subsequently Mr Rowland). When reaching this conclusion the tribunal has had regard to the above mentioned record of the minutes of the Employment Committee on 14 January 2016 together with the statements which were prepared by Messrs Faull and Rowland for the purposes of the subsequent disciplinary proceedings (pages 179-182 of the bundle).

### **The email dated 26 January 2016**

35. On 26 January 2016 Mr Paynter e-mailed Mr Gunby and his wife advising them that he was prepared to contribute £150 of his community chest monies towards the cost of two advisory traffic signs for their hamlet. Mr Paynter stated in the e-mail that he was attaching the relevant application form for the monies which needed to be completed by the respondent. Mr Paynter further advised that he understood that there was a meeting of the respondent the following day and warned that time was of the essence as the deadline for the submission of the application for the community chest monies was 12 February 2016. This e-mail is at page 147 of the bundle.

### **The email dated 27 January 2016**

36. Mr Gunby's wife e-mailed the claimant at lunchtime on 27 January 2016 advising her that she was writing from an e-mail address which she shared with her husband regarding a matter which affected them both. Mrs Gunby's wife advised the claimant that Mr Paynter of Cornwall Council had agreed to assist in the funding of the advisory traffic signs and that he had forwarded the application form for such monies which needed to be completed and signed by the respondent by no later than 12 February 2016. Mr Gunby's wife indicated that she

was happy to complete the form to save time. Mr Gunby's wife also summarised the background to the matter including that the overall cost of the installation of the signs would be approximately £600, the damage which had been caused to their property and the dangers to the vulnerable residents in their hamlet. She asked the respondent to reconsider its previous decision not to fund the signs and to provide the remaining monies amounting to approximately £460. Mr Gunby's wife also stated that she appreciated however that the respondent might not be able to take a decision regarding the remaining funding in time for the 12 February 2016 deadline and that the completion of the application form for the community chest monies therefore remained a separate matter.

37. Mr Gunby's wife e-mailed the claimant again at 17.57 attaching the application form for the community chest monies which she had partially completed including with supporting information concerning the vulnerability of the local residents and associated dangers and damage previously caused. Mr Gunby's wife stated that she appreciated that it had come out of the blue however she had only just heard from Mr Paynter and did not want to miss the opportunity to secure his funding. This e-mail is at page 150 of the bundle.

#### **The Council meeting on 27 January 2016**

38. There was a public meeting of the respondent on 27 January 2016. All of the respondent's councillors and the claimant were in attendance. There were no members of the public in attendance at the meeting.
39. The claimant contended in her oral evidence to the tribunal that at the meeting on 27 January 2016 :-
- (1) The claimant advised the parish councillors that she had received emails (relating to the highway signs) which could not go on the agenda under finance for discussion at that meeting as the agenda had already gone out with the required three days' clear notice. The claimant also advised that the emails could be noted under correspondence.
  - (2) Mr Gunby started to read out the emails from his wife asking for grant monies from Cornwall Council's community chest grant.
  - (3) The claimant advised Mr Gunby that he might have an interest in the matter and should possibly not be reading out the email himself or participating in the discussion and further that he should leave the room.
  - (4) The claimant further advised the meeting that the matter should be on the agenda and that they should hold another properly convened meeting to discuss it. She explained that they were acting outside of their powers and that they had a duty to the public.
  - (5) Despite the claimant's advice Mr Gunby was allowed to read out the emails.

- (6) The claimant was asked by the chairman, Mr Rowland, to complete the application form for the community chest monies. The claimant stated that she was unable to do so because it would be outside of her role and that she would therefore be acting ultra vires.
- (7) The chairman, Mr Rowland, took the application form from the claimant and said that he would complete it at which point the claimant advised that further action would be taken.

40. In summary, the respondent contended that the meeting on 27 January 2016:-

- (1) Mr Gunby asked the claimant whether she had had a chance to read his wife's email. When the claimant confirmed that she had not had an opportunity to do so Mr Gunby requested that he be allowed to explain the content as they needed to sign the application form that day in order to ensure that the hamlet would receive the funding from the local county council.
- (2) Mr Gunby made it clear at the meeting that he was not asking for parish council funds but merely for the signing of the application form for funding by the county council.
- (3) The claimant angrily protested that a decision on whether to sign the application for funding should not be made as it was not on the agenda and had not been posted three days prior to the meeting.
- (4) The respondent decided that as the email had been sent to the claimant in her capacity as the Clerk by a parishioner it could be dealt with under correspondence. The respondent further agreed that the road signs would be of benefit to parishioners and it was therefore a reasonable request for the respondent to sign the application form for funding from Cornwall Council.
- (5) Mr Gunby made it clear that all that was required that evening was the completion of the application for the grant from the Cornwall Council and that no further decision was required regarding any additional parish council funding.
- (6) The respondent agreed and confirmed that any request for additional parish funding would need to be discussed as an agenda item at a future meeting.
- (7) Messrs Bellamy and Cooper proposed and seconded the motion that the respondent should complete the form to enable the grant monies to be released from Cornwall Council.
- (8) The claimant's attitude at the meeting was rude and unprofessional, she became angry and refused to complete the application form when asked to do so by Mr Rowland.
- (9) The form was therefore completed by Mr Rowland on behalf of the respondent.
- (10) Mr Gunby accepted in his evidence that, on reflection, and having had regard to the Code of Conduct, he should have declared an interest in the matter and left the room whilst the matter was being discussed

(11) The claimant also reacted angrily at that meeting to the request by the councillors for amendments to the minutes of the previous council meeting.

41. The parties subsequently prepared their own versions of the minutes of the meeting on 27 January 2016. The tribunal has had regard to these minutes when determining the events of 27 of January 2016.
42. The claimant's draft minutes of the meeting on 27 January 2016 (dated 8 February 2016) are at pages 155-158 of the bundle. The tribunal has had regard in particular to the contents of the final paragraph of the minutes on page 157 of the bundle and to the top paragraph on page 158 of the bundle relating to this matter.
43. The tribunal has noted in particular that the claimant has recorded that (a) she pointed out to the councillors that no decision should be made regarding the application for the community grant chest monies as it was not a urgent item and would need legally to be on an agenda with three clear days/ notice so that the public could have a chance to comment on the use of public monies (b) that she further pointed out that Mr Gunby should declare an interest and leave the room whilst any discussion was to take place and (c) Mr Gunby asked the councillors if they would find the remaining monies for the signs to which they responded that they would probably find it somehow by moving budget money around (d) the claimant refused the chairman's (Mr Rowland's) request to complete the application form to allow the grant monies to be paid on the grounds that to do so would be in breach of the respondent's/ legal procedures and inappropriate and unfair to the public.
44. The respondent's minutes of the meeting on 27 January 2016 are pages 159-162 of the bundle these minutes were not formally approved and adopted by the respondent until 28 September 2016.
45. Having considered all of the above the tribunal is satisfied that there is a broad level of agreement between the parties concerning the events at the meeting on 27 January 2016 including that (a) Mr Gunby read out to the meeting the email from his wife asking the respondent to complete an application form to allow it to access the offer of community chest monies from councillor Paynter (b) Mr Gunby made it clear that the request was urgent as there was a closing date of 12 February 2016 for the application (c) the claimant advised that no decision should be taken regarding the application for the community chest monies/the securing of any further required funds from the respondent's funds as the matter was not urgent and would need to be on a future agenda with 3 days' clear notice (d) the claimant pointed out that Mr Gunby should declare an interest in the matter and leave the room if any discussion was to take place but Mr Gunby declined to do so (d) Messrs Bellamy and Cooper proposed and seconded a decision to allow the respondent to apply for the release of the

community chest monies and Mr Gunby was advised by the respondent that any remaining monies could only be secured by moving budget monies around and in respect of which no decision was made at the meeting (e) the Chairman, Mr Rowland asked the claimant to complete the application form for the community chest monies. The claimant refused to do this as she believed that the matter had not been dealt with in accordance with the council's procedures and that it would be inappropriate and unfair to the public to complete the form (f) the claimant refused to complete the form and she returned the form to Mr Rowland.

46. The tribunal is satisfied that the claimant's advice and refusal to complete the form was expressed in forceful terms, which the respondent's councillors perceived to be disrespectful and unreasonable. The tribunal is not however satisfied in the light of the conflicting oral evidence that the claimant became angry at the meeting on 27 January 2016.
47. The tribunal is also satisfied that there was a discussion at the meeting regarding the contents of the minutes of the previous council meeting including that the claimant reacted badly to the respondent's suggestions for amendments to the minutes.
48. Following the meeting on 27 January 2016, Mr Gunby wrote to Mr Rowland the same day apologising for failing to disclose an interest during the discussion regarding the road signs and application for funding. Mr Gunby stated in his letter dated 27 January 2016 that he had realised as soon as he had returned home that he should have declared an interest and that he was extremely sorry for any embarrassment that he had caused to the respondent. This letter is at page 162a of the bundle.

#### **The meeting on 28 January 2016**

49. On 28 January 2016, the members of the respondent's Employment Committee namely, Messrs Colwill, Faull, Gunby and Rowland met with Mrs Mason, the county executive officer of CALC on an informal basis at Mr Rowlands' home to discuss employment issues relating to the claimant. The tribunal has not been provided with any notes of that meeting. Whilst the main focus of the meeting was to consider issues arising from the council meeting on 27 January 2016 the members of the Employment Committee shared with Mrs Mason other instances of the perceived poor behaviour and attitude of the claimant and raised concerns regarding the working relationship with the claimant including examples of where they believed that the claimant had acted inappropriately or outside of her role. Mrs Mason explained to the Employment Committee a number of options ranging from an informal meeting with the claimant to set clear goals to a formal investigation in accordance with the respondent's disciplinary procedure.

**The claimant's email dated 29 January 2016**

50. On 29 January 2016 the claimant sent an email to Mr Simon Mansell, Corporate and Information Governance Manager at Cornwall Council raising concerns regarding alleged breaches of the Code of Conduct relating to finance and declarations of interest in respect of the funding of road signs at the council meeting on 27 January 2016. A copy of the claimant's detailed email setting out her concerns is at pages 164-166 of the bundle. The claimant explained the background to the matter including that the members of the respondent had ignored her advice and discussed the application for funding notwithstanding that the item was not on the agenda which had already gone out three clear days prior to the meeting and that Mr Gunby did not declare an interest and leave the room. The claimant further informed Mr Mansell that Messrs Cooper and Greene had voted to sign the form in breach of the Code of Conduct notwithstanding that it was not an agenda item which had been advertised to the public and that she had given numerous warnings and advice regarding the relevant protocol. The claimant also informed Mr Mansell that when she told Mr Rowland that she was not prepared to sign off the community form and provide relevant bank details he took the form from her and completed it without the relevant authority. The claimant contended that Messrs Gunby, Cooper, Greene and Rowland had acted in a way that was not accountable to the public, that they did not have any respect for her as an employee advising them of the correct procedure and had not acted objectively or with honesty and integrity in their role by favouring Mr Gunby for the grant.

51. Mr Mansell replied to the claimant's email on 29 January 2016. His response is at page 167 of the bundle. Mr Mansell advised the claimant that on the basis of the information provided by her Mr Gunby may potentially have failed to declare an interest but this could only be finally determined via the complaints process. Mr Mansell attached a form to enable the claimant to make a complaint regarding Mr Gunby's conduct. Mr Mansell further advised the claimant that he was unable to assist her with regard to the other matters which she had raised which could potentially be open to investigation by the auditors if the respondent had misused funds and suggested the provision of training on governance matters which would require a resolution of the respondent and payment of a fee. The claimant accepted in her evidence that she did not tell the respondent about this email prior to termination of employment with the respondent. Further, the tribunal is satisfied on the evidence that the members of the respondent were unaware of such exchange of correspondence during the events in question.

**The respondent's letter dated 29 January 2016**

52. Messrs Rowland and Faull wrote to the claimant by letter dated 29 January 2016 advising the claimant that the Employment Committee

wished to invite her to an informal meeting on 4 February 2016. The claimant was further advised that she was entitled to be accompanied at the meeting by a colleague or a trade union representative. The claimant was requested to respond by email or telephone. This letter is at page 163 of bundle.

53. There was a subsequent telephone conversation between the claimant and Mr Rowland regarding the claimant's attendance at the proposed meeting on 4 February 2016. Having considered the available evidence (including the evidence of Mrs Christine Mason) the tribunal is satisfied that the claimant advised Mr Rowland during the telephone conversation that she was unable to attend the meeting on such short notice. The tribunal is also satisfied that the claimant asked Mr Rowland for further details of the purpose of the meeting and gave Mr Rowland the impression that she was reluctant to engage in such process. Mr Rowland did not however rearrange the meeting or make any further attempt to engage with the claimant on an informal basis.

#### **The Employment Committee meeting on 4 February 2016**

54. There was a meeting of the respondent's Employment Committee on 4 February 2016. A copy of the minutes of that meeting are at page 170 of the bundle. In summary the minutes of the meeting record that Mr Rowland explained to the committee that the claimant had declined to attend the meeting, that the Employment Committee reviewed the advice received from CALC and agreed that Mr Gunby would write to the claimant setting out the respondent's proposed options for the way forward and that the claimant should be given a reasonable period of time to consider her response. The minutes also record that the Employment Committee's proposed way forward was to reach an agreement with the claimant regarding the terms of the termination of her employment with the respondent.

#### **The respondent's letter dated 7 February 2016**

55. Mr Gunby wrote to the claimant on behalf of the respondent's Employment Committee by letter dated 7 February 2016. This letter is at pages 172-174 of the bundle.
56. Mr Gunby advised the claimant that the Employment Committee had become increasingly concerned over the previous few months about the claimant's apparent unease and frustration with her role as clerk which had unfortunately begun to manifest itself in behaviours that were proving extremely detrimental to the reputation and effective running of the respondent. Mr Gunby also stated that whilst the Employment Committee would have liked to have met with the claimant informally to better understand her concerns and discuss possible next steps they respected her decision to decline the request for an informal meeting and he was therefore writing to inform her of their concerns and possible options for resolution.

57. In summary, Mr Gunby advised the claimant that the Employment Committee agreed that the claimant's behaviour had been impacting negatively upon the effectiveness of the respondent including that she had demonstrated a confrontational attitude, lack of respect, lack of professionalism and obstructive and insubordinate behaviour. Mr Gunby cited examples of such alleged behaviour including with regard to the issue of a letter regarding a licensing application and the claimant's conduct at the council meeting on 27 January 2016 when the claimant allegedly responded angrily to the inaccuracies in the minutes of the previous meeting and refused to send a unanimously agreed application to the county council for the funding for road signs.

58. Mr Gunby stated that the respondent had reluctantly concluded that the claimant's behaviour and significantly damaged the trust between the respondent and the claimant and that having consulted with CALC there were two possible ways forward namely (a) to initiate formal disciplinary proceedings for gross misconduct, insubordination and bringing the council into disrepute including that these were significant enough to justify dismissal if proven and (b) to discuss with the claimant and to agree the termination of her employment and settlement terms which would comprise of three weeks' salary, a further three weeks' payment in lieu of notice together with outstanding holiday pay and a reference. Mr Gunby further advised the claimant that if she decided to decline the settlement or failed to respond to the offer by 10 February 2016 the formal disciplinary procedure was likely to proceed swiftly.

#### **The claimant's response**

59. The claimant advised the respondent on 11 February 2016 that she was unfit for her duties as clerk of the respondent. The claimant did not otherwise respond to the respondent's letter dated 7 February 2016. The claimant was signed off sick from her council duties for three months commencing in February 2016. The sick note was extended for a further three months in May 2016.

#### **The meeting of the Employment Committee on 18 February 2016.**

60. There was a meeting of the respondent's Employment Committee on 18 February 2016. Mrs Mason of CALC was also in attendance at the meeting. The respondent's record of that meeting is at pages 176-177 of the bundle. In summary, the minutes record that (a) the respondent had been advised of the claimant's sickness absence but that the claimant had otherwise failed to respond to the respondent's letter dated 7 February 2016 (b) it was agreed that, subject to any advice from CALC, the Employment Committee would proceed with implementing the formal stages of the disciplinary procedure on the main grounds that the claimant had failed to respect councillors/the



respondent, had failed to act reasonably and take clear instructions from the respondent and had exhibited a pattern of behaviour which had undermined the perception that the claimant would act independently and further that there had been a breakdown of the mutual trust between the parties (c) CALC would be instructed to draft a letter to the claimant confirming the decision to initiate the disciplinary procedure and to establish a disciplinary hearing panel to hear the allegations of misconduct.

### **The initiation of the disciplinary process**

61. Mrs Mason wrote to Mr Gunby on 22 February 2016 setting out the proposed way forward including associated procedural matters. Mrs Mason advised Mr Gunby that in the light of the fact that the claimant was currently off work and, having taken professional HR advice, she proposed that she would undertake the disciplinary investigation. Mrs Mason also proposed that the claimant would be given an opportunity to meet with her to put forward her point of view or, if she felt more comfortable, to submit a written report. Mrs Mason would then prepare a written report for the hearing panel which would include an independent chairman. Mrs Mason also advised Mr Gunby that she would have to charge the respondent for a day of her time for undertaking the investigation and her subsequent involvement in the matter which would cost £350 plus VAT and mileage and that the costs would have to be approved by the Employment Committee or full council. Mrs Mason also gave Mr Gunby guidance regarding the other resolutions which would be required in support of the above process.
62. Messrs Colwill, Faull and Rowland prepared confidential reports of the issues which they contended that they had experienced with the claimant for the purposes of the investigation these documents are at pages 175, 179-180 and 181-182 of the bundle respectively.

### **The meeting of the Council on 24 February 2016**

63. There was a council meeting on 24 February 2016. The minutes of that meeting are at pages 183-186 of the bundle. The respondent ratified certain matters arising from the meeting on 27 January 2016 including the application to access money from the community chest fund towards the cost of road signs. It was also recorded that there was no further discussion or decision regarding any contribution by the respondent towards the cost of the road signs and further that Mr Gunby had left the meeting when this item was discussed. Mr Rowland gave a confidential report concerning the actions of the Employment Committee and the respondent passed resolutions to implement the process recommended by Mrs Mason including for the payment of her costs of the investigation and associated matters.

### **The correspondence passing between the claimant and Mrs Mason**

64. Mrs Mason wrote to the claimant by letters dated 8 and 16 March 2016. Mrs Mason advised the claimant that she had been appointed to conduct an investigation into disciplinary matters raised by the respondent namely, (a) refusal to take council instructions (b) threatening and inappropriate behaviour at meetings (c) lack of respect to the council and its members (d) threatening and inappropriate behaviour towards members of the public (e) bringing the council into disrepute and (f) failure to carry out her duties to an appropriate standard. Mrs Mason did not provide the claimant with any further details of the allegations. Mrs Mason invited the claimant to attend an investigation meeting and advised her that she was entitled to be accompanied by a representative. The letters are at pages 188-190 of the bundle.
65. The claimant responded by e-mails dated 17 and 19 March 2016 which are at pages 192 and 193 of the bundle. The claimant informed Mrs Mason that she was not currently well enough to attend a meeting and also raised various concerns about the recent events and process. The claimant asked Mrs Mason to defer any meeting until she was well enough to attend and to provide her with further information relating to the allegations.
66. In the subsequent correspondence the claimant declined the respondent's proposal to implement the fit to work scheme on the grounds that she was not well enough to attend for work and the parties were also unable to agree upon a mutually convenient date for Mrs Mason to meet with the claimant and her professional adviser. The claimant advised Mrs Mason in her e-mail dated 30 March 2016 that her medical advisers had signed her off completely from any council work and asked Mrs Mason to stop depicting her as someone who was not prepared to engage in the investigatory process (page 202 the bundle). The claimant further advised Mrs Mason by e-mail dated 31 March 2016 that she did not consider that it would be practicable to meet on 5 April 2016 as she had not yet been contacted by her professional adviser and was awaiting further details of the allegations from the respondent. This e-mail is a page 206 bundle.
67. Mrs Mason wrote to the claimant by e-mail dated 5 April 2016. This e-mail is at page 207 of the bundle. Mrs Mason noted that the claimant had declined two opportunities to meet with her and stated that she considered that it was important to complete the investigatory process as soon as possible. Mrs Mason also advised the claimant that the respondent considered that it was reasonable to continue with the investigation notwithstanding that the claimant remained off work sick as the claimant continued to carry out other employment. Mrs Mason stated that the claimant was required to submit by no later than 11 April 2016 any information which she wished to be considered in the investigatory report and that this was the claimant's final opportunity to participate in the investigatory process. Mrs Mason also advised the claimant that her investigation report would be presented to a meeting

of the respondent staffing committee for further consideration during the week commencing 18 April 2016.

68. Following the submission of further emails, in which the claimant continued to raise matters of concern, the claimant submitted a number of annotated documents relating to the process to date together with a bundle witness statements. The witness statements included four anonymous statements based on the same template which Mrs Mason treated as one statement.

### **The letter email 21 April 2016**

69. Mrs Mason emailed the claimant on 21 April 2016 confirming that she had received 4 witness statements from the claimant which had been considered as part of our investigation report. Mrs Mason advised the claimant that she had now completed her investigation and that any further witness statements would be added to the dossier but would not be considered in the report.

### **The investigation report**

70. Mrs Mason's investigation report dated 28 April 2016 is at pages 229 – 236 of the bundle. In summary Mrs Mason :-

- (1) Identified three allegations against the claimant namely that (a) she had a confrontational attitude to members which was unprofessional and had brought the respondent into disrepute (b) she had refused to take clear instructions from the respondent and (c) there were performance issues regarding record management and the production of the respondent's documents.
- (2) Stated that the claimant had provided an unsigned copy of a standard contract of employment to the respondent's Employment Committee and that in the absence of any other evidence from either party she had proceeded on the basis that the national contract model was the implied contract of employment between the respondent and the claimant.
- (3) Gave a summary of events/ evidence received for the purposes of the investigation including document/statements which she had received from the claimant and listed the written submissions which she had received from Messrs Rowland, Faull, Gunby and Colwill.
- (4) Mrs Mason addressed each of the allegations as set out below:-

**Allegation 1 – the alleged confrontational and unprofessional attitude to members**

- (5) This allegation related to criticisms of the claimant concerning her conduct at council meetings including at the meetings in September 2015 and 27 January 2016.
- (6) Mrs Mason stated that in the opinion of the members the claimant had acted inappropriately at the meeting on 27 January 2016 (a) in respect of the amendments which the members wished to make to the previous minutes in response to which the claimant allegedly reacted angrily and challenged the right of members to amend the minutes as drafted and (b) by making disparaging comments against a member who addressed the meeting and further that the claimant was allegedly overheard talking over the discussion and ridiculed the respondent.
- (7) Mrs Mason stated that evidence from Messrs Rowland, Gunby and Colwill confirmed that the claimant repeatedly passed unprofessional comments during council meetings including that at the budget discussion meeting in September 2015 the claimant was overheard openly criticising the members. Mrs Mason further stated however that it was contended by the claimant that any such comments related to the task rather than to the councillors.
- (8) Finding in respect of Allegation 1 - Mrs Mason stated that having considered the guidance contained in the NALC/ SLCC guide to good employment practice (“the Guide”) and in particular the guidance concerning the role and duties of the clerk contained therein together with the Nolan principles of Public Life she considered that the claimant had failed to meet such standards in her work. Mrs Mason further stated that in her opinion when members of the respondent and the public had exercised their right to question the claimant on various aspects of her work the claimant had failed to respond appropriately including calmly and with respect and had brought the respondent into disrepute.

**Allegation 2 - alleged insubordination and refusal to take clear instructions from the respondent**

- (9) This allegation related to the claimant’s alleged conduct at the council meeting on 27 January 2016 and an extraordinary meeting on 9 December 2015.

- (10) Mrs Mason stated that the respondent had resolved unanimously at the meeting on 27 January 2016 to apply to the Cornwall Council board member for a grant towards road signs which decision was taken against the advice of the claimant. Mrs Mason further stated that the claimant was instructed to complete the application form on behalf of the respondent but refused to do so and, “flicked it back across the table” to the chairman in a disrespectful manner. Mrs Mason further stated that the claimant contended that she had given the correct procedural advice however she was not satisfied, on the balance of probabilities, that the claimant had given it in a calm and professional manner.
- (11) Mrs Mason also referred in her report to an incident relating to a licensing application for a festival following an extraordinary meeting on 9 December 2015. Mrs Mason stated that it was the recollection of the members that responsibility for the preparation of a draft letter in response to such application and been specifically delegated to the claimant and the chairman however, the claimant sent out the letter after consultation with other members but not the Chairman.
- (12) Finding in respect of Allegation 2 - Mrs Mason stated that having considered the role and duties of the claimant in the context of the Guide it was evident that the claimant had failed in respect of the above matters to carry out the decision of the respondent.

**Allegation 3 - performance in record management and production of the respondent’s documents.**

- (13) Mrs Mason stated that during interviews with members the respondent referred to consistent failings in the production and management of documents by the claimant. Mrs Mason cited a number of examples of alleged failings including the lack of organisation and failure to bring correspondence to council meetings.
- (14) Mrs Mason stated in her findings that the respondent had not raised any of the above examples with the claimant through performance management or staff appraisals (which had not taken place since 2014) and that the claimant had interpreted that as meaning that her work was meeting the necessary standards. Mrs Mason further stated that the evidence which had been submitted to the investigation by the claimant was of an inconsistent standard and suggested that there were performance issues which needed to be addressed through proper appraisal and that the respondent should have addressed them earlier.

## Conclusions

71. Mrs Mason stated that she believed that (a) the claimant had become frustrated in her working relationship with the respondent including by the way in which the respondent chose to conduct its business (b) the claimant had failed to show any respect for the elected members or the office of Chairman and had become very confrontational with members when frustrated (c) the claimant's inability to keep her temper and act professionally had brought the respondent into disrepute and (d) the claimant had not engaged proactively or constructively in finding solutions to problems as a result of which she had publicly refused to carry out a direct instruction which, in the absence of sufficient mitigation, could amount to insubordination.

## Recommendations

72. Mrs Mason recommended that (a) there were significant issues relating to the conduct, behaviour and performance of the claimant which should be addressed at a formal disciplinary hearing and (b) that in the interests of fairness members of the disciplinary panel should not be drawn from current members of the Employment Committee and that it should have an independent chairperson provided by the CALC/ SLCC Employment Support Panel (c) the respondent would benefit from basic counsellor skills training to gain a better understanding of the roles responsibilities and the legal framework and (d) the respondent shall establish a proper staff appraisal system to address issues of capability and performance.

## The claimant's email dated 1 May 2016

73. The claimant sent an email to Mr Barrie Morris, external auditor, dated 1 May 2016. This email is at pages 247 – 249 of the bundle. The claimant requested in the email that it be kept confidential and that Mr Morris should not pass it to anyone else. The claimant raised a number of serious allegations concerning the alleged conduct of the respondent and individual members including (a) a detailed account of the alleged events at the council meeting on 27 January 2016 including with regard to the conduct of Mr Gunby and of the other members of the respondent in allowing him to raise the matter including to make a request for money and (b) a wide range of more general concerns including matters being allegedly considered at council meetings without being on the agenda (including in respect of the grant monies on 27 January 2016), that the respondent's accounts did not provide a fair or true picture and the failure of the members to follow advice.

74. The claimant did not contend that she had made the respondent aware of this letter prior to her dismissal/dismissal of her appeal and the respondent denied that it was aware of the letter at any relevant time.

The claimant alleged in a subsequent email appealing against her dismissal dated 1 June 2016 that she had been victimised for whistleblowing on the respondent's behaviour and reporting their handling of financial matters (page 281 of the bundle). There was however no evidence before the tribunal to indicate the respondent or any of its members were made aware of the claimant's email to the external auditor dated 1 May 2016 (or the contents of the email) at any time prior to the dismissal of the claimant's appeal and which is consistent with the claimant's request to the external auditor not to reveal the contents of the letter.

### **The meeting of the Employment Committee on 3 May 2016**

75. There was a meeting of the respondent's Employment Committee on 3 May 2016 at which the conclusions and recommendations contained in Mrs Mason's Investigation Report were accepted and it was unanimously agreed to proceed with a disciplinary hearing in accordance with the respondent's disciplinary policy. Mrs Mason was requested to identify a suitable independent chairman for the hearing panel who would sit with two members of the respondent who would not be members of the respondent's Employment Committee. It was also agreed that the respondent would arrange for someone with no involvement in the work of the respondent to take the notes of the disciplinary hearing.

### **The notification of the disciplinary hearing**

76. Mrs Mason wrote to the claimant by letter dated 4 May 2016 giving notice of a disciplinary hearing on 9 May 2016 which she stated would be conducted by Messrs Greene and Bellamy together with an independent chairman, Councillor Linda Higgins from the CALC/ SLCC panel. Mrs Mason advised the claimant that the respondent had given delegated authority to the Employment Committee to act on behalf of the respondent and that the Employment Committee had resolved to accept the decision of the hearing panel and had delegated the authority to make any relevant decision to Messrs Greene and Bellamy. Mrs Mason stated that the allegations which would be considered at the hearing were (a) that the claimant's confrontational attitude to members was unprofessional and had brought the respondent into disrepute (b) that the claimant had refused to take clear instructions from the respondent and (c) performance issues in record management and production of respondent documents. Mrs Mason advised the claimant that the hearing was being convened at stage 4 of the respondent's disciplinary incapability procedure and that action up to and including dismissal was therefore a potential outcome. The claimant was advised of her right to be accompanied at the hearing and was required to submit copies of any additional evidence at least two working days prior to the hearing. The claimant was also advised that an independent person would be present as a note taker.

This letter is at page 252 of the bundle. The respondent also provided the claimant with a copy of the supporting evidence upon which it was relying.

77. The disciplinary hearing was postponed twice at the claimant's request and ultimately rearranged for 26 May 2016. The claimant was advised in Mrs Mason's letter dated 16 May 2016 that if the claimant was unable to attend the hearing on 26 May 2016 it would proceed in her absence. The claimant was requested to submit copies of any additional witness statements or other written evidence/names of any witnesses by 23 May 2016.
78. Prior to the disciplinary hearing the claimant submitted a number of witness statements from parishioners who were supportive of the way in which she had conducted herself at council meetings. They denied that the claimant was disrespectful and rude and contended that her advice was not listened to properly by some councillors. These statements are pages 247-260 and 267 of the bundle. There is a dispute between the parties as to whether these statements were taken into account at the disciplinary hearing. This issue is addressed further below.
79. There was further correspondence passing between the claimant and Mrs Mason leading up to the disciplinary hearing on 26 May 2016 in which the claimant raised concerns including in particular about the absence of the minutes of the Employment Committee and the involvement of Mr Greene on the hearing panel as he was referred to in one of the complaints.

### **The disciplinary hearing on 26 May 2016**

80. The disciplinary hearing took place on 26 May 2016. The disciplinary panel consisted of Cllr Higgins (chairman of the panel) and Messrs Bellamy and Greene. The claimant was supported by a parish clerk who had been nominated by the claimant's ESO representative Liz Moore. Mrs Mason was in attendance for part of the disciplinary hearing in the capacity as investigating officer. Mr Faull also attended the disciplinary hearing as a witness on the part of the respondent. As stated previously above the tribunal has not received any evidence from any of the members of disciplinary panel. There was an independent minute taker at the disciplinary hearing.
81. The respondent's minutes of the disciplinary hearing are at pages 274 a-274e of the bundle. These minutes were not provided to the claimant until March 2017. The claimant contended that the minutes were not an accurate note of the disciplinary hearing. The claimant was however unable to identify any specific inaccuracies in the minutes during the tribunal hearing. The tribunal is satisfied that the minutes are a broadly accurate account of the disciplinary hearing. When reaching this conclusion the tribunal has taken into account that the notes were



prepared by an external minute taker, that the claimant has not provided any alternative minutes of the hearing and further that the claimant has been unable to identify any specific inaccuracies.

82. In summary the tribunal is satisfied that :-

- (1) The claimant raised concerns at the commencement of the hearing regarding the composition of the panel and documentation. There was a discussion in particular regarding Mr Greene's involvement in the disciplinary panel as he was referred to in the submissions provided by Mr Gunby. The tribunal is satisfied however from the minutes of the hearing that after further discussion the claimant confirmed that she was happy for Mr Greene to continue as a member of the panel. The claimant was also given an opportunity to consider minutes of the respondent's Employment Committee prior to the commencement of the hearing.
- (2) There is a reference in the minutes to the submission of 4 witness statements by the claimant. The tribunal is satisfied that these statements are the statements identified at paragraph 78 above and that these statements were drawn to the attention of the disciplinary panel as they are specifically referred to in the subsequent record of the decision of the disciplinary panel at page 336 of the bundle.
- (3) Mrs Mason gave evidence of her role in the matter including that she had been asked by the respondent for procedural advice and of the process prior to the disciplinary hearing.
- (4) The disciplinary panel explored the allegations with the parties.
- (5) The claimant denied the allegations including on the following grounds :- (a) the claimant contended that the chairman had tried to exclude whole sections of the minutes which she was unable to agree. The claimant also contended that she had done her best to support members and denied making any inappropriate comments including as the comments attributed to her were inaccurately depicted/taken out of context (b) the claimant gave her account of the meeting on 27 January 2016 including that the chairman and Mr Gunby had ignored her advice regarding Mr Gunby's failure to declare an interest in the matter relating to the road signs and that it could not be lawfully considered at the meeting as it had not been placed on the agenda for the meeting. The claimant accepted that she had declined to comply with the instruction to complete the application form for the grant monies but contended that she had declined to do so because of her role as the responsible financial officer and her belief that she would be acting unlawfully in doing so (c) the claimant denied acting

inappropriately with regard to her dealings with members of the public (d) the claimant contended that there was insufficient information to support the allegations and (e) the claimant acknowledged that the relationship with the councillors was difficult but contended that it would have been better if the councillors had attended training.

- (6) The claimant denied that she had failed to engage constructively with the investigative process including that she had declined to attend the meeting on 4 February 2016. The claimant contended that she had telephoned Mr Rowland upon receipt of the letter to inform him that it was being convened at too short notice and to obtain further information regarding the purpose of the meeting. The claimant further contended however that notwithstanding such request the meeting had gone ahead on 7 February 2016 following which she had received the letter from Mr Gunby offering the claimant a settlement payment and a reference on the basis that if she declined to accept such offer a disciplinary process would ensue.

83. The minutes record that at the conclusion of the hearing Mrs Higgins informed the claimant that she could sense her frustrations and asked the claimant whether she felt that she had been confrontational to which the claimant responded that she had clearly advised Mr Gunby to leave the meeting (on 27 January 2016) and further that the item relating to the road signs was not on the agenda. The claimant further stated that it was difficult to work together with the councillors if her advice was not followed. The claimant also expressed a willingness to work together with the councillors.

### **The decision of the disciplinary panel**

84. The disciplinary hearing concluded on the basis that the disciplinary panel would inform the claimant of its decision. Mrs Mason and Mr Faull did not play any part in the decision making process of the disciplinary panel save that the panel took advice from Mrs Mason and a representative of the SLCC regarding the payment of salary/notice. The minutes of the disciplinary hearing record (at page 274e- f of the bundle) that allegation one (relating to the claimant's alleged confrontational and unprofessional attitude) was proven and that allegation two relating to the claimant's refusal to carry out the direction of the respondent) was proven insofar as it related to her actions in respect of the meeting on 27 January 2016. The minutes further record that (a) on that basis it was agreed to dismiss the clerk with notice and a reference (b) the panel members also felt, on the balance of probabilities, that the working relationship between the claimant and the respondent had irretrievably broken down and expressed concern about the effect on the claimant's health and (c) Messrs Greene and

Bellamy decided to adopt the resolution and to dismiss the claimant under their delegated powers from the respondent.

85. The decisions of the disciplinary panel are set out in more detail at pages 336-337 of the bundle including (a) that allegation 1 was proven, on the balance of probabilities, to the extent that the relationship between the claimant and the councillors had broken down (b) the panel found that allegation 2 (a) (relating to the refusal of the claimant to complete the application form on the grounds that Mr Gunby should have declared an interest and withdraw from the discussion of that item/ that the item not been on the agenda) was proven including as the panel accepted that it was a requirement of the post to carry out the clear instructions of the council (albeit recording in the minutes that the decision was taken against advice) (c) allegation 3 was dismissed as there was no consistent evidence of very poor performance and the claimant had not been challenged about such failures and (d) the panel members felt, on the balance of probabilities, that the working relationship down between the claimant and the respondent had irretrievably broken and that it was concerned about the effect of such breakdown on the health of the claimant. The disciplinary panel also accepted the recommendations contained in the investigation report regarding the requirement for further training for members to better understand their roles and responsibilities and that the respondent should establish a proper staff appraisal system to address issues of capability and performance.

**The letter of dismissal dated 31 May 2016**

86. Mrs Mason emailed the claimant on 31 May 2016 attaching the respondent's letter of dismissal. The letter of dismissal is a pages 278-279 of the bundle. In summary, the letter advised the claimant that the disciplinary panel had concluded, on the balance probabilities, that her conduct was unsatisfactory and that she should be dismissed. The letter confirmed that the reasons for her dismissal were that (a) her confrontational attitude to members was unprofessional and had brought the respondent into disrepute and (b) she had refused to carry out a clear instruction of the respondent at the council meeting on 27 January 2016. The letter also stated that the disciplinary panel had dismissed an allegation of insubordination relating to the meeting of the Council on 9 December 2015 and had accepted the recommendation within the investigation report that an allegation of poor performance should not be upheld. The claimant was also advised that the decision to accept the findings of the panel had been delegated by the respondent to the respondent members of the panel who had resolved that the claimant should be dismissed with payment in lieu of notice and that the last day of service with the respondent would be 31 May 2016. The claimant was further advised of her right of appeal. The claimant contended that she did not receive a "hard copy" of the letter of dismissal until 2 June 2016. The claimant did not however contend that there was any delay in receiving Mrs Mason's email dated 31 May

2016 and the tribunal is therefore satisfied that this date is the effective date of termination for the purposes of the Act.

### **The claimant's appeal**

87. The claimant emailed Mr Gunby on 1 June 2016 appealing against her dismissal. The claimant's email is at pages 280-282 of the bundle. The claimant asked Mr Gundy to send her a copy of the minutes of the meeting as soon as possible so that she could consider them with her ESO (this request was repeated by the claimant on 5 June 2016).
88. The claimant appealed against her dismissal on the grounds that (a) the findings and penalty were unfair (b) the procedure was not applied properly and (c) new evidence was raised but it was not properly taken into account by the Investigation report.
89. In summary:-
- (1) The claimant denied that she had brought the respondent into disrepute by her confrontational attitude to members of the respondent. The claimant contended that she had not been provided with sufficient information to enable her to defend such allegations. Further the letter dismissal was unclear as to which allegations had been upheld and on what grounds. The claimant also asked the respondent to confirm the names of the councillors who had made the decision to dismiss her which she understood to be Messrs Greene and Bellamy. The claimant contended that Mr Greene had not been objective and had made a biased decision. The claimant acknowledged however that there had been a discussion at the commencement of the disciplinary hearing regarding her concerns relating to Mr Greene's involvement in the disciplinary hearing as he had been named in the allegations but that she had agreed to allow him to remain on the panel on the condition that he was not biased.
  - (2) The claimant contended that she had not completed the grant application form as instructed at the meeting on 27 January 2016 as she was unable, as the Responsible Financial Officer and clerk, to complete the form in circumstances where (a) it had been partially completed by Mr Gunby's wife (b) the matter was discussed by the councillors notwithstanding that it was not on the agenda/open and transparent (c) there was time for a properly convened meeting and (d) she had checked the position with Cornwall Council who had advised that there should be backup paperwork before approving it and (e) Mr Gunby did not declare an interest or leave the room notwithstanding that he was asking for money and (f) the Council did not follow its procedures or the Code of Conduct and tried to bully the clerk into completing the form.

- (3) The claimant raised a number of issues regarding outstanding payments including that the letter of dismissal made no reference to outstanding holiday pay.
- (4) The claimant contended that the respondent had dismissed her notwithstanding that they were well aware that she was off sick and that no effort had been made to support her to return to work/ that the respondent had harassed her to return to work. The claimant further contended that she had been victimised for whistleblowing in respect of the respondent's behaviour and the reporting of their handling of financial matters. The claimant did not however make any reference to her previous correspondence with Cornwall County Council or with the external auditor.
- (5) The claimant contended that Mrs Mason had not been independent and that she had expressed her opinions rather than reporting on facts which had resulted in a very biased report. The claimant further complained that Mrs Mason had allowed the submission of additional papers by Messrs Colwill and Rowland which were bullet points and accusations and were not supported by any further information.
- (6) The decision to dismiss her was predetermined as the respondent had already made a decision to discipline her if she refused to accept a payoff and reference.

### **The claimant's appeal**

90. Mrs Mason wrote to the claimant by email dated 9 June 2016 advising the claimant that her appeal would be heard by a panel of two independent members on 21 June 2016. This date was subsequently rearranged at the claimant's request. Mrs Mason wrote to the claimant by email dated 21 June 2016 confirming the rescheduled hearing and attaching the record of the disciplinary panel meeting on 26 May 2016. The record of the disciplinary panel is the summary document at pages 336 – 337 of the bundle.

### **The appeal hearing on 28 June 2016**

91. The claimant's appeal hearing took place on 28 June 2016. The Chairman of the appeal panel was Councillor Drew who was accompanied by Councillor Paul O'Brien. The councillors were appointed from the CALC/ SLCC Employment Support panel. The claimant attended with her accredited trade union representative from SLCC, Mrs L Moore. Mrs Mason, and Mr Faull and Cllr Higgins were available to provide clarification if required by the appeal panel.
92. The respondent's notes of the appeal hearing (which were taken by an administration assistant from CALC) are at pages 295a – 295 n of the

bundle. The tribunal is satisfied that these notes are a broadly accurate note of the appeal hearing.

93. The appeal panel was provided with a copy of Mrs Mason's investigation report together with the summary note of the decision of the disciplinary panel (at pages 336-337 the bundle), the four anonymous witness statements which had been provided by the claimant in respect of the meeting on December 2015 and various correspondence passing between the claimant and Mrs Mason prior to the disciplinary hearing. Cllr Drew did not recall having sight of the written submissions from the respondent's councillors at pages 179-181 of the bundle. Cllr Drew consulted ACAS prior to the meeting in order to obtain advice regarding the conduct of the appeal hearing. Councillors Drew and O'Brien approached the appeal hearing on the basis that they were required to determine whether the decision of the disciplinary panel was reasonable in the circumstances.
94. The claimant was given an opportunity to make representations regarding the three grounds of appeal identified in her grounds of appeal including to put questions to Mrs Mason, Mr Faull and Mrs Higgins.
95. In summary, the grounds of appeal were discussed in as follows:-
- (1) The findings / penalty was unfair – the claimant contended in particular that (a) insufficient weight had been placed on the witness statements provided by her which attested to her professionalism and time spent trying to keep the respondent “on track” (b) the respondent did not appear properly to appreciate that the claimant had been trying to protect the respondent at the meeting on 27 January 2016 and that her actions should have been judged in such light (c) the matter should have been treated as a matter of misconduct rather than gross misconduct particularly as the panel had not raised any employment issues with her previously (d) she had not had an employment related meeting with the respondent for over two years and there was no system in place for such meeting notwithstanding that her contract provided for an annual appraisal and ( e ) the councillors did not have a good understanding of their role which made it difficult for her to carry on with the job.
  - (2) The procedure was not applied properly - the claimant contended in particular that (a) it had been inappropriate for Mrs Mason to act as investigating officer as the respondent was a member of CALC and it would therefore have been more appropriate for the investigation to have been carried out by ACAS or some other independent body (b) The Employment Committee had a predetermined view of the of the matter which

was compounded by the relationship between the respondent and CALC (c) the claimant was unclear what weight had been placed during the hearing process on the respondent's statements/ what part they had played in the decision making including as the statements do not appear to have been supported with proper evidence (d) the terms of reference of the Employment Committee did not appear to have been properly authorised including the power to appoint Messrs Greene and Bellamy to make decisions on behalf of the respondent

- (3) The investigation report did not use new evidence raised – the claimant contended in particular that (a) the statements of the councillors had been given more weight than the statements submitted by her notwithstanding that the statements of Messrs Colwill and Rowland contained no names/ details just bullet points (b) she had not been provided with a copy of the minutes of the Employment Committee until the morning of the disciplinary hearing (c) the respondent had failed to address issues relating to bullying which had resulted in the claimant being signed off sick with stress and (d) there were double standards in the requirements for the type/timing of information to be given.

96. Following a break in the hearing of approximately one hour to allow the appeal panel to review the matter including to identify areas where further clarification was required the appeal panel called (individually) Mrs Mason, Mr Faull and Mrs Higgins to answer/ clarify a number of matters.

97. The evidence of Mrs Mason – Mrs Mason contended that (a) all of the claimant's witness statements had been received and had been properly taken into account (b) Mrs Mason confirmed that there was no further evidence relating to the statements of councillors Colwill and Rowland including that there was no missing evidence relating to the matters raised in the bullet points as the matters raised were based on people's perceptions.

98. The evidence of Mrs Higgins – Mrs Higgins (a) confirmed that the disciplinary panel had received two sets of witness statements from the claimant which were given equal weight (b) was requested by the claimant's representative to confirm the panel's understanding of the claimant's role and her belief regarding her actions on 27 January 2016. Mrs Higgins stated that she had made sure that the panel was aware of the role of the clerk as she had undertaken the role of a clerk and therefore understood the claimant's frustration in trying to make the respondent understand that they were not dealing with the matter correctly. Mrs Higgins further stated that the disciplinary panel had however come to the conclusion that the claimant was aware that if she had acted as instructed she could have made a note in the minutes

that she had given advice which had not been followed. Mrs Higgins further contended that the disciplinary panel had tried to see it from both sides (c) confirmed in response to a question from the claimant that the disciplinary panel had used the model employment contract when determining the allegations as it was included in the bundle which was provided to them for the purposes of the disciplinary hearing (d) Mrs Higgins confirmed in response to a question by Councillor Drew regarding the events of 27 January 2016 that the disciplinary panel had accepted that the respondent had been acting unusually. The disciplinary panel had however concluded that it was the duty of the claimant to carry out the instructions of the respondent as she would not have been accountable for any such decision if she had made the position clear in the minutes. The appeal panel agreed to review the provisions of the claimant's contract which were highlighted by the claimant during the appeal hearing.

99. The evidence of Mr Faull - Mr Faull gave evidence to the appeal panel regarding (a) the delegation and authorisation of powers to Messrs Greene and Bellamy to determine the disciplinary allegations (b) the meeting on 27 January 2016 including that he had no recollection of suggesting that the respondent should call another meeting to deal with the matter and that it was agreed that the respondent would accept the money (c) the position with regard to the adoption of the respondent's minutes.
100. During the course of the appeal hearing the claimant produced a copy of her signed contract of employment a copy of which was provided to the appeal panel.
101. At the conclusion of the appeal hearing the claimant's representative summed up on her behalf including in summary that the claimant had appealed on the grounds that (a) the reasons for dismissal did not amount to gross misconduct and had submitted evidence that the accusations were unsubstantiated and (b) the claimant had raised concerns regarding the inappropriateness of CALC providing investigation services and the delegation of decisions to the Employment Committee.

### **The outcome of the claimant's appeal**

102. The appeal panel dismissed the claimant's appeal. The recommendation of the appeal panel that the claimant's appeal should be dismissed was accepted by the respondent at a confidential meeting of the respondent on 29 June 2016. The minutes of that meeting are at page 298 a of the bundle. The respondent also resolved to make payment of outstanding monies to the claimant as set out in the calculation dated 29 June 2016 which is at page 300 of the bundle. Cllr Drew wrote to the claimant by letter dated 29 June 2016 confirming that the appeal panel had decided, having heard evidence from the claimant, Mrs Mason, Cllr Higgins and Mr Faull to dismiss the



claimant's appeal as the appeal panel believed that the penalty imposed by the disciplinary panel was appropriate. This letter is at page 299 of the bundle.

103. Cllr Drew e-mailed Messrs Gunby and Faull on 29 June 2016 attaching a copy of the decision notice of the appeal panel. This e-mail is at page 303 of the bundle. Cllr Drew further advised them that the appeal panel strongly supported the recommendations of the investigation report that (a) the respondent should receive training on council procedures, roles and responsibilities (b) the respondent should implement a proper system of performance management and (c) that the respondent should seek advice from CALC to ensure that the respondent's employment policies and associated documentation were reviewed and were consistent with best practice.

104. The tribunal is satisfied having considered the witness statements and oral evidence given to the tribunal by Cllr Drew that the appeal panel concluded that (a) the new evidence relied upon by the claimant related to the 4 anonymous witness statements which Mrs Mason had mentioned in her investigation report which they were also satisfied should carry little or no evidential weight in the light of their anonymity and almost identical content (b) the respondent had applied it disciplinary procedure properly in difficult circumstances which were largely created by the claimant's refusal to participate in the process and (c) the claimant had acted towards the respondent in a confrontational manner in respect of the meeting on 27 January 2016 to such a degree that it had become unprofessional and was bringing the respondent into disrepute. When reaching this conclusion the appeal panel also took into account that there had not been any acknowledgement by the claimant that her conduct had been inappropriate or that she had overreached her legal duty as the clerk. Further, the appeal panel was satisfied that the claimant had been dismissed by the respondent for misconduct in respect of her refusal to carry out a clear instruction of the respondent on 27 January which had arisen because of her mistaken belief that the respondent's decision was incorrect and her failure to accept that her duty in such circumstances was limited to recording the advice which she had given and (d) dismissal for gross misconduct was appropriate in all the circumstances as there was clear evidence of gross misconduct by the claimant. Further, in view of the serious and deteriorating confrontational attitude displayed by the claimant leading to her unprofessional behaviour and refusal to carry out the instructions of the respondent at the meeting on 27 January 2016 and the lack of any acceptance or recognition by the claimant of the situation there was no expectation of any improvement in her conduct in the future.

**The respondent's letter to the claimant dated 30 June 2016**

105. The respondent wrote to the claimant by letter dated 30 June 2016 advising the claimant that the respondent had accepted the

recommendation of the appeal panel to dismiss her appeal. This letter is at pages 306-307 of the bundle. The respondent also advised the claimant that they were arranging for any outstanding monies to be sent to her. The respondent had taken advice from Mrs Mason regarding the payment in lieu of notice.

## Holiday

106. Paragraph 15 of the claimant's contract of employment provided in summary that (a) the calculation of the claimant's annual leave entitlement would commence on the first day of her employment (1 May 2013) (b) the claimant was entitled to 21 working days' leave each year (pro rata for part-time employees) plus normal bank and public holidays together with two extra statutory days leave (c) if the claimant's employment commenced or terminated part way through the leave year, leave entitlement would be calculated on a pro rata basis with deductions from final salary in respect of any excess leave and (d) the claimant was entitled to carry up to 5 days' leave to the following leave year subject to the approval of the Council (pages 85-86 of the bundle).
107. The claimant was paid £6.95 in respect of five days accrued leave in respect of the 2015/2016 annual leave year (0.77 hours x £9.03) and a further sum of £43.50 in respect of accrued annual leave for the leave year 2016/2017 (4.77 hours x £9.12). These sums were paid to the claimant in accordance with calculations which were prepared by the claimant's ESO Ms Moore (her manuscript calculations are pages 338-339 of the bundle).
108. The claimant contended in her claim form that she had an outstanding entitlement to holiday pay of 10 hours (page 8 of the bundle).
109. The respondent wrote to the claimant by letter dated 25 November 2016 enclosing a cheque in the sum of £22.34 in full and final settlement of any outstanding claims for holiday pay as contained in the claimant's claim form.
110. The claimant claimed in her schedule of loss (which is at page 355 of the bundle) outstanding holiday pay for the 2015/2016 holiday year of 10 hours at £9.03 per hour (£90.30). The claimant has not however provided any clear explanation of the basis upon which she contends that any further monies are outstanding.

## Other matters

111. There is an extract from the external auditors' report for the respondent for the year ended the 31 March 2016 (dated December 2016) at pages 333-334 of the bundle. The tribunal has noted the

concerns raised in the extract including regarding the respondent's failure to comply with the regulations relating to the publication of its notice relating to the exercise of public rights and that it is recorded that financial decisions were not properly minuted and that decisions were therefore not approved correctly in accordance with guidelines.

112. CALC issued an invoice to the respondent dated 8 December 2016 in the sum of £399 plus VAT for the provision of employment support.

## **CLOSING SUBMISSIONS**

113. The tribunal has had regard to the submissions of the parties including the detailed written submissions and accompanying authorities provided by the respondent for the hearing on 12 May 2017.

## **THE LAW**

114. The tribunal has had regard, in particular, to the following statutory/associated provisions and authorities referred to below together with any further authorities referred to in the closing submissions referred to above

### **The claimant's complaint of unfair dismissal pursuant to section 103 (A) of the Act.**

115. The tribunal has had regard in particular to the following in respect of the claimant's complaint of unfair dismissal pursuant to section 103A of the Act :-

(1) Sections 43A, 43B, 43C- H, 103A, 122 and 123 of the Act and section 207A of the TULCRA.

(2) The ACAS Code

(3) The following authorities :-

**Abernethy v Mott, Hay and Anderson [1974] ICR 323 CA**

**Maund v Penwith District Council 1984 ICR 143 CA**

**Darnton v University of Surrey [2003] IRLR 133**

**ASLEF v Brady [2006] IRLR 576.**

**Kuzel v Roche Products Limited [2008] ICR, 799, CA**

**Cavendish Munro Professional Risks Management Ltd v**

**Geduld [2010] IRLR 38 EAT**

**Western Union Payment Services UK Ltd v Anastasiou**

**UKEAT/0135/13/ [2014] ALL ER EAT**

**Blackbay Ventures Limited t/a Chemistree v Gahir [2014] IRLR**

**[2014] EAT**

**Co- operative Group Limited v Baddeley [2014] EWCA Civ 658**

**Kilraine v London Borough of Wandsworth [2016] IRLR 422  
EAT  
Royal Mail Group Limited v Jhuti UKEAT/0020/16**

116. The tribunal has reminded itself in particular of the following matters:-

- (1) For the purposes of section 103A of the Act, an employee shall be regarded as unfairly dismissed if the reason, or if there is more than one, the principal reason for the dismissal is that the employee made a protected disclosure/ disclosures.
- (2) The tribunal is required to approach the matter by considering the following questions:-
  - (a) Has the claimant shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason for his dismissal? At this stage it is necessary for the employee to show only that there is an issue warranting investigation and capable of establishing the prohibited reason.
  - (b) If so, has the respondent proved its reason for dismissal?
  - (c) If not, has the respondent disproved the section 103A reason advanced by the claimant? and,
  - (d) If not, the dismissal of the claimant is therefore for the section 103A reason.
- (3) A principal reason is the reason that operated in the employer's mind at the time of the dismissal.
- (4) A reason for the dismissal of an employee is, "a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee" ( **Abernethy** referred to above). The reason for dismissal therefore connotes the factors operating on the minds of the person or persons who made the decision to dismiss/reject an appeal and normally require a careful consideration of the mental processes of the decision-makers.
- (5) An employer may have a good reason for dismissing an employee whilst welcoming the opportunity to dismiss which that reason affords. Conversely however, it does not follow that whenever there is misconduct which could justify a dismissal a tribunal is bound to find that this was the operative reason. If an employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated

others in a similar way the operative cause would not be the misconduct (**ASLEF** above).

- (6) In most cases it is necessary to discern the set of facts known to the person who made the decision to dismiss/ reject an appeal (**Baddeley**).

**The claimant's complaint pursuant to section 98 of the Act**

117. The tribunal has had regard in particular to the following in respect of the claimant's claim pursuant to section 98 of the Act :-

- (1) Sections 98, 122, and 123 of the Act and section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992.
- (2) The ACAS Code and accompanying guide.
- (3) The following authorities (in addition to any relevant authorities referred to by the respondent ):-

**British Home Stores Limited v Burchell [1980] ICR 303EAT**  
**Nelson v BBC (no. 2) 1980 ICR, 110 CA**  
**Polkey v AE Dayton Services Limited [1987]IRLR 503 HL**  
**J Sainsbury plc V Hitt [2003] ICR 111 CA.**

118. The tribunal has reminded itself in particular of the following matters:-

- (1) The starting point is section 98 (1) of the Act. It is for the respondent to establish the reason for dismissal or, if more than one, the principal reason for the claimant's dismissal, including that it had a genuine belief in such reason and that it was for one of the potentially fair reasons permitted by section 98 (1) and (2) of the Act.
- (2) The matters referred to previously above regarding the determination of the reason for dismissal.
- (3) If the respondent is able to establish the reason for the claimant's dismissal, the tribunal has to determine whether such dismissal was, in all the circumstances of the case, fair or unfair having regard to the matters set out in section 98 (4) of the Act. This includes whether the respondent's belief that the claimant was guilty of any alleged misconduct was based on reasonable grounds and after undertaking reasonable investigations.
- (4) The tribunal also has to consider whether having regard to the further matters set out in section 98 (4) of the Act the

respondent acted fairly or unfairly in all the circumstances in treating the reason for dismissal as sufficient for dismissal.

- (5) The tribunal has to consider the position at the time of the claimant's dismissal and the rejection of his appeal in the light of the information which was available and/or should reasonably have been available to the respondent at that time.
- (6) The tribunal has to determine whether or not the overall procedure adopted by the respondent and also the decision to dismiss the claimant/to reject his appeal, considered together, fell within the range of responses of a reasonable employer and that it is not entitled to substitute its own decision. When determining the fairness of the procedure adopted by the respondent the tribunal has to have regard to the overall procedure including whether the respondent has adhered to its own policies and the provisions of the ACAS Code. The tribunal has further reminded itself that the degree of investigation required will depend upon whether the factual basis of the allegations are admitted.
- (7) The refusal to obey a reasonable and lawful instruction is misconduct. The nature of the refusal and the importance of the order will determine whether the misconduct is minor or gross. If an employee is dismissed for failing to obey an order or instruction of the respondent the tribunal is required to consider the nature of the employer's instruction and the employee's reason for refusing to comply.
- (8) A tribunal should view with caution any reliance by an employer on an alleged breakdown in trust and confidence (a dismissal for some other substantial reason) as grounds for dismissal including whether it is being used as a pretext to conceal the real reason for dismissal.
- (9) Dismissal for a first offence may be justified, notwithstanding the lack of any previous misconduct, in particular where the act of misconduct is so serious that dismissal is a reasonable sanction notwithstanding the lack of any previous misconduct, where the rules make it clear that a particular conduct will lead to dismissal and/or where the employee has made it clear that he/she is not prepared to alter their attitude so that a warning is unlikely to lead to any improvement.
- (10) A finding of gross misconduct does not automatically justify dismissal and it is important to consider any mitigating factors which might justify a lesser sanction for reasons specific to the employee or the incident in question.

- (11) If the tribunal considers that there were procedural defects which were sufficiently serious to render the claimant's dismissal unfair, the tribunal is required to consider for the purposes of any award of compensation (if it is possible to do so on the evidence available), what is likely to have happened if a fair procedure had been followed including the percentage chance that the claimant would thereafter have been fairly dismissed for the purposes of any compensatory award pursuant to section 123 (1) of the Act.
- (12) If the tribunal finds that the claimant has been unfairly dismissed, the tribunal is also required to determine whether there should be any reduction/further reduction in any basic and/or compensatory award pursuant to sections 122 (2) and/or 123 (6) of the Act by reason of the claimant's contributory fault. The tribunal has reminded itself that contributory fault covers a wide range of conduct and can include culpable, blameworthy, foolish or otherwise unreasonable behaviour. The tribunal has also reminded itself however, that for the purposes of determining any contributory fault for the purposes of section 123 (6) of the Act it has to be satisfied that the claimant was, on the balance of probabilities, guilty of any such conduct, that it caused or contributed to the dismissal and that it is just and equitable to reduce any award.

## **THE CONCLUSIONS OF THE TRIBUNAL**

### **The claimant's complaint of unfair dismissal contrary to section 103 A of the Act**

119. The Tribunal has had regard to the issues identified in the List of Issues. The tribunal however considers that it is appropriate to determine first the claimant's complaint that she has been unfairly dismissed contrary to section 103 A of the Act for making protected public interest disclosures including (1) whether the claimant has made any qualifying and/or protected public interest disclosures for the purposes of sections 43B (1) and C- H of the Act and (2) whether any such protected public interest disclosures were the reason and/or principal reason for the claimant's dismissal.
120. The claimant relied on three alleged discrete protected public interest disclosures namely :-
- (1) The alleged oral disclosure/disclosures to the respondent at the council meeting on 27 January 2016 considered in more detail below.
  - (2) The alleged written disclosure to Cornwall Council on 29 January 2016. The claimant's e-mail is at pages 164-166 of the bundle (paragraph 50 above).

- (3) An alleged oral and/or written disclosure to the external auditor on 1 May 2016. The claimant's email is at pages 247-249 of the bundle (paragraph 73 above). The tribunal has not however heard any evidence from the claimant regarding any alleged oral disclosure to the external auditor.

121. The tribunal is satisfied, in the light of its findings at paragraphs 51 and 73-74 above, that the respondent (including its members) was not aware of the alleged disclosures identified at paragraphs 120 (2) and (3) above at any time prior to the termination of the claimant's employment. In the circumstances the tribunal is satisfied that any such disclosures cannot have been the reason/the principal reason for the claimant's dismissal and this aspect of the claimant's unfair dismissal claim pursuant to section 103 A of the Act is therefore dismissed.

### **The alleged disclosures on 27 January 2016**

122. The tribunal has therefore gone on to consider the position with regard to the alleged protected public interest disclosures made by the claimant at the meeting of the respondent council on 27 January 2016.

123. The tribunal is satisfied in the light of the findings of fact at paragraph 45 above that at the meeting on 27 January 2016 the claimant advised :-

- (1) The members of the respondent that no decision should be taken regarding the application for the community chest monies/the securing of any further required monies from the respondent for the funding of road signs as the matter was not urgent and would need to be on a future agenda with three clear days' notice.
- (2) Mr Gunby that he should declare an interest in the matter and leave the room if any discussion was to take place.
- (3) The members of the respondent that she was not prepared to complete the application form for the community chest monies as she believed that the matter had not been dealt with in accordance with the respondent's procedures and it would therefore be inappropriate and unfair to the public to complete the form.

124. In summary, the respondent contended that the claimant did not make a disclosure of information at the meeting on 27 January 2016 and relied in particular on **Cavendish Munro Professional Risk Limited v Geduld** (referred to above) and **Mustapha v Pro Tx Limited and others ET case no 2303086/99**.



125. The claimant contended that she had made disclosures at the meeting on 27 January 2016.
126. The tribunal is not satisfied on the facts of this case that any of the matters referred to at paragraph 123 above amounted to disclosures of information for the purposes of section 43B (1) of the Act.
127. When reaching this conclusion the tribunal has had regard not only to the authorities relied upon by the respondent but also to the authorities of **Western Union Payment Services UK Limited v Anastasiou and Kilraine v London Borough of Wandsworth** (referred to above) in which the courts adopted a less stringent approach to the assessment of what constituted a disclosure of information and cautioned against a rigid division of potential disclosures into either information or allegations.
128. The tribunal is not satisfied in the circumstances of this case that any of the matters referred to at paragraph 123 above amounted to disclosures of information for the purposes of section 43 B (1) of the Act for the following reasons:-
- (1) The claimant was giving advice at the council meeting as part of her role as the clerk to the respondent/Responsible Financial Officer.
  - (2) The claimant's advice was given in the context of the factual situation which had already arisen in respect of the application for the community chest monies and associated matters to which the claimant was responding when she gave such advice.
129. In all the circumstances, the tribunal is not satisfied that the claimant made relevant disclosures to the respondent at the meeting on 27 January 2016 for the purposes of section 43B (1) of the Act.
130. In case however, the tribunal is wrong with regard to the above interpretation, it has gone on to consider whether if any of the above matters raised at the respondent's council meeting on 27 January 2016 had amounted to disclosures they would also have constituted qualifying disclosures for the purposes of section 43 B (1) of the Act.
131. The claimant relied for such purposes on a reasonable belief that such alleged disclosures were made in the public interest and tended to show that (a) a criminal offence had been committed and/or was being committed and/or was likely to be committed (section 43 B (1) (a) of the Act and/ or (b) a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject (section 43 B (1) (b) of the Act) and/or section 43 B (1) (f) of the Act (that information tending to show any matter falling within the

preceding paragraphs had been or was likely to be deliberately concealed).

132. The claimant relied on the alleged breaches of the Standing Orders and/or the Code of Conduct identified at paragraphs 8.1 and 8.2 of the List of Issues. The claimant also relied in her evidence to the tribunal on alleged breaches of paragraphs 1.3, 1.8 1.11, or 1.12 and 2.1 of the Regulations.

133. The respondent denied that the claimant had a reasonable belief that the alleged qualifying disclosures made on 27 January 2016 identified above showed any such breaches and/or were made in the public interest.

134. In summary, the respondent contended that the claimant had failed to establish that she had a reasonable belief that the matters referred to by the claimant at the respondent's council meeting on 27 January 2016 constituted a breach of the Code of Conduct and/or the Standing Orders and/or the Regulations including as appropriate notice had been given of the meeting, the meeting was quorate, no decisions were taken regarding the expenditure of the respondent's monies/no payments were authorised and the Chairman had the authority to issue instructions to the clerk. Further, the respondent contended that although it accepted on the balance of probabilities that it could be argued that Mr Gunby had a non-registerable interest at the meeting on 27 January 2016 it was the evidence of the respondent that it did not require any such interest to be declared at the relevant time.

135. The tribunal has reminded itself in particular that for the purposes of section 43 B(1) of the Act that the claimant does not have to establish that such belief was correct but rather that it was reasonable, in all the circumstances, for her to have had such belief.

136. Having given careful consideration to all of the above (including the various provisions relied upon by the claimant) the tribunal is not satisfied that the claimant would have had a reasonable belief that any of the matters referred to by her at the respondent's council meeting on 27 January 2016, in any event, tended to show/ were likely to show a breach of any of the above mentioned provisions/ a legal obligation save in respect of the following. The tribunal is however satisfied that if the claimant had established a relevant disclosure in respect of Mr Gunby's failure to declare a non registerable interest/ leave the meeting the tribunal is satisfied that the claimant would also have shown that she had a reasonable belief (having regard to paragraphs 3.5 and 5 of the Code of Conduct) that any such disclosure tended to show the breach of a legal obligation to comply with the terms of the Code of Conduct.

137. When reaching this conclusion the tribunal has also taken into account (a) Mr Gunby's letter to Mr Rowland dated 27 January 2016 at

page 162 of the bundle in which he stated that he realised that he should have declared a disclosable pecuniary interest and apologised for the embarrassment caused to Mr Rowland and the respondent and (b) the e-mail from Mr Mansell dated 29 January 2016 (page 167 of the bundle) in which he advised the claimant that there was a potential that Mr Gunby may have failed to declare an interest based on information provided by the claimant.

138. The tribunal is further satisfied that the claimant would, if she had established that she had made such a relevant disclosure on 27 January 2016, have also established the requisite reasonable belief that it was in the public interest given the nature of the matter including that the disclosable pecuniary interest related to public funds (whether from the county council or the respondent) for proposed road signs. Moreover, the tribunal is satisfied that any such disclosure would have been a protected disclosure for the purposes of section 43 C of the Act as it was made to the claimant's employer, the respondent, at the council meeting on 27 January 2016,

139. The tribunal has therefore gone on to consider whether, if the claimant had made a protected public interest disclosure in respect of Mr Gunby's failure to declare a disclosable pecuniary interest/withdrawal from the meeting on 27 January 2016 this would also have been the reason or principal reason for the claimant's dismissal contrary to section 103 A of the Act.

140. When considering this matter the tribunal has adopted the approach referred to previously above including if the claimant had established a relevant protected public interest disclosure she would also have established sufficient evidence to raise the question of whether the reason for her dismissal was such protected disclosure.

141. The tribunal is satisfied in the light of the tribunal's findings of fact that if the claimant had established a protected public interest disclosure relating to Mr Gunby's failure to declare a disclosable pecuniary interest/ withdraw from the meeting on 27 January 2016 she would also have been able to show in such circumstances that it was one of the reasons for her dismissal. The tribunal is not however satisfied that there would, in any event, have been sufficient evidence for the claimant to have shown that it was the reason or principal reason for the claimant's dismissal such as to require the respondent to have disproved the possible section 103A of the Act reason for dismissal.

142. When reaching this conclusion the tribunal has taken into account that one of the matters identified in the decision of the disciplinary panel at pages 336 – 337 of the bundle (paragraph 85 above) related to Mr Gunby's failure to declare an interest at the meeting on 27 January 2016 and to withdraw from the meeting.

143. The tribunal has also taken into account however that it is clear from (a) the investigation report of Mrs Mason (pages 232 and 233 of the bundle) (b) the allegations contained in the notification of the disciplinary meeting (pages 254 – 255 of the bundle) (c) the matters identified in the decision of the disciplinary panel as proven at pages 336 – 337 of the bundle (paragraph 85 above) and in the associated letter of dismissal at pages 278 – 279 of the bundle (paragraph 86 above) that the issues relating to Mr Gunby were part of much wider concerns relating to the conduct of the claimant and the state of the relationship between the respondent's members and the claimant.

144. When reaching this conclusion the tribunal has further taken into account the further matters referred to in the above documents relating in particular (a) to the claimant's alleged confrontational attitude to the members including with regard to the request for amendments to the draft minutes of the respondent's meeting and inappropriate comments at council meetings (b) the refusal to comply with instructions of the members to complete the community chest application form (rather than to minute her disagreement with such course of action in the minutes) and (c) the inappropriate manner in which the claimant was considered to have communicated her refusal to complete the form community chest application form.

145. The tribunal has also taken into account that the respondent's Employment Committee had previously met on 14 January 2016 (prior to any alleged disclosures) to consider increasing concerns regarding the alleged conduct, performance and attitude of the claimant.

146. In all the circumstances the tribunal is not satisfied that even if the claimant had been able to establish that she had made a relevant protected public interest disclosure, in respect of Mr Gunby's failure to declare a pecuniary interest / withdraw from the council meeting on 27 January 2016 that she would also have raised sufficient evidence on the facts to require the respondent to disprove that it was the reason or principal reason for the claimant's dismissal for the purposes of section 103 A of the Act.

147. In all the circumstances the claimant's complaint of unfair dismissal contrary to section 103 A of the Act is therefore dismissed.

**Was the claimant unfairly dismissed for the purposes of section 98 (1) / (2) of the Act**

148. The tribunal has gone on to consider Issue 1 of the List of Issues namely, what was the reason for the claimant's dismissal.

149. In summary, the respondent asserts that the reason for the claimant's dismissal was her conduct and behaviour throughout her

employment culminating in the meeting of 27 January 2016 or, in the alternative, that the claimant was dismissed for some other substantial reason (“SOSR”) relating to the breakdown in the working relationship between the parties.

150. The claimant asserts that she was dismissed for making public interest disclosures or, in any event, that the respondent has failed to establish a reason for dismissal for the purposes of section 98(1)/ (2) of the Act.

151. The tribunal has reminded itself that when determining whether the dismissal of an employee is fair or unfair for the purposes of section 98 (1) of the Act it is for the employer to show the reason (or if more than one the principal reason) for the claimant’s dismissal and further that it is one of the reasons identified in sections 98(1) or (2) of the Act. The reason for the dismissal of an employee is “a set of facts known to the employer, or it may be the beliefs held by him, which cause him to dismiss the employee (**Abernethy** referred to above).

152. The tribunal is not satisfied in the circumstances of this case that that the respondent has established the reason/ principal reason for dismissal. When reaching this conclusion the tribunal has had regard in particular to the following matters :-

- (1) Although the respondent has adduced evidence from Councillor Drew (the chairman of the appeal panel) regarding the reasons for the dismissal of the claimant’s appeal the respondent has not adduced any evidence from any of the members of the disciplinary panel including in particular, from Messrs Greene and Bellamy who were given delegated powers to determine the disciplinary proceedings.
- (2) Although Mrs Mason and Mr Faull (who gave evidence to the tribunal) were both in attendance at the disciplinary hearing they did not participate in the decision to dismiss the claimant and were unable to adduce any evidence regarding such decision making process.
- (3) Councillor Drew gave evidence to the tribunal that he and Councillor O’Brien(who were external panel members) had approached the appeal on the basis that their role in the process was limited to a determining whether the decision of the disciplinary panel was reasonable in the circumstances (including whether there was any new evidence (paragraph 93 above) .
- (4) The available documentary evidence is of limited assistance to the tribunal as (a) although the decision of the disciplinary panel (paragraph 85 above) and at pages 336-337 of the bundle sets out the findings of the disciplinary panel it does not contain any

explanation/ any proper explanation of why the disciplinary panel reached such conclusions including whether the principal reason for the claimant's dismissal was misconduct and/or SOSR (b) the letter of dismissal dated 31 May 2016 does not contain any further explanation (paragraph 86 above) and (c) the evidence of Mrs Higgins (the chairman of the disciplinary panel) at the appeal hearing as recorded in the subsequent minutes of that hearing regarding the reasons for the claimant's dismissal was limited to the matters at pages 295i – j of the bundle and at paragraph 98 above.

153. In all the circumstances, the tribunal is not satisfied that the respondent has established the reason/principal reason for the claimant's dismissal as required pursuant to section 98 (1) of the Act and the tribunal is therefore satisfied that the claimant has therefore been unfairly dismissed.

**Was the claimant's dismissal in any event fair or unfair for the purposes of section 98 (4) of the Act.**

154. In case the tribunal is wrong with regard to the issue of whether the respondent has established the reason or principal reason for the claimant's dismissal pursuant to section 98 (1) of the Act the tribunal has gone on, in any event, to consider whether, if the respondent had been able to establish the reason/principal reason for dismissal was misconduct or SOSR (a) the decision to dismiss would in any event have been a fair sanction and within the range of responses open to a reasonable employer on the facts and (b) the respondent adopted a fair procedure.

155. When considering the above the tribunal has had regard in particular to the issues identified at paragraph 3 and 4 of the List of Issues. The tribunal has also reminded itself that (a) there is a neutral burden of proof in respect of section 98 (4) of the Act (b) a tribunal is required to consider for such purposes whether the decision to dismiss the claimant, including the procedure adopted by the respondent, was fair in all the circumstances and within the range of responses of a reasonable employer having regard to the matters identified in that section and further (c) that the tribunal is not entitled to substitute its own decision.

156. In summary the respondent contended that on the facts that it had adopted an overall fair procedure (notwithstanding the difficulties which it had encountered in seeking to engage the claimant in the investigatory process) and further that the claimant's dismissal (whether for conduct or SOSR) was fair and reasonable and within the range of responses of a reasonable employer in all the circumstances.

157. In summary, the claimant contended that the respondent had failed to adopt a fair procedure (including for the reasons identified at paragraphs 4.1-4.8 of the List of issues) and further that dismissal was not within the range of reasonable responses of a reasonable employer as (a) the respondent failed to have proper regard in particular to the circumstances in which the claimant declined to complete the grant application form at the meeting on 27 January 2016 and (b) that the claimant was not in any event guilty of gross misconduct/that dismissal was not within the range of responses of a reasonable employer including as the respondent had not previously advised her of any concerns.

158. Having given the matter careful consideration the tribunal is satisfied as follows:-

- (1) that viewed overall the procedure adopted by the respondent was fair for the purposes of section 98 (4) of the Act (including in respect of any dismissal for misconduct for the purposes of the ACAS Code ) including as (a) the claimant was informed in broad terms of the allegations which she was required to meet (and responded accordingly) (b) a reasonable investigation was undertaken by Mrs Mason (c) the claimant was given, but declined, the opportunity to attend an investigation meeting (and in any event submitted written evidence/representations) and (c) the claimant was given appropriate opportunities to state her case during the investigation, the disciplinary and appeal hearings (paragraphs 61, 64-69, 70- 72, 76-83, 91, and 94-101 above).
- (2) The tribunal is further satisfied on the facts that notwithstanding the respondent's letter dated 7 February 2016 (paragraphs 55-58 above) the outcome of the disciplinary (and the subsequent appeal) were not predetermined. When reaching this conclusion the tribunal has reminded itself that it has not received any oral evidence from any of the dismissing officers. The tribunal has however also taken into account the process which was adopted by the respondent between February and May 2016 including the investigatory process, the investigation report by Mrs Mason and the notes of the disciplinary and appeal hearings which indicate that the principal matters in issue were explored with the claimant and that the outcome of such processes was not predetermined. Further the tribunal is satisfied that any delay in providing copies of the Employment Committee minutes was not sufficiently serious to render the claimant's dismissal unfair.
- (3) The tribunal is further satisfied that the claimant's dismissal was not rendered unfair by reason of the involvement of Mrs Mason as the investigating officer including that her role at CALC did

not preclude her from undertaking such investigation. When reaching this conclusion the tribunal is taken into account in particular (a) the terms of the service level agreement between the respondent and CALC (paragraph 23 above) including that such agreement envisaged that CALC would provide support on employment matters/ the breakdown of relationships for which they could make a charge (b) that there is no suggestion that Mrs Mason had any previous involvement with the claimant prior to January 2016 and (c) that there was no evidence to suggest that Mrs Mason played any part in the decision-making processes at dismissal or appeal (other than giving advice regarding the payment of notice monies (paragraphs 104 and 105 above).

159. The tribunal has therefore gone on to consider whether, if the respondent had been able to establish that the reason or principal reason for dismissal was conduct or SOSR the decision to dismiss the claimant would, in any event, have been fair for the purposes of Section 98 (4) of the Act.

160. In summary, the claimant contended in particular that (a) the reasons given for her dismissal did not amount to gross misconduct including that her actions on 27 January 2016 should have been considered in the contents of the events of that meeting during which she was trying to protect the respondent from acting inappropriately/in breach of its legal obligations (b) the allegations relating to her alleged confrontational and associated conduct were largely unsubstantiated and the disciplinary and appeal panels failed to give proper weight to the evidence which she had produced from parishioners indicating that she had acted appropriately (c) the respondent had not previously raised any concerns with her regarding her conduct and/or performance prior to the letter of 7 February 2016.

161. In summary, the respondent contended in that the tribunal should have regard in particular to the circumstances of the case (a) including the role of the claimant (b) the size and limited resources of the respondent including the lack of any employment or legal expertise on the part of the members of the respondent (c) the independent appeal panel's review of the evidence presented by both parties who reached the conclusion that the claimant was guilty of gross misconduct (including that she had unreasonably refused to follow instructions) and that dismissal was the only available option and (d) further or alternatively that there had been an irretrievable breakdown in the relationship between the claimant and the respondent.

162. When considering this issue the tribunal has reminded itself firmly that it is not entitled to substitute its own decision but that it has to consider whether or not the decision to dismiss the claimant was in



all the circumstances within the range of responses of a reasonable employer as identified previously above.

163. Having given this matter careful consideration the tribunal is not however satisfied that, even if the respondent had been able to establish the reason for the claimant's dismissal for the purposes of section 98 (1)/ (2) of the Act, the claimant's dismissal would have been fair for the purposes of section 98 (4) of the Act (including whether the reason/principal reason for such dismissal had been established as conduct and/or SOSR)
164. When reaching this conclusion the tribunal has taken into account in particular (a) that the clerk was the only employee of the respondent and further that it was a pivotal role which required a high degree of trust and confidence (b) the limited size and administrative resources of the respondent including that the respondent council was made up of elected volunteers and (c) that the claimant had refused at the meeting on 27 January 2016 to complete the application form to apply for the community chest monies notwithstanding such request from the respondent and (d) the claimant's reluctance to engage in the investigatory process.
165. The tribunal has however balanced against such matters (a) the terms of the respondent's disciplinary procedure including in particular that the examples of misconduct (as opposed to gross misconduct) included a failure to perform the job to the expected standard or in line with the job description and the refusal to carry out reasonable requests or instructions (page 54 bundle) (b) the claimant had not been the subject of any disciplinary action prior to the events in question (paragraph 27 above) and further the tribunal is not satisfied on the facts that any concerns relating to the claimant's conduct or performance were raised with the claimant until February 2016 (paragraph 28 of the bundle) (c) it was recognised at the meeting of the Employment Committee on 14 January 2016 that it was necessary to clarify the way in which the duties of the clerk were being carried out and further none of the matters arising prior to that date were considered serious enough at that time to justify formal disciplinary proceedings (including with regard to the conduct of the claimant following the meeting on 9 December 2015) (d) it was acknowledged by Mrs Mason at the appeal hearing that many of the complaints of confrontational/unprofessional conduct by the claimant were a matter of perception for which there was no further evidence (paragraph 97) (e) the tribunal is satisfied that a reasonable employer acting within the range of reasonable responses would have recognised that the meeting on 27 January 2016 was a difficult meeting including that Mr Gunby should have accepted at that meeting (as subsequently acknowledged by him later that day (paragraph 48 above) that he should have declared an interest and withdrawn from the meeting and (f) the tribunal is not satisfied on the available evidence that the

disciplinary and/or appeal panel gave any proper consideration the possibility of any other sanction (such as a warning or mediation) (g) the recommendations at paragraphs 11.1 and 11.2 of the investigatory report regarding the requirement for basic councillor skills training for all members to obtain a better understanding of their roles and responsibilities and the need to establish a proper staff appraisal system to address issues of capability and performance (page 236 of the bundle) (which recommendations were strongly endorsed by the appeal panel (page 303 of the bundle)).

166. Further, in respect of any SOSR reason for the dismissal of the claimant the tribunal has taken into account that notwithstanding the matters identified at the Employment Committee on 14 January 2016 the respondent had taken no steps to address any matters in such a manner and further Mr Rowland made any further attempt to engage with the claimant on an informal basis following the indication by the claimant that she was unable to attend the meeting on 4 February 2016 on such notice/that she had requested further details of the purpose of the meeting.

167. In all the circumstances, the tribunal is therefore satisfied that even if the respondent had been able to establish that the reason for the claimant's dismissal/the principal reason for such dismissal was misconduct and/or SOSR that her dismissal would, in any event, have been unfair for the purposes of section 98 (4) of the Act.

**Would the claimant have been fairly dismissed in any event if a fair procedure had been followed and/or to what extent and when?**

168. The tribunal has gone on to consider Issue 5 of the List of Issues as identified above including whether any compensatory award should be reduced pursuant to section 123 (1) of the Act on the grounds that the claimant would in any event have been fairly dismissed at some point in the future.

169. This is denied by the claimant.

170. The respondent relied on the authorities identified in its written skeleton argument in support of such argument.

171. Having given careful consideration to the facts in this matter the tribunal is satisfied that if the claimant had not been unfairly dismissed there is a significant chance that she would have been fairly dismissed/ would have resigned her employment by 31 December 2016 and that any compensatory award in respect of any compensation awarded for the period after 31 December 2016 should be reduced by 75% to reflect such chance.

172. When reaching such conclusion and the tribunal has taken into account in particular that if the claimant had not been unfairly

dismissed on 31 May 2016 it is likely that the claimant would, in any event have been subjected to (a) a warning in respect of her failure to comply on 27 January 2016 with the instruction of the respondent to complete the community chest application form and (b) subjected to formal assessment and performance management in respect of the other issues identified at the meeting of the Employment Committee on 14 January 2016 and subsequently in the Investigation Report and (c) the relationship between the claimant and the respondent was a pivotal relationship which was already difficult and there is therefore a significant chance that having regard to the further matters referred to above one or other of the parties would have terminated the relationship fairly by 31 December 2016.

**If the dismissal was unfair did the claimant contribute to her dismissal by culpable conduct as set out in paragraph 6 of the List of Issues**

173. The tribunal has gone on to consider whether the claimant contributed to her dismissal by culpable conduct as set out in Issue 6 and if so whether any basic award should be reduced pursuant to section 122 (2) of the Act or any compensatory award should be further reduced pursuant to section 123 (6) of the Act.

174. Having given the matter very careful consideration the tribunal is satisfied that it is appropriate in the light of its findings of fact regarding the claimant's refusal to complete the application for the community chest monies and her decision to return it to Mr Rowland for completion it is appropriate to reduce any basic award by 25% in respect of such conduct. The tribunal is not however satisfied in the light of the reductions which it has already made to the compensatory award pursuant to section 123 (1) of the Act that it is appropriate to make any further reduction to such an award.

175. Further, the tribunal is not satisfied that is appropriate to make any/any further reduction to the basic and/or compensatory award from the other matters identified at paragraph 6 of the List of Issues including as the claimant was subject to a sick note during the course of the investigation and did participate by written submissions in the investigatory process/engage with the disciplinary appeal hearings. Further, the tribunal has already made a reduction in the claimant's basic award in respect of the matters identified above.

**The ACAS Code**

176. The tribunal is not satisfied that it is appropriate to make any adjustments to the claimant's compensatory award in respect of the ACAS Code in the light of its findings at paragraph 158 above.

**Holiday pay**

177. Finally, the tribunal has considered the claimant's claim for 10 hours' outstanding holiday pay. The tribunal is not however satisfied, having regard to its findings at paragraphs 106-110 above that the claimant has established any entitlement to any outstanding leave payments and this claim is therefore dismissed.

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Employment Judge Goraj

Dated 30 August 2017

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JUDGMENT SENT TO THE PARTIES ON

.....31 August 2017.....

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FOR THE OFFICE OF THE TRIBUNALS