EMPLOYMENT TRIBUNALS

Claimant: Mr C Beety

Respondent: Community Ventures (Middlesbrough) Limited

Heard at: Manchester **On:** 19-23 & 26-28 February 2018
26 November 2018
29 and 30 November 2018
(in Chambers)

Before: Employment Judge Sherratt
Mr G Skilling
Dr H Vahramian

REPRESENTATION:

Claimant: Mr C Allen, Solicitor
Respondent: Mr S Brochwicz-Lewinski, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's claims are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as its Chief Executive Officer from 1 September 1996 until his dismissal on 18 May 2016. The claimant was answerable to a management board consisting of volunteers who were retired businessmen. Arising out of his dismissal the claimant brought his claims before the Employment Tribunal, and the issues to be determined, taken from the claimant's solicitor's written submissions, are as follows:

(1) What were the facts known to, or beliefs held by, the employer which constitute the reason, or if more than one, the principal reason for the dismissal?

(2) Were they, as the respondent alleges, related to the employee's conduct?

(3) Having regard to that reason, did the employer act reasonably in all the circumstances of the case:

(a) in having reasonable grounds after a reasonable investigation for its genuine beliefs;

(b) in following a fair procedure;

(c) in treating that reason as sufficient to warrant dismissal?

(4) If it acted fairly, substantively but not procedurally, what are the chances it would nevertheless have dismissed if a fair procedure had been followed?

(5) If dismissal was unfair, has the employee caused or contributed to the dismissal by culpable and blameworthy conduct?

(6) In the wrongful dismissal claim, was the claimant guilty of gross misconduct?

(7) Given the respondent subjected the claimant to treatment falling within section 39 of the Equality Act 2010 by dismissing him, has it treated the claimant less favourably than it treated or would have treated him had he been of a different age group?

(8) If so, has the claimant proved primary facts from which the Tribunal could properly conclude the difference in treatment was because of age?

(9) If so, what is the respondent's explanation? Does it prove a non discriminatory reason for such treatment and/or show the treatment was a proportionate means of achieving a legitimate aim?

The Evidence

2. The claimant gave evidence on his own behalf in a 64 page witness statement and was cross examined.

3. The respondent called Simon Pearson, Michael Stewart, Ian Collinson, David Dorman-Smith, Simon Davidson and Frank Holden. A number of the witnesses for the respondent also provided supplementary witness statements. The respondent's statements were set out over 147 pages.

4. There were three files of documents together containing around 1,000 pages.

The Facts

5. The claimant has provided a chronology which lists the main events with which the Tribunal will be concerned, and having set out the date the claimant's employment began on 1 September 1996 the next significant date is 29 January 2016 when the respondent held a Board meeting with topics of discussion including forward planning and redundancies.

6. The respondent, in its own documentation, refers to itself as "CVL" and we shall adopt this abbreviation. The forward planning discussion paper noted that the outlook for the remainder of 2015/16 and for 2016/17 was disappointing in terms of external funding. The paper went on to say that:

> "There is a major reduction in the need for staff to deliver business services and operational activities/projects. It is essential that measures are taken immediately to reduce the staffing costs/levels of business services delivery, whilst at the same time retaining resources skilled in rebuilding the business services offer by marketing and bringing in work from new, existing or previous clients."

7. It suggested that cost reductions could be realised in the provision of internal technical support, £5,000 could be realised by outsourcing the provision of health and safety/quality management technical support activities, and the conclusion "can only be that there is a need to consider reducing the staff resource in CVL as soon as possible through redundancy whilst retaining the necessary skills through different arrangements".

8. The minutes of the Management Board meeting on 29 January 2016 indicate that there were present G Kennedy, Chair; R M Stewart; A S Pearson; L Collinson; Dr E Hamilton (auditor); C Beety, and in attendance were S Davidson and J Kirk.

9. As to forward planning, the subsequently approved minute notes that:

> "The paper was tabled and discussed in detail. The recommendations were accepted."

10. On Monday 8 February 2016 at 13:39 the claimant sent an email to Messrs Stewart, Pearson, Collinson, Purvis and Kennedy telling them that having been asked by the Board what his personal position would be following the restructuring, he would be "intending to travel extensively across Europe but would be happy to be employed by CVL on a part-time basis as a special adviser for at least the next 12 months…provide a resource which the new Chief Executive could call upon for support and advice as and when necessary".

11. At 14:28 on 8 February 2016 the claimant sent an email to Messrs Stewart, Purvis, Kennedy, Pearson and Collinson on the subject of restructuring, setting out the discussion at the last Board meeting. In the words of the claimant:

> "(1) There is a need to restructure, particularly to reduce staffing for business support to external organisations retaining the infrastructure to enable CVL Group activities to be refocussed/rebuilt in the future.
>
> (2) the CVL senior management structure for the next financial year will comprise two posts: Chief Executive (c £50k) – special adviser (part-time c £30k). Group health and safety and/or quality management will be either outsourced or provided by a part-time employee (c. 0.5 – 1 day per week) at a cost of £6k per annum.
>
> (3) …

(4) The anticipated financial effect of these changes will be a saving of c.£85k per annum in CVL…

(5) The implementation of this restructure will necessitate redundancies in CVL. This will in practical terms require enhanced redundancy payments through Settlement Agreements to facilitate the changes. Payments based on actual weekly salary rather than statutory cap of £475 per week would incur a maximum one-off total cost of c.£65k for which a provision would be made in the 2015/16 account. This would still leave CVL with balances of over £600k.

(6) Consultation would continue with staff up to the date of implementation in May 2016.

(7) I will commence formal redundancy procedures at the end of this week. Please let me have your confirmation before then that this note reflects the discussion."

12. The recipients of the emails confirmed their understanding of the position.

13. What was the position? In his witness statement the claimant says that when the Board discussed the paper at the meeting on 29 January 2016 it was made clear that Mr Morrell would require an enhanced package if he was to voluntarily relinquish his post of Operations Manager:

> "The Board decided the two redundant posts were Deputy Chief Executive and Operations Manager. My post (CEO) was not to be redundant as the Group needed a CEO. At the same time the Board felt that to retain an infrastructure which could enable future development it ideally wished to retain Mr Davidson given his age and, as Mr Pearson said, 'didn't want to lose Simon' (as I was 69 years of age and he was a much younger man). Mr Davidson had been appointed some years ago to be developed to ensure a succession plan if necessary for my post of CEO. He was under no illusion that his succession was not likely in the foreseeable future as I had no intention of relinquishing my post until this restructuring arose."

14. The witness statement goes on:

> "The anticipated quantum of redundancy payments of £65,000 (combined for the Operations Manager Mr Morrell and myself) was discussed and clearly recorded in my subsequent email of 8 February 2016 (paragraph 5) reflecting accurately the outcome of the discussions. This was sent to the Board members to which all Board members replied, agreeing fully that my email reflected the discussion and agreeing fully to the proposals which had 'crystallised from the discussions'."

15. The claimant then goes on to record that he was asked if he would stay on for at least a year so Mr Davidson and the Board would continue to receive support from him. The claimant was under no pressure to leave his post but could see the benefits of CVL retaining the younger man to enable the company's long-term redevelopment.

16. According to the claimant, it was fully discussed and agreed at the outset on 29 January 2016 and then clearly set out in emails that the policy for implementing the restructure would require "enhanced redundancy payments through Settlement Agreements…based on actual weekly salary rather than the statutory cap".

> "The Board were therefore clear at this earliest point that the payments would be above the statutory level and that they would be made contractual through Settlement Agreements. Clearly I would not be relinquishing my role as CEO on 31 May 2016 unless contractual arrangements were put in place before that point to ensure the compensatory payments would be made at 31 August 2016."

17. The claimant goes on to state that it was a commercial transaction to deal with a budget deficit problem. It provided long-term savings over £100,000 per annum for CVL. If the financial terms were not acceptable to him then clearly he would not be prepared to relinquish his post and his £92,084 per annum salary. According to the claimant, he never portrayed the enhanced voluntary redundancy payments as "necessary", nor had he claimed the sums as a "statutory right". Any suggestion that he had is a clear misrepresentation of the facts. He made clear that the sums were not an entitlement and in fact were more than he was entitled to, a quid pro quo. He accepted the decision of the Board as authority/notification for his redundancy and that of Mr Morrell on those terms, and he proceeded to implement the Board's instructions regarding the redundancies and specifically the use of weekly salary rather than the statutory cap as the basis for the packages.

18. According to Mr Pearson, the claimant presented his forward planning paper at the end of the 29 January 2016 Board meeting. This was the only information that they had. He remembers the claimant highlighting that now might be the time for him to step down from his post and pass the mantle to Simon Davidson, but he proposed to stay involved with CVL either as a consultant or undertaking a part-time role. According to Mr Pearson, the claimant did not put forward any detail on how the restructure was to be carried out or any potential or proposed redundancy costs. He asked the claimant to send the Board an email summarising what was discussed.

19. He refers to the claimant's email of 8 February 2016 set out above with reference to "this will in practical terms require enhanced redundancy payments through Settlement Agreements to facilitate the changes". Whilst "Chris did note that the restructure would cost CVL £65,000 however neither I nor the other Board members knew what or who the £65,000 related to as Chris did not provide any further financial detail".

20. According to Mr Stewart, at the Board meeting they did not discuss any financial aspects other than the potential savings that would be made should the two roles be made redundant.

21. On the basis of the evidence provided to us we cannot be satisfied that any redundancy costings were mentioned at the 29 January 2016 Board meeting, but we are satisfied that the amount of the statutory cap and the global figure of £65,000, but without any breakdown between those to be made redundant, were set out in the claimant's 8 February email.

22. The claimant dealt with the redundancy of Mr Morrell, writing to him on 16 February 2016 giving him notice of termination of employment by reason of redundancy. The employment was to terminate on 15 May 2016 with the agreed terms being set out in a Settlement Agreement. The Settlement Agreement was prepared by Mr Morrell's solicitor and it provided for a redundancy payment using the actual salary of Mr Morrell rather than the statutory cap when calculating the amount to be paid to him. These steps were taken by the claimant without any further reference to the Board.

23. The next item in the claimant's chronology is the 26 February 2016 Board meeting. Item 8, any other business, records that:

> "The Board were updated on matters associated with the forward planning arrangements and payment arrangements discussed and agreed."

24. At the start of the 26 February 2016 meeting the minutes of the 29 January 2016 meeting were confirmed as a true and accurate record.

25. According to the claimant, planning and payment arrangements for Mr Davidson, Mr Morrell and himself were discussed and agreed, which is confirmed by the minutes of the meeting being signed as accurate by Mr Stewart at the subsequent meeting on 1 April 2016. According to the claimant:

> "At that meeting the Board confirmed with the company's external auditor who attends all Board meetings the final provision for all restructuring costs at a total of £100,000 being combined with voluntary redundancy payments (circa £67,000) and my sabbatical payment (circa £23,000) to be made in the 2015/16 accounts, which again proves the restructuring and basis of payment was agreed."

26. Mr Pearson was not at the 26 February 2016 meeting for medical reasons.

27. According to Mr Stewart, who was present, the forward planning paper was discussed again at the meeting on 26 February 2016. The claimant referred to the redundancy payment as "mandatory". He denies that the claimant referred to the more generous method of calculating redundancy payments utilised by Middlesbrough Council, and he denies that the Board agreed to the full details of the enhanced redundancy package as the Board had no financial information concerning it. According to him, the Board had agreed to the proposals put forward by the claimant in his 8 February email to the effect that they were mandatory payments which were legally required to be made.

28. Mr Collinson who attended the Board meeting on 26 February 2016 takes the same position as Mr Stewart as to what was said at the meeting.

29. The auditor, Dr Elizabeth Hamilton, was present at all the Board meetings but neither party called her to give evidence.

30. The claimant records that the Supervisory Board of Trustees met on 8 March 2016 and, according to the claimant, the Management Board decisions regarding financial and HR arrangements for the restructuring were agreed as the policy for the restructuring after discussion. The minutes of that meeting do not indicate what

figures, if any, were discussed. From the minutes of the Supervisory Board meeting on 8 March, item 8 is the Management Board Chairman's report and it is recorded that:

> "In GK's absence CB provided an update from the Management Board, including financial and HR arrangements for restructuring proposals. These were agreed and the Management Board were given delegated powers to implement the detailed arrangements."

31. Dr Hamilton, the auditor, was also present at that meeting.

32. Simon Pearson met with the claimant and Simon Davidson on 9 March 2016. to discuss various matters, including Mr Davidson becoming the Chief Executive and the redundancies. He acknowledged that he would need some time together with the claimant in the absence of Mr Davidson. According to him it was at this meeting that the claimant put forward for the first time the financial details relating to his proposed redundancy, stating that the financial details had been agreed by the Supervisory Board at their meeting on 8 March 2016.

33. We were provided with a manuscript note made by Mr Pearson, and in respect of the claimant it notes:

> "Redundancy situation, no suitable alternative. Still on payroll as part-time employee. But continuous service ends.
>
> Give [?] notice 5 April expire 20/8.
>
> Settlement Agreement.
>
> (CRT query two weeks plus six months ??)
>
> £92k and car allowance
>
> (AUG) 20 years' service - £1,769 per week by 31/8
>
> = 53,070 (tax on 23,070)
>
> Three months' notice working
>
> Three months' sabbatical 2,011
>
> Not taking it (£23k)
>
> Total £76k."

34. The note continues with reference to the arrangements being made and includes:

> "Conflict interest – no: contractual rights. CB."

35. After this meeting the claimant sent an email to Mr Pearson at 22:58 on Wednesday 9 March 2016. Under the hearing "Details of timings/payments/future arrangements as agreed" the claimant wrote:

"(1) R G Morrell's employment terminated by reason of redundancy WEF 15/5/16 with payment through Settlement Agreement of £17,559. New part-time employment contract to provide health and safety support service to CVL Group from 16/5/16/

(2) C J Beety's employment terminated by reason of redundancy WEF 31/8/16 with contractual redundancy payment of £53,125.06 gross and contractual sabbatical payment of £23,020.86 gross. CJB to relinquish post of CEO in favour of SD WEF 31/5/16.

(3) Post of Deputy CEO to be deleted WEF 31/5/16. SD to take up post of CEO WEF 1/6/16 with contractual salary of £50,000pa and holiday entitlement of 25 days plus eight Bank Holidays pa.

(4) C J Beety to be employed on current full-time salary as special adviser WEF 1/6/16 to 31/8/16 and thereafter as special adviser (part-time) on a salary of £30,000pa with employment contract (to be reviewed annually) to: ….

Notes:

Redundancy payments calculated using statutory calculator of number of years' service x 1.5 weeks at actual gross salary.

Payments above £30,000 subject to tax and national insurance contributions.

Acceptance that notice of termination of employment will be given and accepted to avoid entitlement to pay in lieu of notice.

Acceptance that outstanding holidays will be taken before termination date to avoid entitlement to payment in lieu of accrued holidays."

36. From the perspective of the claimant he met with Mr Pearson on 9 March and he updated Mr Pearson, who did not express any concern regarding the terms for himself or Mr Morrell. The claimant confirms he sent the email set out above, and according to him:

> "This was not my proposal but rather it was the accurate outcome of the Board's decision on terms that had crystallised from discussions at the Board meetings on 29 January and 26 February 2016. The email simply amplified the practical arrangements including payments through Settlement Agreements i.e. becoming contractual payments through those Settlement Agreements, and confirm the clear agreement made by the Board members in their emails and in their previous Board meetings."

37. According to the claimant, the footnotes are a clear demonstration that he was not trying to mislead or misrepresent anything to his financial advantage.

38. On 11 March Simon Pearson sent an email to Ian Collinson and Mike Stewart under the heading "Settlement Agreements", explaining that he had long meetings "last Wednesday" with the claimant initially then with the claimant and Simon

Davidson together. He refers to the Settlement Agreements with the financial implications for CVL. According to him:

> "Settlement Agreements seem commonplace (done some research) and of course I have been guided by Chris on this one as the HR expert. The Agreements do give us the security that CVL needs and there can be no dispute/comeback following signatures. Once the Agreements are drawn up I will circulate them."

39. Mr Pearson's email then goes on to set out word for word the claimant's 9 March email, including the claimant's notes but without including the claimant's heading set out above at 35. He then continues with his own points to note:

> "Although Chris starts as special adviser role on 1/6/16 he retains full salary until 31/8/16 because of contractual notice period.
>
> I was not aware that Gerry had agreed a three month sabbatical with Chris in 2011, which Chris had not taken but is costing CVL £23k.
>
> Chris is anticipating July away so he can be around when the Mbro tender comes in.
>
> Chris' salary is £98k which Settlement Agreement is based on."

40. Mr Pearson went on to write:

> "I think the Settlement Agreement is a sensible solution and the timing is about right. However, the overall cost to CVL will be £93,704 which is substantial and added to the loss for this financial year, could show a deficit of around £183,000. We are of course aware of our bad year and might as well get it over with. We fortunately have the cash, but I was not thinking the Settlement Agreement to Chris would be as high as £76,145! Chris says that it is his entitlement, and I guess it is, and I wouldn't for one minute suggest that he hasn't done a superb job. The sabbatical £23k is for me the problem area, but if Gerry granted it, then I suppose we have to honour it. The full pay until 31/8 also doesn't help us reduce costs in the short-term, but it is his three months' notice period.
>
> Simon D is aware of Chris' package and thinks he is pushing it somewhat!
>
> I would welcome your thoughts/comments and we need to formally agree (or otherwise) this at the Board meeting on the 1st and would suggest that it could be treated as a special item at the end for the three of us to discuss.
>
> Apologies that this note is so long-winded but it is our reorganisation and the costs involved."

41. Mr Collinson's response was that redundancies are never cheap but the benefits will come later:

> "Must confess, I did not appreciate that CJB termination package would be as large as this – looks like it is all contractual though? However, that said, I support moving on as Simon has proposed and take the hit. We still need

> good interim cooperation and support from Chris. This clears the way for the new era under new CEO."

42. Mr Stewart's response was:

> "Like Ian, I am very surprised at the size of Chris' retirement package. However I am sure that it is kosher; nobody knows their way around these aspects better than Chris himself. Has Gerry explained why he approved that generous sabbatical payment for Chris? ...When Chris retires we need to consider revising the 'application for an honour' that we drafted a year ago."

43. Mr Pearson responded to both on 14 March, noting they were all surprised at the size of the package but it was based on the annual salary of £98,000 and:

> "It is indeed his contractual requirement. As we all know, Chris is the expert in this area! I am not happy with the extra £23k (three months' salary) because Chris didn't take the three months' sabbatical agreed with Gerry. Chris says that it is his contractual entitlement (haven't seen anything in writing) and I guess it is. It seems that none of us knew about this leave and maybe we should have been informed. It is water under the bridge, and I don't think it is worth talking to Gerry about it as he is leaving the Board…Definitely need to resubmit the honours application when he does eventually retire."

44. There was a further meeting of the Board on 1 April 2016 and Messrs Pearson, Collinson and Stewart stayed on to discuss the claimant's proposed redundancy terms as a confidential item. According to Mr Pearson, it was agreed he would seek further clarification from the claimant regarding his proposed redundancy, other payments and his new employment terms.

45. Following this meeting Mr Pearson prepared his "plan of action" which he forwarded to Messrs Collinson and Stewart, noting that it was going to be "somewhat tricky moving forward". His plan started with speaking to Simon Davidson to confirm his appointment, wanting to:

> "Get from him the role the Supervisory Board has played in terms of CBs remuneration and any other agreements we were not aware of i.e. three months' sabbatical…
>
> Tell Simon that I will be discussing CBs package proposal with him and be asking CB for any paperwork regarding contract, salary (increases), pension, car etc., sabbatical and why he feels redundancy and re-employment as a special adviser on a £30k salary is best for both parties.
>
> Indicate to Simon that we feel there is a conflict of interest re CB and that we are open to scrutiny and therefore will consult with Liz (Hamilton) our feelings re package etc and engage an outside HR adviser to give advice on CB's package and indeed all aspects of HR. It is not right for CB to draw up his own settlement agreement, new contract, Simon's contract etc. It may well be we end up with something similar (don't forget CB is an HR expert) but at least we are seen to [be] operating professionally within our remit."

46. Following the confidential discussion at the Board meeting Ian Collinson emailed Messrs Stewart and Pearson saying that he had spoken with Gerry Kennedy confidentially about the claimant's salary increases and the sabbatical but Gerry could not recall any discussion with the claimant regarding a sabbatical but everything he said was handled by the Supervisory Board. Mr Collinson found this rather disturbing. He agreed with the points made by Mike Stewart in an earlier email sent on the same day which were to the effect that:

> "Boards are legally responsible for rates of remuneration of their senior staff. Many set up remuneration committees. This has not happened in CVL unless Gerry was a one band remuneration committee. We are responsible as we did not demand to know what was happening to the claimant's salary. Board members could be challenged by auditors or the Charity Commission to explain the very generous retirement package we are giving from the Charity's money to our 'friend' CB, therefore we have a right to ask for an explanation of items in the package, particularly the surprising sabbatical leave payment."

47. On 4 April the claimant emailed Simon Pearson ahead of the next day's meeting, noting that the Board's need to ensure it had discharged its governance role fully had been mentioned so he set out the steps taken prior to the year end which started on 29 January with the discussion of the forward planning paper and its agreement by the Management Board. The claimant then emailed Board members with his personal position on 8 February. The Management Board members responded to confirm their agreement. On 26 February the Management Board discussed and agreed forward planning and payment arrangements which was agreed by the Supervisory Board on 8 March. On 9 March the claimant met with Mr Pearson to update him on decisions of the Management and Supervisory Board meetings following his enforced medical absence, and set out agreed arrangements to be implemented in an email which was circulated to Management Board members:

> "As you will see from the above all the appropriate decisions have been made by both the Management and Supervisory Boards."

48. On 4 April 2016 Mr Pearson arranged to meet with the claimant on 5 April, and he emailed Messrs Stewart and Collinson having spoken to the claimant, saying:

> "He was rather agitated and kept asking what is the problem. I said as new Chair I just wanted to get closer to things as it is good governance. He replied by saying that nothing can be changed as it is contractual. Chris has since sent the email below, and by its tone and indeed Chris' approach on the phone, he believes it has already been approved by everyone. I need to check what paperwork I have, but it is not my understanding that it has already been approved. The first time I saw any figures from Chris is when I met him on 9 March (as he has indicated) and I then sent them to you. Have you seen figures prior to 9 March? Your comments before the meeting would be helpful…I think we will have a battle on our hands..."

49. Mr Pearson produced his manuscript notes of his meeting with the claimant and summarised it in his witness statement. According to him the claimant went into detail as to why he was contractually entitled to the redundancy payment, stating the statutory calculation was based on the number of years' service x 1.5 weeks x his

actual week's pay, then he went into technicalities about being "bumped" into redundancy leaving the CEO role vacant for filling by Simon Davidson. There was no conflict of interest as he was contractually entitled to the payments he had detailed.

50. The claimant anticipated that the 5 April meeting would be to discuss steps taken to ensure proper governance had taken place. The claimant believes he was misled as to the purpose of the 5 April meeting. He believed it was to conclude negotiations on his package and he was prepared to do so before taking personal advice on the Settlement Agreement from a solicitor. Mr Pearson did not tell the claimant of his discussions with Mr Davidson the previous day, asking whether the Supervisory Board could overturn the decision. The claimant thought this was not indicative of an open approach but rather one of duplicity and manipulation by Mr Pearson. He notes that on 5 April Simon Pearson emailed Messrs Collinson and Stewart to the effect that he had had a good meeting with the claimant, all very constructive with no real concerns but :

> "Unfortunately Chris produced a letter from Gerry re sabbatical April 2011."

51. On 6 April Mr Pearson emailed Messrs Collinson and Stewart saying he now felt he had a much clearer picture of things and he asked whether they could meet the following week. By 18:40 on 6 April in a further email Simon Pearson had a couple of comments to make before their meeting the following week:

> "The £53k he is claiming for his redundancy, knowing Chris, will be legitimate, and unfortunately we have agreed to this; his email of 8th Feb and we all responded with agreement.
>
> - The £23k for untaken sabbatical is a different matter. As already mentioned, he produced a letter from Gerry, unsigned, giving permission to take three months' sabbatical leave. This I believe is contentious; should the Board have approved it; can we insist he takes it before 31 August, etc. Chris said it is contractual. I am trying to scan it to send to you.
>
> - I have spoken to Liz (Hamilton-auditor) off the record, and she said is relaxed re year end agreed accrued items as long as we have agreed before 31 March. We did as far as £53k redundancy but not £23k sabbatical. I raised conflict of interest, Liz said 'ah yes', Chris says it isn't, it is contractual. Liz can't support us other than aforementioned comment.
>
> There is much more background I can give you when we meet, but with your permission, I believe I now need to speak to an employment lawyer to verify the current situation, the sabbatical issue, his requirement to be employed at £30k a year implications etc.
>
> Rest assured, once we challenge, he will fight tooth and nail. I am bitterly disappointed in his attitude (all about CJB and nothing else) and actually we will have more fundamental issues to discuss; Simon D is disgusted at his approach; will it really work with him in a subservient role to Simon; do we actually need him; rumour that MBRO might be extended until 2017 etc.

> Chris rang me today wondering why I needed to meet you both when everything had been agreed. I explained that I needed to update you and give you full background and of course the sabbatical letter turned up."

52. Prior to Simon Pearson meeting with Ian Collinson and Mike Stewart on 15 April 2016 he had met with an employment lawyer, Stephen Elliott, of Endeavour Partnership, and his note of the 5 April meeting refer to the key points raised by the solicitor:

- The Board's statutory duty in terms of obligations and governance.
- Whether it is a true redundancy situation.
- Incorrect calculation of redundancy payment.
- The effect of immediate re-employment.
- Issues with CB's new contract.
- Attempts to amend standard ACAS document.
- Unlikely justification of sabbatical payment.
- Were the issues surrounding good faith the apparent attempt to deliberately mislead the Board; CB is an HR expert and yet recommendations he has made are incorrect.

53. According to the note the Board felt that this was an extremely serious situation and agreed with the solicitor's recommendation to meet CB and discuss his proposal directly with him. SP agreed to fix a meeting date with CB which would be attended by Stephen Elliott and SP. SP would feedback to the Board from the meeting. Whilst the Board would await feedback from the meeting there was a general feeling of loss of trust in CB.

54. The new contract is referred to in the list of queries from the solicitor. The claimant provided a new contract and it was noted that there were no provisions as to hours of work, that the contract provided for the full-time holiday allowance of 33 days' holiday plus Bank Holidays although the intention was that the claimant would work part-time. In addition he had proposed to start the new employment on 1 September which it was understood meant there would be no break in his employment and if he were to be made redundant in the future 20 years' service would have to be considered again in calculating any redundancy payment.

55. Looking at the proposed statement of terms and conditions of employment for Mr Beety, it does refer to commencement on 1/9/16 but gives the date the period of continuous employment starts as 1/9/16. As to holidays, there is reference to 30 working days pro rata in each year plus public holidays. There is no reference to any normal hours of work, although there is reference to the job title of special adviser carrying out support and advice services to Group company activities.

56. With regard to the attempts to amend the standard ACAS document, Mr Pearson's statement tells us that:

> "The ACAS model Settlement Agreement had in fact been altered in a number of ways which were preferential to Chris and detrimental to CVL, for example CVL as the employer was to be liable for any tax payable under the Settlement Agreement."

57. The ACAS draft provides for the parties to insert things such as names, dates and amounts. At 3.2 there is an option where two paragraphs are mentioned and between them is the word "OR". The claimant has left both options in. At paragraph 5, point 3, the ACAS model says that, "the (employee/employer) agrees to indemnity the (employer/employee) for any further tax and/or employee's national insurance contributions due in respect of the settlement payment".

58. The claimant has completed his draft with "the employer agrees to indemnify the employee for any further tax and/or employee's national insurance contributions due in respect of the settlement payment".

59. At paragraph 5.2 the claimant has not altered the ACAS draft which says that, "the employer and the employee believe that the first £30,000 of the settlement payment is not subject to tax or national insurance [the remainder is subject to tax but not national insurance]".

60. On 18 April Simon Pearson emailed the claimant telling him that the Board had engaged the services of Stephen Elliott, an employment lawyer, to give advice of the restructure of CVL, specifically as it related to the proposals he had put to the Board concerning himself. It was put to the claimant that as an experienced senior executive in the charity sector for many years, and indeed an HR expert, he will appreciate the need and will support the requirement to seek independent legal advice to ensure they met charitable obligations and achieve good governance. He invited the claimant to meet with himself and Stephen Elliott. The claimant responded stating he would need to take his own legal advice, and a meeting was arranged. Prior to the meeting the claimant emailed Simon Pearson to the effect that contracts and/or redundancy terms had already been offered and accepted by the staff involved and he was confident that the Board had discharged its governance role in the restructuring and had not acted unlawfully and that the new adviser would confirm this.

61. A meeting took place on 20 April 2016 involving the claimant, Simon Pearson and Stephen Elliott, the solicitor. The note prepared by the solicitor is headed "Note of fact-finding meeting".

62. The claimant recorded the meeting, and provided a transcript which occupied pages 175-211 of the bundle. The solicitor's note was over three pages, albeit in a much smaller font.

63. According to the note, Mr Elliott explained that the meeting was purely a matter of fact finding. There were no allegations of wrongdoing and the meeting was not a disciplinary hearing or anything similar. It was simply to establish the facts.

64. Simon Pearson (SP) said that the claimant (CB) had consistently given the impression to the Board that he was contractually and/or statutorily entitled to the various payments he had proposed be made. SP said that CB was an HR expert and as such had simply accepted his advice that Settlement Agreements were required.

CB again stated that the Board had agreed to the proposals. He referred to a Board meeting on 26 February. SP and CB disagreed as to what precisely had been agreed at the Board meeting. CB agreed his employment contract did not contain any entitlement to enhanced redundancy terms, and there was no other document containing any such entitlement. CB referred to the statutory redundancy entitlement as being a "minimum not an entitlement". Mr Elliott (SKE) asked CB why it was necessary for him to receive an enhanced redundancy payment and his response was "it wasn't in my case, not at all, but it was normal for individuals to receive enhanced redundancy payments and virtually the norm for the statutory cap on a week's pay to be dis-applied when calculating redundancy payments". He gave examples of two organisations which operated enhanced redundancy terms. SKE said that these seemed to have derived from collective agreements.

65. SKE asked CB about the effect of section 138 of the Employment Rights Act 1996. CBE responded that it was not applicable because the re-employment was not in a position which was suitable alternative employment. CB stated he had never indicated to the Board he had a statutory right to a redundancy payment. He referred to the practical problems which would arise if they were to backtrack from paying him the agreed redundancy payment. To refuse to pay the agreed amount would be to pull out of terms which had been agreed freely by both parties and this would amount to a fundamental breach of trust and confidence.

66. They discussed the proposed new contract for a special adviser. The claimant could see nothing of any real substance different from the standard contracts used, and SKE pointed out it did not contain any provisions as to hours of work. CB had amended the document to remove such a provision, taking the view that he would work the hours it took. The document referred to continuous employment being from 1 September 2016 with the claimant stating it was his understanding he would have no ongoing employment rights.

67. The claimant had prepared the draft Settlement Agreement using the ACAS model. SKE referred to clause 5.3 suggesting that the wording of the tax indemnity did not actually reflect the wording of the ACAS model document. CB said he had not altered it. SKE explained that the ACAS model contained two alternative tax indemnities – one more favourable to the employee than the other. In the claimant's draft the employer friendly alternative had been deleted. The employee friendly version was left ostensibly as the default position. The claimant acknowledged this was the case but the point was considered "matterless to me". CB and SKE disagreed as to the meaning of the two alternative tax indemnity provisions.

68. The claimant was asked about the letter from Gerry Kennedy dated 15 April 2011 and to comment on the fact it was unsigned and incomplete. (This letter referred to the sabbatical).

69. The claimant stated it was unsigned because it had been sent by email. He would provide the email trail to clarify. As to the fact that there was no start date, CB explained there had not yet been an opportunity for him to take it. He considered all the appropriate decisions had been made and that the governance role had been properly discharged. CB indicated he expected to be allowed to attend the forthcoming Board meeting and any refusal to allow him to do so would be seen as a continuing demonstration of CVL's breach of duty of trust and confidence. CB said it

was very unsatisfactory for him personally and he found it extremely stressful. The concluding paragraph was to note that the next step would be for SP to consider what had been said and to discuss matters with the Board. SP would consider whether it was appropriate for CB to attend and would confirm the position by email.

70. Mr Pearson sought legal advice as to whether or not the claimant had the right to attend the forthcoming Board meeting, and he also questioned whether CVL had contractually committed itself to making the various payments to him. As the email was mistakenly copied to the claimant the advice given on 21 April 2016 was provided in the bundle. The email comes from a trainee solicitor who says that she has reviewed matters alongside a solicitor in the Corporate and Commercial Department. In their view the claimant was not a director. Paragraph 42 in the CVL Articles requires management directors to declare interest and withdraw where they have a personal, financial or material interest. If the claimant argued he was a management director then he would have to comply with that paragraph in that Articles. The Supervisory Board could delegate their powers to the Management Board. There were no other articles they could see that could cause an issue in preventing the claimant from the meeting because he was not a director, but if he claimed he was one then he should withdraw due to conflict.

71. With regard to whether or not there was a binding agreement, someone else she had spoken to was not convinced that there was a binding agreement. Even if there was an agreement in place it could be argued that at the base of this contract there was deliberate misrepresentation and a clear conflict of interest. The oral agreement was not reached honourably. If the claimant wanted to try to argue on equitable estoppel that he should not be prevented from the benefits of an agreement he needs to have acted equitably. It was clear that he had not acted fairly or properly and had breached his obligations. Any agreement was reached in bad faith. They were satisfied that any legal action brought by the claimant on the back of there being a legally binding agreement would only have a 5% chance of success. As a minor point about the sabbatical, the view was that as the letter was never finalised and signed it was not contractual, merely a suggestion and was out of date.

72. Having received this advice Mr Pearson circulated it to fellow Board members and by error to the claimant.

73. The Board meeting on 26 April 2016 did not have the claimant in attendance. Mr Davidson was in attendance. It is minuted at the end that a confidential matter was discussed. According to Mr Pearson it was determined by the Board that CVL was not obliged to pay the claimant the amounts he had proposed and that it would not do so. He informed the claimant of this by email giving detailed reasons.

74. The note to the claimant said that the Board had discussed his proposals in respect of the suggested Settlement Agreement and the new employment contract, and they had taken the view that could not proceed with either transaction, setting out the reasons:

- They had to ensure that charitable funds were being used to further the object of the charity.
- They were keen to ensure compliance with the charity's obligations.

- It did not appear to them to be a true redundancy situation where the decision was made by the employer. In this situation you suggested it rather than the Board.

- You have suggested you should have been paid an enhanced redundancy payment. There is no contractual or statutory right to this and the only payment due to you would be capped at £479 per week which would mean a payment of £14,370 rather than £53,125.06.

- Your proposals included provisions for you to return to work immediately after the redundancy. As you are to be re-employed, employment law says you are not entitled to any redundancy payment.

- You have argued your entitlement to payment in lieu of a sabbatical period on the basis of an unsigned draft letter from a Board member in 2011. It was never finalised, was not contractual, merely a suggestion and is out of date. If you chose not to take the break that was your decision, it does not give rise to an entitlement to a payment in lieu five years later.

- You rely on there being an enforceable contractual agreement for payment. We think this is not true.

- We had discussed your proposals but not reached a binding agreement. When presented with the proposed documents we were free to accept or reject the terms.

- Even if we had a contract it was based upon what appears to be clear misrepresentation.

- Our obligations under charity law take precedence over any contractual agreement and we cannot apply funds for purposes which will not further the objectives of the charity.

In the light of the above they did not agree to any part of the deal and the charity would not be making any payment.

75. Mr Beety responded, stating his disappointment as the forward planning discussion paper was to deal with long-term cost saving measures to meet the charity's obligations in the light of the downturn in work and income. He recited what had happened at the meetings but:

> "Notwithstanding the above I do accept that legal paperwork in relation to my proposed exit has not been concluded, and whilst the decision not to proceed with the implementation seem rather eleventh hour I do accept your decision not to honour the terms I believed were accepted. Of course it follows that I remain as CEO and will continue to carry out my duties fully for the foreseeable future. Any suggestion that my role is redundant is no longer relevant, and in any event I note you have acknowledged that my position isn't redundant. On that basis I expect you now to make clear to Simon Davidson that his proposed promotion to CEO is retracted with immediate effect. I must take issue with your use of the word 'misrepresentation' in paragraph 9. It is

> deeply offensive, judgmental and, if repeated to others, defamatory. Your concerns about the manner in which this matter has developed and the negotiations are simply unfounded. I am more than willing to discuss matters with you on my return from holiday. Hopefully this can be done face to face with all three Board members…we can also discuss my sabbatical entitlements at that meeting. Thank you for confirming your position. I trust this email confirms mine. I look forward to continuing my duties as CEO for CVL."

76. The Board members held a special meeting on 4 May 2016 and determined that the claimant was to be suspended and to be invited to a disciplinary meeting.

77. In a formal letter, emailed to the claimant on 8 May, the claimant was informed of a requirement to attend a disciplinary meeting on Friday 13 May to discuss the issues set out.

78. As to those issues:

> "In general terms the issue is that between February and April 2016, in relation to the proposed restructuring of the management functions of Community Ventures (Middlesbrough) Limited 'the charity' you appear to have proposed for acceptance by the Board a number of arrangements and transactions which, had they been accepted, would have created a number of substantial benefits to you personally whilst at the same time committing charitable funds to payments to you which in the circumstances were wholly unnecessary and entirely inappropriate.
>
> In more specific terms it is alleged that:
>
> (1) On 9 March 2016 following discussions you formally proposed the terms of a restructure of the charity's senior management team. These terms are set out in your email to me of that date (attached as document 1).
>
> (2) One element of this proposal was a 'package' for the termination of your employment. This package provided for the payment to you of what I now understand to be a substantially enhanced redundancy payment. Instead of the statutory redundancy payment of £14,370 to which you would have been entitled upon being made redundant your proposal was that you receive a redundancy payment of £53,125.06.
>
> (3) You had previously (on 8 February 2016) emailed the Board to advise that the implementation of the proposed structure would *'necessitate redundancies in [the charity]'* and that *'this will in practical terms require enhanced redundancy payments…to facilitate the changes'.* A copy of your email is attached as document 2.
>
> (4) Your communications left the Board with the clear understanding that the payment to you of this enhanced amount was something which, in your own words, was something which was "necessary" or "required". The Board's understanding was that you were legally entitled to be paid the redundancy payment of £53,125.06 you had put forward.

(5) When we discussed this at our fact finding meeting on 20 April you conceded that you did not have any contractual or other right to such an enhanced redundancy payment. This is something which you have confirmed in your email of 28 April 2016, attached as document 3.

(6) Your proposal also envisaged that the day immediately following your redundancy you would be re-employed by the charity as a specialist consultant or adviser on a salary of £30,000 per year. Given that immediate re-employment I now understand that you would not be entitled even to a statutory redundancy payment.

(7) You drafted the new employment contract for the specialist consultant/adviser role and a copy is attached to your email of 7 April 2016 attached as document 4. Although you told me repeatedly at our meeting on 20 April 2016 that you had based this on the "standard" charity employment contract the document in fact differs fundamentally from the standard document in that, whilst the salary is expressed as a fixed annual amount, the provisions governing hours of work have been omitted. The effect of this is that the charity would be contractually obliged to pay your full salary whilst having no ability to hold you to any minimum hours of work.

(8) When this was pointed out to you at our meeting on 20 April 2016 you conceded that you had in fact amended the standard document after all. Your explanation was that you had deleted the hours of work provision simply because you proposed to 'work the hours that it takes'.

(9) When preparing your new employment contract you inserted a statement that your period of continuous employment under that contract would start on the contract commencement date rather than at the point on which your employment with the charity initially commenced in 1996. This led the Board to believe that you would not have ongoing employment rights connected to your previous service. I now understand that, as a matter of law, this is simply not the case. It is noteworthy that, when you prepared Simon Davidson's new employment contract, you did in fact express his continuous service date as being the date on which he originally commenced employment with the charity.

(10) An additional element of the termination package you put forward was that you be paid the sum of £23,020.86. You describe this in your email of 9 March (document 1) as a 'contractual sabbatical payment'. Despite your description of it as such, it appears in fact that you do not have any contractual right to such a payment. Although you have produced an unsigned letter from Gerry Kennedy dated 15 April 2011 (attached as document 6) which refers to a proposed sabbatical *'following an excessive input of your time over several of the past few years',* that letter is clearly incomplete and/or merely a draft given that the date of commencement of the period of leave was left blank. Whether or not that letter accurately reflected Gerry's intention at the time (and, given his current health, it is of course now impossible to say) the letter does not, on any interpretation, give you the contractual right to a payment in lieu

of the sabbatical leave period upon the proposed termination of your employment some five years later.

(11) Again, the Board was left with the clear understanding that you had a legal entitlement to the payment in lieu of the sabbatical leave period.

(12) On 7 April 2016 you presented the Board with a Settlement Agreement to be entered into between you and the charity. This is attached as document 7. You have headed the document "ACAS Model Settlement Agreement" and by virtue of the square brackets and spaces for definitions it contains it was clearly presented to the Board as a document to which amendments should be made to reflect the agreement reached.

(13) Despite this a crucial aspect of the document has in fact been altered to make the charity responsible for meeting and for indemnifying you in respect of all the tax which is payable in connection with the amounts paid to you under the proposed agreement. The relevant clause of the document is clause 5.3. Not only does this not reflect the ACAS model document (a copy of which is attached for comparison purposes as document 8, it also flies in the face of the near universal tax treatment of termination payments which, broadly speaking, is that the payment is paid free of deductions to the appropriate level (normally £30,000), tax is deducted for the excess and paid to HMRC and the departing employee agrees to indemnify the employer in respect of any future tax liabilities.

(14) At our meeting on 20 April 2016 you initially stated that you had not made any changes to the ACAS model document. You stated that, 'the ACAS document is the ACAS document' and you reiterated that you had not altered it, although when you were shown the true ACAS model document you were left with no option but to concede that you have amended clause 5.3. You then described the amendment you had made as 'matterless'.

The Board is very mindful that you an experienced and knowledgeable HR professional. You hold a CIPD qualification. You have worked in HR for many years and a key part of your job, over a lengthy period, has been to provide strategic HR advice to the charity's clients. For example you are currently managing a HR consultancy contract for Coalfields Regeneration Trust. The Board has therefore been entitled to take you at your mind in matters of HR and employment law. The Board is also mindful of the fact that you have for many years served the charity in a senior managerial capacity and that you are fully aware of the integrity and probity which is expected of any senior employee; particularly one who is responsible for charitable funds and who reports to a part-time voluntary Board.

Taking all this into account the Board is concerned that in acting as you appear to have done you may have deliberately, wilfully and dishonestly misrepresented your position in your dealings with the Board, and that you have deliberately, wilfully and dishonestly presented as 'standard' or 'model' documents which you had in fact amended in order to give you, at the

> expense of our charitable funds, a substantial financial advantage to which you were not entitled. The Board is concerned that if this is correct it demonstrates that you have put your own personal financial interests above those of the charity in such a way which amounts to a wholesale abuse of the trust which the Board has placed in you as Chief Executive and as custodian of charitable money.
>
> Such conduct if proven or admitted at the hearing would amount to a serious breach of the implied contractual duty of trust and confidence which you owe to the charity. As such it would amount to gross misconduct. You should therefore be aware that one possible outcome of the hearing is your summary dismissal."

79. The letter went on to state that Mr Pearson would conduct the hearing supported by an independent HR consultant, and the claimant was entitled to be accompanied at the hearing by a colleague or trade union representative. He was to be suspended pending the hearing.

80. The claimant's solicitor, Mr Allen, wrote to the respondent's solicitor, Mr Elliott, on 11 May seeking an adjournment of the disciplinary hearing, principally because Mr Pearson had proposed himself as the person to chair the disciplinary hearing thus he will be the disciplining officer having also been the investigating officer. He should be regarded as a witness rather than the person to chair the hearing. It was suggested that the respondent should appoint an entirely independent person to chair any disciplinary hearing.

81. The email went on to state that the evidence of the Board directors is of great importance but there were no witness statements. Mr Allen intended to interview all of the Board members and could not see that a disciplining officer could make a reasoned judgment without hearing what the Board members had to say. There may be documents to be considered. Without an independent Chair and appropriate evidence he would consider any disciplinary sanction to be flawed. He asked for a representative from his firm to attend to take notes and for the hearing to be recorded.

82. Having taken instruction Stephen Elliott stated that Mr Pearson had determined that there should be no postponement, but later in the day Mr Elliott stated to Mr Allen that:

> "In the light of your suggestion (which of course is not accepted) that it would be unfair for Mr Pearson to chair the disciplinary hearing given his involvement at the investigatory stage, tomorrow's meeting will now be chaired not by Mr Pearson but by the independent HR consultant instead."

This, it was written, made sense because CVL was already committed to the costs of his attendance, but Mr Pearson would attend to be available to deal with the claimant's challenge to his evidence regarding recent events. The consultant was identified as David Dorman-Smith of Mayberry Consultancy of Stockton-on-Tees.

83. The claimant provided a ten page statement in response to the allegations made against him, and produced it at the disciplinary meeting. He dealt with the points raised in the disciplinary letter.

84. We have been provided with minutes of the disciplinary hearing held on Friday 13 May 2016 when there were present David Dorman-Smith, Chris Beety and Simon Pearson. According to the meeting minutes, it lasted from 2.00pm to 5.30pm. No conclusions were reached as Mr Dorman-Smith needed to consider and reflect upon matters before reaching his conclusions. The claimant would have preferred to have had an answer that day and then returned to work straightaway.

85. It was apparent to the claimant that Mr Pearson and Mr Dorman-Smith spent some time together before he was admitted to the meeting, at times when the meeting was adjourned briefly, and that they stayed together at the end of the meeting and emerged together. According to both Mr Dorman-Smith and Mr Pearson, they did not discuss the claimant's case during their time together.

86. Mr Dorman-Smith told us that he was an experienced and independent Human Resources consultant and a member of the Chartered Institute of Personnel and Development, and a non legal member of the Employment Tribunal Service. He works through Mayberry Consultancy with significant experience providing HR and employment advice and has been involved in many disciplinary and appeal hearings relating to senior executives. For the purposes of this hearing it was agreed that he was solely responsible for all decision making and he took no instructions from Mr Pearson on this subject. He confirmed he was provided with all of the paperwork that was provided to Mr Beety. He picked up information from the documents provided and read through it all in advance of the meeting.

87. At the disciplinary meeting Mr Beety confirmed he did not wish to be represented. Mr Dorman-Smith confirmed he was responsible for the decision making and that he would go through the points and allow Mr Beety to respond. He sets out Mr Beety’s responses and explanations in respect of the various allegations.

88. He confirms that Mr Pearson did not play a major role in matters. He did not ask any questions. The deliberations were undertaken by him and he reached the decision. Following the hearing he took quite a lot of time to consider the allegations and Mr Beety’s submissions. He noted his position within the organisation, his length of service and his clean disciplinary record, but notwithstanding this he concluded that Mr Beety should be summarily dismissed. This was confirmed in a letter dated 18 May 2016.

89. At the start of the letter Mr Dorman-Smith sets out the background and that he was the decision maker. He had listened carefully to the claimant's responses and considered his representations.

90. It was noted that the claimant prepared a package for termination of his employment, including a substantially enhanced redundancy payment. It was the claimant’s position that he based his procedures on that of Middlesbrough Council, and the Coalfields Regeneration Trust and Community Development Trust in regard to voluntary redundancy payments. Both of the latter organisations are charities and on the basis that all three provided enhanced redundancy payments the claimant considered it to be necessary and normal practice to offer such incentives. Mr Dorman-Smith accepted that the proposals for redundancy was first made by him rather than the Board, and the future planning paper was a document prepared by the claimant offering advice to the Board.

91. The claimant indicated that references to the redundancy becoming "contractual" refer to the Settlement Agreement, in that the payment would become contractual because it would be contained within the Agreement. He noted that this was not explained to the Board and the clear import of his proposals was clearly to invite the Board to the conclusion that he was contractually entitled to such a payment without reference to any Settlement Agreement. (See point 2 of the email on 13 April).

92. He noted that Middlesbrough Council was not a registered charity and had many hundreds of employees with union recognition and collective agreements in place. The two charities quoted were also of a substantial size. He considered it more appropriate to draw comparisons with charities of a similar size to CVL and in doing so he knew of no other charity offering enhanced redundancy. That was not to say none did, but in his view it was inappropriate for the claimant to base his argument in just two charities that did so:

> "To mislead the Board therefore into believing that such a payment as you proposed was 'necessary', 'contractual' or 'required', especially when the original proposals were generated by you is to mislead the Board in a deliberate manner calculated to result in substantial payments being made to yourself that you are not entitled to."

93. He then referred to the adviser's contract which the claimant proposed was a standard contract, however it was noted there were no hours of work. The claimant pointed out his current contract referred to working hours required to fulfil the work required but the new contract was entirely different having no clause regarding hours at all. In proposing such a contract the claimant was asking the Board to pay him for a part-time post where they would be committed to paying the monthly salary but the claimant was not committed to any hours of work. This could not be described as "standard" and "the removal of the hours of work clause can only suggest you were fully aware of your actions and its implications".

94. He then moved on to the redundancy package including a payment of £23,020.66 which the claimant stated was a sabbatical agreed in 2011. The question being addressed was whether it was a contractual payment. The claimant claimed he was entitled to payment in lieu as he would have no opportunity to take it, however:

> "It is clear to me that there was an agreement that entitled you to take a sabbatical in 2011 and you have had the opportunity to do so at any time in the last five years. However you have chosen not to do so. I do not consider this agreement to a sabbatical to be such that payment could be made to you because you had run out of time in which to take it. Finding the time for a sabbatical was your responsibility and it was an offer that in the end you chose not to take up. I see no justification for any payment in lieu at all. In claiming this payment therefore you were deliberately seeking to claim a payment to which you are not entitled."

95. The fourth matter was the ACAS Settlement Agreement which the claimant claimed was the model document. Mr Dorman-Smith agreed that it was, however:

> "The point at issue is that you deliberately changed 5.3 in order to avoid any further tax implications on the portion of the settlement figure that exceeded £30,000 making the employer responsible for such liability rather than the liability being met by yourself. The wording of the document is very clear as is the wording in the original ACAS document. It is clear, therefore, that you have attempted to shift any further tax liability from yourself to CVL while at the same time failing to inform the directors at this stage."

96. The fifth matter consider by Mr Dorman-Smith was the claimant's knowledge and experience in HR matters, with the claimant arguing he had not given advice in such matters for many years and would now take advice himself before offering advice to others. Mr Dorman-Smith noted that the charity delivered HR support to the Coalfields Regeneration Trust and he considered it inconceivable that the claimant as the HR adviser did not know about employment matters and questions of redundancies. It was clear to him he was the HR professional at CVL and that the Board expected he would manage all internal HR issues. He was a chartered fellow of CIPD and should have been aware of the emphasis placed by CIPD on continuous professional development. He could not accept the claimant's assertion that the lack of a break in employment was anything other than deliberate, and he could only conclude he deliberately sought to extract a redundancy payment from the charity to which he was not entitled knowing full well what the law requires in this area.

97. He noted the claimant's comments about the Board being professional business people but he noted they were all retired, some for a considerable time and not being in a position to keep up-to-date with the latest changes in employment law. Bearing in mind the claimant's vast experience in HR matters it seemed very reasonable that they would rely on his advice.

98. Having taken into account the matters set out and noting the concern of the Board that the claimant appeared to have acted deliberately, wilfully and dishonestly, as outlined above, Mr Dorman-Smith concluded that the allegations amounted to a serious breach of the implied contractual duty of trust and confidence that the claimant owed the charity and therefore he found such a breach amounted to gross misconduct. Whilst aware of the considerable service offered over many years and the undoubted massive contribution made to the growth of the charity and its success, notwithstanding all this he was left with no choice but to apply the sanction of gross misconduct. He was aware of the various options open to him in regard to an appropriate sanction but believed he had no alternative but to dismiss without notice, and he concluded giving the right of appeal to Simon Pearson as Chair of Trustees within seven days, stating reasons for the appeal.

<u>Cross examination of the appeal officer</u>

99. In answer to Mr Allen's cross examination questions, the following items emerged from the evidence of Mr Dorman-Smith:

> "(1) With regard to the claimant's email to the Board dated 9 March 2016, there is nothing misleading about the paragraph: it says that there is a requirement for enhanced redundancy payments to be made, to be delivered by Settlement Agreements.

(2) The company's case was put in the form of the documents that I received. What mattered to me was that I understood clearly what the case was, the evidence was, and I did not have any queries about the position of the company. By the time I got to the disciplinary I was confident I knew what the company's case so the purpose was to hear what Mr Beety said.

(3) Mr Pearson and I did not engage in conversation during periods of adjournment.

(4) Mr Pearson did not influence my decision.

(5) I was clear on the company's position: I did not need to ask any questions of Mr Pearson.

(6) The outcome was not predetermined.

(7) I thought the claimant's statement was a helpful summary but it also covered quite a lot of the stuff we had already covered at the meeting. I wanted to let him read it to me and I would reflect on what it was about. Part of my reflection and decision making was to understand what his case was, which included the statement as well as the information he provided when answering questions.

(8) I did not speak to any of the Board members. I only spoke to Mr Elliott, the solicitor. I felt that I had been provided with the information that I needed, but had I felt that I needed anymore I would have asked.

(9) I did not speak to Collinson, Kennedy and Stewart, notwithstanding the allegation was about misrepresenting matters to them because from my point of view the misrepresentation was to the Board, not to the individuals. They acted together as a body. What mattered was that I gained insight and understanding as to the Board's position by reading all the documentation that I had been provided with and listening and looking at the finding of facts undertaken by Mr Elliott. That gave me, I felt, a good and comprehensive grasp of the issues.

(10) I saw my role as looking at all the evidence available and testing one side against the other. I wanted the claimant to provide me with his explanation and understanding of why things happened so I can test his understandings of what the position was. The evidence I was provided with was not necessarily the evidence of the Board members but evidence produced by Mr Beety.

(11) The case I was looking at was whether the claimant had misled the respondent. If it had been a question of debate or things said and not written down or things said by the Board members themselves then it would have been important to speak to them, but in this case it seemed to me we were dealing with the evidence of Mr Beety himself in that he wrote the emails that talked about contractual redundancy payments and he drew up the ACAS Settlement Agreements and prepared the

adviser contract. He may have been asked to prepare them but that was not the issue.

(12) The evidence had actually been produced by Mr Beety. The crux of the hearing was to understand why he had done what he had done in the form that it was in, and if there was a fair and good reason for him doing it. Then the allegations would be dismissed. The nature of this particular disciplinary was focussed on establishing the motives from Mr Beety in terms of the documents he produced, which I don't think were in dispute because he produced them.

(13) Within the document there is nothing that Mr Stewart felt dishonestly or deliberately or wilfully misled. My understanding is that as I said before was that the position of the Board was that of the Board, including all the members, and they were unanimous in their view. I can't comment on what I don't have or didn't receive.

(14) In answer to the question "it sounds like you have turned up, ignored Mr Beety's statement, disinterested, ticked box and were out of there" the answer was:

"No. I read the docs in advance. I believed I understood the company's position. The documents had been produced by Mr Beety and my concern was to obtain an understanding of why he had produced them before I went on to make a decision. Here we had documents produced by the claimant where he had made proposals which he had advised the Board were contractual and related to very significant amounts of money, where he had included any redundancy package, the £23,000 for a sabbatical payment, where I have suggested there was no justification for any payment in lieu. We are talking about a significant amount of money. You get to the point where the amounts involved are so significant where points such as clean record, length of service and so on are overridden.

What the claimant was saying is that the package he was putting together which he was saying he needed and he quoted other councils allowing for all that, he put together a package and a proposal. Once the Settlement Agreement was signed it would become a contractual arrangement.

Going back to the email sent by the claimant on 9 March, it was clear that the third paragraph related to future arrangements but we are not talking about Mr Davidson, we are talking about the claimant. Paragraph 2 talks about a contractual redundancy payment. The Board was led to believe that it was a contractual payment, which is how I understood it."

(15) In answer to the question "until a Settlement Agreement is signed up, it is only once it is signed up that you have a binding agreement" the answer was:

"My understanding was that the Board was told that this was a contractual payment that needed to be made so they had no choice. Their understanding was that they were required to make a payment of £53,000 once they were obliged to pay it, they were misled. I was led to believe that it was the position of the whole Board and had no reason to doubt that it wasn't. The nature of the payment was presented to the Board as normal, necessary and required by the claimant. They believed that to be on a contractual basis. They agreed to it because they didn't think they had any option. I was not aware that Mr Pearson had not understood the calculation of the enhanced redundancy payment."

(16) A question was raised in relation to an answer given by the claimant during the course of the disciplinary meeting:

"…In my case I believe my employment would be broken by the termination of my employment by the payment to be paid to me and by the Settlement Agreement. In particular I believe that a change from a full-time employment Chief Executive with a £92,000 per annum salary to a part-time employment as an adviser on £30,000 per annum wouldn't be classed as an alternative in a redundancy situation. Quite frankly I think it is irrelevant, the attraction to me at early retirement from full employment to the adviser role was the financial terms that I believed were then agreed and would be honoured otherwise there was no attraction in it for me at all. My email on 9 March clearly states that it was simply, and I quote from the heading 'details of payments, timings and (I stress) future arrangements'."

(17) It was put to the claimant that on point 2 of the email he talked about contractual redundancy payments of £53,125. In answer the claimant said:

"I will refer to that clause, as I have said I stress that that is headed as 'future arrangements' and those 'future arrangements' would, by virtue of a Settlement Agreement which was requested by the Board, resulting in the payment that were being agreed becoming an contractual entitlement as a result of that [sic]."

(18) The claimant was asked, "when it talks – in point 2 there – about a contractual redundancy payment and a contractual sabbatical payment, your understanding of the word 'contractual' relates to the Settlement Agreement. Is that what you you're saying?". The claimant answered:

"It would clearly be a contractual arrangement once the Settlement Agreement was brought out."

(19) The claimant was asked if his understanding of the word "contractual" is a reference then to the Settlement Agreement as a contractual document, with the answer being "well of course it is, yes".

(20) It was put to Mr Dorman-Smith that this was a clear as day explanation of any ambiguity of what might be meant by "contractual" and he said that he understood what was being said by Mr Beety, but this was not the understanding of the Board:

"They were led to believe that the enhanced redundancy payments were of a contractual nature which they had to pay. There was no option. I understood what the claimant was saying, but that is not the point. The point is what the Board thought. They were being misled, not me. I take the view that it is wilful and dishonesty when I review all the information available to me. The claimant did not talk to the Board about statutory payments. He only talked to them about enhanced payments. My conclusion was that he led them to believe that any redundancy payments that he would be due would be of an enhanced nature."

(21) In respect of the claimant's new agreement where there was no mention of the obligation on the claimant to work any particular hours, "what was missing was the entire clause from the contract. Had there been something further to be inserted I would have expected it to be there, but blank. Mr Davidson's document had a section dealing with hours of work. Removal of the hours of work section in the claimant's document altogether has clear implications and must have been deliberate".

"He believed he was entitled to a sabbatical. I look at where is the evidence for that. He made a claim against the company for £23k for a payment in lieu but there was no evidence for that. He had five years to take the sabbatical and plenty of time to take it. He could have taken it at any point, he chose not to for whatever reason. The problem for me was that the claimant had added it to the redundancy payments and called it a contractual sabbatical payment. He did it in such a way that they were led to believe he was entitled to it. They considered he was a trusted HR expert and if he said it was a contractual matter…anything else needed to be said or done, he agreed. It was entirely inappropriate to claim £23,000 in lieu because he had chosen not to take it."

(22) Question: For someone to be asked to be paid a sum of money in respect of a sabbatical that cannot be dishonest? Answer: when he calls it a contractual payment it can be.

(23) Turning to the ACAS Settlement Agreement, the model document shows that there is a choice over employer/employee. In the document produced by the claimant he had already removed the option of the employee giving the tax indemnity. Having taken these options out there was not an option to discuss and the Board did not realise there was such an option. Mr Morrell's agreement was less than £30,000 so this was not relevant to his agreement. He has, however, followed the same path in that the employer is giving the indemnity to the employee. My concern was what the claimant had done was to alter the model

document to his own advantage in that he removed any liability on the employee before it got to the Board for discussion.

"You don't alter them before you have discussed them with your client. The claimant presumed what the outcome would be by taking certain clauses out to his favour before the Board saw it.

I believe there was no redundancy. The claimant could have made a proposal to the Board and not couched it as a contractual redundancy payment. My view was that the wilful dishonest acts related to misleading the Board in a deliberate fashion in relation to claiming contractual redundancy payments and using that term against enhanced payments by deliberately altering the adviser's contract and taking out payment and claiming the sabbatical payment was contractual, and it wasn't. He led the Board to believe that it was obliged to make those payments. Every single one of the allegations has been proved to my satisfaction. The crucial issue related to him misleading the Board in connection with the contractual redundancy payments, making the Board believe they had to make them. We are talking about a very considerable amount of money and this was charity.

Notwithstanding the claimant offered to speak to the Board on a number of occasions, I looked to the evidence that he had produced for the Board in such a way that they were expected to accept it as it was. I did not interview the Board members. I relied upon the documents produced by Mr Beety."

100. In re-examination the following points arose:

"(1) I saw no evidence that the claimant had linked the contractual nature of the redundancy and sabbatical payments to the settlement Agreement. There was no reference that I saw that linked it to a future contract of a Settlement Agreement. There was no evidence that he had intended to convey that when talking to the Board so my conclusion was that he misled them.

(2) In respect of the proposed employment, the obligations on the part of the employee are clear, but there are no obligations on behalf of the employee because they are no contracted hours.

(3) I found no evidence of any right to a payment in lieu of the sabbatical. There was an agreement to take one but no reference to any payment in lieu.

(4) Looking at the various allegations, we went through each of the various allegations set out in the letter and inevitably some are more weighty than others and if one or two had perhaps been part of a disciplinary by themselves they may not have led to a dismissal. The ones that clearly in my estimation would have done so by themselves were the first item in relation to enhanced redundancy payments and the third, which is the sabbatical payment. The question of the adviser's contract would

have been borderline, and the ACAS agreement added to the body, but if it had been the only item on the disciplinary would not have led to dismissal.

(5) If I had spoken to the other directions it would not have altered my view or finding.

101. On 25 May 2016 the claimant wrote his letter of appeal, over five pages, to the Chair of Trustees of CVL. In the letter the claimant set out the basis of his appeal. He questioned the involvement of Simon Pearson at the hearing, believing he heavily influenced the outcome. He believed the company had failed to conduct any reasonable degree of due diligence into the allegations. There was no evidence to suggest Mr Dorman-Smith had been in contact with or taken witness statements from other Board members. He had always been open and transparent with regard to the enhanced redundancy payment. He informed the Board from the outset that the proposed redundancy payment would be enhanced. He had never stated the payments were necessary and to imply that he tricked the Board was a distorted and inaccurate representation. Mr Dorman-Smith was factually incorrect in asserting that the claimant never explained his redundancy proposals to the Board. Neither he nor Mr Morrell wished to vacate their posts voluntarily for the statutory minimum entitlements. It was a commercial transaction providing large long-term savings for CVL, and "if the financial terms had not been acceptable I would not have relinquished my post". He firmly believed his entitlement to a sabbatical was contractual pursuant to his negotiation with Gerry Kennedy in 2011. There was no time limit set within which the sabbatical had to be taken; no-one has ever said he could not take it nor that he had lost the right to do so. The suggestion that the claimant might be paid in lieu could not reasonably be described as a breach of trust and confidence. The ACAS Settlement Agreement was drawn up at the request of the Board. Clause 5.3 was the same as agreed with Mr Morrell, who had taken advice:

> "I was not undertaking a process to improve my position. I was being consistent. As to my knowledge and experience in HR matters, I did not get my CIPD qualification by examination. My knowledge is not up-to-date or complete. I usually sought HR advice from third parties. The proposed part-time was again produced at the request of the Board who knew I would not be working fixed hours. I protest at any finding that I have behaved deliberately, wilfully and dishonestly in my dealings with the Board."

102. The respondent arranged an appeal hearing for Monday 27 June 2016, with the appeal being heard by Frank Holden, an experienced and independent HR consultant based in North West England with no previous involvement with CVL. Mr Pearson was not to be present. The claimant was told of the right to be accompanied at the appeal hearing. The hearing would be recorded. A list of the documents to be made available to the appeal officer was set out, starting with the invitation to the disciplinary letter and the documents attached, the bundle provided by the claimant's solicitor on the morning of the disciplinary hearing, the claimant's statement for the disciplinary hearing, the transcript, the dismissal letter and the appeal letter.

103. There was some discussion about the date of the appeal hearing, and it was re-arranged for Thursday 28 July 2016 to start at 10.30am.

104. Mr Beety provided a statement for use at the appeal hearing set out over 27 pages.

105. The claimant's Unison representative produced a document complementing the claimant's case submission to be considered alongside the other documents. This quoted from the ACAS Code of Practice and an employment law text book and dealt with the investigation, the disciplinary hearing and the appeal hearing. It included an extract from paragraph 5 of the ACAS Code of Practice dealing with disciplinary matters:

> "It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing."

106. Mr Holden confirmed that he received the documentation in advance of the appeal, including Mr Beety's submission. He made a note setting out his proposed structure for the appeal hearing.

107. At the meeting Mr Beety provided a summary of his grounds of appeal and confirmed that he would like to be reinstated to his former position. Although Mr Holden intended to work through the eight points of appeal, Mr Beety stated his preference was to use his documentation which he said would cover them and Mr Holden agreed to this, allowing Mr Beety to take him through his pre-prepared statement line by line and there was the opportunity to discuss each of the appeal components in the hearing.

108. In his witness statement Mr Holden goes on to describe what was said at the appeal hearing. Mr Beety addressed all of the issues. The hearing started at 09:30 and finished at 17:40. The claimant's trade union representative had to leave at 14:30 but the claimant elected to continue without representation.

109. Following the hearing Mr Holden decided that he wished to interview the various Board members to ascertain their understanding of the nature of the payments that Mr Beety had put forward, and he also wished to speak with Mr Dorman-Smith and Mr Purvis. He told the claimant of his intention to do this.

110. Mr Holden prepared a post appeal hearing list of questions to the witnesses identified by Mr Beety. He was to talk to Simon Pearson, David Dorman-Smith, Michael Stewart, Ian Collinson and Peter Purvis (Chair of the Supervisory Board). In summary each of the three Board members were firmly of the view that Mr Beety had given them the clear impression that the redundancy and other payments he was proposing were ones to which he was legally entitled. They confirmed that they were not provided with specific financial details of his proposed redundancy until after Simon Pearson had met with Mr Beety on 9 March 2016.

111. He spoke to Mr Dorman-Smith who said that Mr Pearson was there to deal with any issues that might have arisen. He was not influenced by Simon Pearson and David Dorman-Smith deliberated by himself and reached his own conclusions.

112. Mr Purvis confirmed that Mr Beety had not discussed the restructure with him in any detail.

113. Having collated the additional information, Mr Holden sent a copy of his notes and Simon Pearson's timeline of events to Mr Beety and invited him to make comments. This was done on 15 August. He referred in his email to the complaint that there was an apparent lack of contact with the other Board members by Mr Dorman-Smith. He had conducted telephone interviews with them asking them to respond to the specific issues raised in the appeal. As he would be using their evidence to come to a decision it would be remiss of him not to let the claimant have sight of the documents so that he could comment upon them should he wish. He had also spoken to Simon Pearson and David Dorman-Smith. Separate attachments were provided for his conversations with Messrs Collinson, Stewart, Purvis, Pearson and Dorman-Smith. He asked the claimant for comments after which he would send his decision and the reasons for it.

114. On 8 September 2016 Mr Beety said he hoped to be in a position to respond and he provided his full response by email on 12 September 2016, which appears in the bundle from pages 486-526. Mr Beety then sent a further email on 12 September appearing at pages 527-543, after which Mr Holden told him that he had set some time aside to review his responses.

115. Mr Holden prepared a decision matrix document.

116. The document sets out in the first column the appeal issues raised by the claimant, in the second column it sets out the appeal evidence and in the third column it deals with comments/further investigation. By way of example looking at clause 5.3 of the draft Settlement Agreement the appeal evidence is recorded as "it was never his intention to improve his position but maintain consistency with the BM redundancy he had just managed". The comments/further investigation states:

> "Was it wilful or naivety as CB claims? For such a senior manager to offer a document with so many changes from the ACAS template is at best incompetent and at worst wilful. There appears no attempt to explain the document changes and options available to the Board at any stage in the restructuring decision. Part of his role was to offer HR advice within the company. He handled the BM termination which involved changes to the model ACAS Settlement Agreement and had drawn up an agreed contract for SD. My conclusion is that CB is contract savvy and sought to achieve a personal settlement by portraying terms in the most favourable light for his benefit."

117. The next document within the bundle is the ACAS Guide to Settlement Agreements, and with relation to clause 5 dealing with payments notes that clause 5.1 sets out the amount of money the employer agrees to pay. Clause 5.2 sets out the tax liabilities the parties expect to attach to the settlement payment. If the reason for the employment coming to an end is redundancy it is prudent to state the amount paid as redundancy payment in clause 5.2 as statutory redundancy payments will not be subject to income tax and national insurance but a contractually enhanced redundancy payment might be. The note in respect of clause 5.3 states:

> "If the settlement payment, or a portion of it, is paid without deducting tax and/or national insurance contributions, it is common for one of the parties to agree to pay any tax and/or national insurance contributions which later become payable in respect of the payment."

118. Mr Holden wrote to Mr Beety on 13 September 2016 dismissing his appeal. The letter appears in the bundle from pages 544-550.

119. As to the unfairness of the process and the inappropriate role of Simon Pearson, he set out various factual matters involved in the process and concluded that although the process was not perfect the claimant had been allowed the time and opportunity to put forward his explanations for his actions.

120. With regard to the due diligence of the dismissing officer, he concluded that Mr Dorman-Smith correctly did not feel it was necessary to speak with the other two Board members, Messrs Collinson and Stewart, as he knew Simon Pearson was acting with the Board's full knowledge and agreement. He also found Board members were not aware of the financial details of the claimant's proposed redundancy terms until 10 March 2016 following his meeting with Simon Pearson when the claimant had portrayed the payments as contractual.

121. As to Mr Beety never stating the figure of £53,125.06 was necessary, for the management restructure to take place he was satisfied Mr Beety did not use the term "necessary" in writing when presenting his figures to Simon Pearson on 9 March. However, he had previously presented in his email of 8 February 2016 that "the implementation of this restructure will necessitate redundancies in CVL. This will in practical terms require enhanced redundancy payments". He also referred to Mr Beety's 9 March email stating that, "contractual redundancy payment of £53,125.06 gross and contractual sabbatical payment of £23,020.86" caused the Board alarm and that an ordinary reader would understand the contractual references to be sums agreed by contract law".

122. Regarding Mr Beety's appeal point that David Dorman-Smith said he had never explained the redundancy payments to both the Management and Supervisory Boards, he concluded that Mr Beety had not presented the financial terms of his redundancy to any Board until his meeting with Simon Pearson on 9 March. Mr Holden found that once Mr Beety had set out his financial terms and insisted they were contractual this led to the Board seeking to satisfy themselves as to the validity of his proposals, which led them to seek external legal advice.

123. As to the contractual right to be paid a sabbatical, he found the addition of the sabbatical figure to the redundancy payment put forward on 9 March 2016 without prior discussion with the Board generated mistrust, and a man of Mr Beety's experience should have realised that such a significant sum would give the impression that he was seeking personal gain from the management restructure that would not be in the best interests of CVL.

124. As to clause 5.3 of the draft Settlement Agreement he concluded that for a senior manager to offer a document with so many changes from the ACAS template and to suggest it was the model document was an attempt to influence the decision makers to agree to his terms. He noted Mr Beety's CVL role included offering HR advice within CVL.

125. As to Mr Beety's HR expertise, he concluded that Mr Beety had considerable HR contractual experience and had been dealing with people issues, management of staff, numbers and job roles for most of his professional life. In addition he had handled Mr Morrell's exit from CVL himself and dealt with the termination of the employment of someone else in 2012. Mr Beety had proposed his own exit and had presented a draft ACAS settlement document.

126. As to the new employment contract for the adviser role, he found there was no dispute from Mr Beety regarding him removing the reference to hours of work from a CVL contract template.

127. Having set out these matters Mr Holden set out this conclusion and his decision, which was as follows:

> "Up until March 2016 the Board and the CEO had worked well together over a long period of time. The discussion with Simon Pearson on 9 March and subsequent circulation of the proposed severance terms drawn up by you with its terminology of 'contractual redundancy payment of £53,125.06 gross and contractual sabbatical payment of £23,020.86' (email from Chris Beety dated 9 March) caused alarm among the Board. Internal attempts to clarify the basis for the sums included by you in your proposed severance agreement failed because you were, and still are, of the belief that the sums included for your redundancy and sabbatical are yours by right. Your desire to achieve a settlement based on your figures drive your behaviours. The Board had every right to trust you to give them the right information given your experience and knowledge. You betrayed their trust and in making and presenting your proposed exist package in the way that you did. I therefore uphold the decision of gross misconduct and the decision to terminate your employment as an appropriate sanction."

128. To conclude the process the claimant wrote to Mr Purvis seeking his stage 2 appeal on the basis that his contract of employment provided for such an appeal. The respondent refused to allow this third stage appeal on the basis that the procedure was designed to deal with disciplinary matters relating to junior employees and not to members of senior management. It would have been nonsensical to have sought to follow it in circumstances where the person who was subject to the disciplinary proceedings was the Chief Executive. The procedure would have required the first and second stages of his appeal to have been heard by persons who were junior to the Management Board, and in one case junior to Mr Beety himself.

129. The following points arose from the cross examination of Mr Holden:

> "(1) I read the documents in detail before the appeal hearing. I was happy to hear anything that Mr Beety had to say.
>
> (2) Mr Beety expressed reservations about the whole process and the characters involved in it.
>
> (3) He contacted every person Mr Beety flagged up in his appeal. He did not flag up Mr Davidson or the auditor as someone to be contacted.

(4) His decision to contact the witnesses by telephone was to best fit in with Mr Beety's timescale to conclude the appeal. Mr Beety had the opportunity to say what he wanted to be raised with those individuals. In the light of the information received after passing on the interview notes I did not consider there was sufficient information to warrant a further hearing.

(5) I did get the transcript of the meeting with Mr Elliott together with the notes provided by Mr Elliott; I looked at both.

(6) Mr Beety challenged everything. That's why I spent so long with him.

(7) I spent 54 minutes on the telephone with Mr Pearson discussing the points I wanted to raise. I declined an invitation to meet him.

(8) To me it was fairly straightforward. There were a few meetings over a short period and the fact that so much has been written was incredible to me.

(9) Was the claimant guilty on the balance of probability of pulling the wool over management eyes to his own advantage?

(10) The concluding document was a rehash of something he had seen earlier.

(11) On the evidence produced he came to the conclusion that the original decision was well-founded.

(12) I did not speak to anyone else in connection with the conclusion.

130. Although we have made reference to the sabbatical document, we have not yet referred to it in any detail.

131. On 12 April 2011 the claimant sent an email to Gerry Kennedy, "Re: Sabbatical". He notes that the STA approach was on the basis of granting a three month paid sabbatical to employee following ten years' service but he had amended their approach to reflect 15 years' service, and he suggested something on the lines of:

> "This letter is to record agreement for a paid sabbatical three month period following 15 years' service.
>
> - During the three month period your existing employment contract will continue.
>
> - You undertake to return to normal duties at the end of the three month period.
>
> - You undertake to be available for contact throughout the three month period.
>
> - The Deputy CEO will manage the operation on a day-to-day basis during the three month period and will be the contact, as the need

might arise, in either direction and a telephone conference will be held at least monthly.

Whilst there is now no rush before 2012 I would like to have these terms agreed for future use."

132. On 15 April 2011 Gerry Kennedy emailed the claimant attaching an initial draft letter for his consideration, and the claimant replied after three hours saying he was happy to agree on the terms.

133. Mr Kennedy, as Chairman of Management Board, produced as an attachment to an email a letter to the claimant dated 15 April 2011 headed "Sabbatical Leave" and stating:

"Further to our informal discussions over recent months concerning a sabbatical period of leave following an excessive input of your time over several of the past few years and prior to the recruitment of a replacement Deputy Chief Executive Officer earlier this year, I set out below the terms of a three month period of paid sabbatical leave to commence on 'date':

- During the three month period your existing employment contract will continue and you undertake to return to normal duties at the end of the sabbatical period.

- You also undertaken to be available for contact by your Deputy CEO, by telephone, email or in person at any time within reason throughout the three month period.

- The Deputy CEO will manage the CVL operation on a day-to-day basis and will be the contact, as the need might arise, in either direction during your period of leave.

- A telephone conference between you will be held at least monthly.

I thank you for your commitment over the past 15 years as Chief Executive of Community Ventures, the impact of which has been evident in the steady growth and diversification of our business.

I trust that you will enjoy your fully deserved period of sabbatical leave."

134. There is a manuscript note on this document to the effect that S Pearson was not on the Board from December 2010 to December 2011 when this letter was written by Mr Kennedy.

Submissions

135. Both representatives provided us with written submissions and each was given the opportunity to add to them orally. The claimant's written submissions were set out over 42 pages and those of the respondent over 24 pages with double rather than single line spacing. We have considered the submissions in detail and taken them into account when reaching the conclusions which follow.

Discussion and Conclusions

Unfair Dismissal

136. At the start of this Judgment we set out the list of the issues to be considered as provided by the claimant's solicitor in his submissions. The first five questions relate to unfair dismissal.

137. The law on unfair dismissal is to be found in the Employment Rights Act 1996 and in particular section 98:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) In subsection (2)(a) –
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
>
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

138. As to the reason for the dismissal, we remind ourselves of the letter of dismissal sent by Mr Dorman-Smith in which he concluded that the allegations found to be proved amounted to a serious breach of the implied contractual duty of trust and confidence which the claimant owed the charity and therefore he found that such a breach amounted to gross misconduct.

139. Having considered the evidence and the dismissal letter, we conclude that the principal reason for the claimant's dismissal related to his conduct which is a potentially fair reason.

140. The remaining unfair dismissal questions flow from the well-known case of **British Home Stores Limited v Burchell [1978] IRLR 379**, a case in the Employment Appeal Tribunal, which holds that:

> "In a case where an employee is dismissed because the employer suspects or believes that he has committed an act of misconduct, in determining whether that dismissal is unfair an Employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

141. In this case an independent consultant stood in for the employer by agreement between the parties following the suggestion of the claimant's solicitor that Mr Pearson was not an appropriate person to conduct a disciplinary hearing involving the claimant. The Tribunal agrees that Mr Pearson would not have been suitable and that in this case it was entirely sensible to involve an outside consultant to whom the decision was delegated.

142. As to the investigation, the respondent company was assisted by solicitors resulting in their meeting with the claimant and the note produced of that meeting. In addition, there were put before the disciplinary hearing copies of the relevant documents produced by the claimant and the respondent at the time when the questions of termination by reason of redundancy and of redundancy payments were being considered in respect of the claimant and Mr Morrell.

143. We have made reference above to the ACAS Code which states that:

> "It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the

> employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing."

144. In this case there was a meeting with the claimant on 20 April 2016 which was stated to be purely a matter of fact-finding, not a disciplinary hearing. It was simply to establish the facts. There was also a collation of the documentary evidence.

145. Given that the events in question occurred over a relatively short period, that they were reduced to writing by the claimant and respondent and that the claimant was given an initial opportunity to explain matters in his meeting with Mr Elliott and Mr Pearson, we conclude that the investigation which resulted in the presentation to the disciplinary meeting of the record of the discussion and the various papers collated by the respondent amounted to as much investigation into the matter as was reasonable in all the circumstances of this case.

146. Has the dismissing officer, acting in place of the employer, established the fact of his belief? We have received the evidence of Mr Dorman-Smith. He has been cross examined. We have given careful consideration to his letter in which he sets out the reasons why he believes the claimant is guilty of misconduct, and based on these matters we are satisfied that Mr Dorman-Smith did believe in the guilt of the employee as set out in his letter. We are also satisfied that Mr Holden believed what he wrote in the appeal outcome letter.

147. Did he have in his mind reasonable grounds upon which to sustain the belief? It was of particular concern to the claimant that Mr Dorman-Smith had not taken any steps to interview the members of the Board who were the people referred to in the allegations as being misled. In this case there was an appeal and the appeal officer took on board the claimant's appeal point as to the lack of involvement of the directors, and Mr Holden took steps to interview them albeit by telephone following his meeting with Mr Beety. Unlike many appeal officers, Mr Holden provided the appellant with the information that he had gathered and gave the appellant the opportunity to comment upon it before he reached his conclusion.

148. In the light of this we find that following the very full appeal process any defect which there may have been in the original hearing was cured by the actions of the appeal officer and so in our judgment the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

149. As an aside, the claimant raised an objection to the presence of Mr Pearson with Mr Dorman-Smith in the original disciplinary meeting. Whilst accepting the evidence of Mr Dorman-Smith that he was not influenced by Mr Pearson, we think it fair to say that in our judgment Mr Dorman-Smith should not have arrived with Mr Pearson, should have kept a respectable distance from him during any intervals in the disciplinary hearing, and should have ensured that Mr Pearson left with the claimant so that he was never at any stage alone with Mr Pearson.

150. The List of Issues for the Tribunal to consider does not include whether or not it was fair to dismiss the claimant. This question must be answered. We remind ourselves of the slightly later case of **Iceland Frozen Goods Limited v Jones [1982] IRLR 439** also in the Employment Appeal Tribunal. The authorities establish

that in law the correct approach for an Employment Tribunal to adopt in answering the question posed by section 98(4) is as follows:

(1) The starting point should always be the words of section 98(4) themselves;

(2) In applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether they consider the dismissal to be fair;

(3) In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) The function of the Employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

151. We again remind ourselves that we are here dealing with the decisions delegated to Mr Dorman-Smith in the first instance and Mr Holden in the appeal, rather than the decisions of the employer. Given their findings we have no doubt that the decision to dismiss the claimant in the particular circumstances was within the band of reasonable responses. We agree with the finding of Mr Holden that the claimant had, on the balance of probability, pulled the wool over the eyes of board members to his own advantage.

Wrongful Dismissal and breach of contract

152. The issue here is, for the purposes of the wrongful dismissal claim, was the claimant guilty of gross misconduct? It is for this Tribunal to reach factual conclusions as to the claimant's conduct when considering this aspect of the claim.

153. What facts do we find in relation to the claimant's claim for wrongful dismissal i.e. the right to be paid for his contractual period of notice?

(1) In the forward planning discussion paper there was no reference to anyone in particular leaving by reason of redundancy and no figures were mentioned.

(2) At the Management Board meeting on 29 January 2016 the minute is that the paper was tabled and discussed in detail. The recommendations were accepted. Nowhere are any figures reported in the minutes of the meeting. We cannot be satisfied on the evidence that any figures were provided by the claimant to the board. The claimant was responsible for the drafting of the board minutes in conjunction with Mr Davidson.

(3) On 8 February the claimant set out in an email the discussion at the last Board meeting, which refers to the implementation of the restructure which "will necessitate redundancies in CVL. This will in practical terms required enhanced redundancy payments through Settlement Agreements to facilitate the changes. Payments based on actual weekly salary rather than the statutory cap of £475 per week would incur a maximum one-off total cost of circa £65k for which a provision would be made in the 2015/16 accounts".

154. In this email the claimant does not set out the individual amounts that he and/or Mr Morrell would be entitled to by way of statutory redundancy payments, and he does not explain the apportionment of the £65,000 between himself and Mr Morrell. He does not state that anything other than a week's pay up to the maximum of the statutory cap is all that anyone is entitled to in the absence of any contractual arrangement to the contrary. There is no reference to the subsequently claimed sabbatical payment. The claimant, in our judgment, did not provide all of the information that he should have provided to enable the management board to make a fully informed decision on a question involving a substantial benefit to himself. He did not advise that the board could consider taking independent advice on his proposition.

155. The claimant dealt with the redundancy of Mr Morrell on the basis that he had described in a manner that he hoped would set a precedent for the company dealing with his own redundancy.

156. When the claimant met with Mr Pearson on 9 March 2016 he gave a greater explanation, but then in his email of 9 March at 22:58 he referred to "future arrangements as agreed" and then seemingly for the first time made reference to a contractual redundancy payment for him of £53,125.06 gross and the contractual sabbatical payment of £23,020.86 gross.

157. Along the way the claimant intimated to the members of the Board that if they wished to talk to him about matters they could do so, and unfortunately none of them took up this offer. No-one made any further enquiries as to how the figures were calculated.

158. Whilst the claimant may not have been an HR expert he did advise the board on HR matters and he had sufficient knowledge of the law concerning redundancy to know how to calculate redundancy payments on a statutory basis, including the statutory cap on a week's pay, and that in some cases redundancy payments might be enhanced. He was also familiar with the use of compromise agreements and the preparation of employment contracts.

159. In the light of these matters we find that the claimant was guilty of gross misconduct in that he failed fully to divulge all relevant matters to the Board of Directors of a charity when seeking to negotiate for himself an advantageous redundancy payment and payment in lieu of a sabbatical. The claimant failed to provide the full and complete information that he should have done, which would have started with the statutory redundancy entitlement before going on to provide a suggestion of a potential and substantial enhancement rather than jumping straight to the enhancement.

160. The claim in respect of notice pay therefore fails.

161. We should also consider under the heading of breach of contract the claimant's claim in respect of payment in lieu of the sabbatical. This is not mentioned in the List of Issues for the Tribunal to consider, but it is clearly on the claim form.

162. Neither party could take us to any decided case that might assist on this question.

163. In submissions on behalf of the claimant there was reference to the claimant producing evidence of the granting of the sabbatical. Whilst Mr Dorman-Smith saw no reason for any payment in lieu, it was clear that the claimant would not be able to take the sabbatical as the company wanted him to work continuously to 31 August 2016 to prepare the upcoming tender. The submission then went on to deal with whether or not requesting that he be paid in lieu could be interpreted as misconduct.

164. With regard to the appeal, it was submitted that the question of the sabbatical was discussed on 9 March 2016. It was clearly in the interests of CVL to pay in lieu at the same cost as if taking the sabbatical rather than having the claimant take it during the remaining months of his full-time employment when they wanted him to deal with the tender document. The request for a payment in lieu appears to have triggered a negative reaction, despite the fact that it was no additional cost to the company. Sabbaticals remain something that is earned. Is it really dishonest to seek payment for a bonus entitlement you cannot take for reasons which were clearly in the company's interest?

165. The respondent notes that the claimant put forward that he should be paid a sum of £23,000 in lieu of a sabbatical that he had never taken. The claimant had apparently agreed years back with Gerry Kennedy that he could take a sabbatical but had never taken it. He sought to add the value of that to his pay-out. Again that was presented as contractual. Whether or not there had been any contractual right in the first place for the claimant to take a sabbatical while employed there was plainly no agreement whatsoever that he could convert it into cash if not taken.

166. In counsel's submission on the claimant's best case the documents provided for the right to a paid three months' sabbatical during employment at a time to be agreed. Any such agreement was incomplete in that the date of the sabbatical was never agreed. What is clear is that there was no provision for any entitlement to a payment in lieu if the sabbatical was not taken. The only entitlement, if at all, is for a sabbatical period to be taken during employment. The former (right to pay in lieu) simply does not follow from the latter. Counsel concludes by submitting that there is simply no proper basis on which to maintain a contractual claim for payment of any sums in respect of the sabbatical which the claimant never took.

167. On the evidence we are satisfied that the claimant reached an agreement with the then Chair of the organisation that he could take a three month sabbatical. The letter referring to it was dated 15 April 2011, and it referred to "informal discussions over recent months" and provided for a three month period of paid sabbatical leave to commence on a date that was not then agreed and thus was not in the document.

168. The document did not provide for any terms as to what would happen if the claimant did not take the period of sabbatical leave offered to him in April 2011. The

claimant did not seek to raise this issue with the Board until the question of redundancy for him was raised in 2016.

169. Given the lack of any reference to the claimant being compensated if he did not take the sabbatical, we do not conclude that there was a contractual right to payment in lieu.

170. In the alternative we find that any rights to take sabbatical leave at some future time, or to be compensated for it if not taken, ended when the contract of employment was terminated as a result of the claimant's gross misconduct.

Age Discrimination

171. The seventh issue recites that the respondent subjected the claimant to treatment falling within section 39 of the Equality Act 2010 by dismissing him, and it asks has it treated the claimant less favourably than it treated or would have treated him had he been of a different age group?

172. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee by, amongst other things, dismissing him.

173. Section 13 of the Equality Act 2010 provides that:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

174. Section 5 of the Equality Act 2010 deals with the protected characteristic of age and provides that:

> (1) In relation to the protected characteristic of age –
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.
>
> (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

175. Mr Allen’s submissions on age discrimination issues seemed to relate to the question of who was going to be dismissed by reason of redundancy, rather than in relation to the decision to dismiss the claimant which was for reasons related to Mr Beety’s conduct and not to his age.

176. Looking at the question in simple terms we are satisfied that the claimant was not treated less favourably because of his protected characteristic of age when he was dismissed. The treatment, the dismissal, was because of his conduct. Had the allegations been made against a hypothetical comparator CEO in a different age group then we find that on the facts found the dismissal of the comparator CEO would still have taken place. The claimant therefore has not proved facts from which we could properly conclude that the difference in treatment was because of his age and the age discrimination claim is therefore dismissed.

Employment Judge Sherratt

12 December 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
14 December 2018

FOR THE TRIBUNAL OFFICE