EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4116742/2018

Held in Aberdeen on 18, 19, 20, 21, 22 February and 10, 11, 12 and 13 June 2019

Employment Judge A Kemp (sitting alone)

Mrs R Milne	**Claimant** **Represented by:** **Mr F Lefevre and** **Mr D Burnside** **Solicitors**
Buchan Dial A Community Bus	**Respondent** **Represented by** **Ms Y Buckle** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was unfairly and wrongfully dismissed by the respondent, and she is awarded the sums of Eight Thousand, Two Hundred and Ninety Nine Pounds and Seventy Seven Pence (£8,299.77) in respect of unfair dismissal, and Six Thousand, Seven Hundred and Seventy Six Pounds and Seventy Six Pence (£6,776.76) in respect of wrongful dismissal, a total of Fifteen Thousand and Seventy Six Pounds and Fifty Three Pence (£15,076.53).

REASONS

Introduction

1. The claimant pursued claims of unfair dismissal, and for breach of contract in respect of notice pay. They were defended by the respondent.

2. At the commencement of the hearing I disclosed to the parties that I had, until about ten years ago, been in partnership with Mr David Burnside, a solicitor who it was intended would take over the conduct of the case from Mr Lefevre towards the end of the hearing on 21 February 2019 as Mr Lefevre, who was to conduct the initial four days of evidence for the claimant, was due to be travelling abroad. I also disclosed that I knew two of the prospective witnesses for the respondent, being Ms Noble who had been the HR manager of a client company I acted for about four years ago, when I was in private practice, and Ms Lockhart who had been a colleague, as an employee of the firm of which I was a partner, until about five years ago. After an opportunity to take instructions neither party had any objection to my hearing the case.

3. There was then a discussion with agents about the pleadings. Ms Buckle explained that she had made an error in the Response Form. Whilst it stated at paragraph 16 that the allegations save (a), (b) and (e) (or 1, 2 and 5 as they were numbered in documents in the bundle) had been dropped, she wished to amend to include the first two sentences of allegation 4, and both of allegations 6 and 7. This was opposed by Mr Lefevre who stated that he had prepared the case on the basis of the pleadings, and had he been aware of such issues would have undertaken further preparations. He sought the exclusion of all evidence related to those allegations which had been dropped. Ms Buckle argued that the issues were inter-related. After hearing further from both solicitors and adjourning briefly I decided that the issue was one of case management under Rule 39, and that it was not in keeping with the overriding objective of Rule 2 to allow such an amendment on the morning of the Final Hearing, but that it was not I considered in keeping with the overriding objective to exclude all evidence in relation to them as it was possible that such evidence

may be relevant to the allegations that had not been dropped, as well as to issues of reliability and credibility, and that such an issue could be decided when the evidence was led, and any objection taken. No objection was later taken, save in respect of one matter which arose.

4. The allegations that were, according to the pleadings, not dropped were those at numbers 1, 2 and 5 in the letter that called the claimant to the disciplinary hearing, as referred to further below. During the course of evidence, there was a question addressed to an allegation in relation to jewellery which had not been pled, or referred to in the decision letter, and which I indicated I did not consider had been the subject of fair notice to the claimant, and Ms Buckle agreed not to pursue that matter.

5. The evidence for the respondent was heard subject to the interposition of Mr Imray, a witness for the claimant, and a break in the evidence of the claimant to allow evidence from her other three witnesses on 12 June 2019 all of which took place with the parties' agreement. Ms Buckle requested that the claimant did not sit in during that day of evidence when her witnesses were heard. Mr Burnside wished her to do so. I considered that it was a matter for the claimant, who was entitled to hear the evidence, but that her having done so may be a matter to take into account in the assessment of the evidence as a whole. In fact it did not feature in the submissions made.

6. During the course of the claimant's evidence, she stated on a number of occasions that she had set matters out in emails, or other documents, which were not before the Tribunal. Attempts were made to obtain them, and a further email was obtained from Mrs van den Akker shortly before she gave her own evidence. Not all documents that might have been relevant were however before the Tribunal. The claimant had not sought any order to obtain documents from the respondent which she might have considered relevant. A large number of emails, some one thousand, had been it was said in evidence, removed from the claimant's laptop, but the cause of that was not known and not established in evidence, and it appeared that they had been restored. Although there was a discussion during the final week of evidence as to

whether to adjourn further to seek additional documents, given the delay that that would involve and the lack of clarity of what if anything may be produced, the parties agreed to proceed and conclude the case. That was in accordance with the overriding objective.

The Issues

7. The issues before the Tribunal were–

    1. What was the reason for the claimant's dismissal?
    2. If potentially fair, was the dismissal unfair under section 98(4) of the Employment Rights Act 1996?
    3. Was the claimant wrongfully dismissed and entitled to notice pay?
    4. In the event of any finding in favour of the claimant what award should be made?
    5. In that regard, (i) did the claimant contribute to her dismissal, and if so to what extent and (ii) had the claimant mitigated her loss?

The Evidence

8. The parties had agreed a single bundle of documents, extending to over 600 pages, together with a bundle of timesheets at Bundle B, and further documents tendered by each party without objection from the other both at the start of the hearing and during its course. Not all of the documents in the bundle were spoken to in evidence.

9. The Tribunal heard evidence from (i) Mr Spencer Critten, the Chair of the Board of the respondent, (ii) Mr Andrew Imray a former colleague of the claimant whose evidence was interposed with the agreement of Ms Buckle, (iii) Ms Melanie Noble formerly of Empire Law at Work who carried out investigation work, (iv) Ms Susie Lockhart also of Empire Law at Work who chaired the disciplinary hearing, (v) Mr Grant Keenan who heard the appeal, (vi) the claimant herself (vii) Mrs Jacqueline van den Akker a Board member of the respondent, (viii) Mr Roy Milne who attended one of the board meetings and (ix) Mr Alan Brown, a former director and employee of the respondent.

The facts

10. I make the following findings in fact:

11. The claimant is Mrs Rachel Milne.

12. The respondent is Buchan Dial a Community Bus. It is a company limited by guarantee. It is a charity. It employed 16 members of staff at the times material to this case.

13. The claimant commenced working for the respondent as a Co-ordinator on 1 May 2000. She was promoted to the position of General Manager by 2009. She also undertook the function of Traffic Manager, also referred to as Transport Manager. Until the dismissal referred to below she did not have any disciplinary record.

14. The claimant's contract of employment with the respondent is dated 24 December 2009. There was no written job description.

15. The contract of employment provided that her position and duties included supervision and management of financial, legal and operational matters. She had responsibility for the respondent and an organisation named DAB Plus, referred to further below. Her normal hours of work were 35 per week, with additional hours if required paid at the normal hourly rate (which was not defined). No time off in lieu of additional hours is permitted without the prior agreement of the Manager (who was not defined). There was a provision headed "Outside Business Interests" which stated that the claimant was expected to devote her whole time and attention to the best interests of the Company during working hours, and she "must not carry out any work (whether paid or unpaid) which may be in direct competition with the Company".

16. Her right to notice was for one week per year of continuous employment up to a maximum of twelve. The contract provided "The Company reserves the right to terminate your employment without notice in the event of gross misconduct or breach of contract." Those terms were not defined. There was a clause with regard to the Disciplinary Policy stating that it was not contractual. A clause

referred to the Handbook and stated that save for section two it was not contractual. The contract was governed by and to be construed under the law of Scotland. The claimant signed the contract on 24 December 2009.

17. The Employee Handbook included an organisational structure chart showing at its head "Trustees", below that "General Manager" and below that "Operations Supervisor" "Finance Supervisor" and "Training Manager", with below that respectively "Operations Department", "Accounts Department" and "DAB Plus Driver Training".

18. The Handbook included a disciplinary and dismissal procedure, which was not contractual. That included a non-exhaustive list of gross misconduct offences which included "Failure to carry out a reasonable and lawful instruction given by a superior during working hours…Gross insubordination…."

19. The respondent is regulated by Office of the Scottish Charity Regulator (OSCR). They can have their accounts audited by that body as part of that regulatory regime.

20. They offer transport for those who require it for visits to hospital, for shopping and similar purposes.

21. They operated by what they termed a Board of Trustees, and separately have directors. As at March 2018 there were two directors of the respondent namely Spencer Critten and Norma Thomson, who were also members of the board of trustees. The board of trustees also included Mr Grant Keenan and Mrs Jacqueline van den Akken, such that there were a total of four trustees at the times material to the present case.

22. The claimant as General Manager reported to the Board of Trustees. She was not herself a member of the Board of Trustees, nor was she a director.

23. The respondent was governed by its Articles of Association ("the Articles"). They provided that, amongst other matters:

    (i) The term "Management Committee" was defined as "all those appointed to perform the day to day management of the Company"

(ii) The term “Directors” was defined as “those appointed to ratify the decision of the Management Committee and those responsible for the legal obligations of the Company.”

(iii) Any member who wished to be considered for appointment as a director required to lodge a written notice of same at an annual general meeting, or may be appointed by the other directors.

(iv) There was a Management Committee of not less than seven and not more than twelve persons, which included the directors.

(v) The business of the company was to be managed by the directors under Article 54 and can delegate powers to a sub-committee under Article 61.

(vi) The day to day management of the Company was the responsibility of the Management Committee under Article 62.

(vii) The quorum for the Management Committee was five under Article 65.

(viii) Article 68 provided that acts done by the Management Committee or any member of the Management Committee shall be valid even if it is afterwards discovered that there was some defect in the appointment of the Management Committee or person acting as such.

(ix) There was a power to invite others to attend the meetings of the Management Committee under Article 70.

(x) There was to be an Annual General Meeting of members, and if called an Extraordinary General Meeting. A quorum for the General Meetings was one tenth of the members, or five, whichever was greater (the number of members of the respondent was not given in evidence)

(xi) No director of the board including the chairman, had a casting vote at any meeting of the Management Committee. It further had provision for the number of directors and quorum which were

24. The Board of Trustees was in practice the Management Committee under the Articles.

25. The respondent receives grant and other income from organisations such as Aberdeenshire Council and Aberdeen City Council, from donations from others, and from similar sources.

26. The respondent established a related organisation named DAB Plus in 2007. It is a Community Interest Company. It was established by the respondent as a means of providing income for the respondent. It is not a charity. It is not regulated by any third party. Where it makes sufficient profit it is able to make grants to the respondent. It was referred to by the respondent on occasion as "the entity", (and that term shall be used for DAB Plus hereafter to distinguish it from the respondent).

27. The entity operates by a Board of Trustees, and separately has Directors. There were two Directors of the entity as at March 2018 being Spencer Critten and Jacqueline van den Akken, who were also board of trustee members. Also on the board of trustees of the entity were Grant Keenan and Norma Thomson.

28. The entity had at the time of the material events for this case two employees. It received income from sources which include a training department, which offers training to drivers for payment of a cost to the entity, and another department operating school buses.

29. Each of the respondent and the entity produces its own accounts. Each has a year end on 31 March. The accounts are prepared by external accountants.

30. In the financial year to 31 March 2018 the respondent made a profit of about £32,000, and held assets including cash in the bank.

31. The entity made a loss in the financial year to 31 March 2018 of £15,300. Within the entity there were departments which made profits, and some making losses. The department called "Shire Schools" made a profit of about £20,000. The training department made a loss, and had never made a profit. As a result of the trading of the entity, it only made two donations to the respondent in the period 2014 – 2018 totalling £1,630. Prior to 2015 it had made more substantial donations to the respondent but thereaftter it had not been able to do so to any

as it did not make profit. Loans had been made by the respondent to the entity in order to allow the latter to continue to trade.

32. The claimant acted as General Manager for the entity, although she was employed and paid by only the respondent.

33. The respondent owned the buses which were used to carry out a large part of the services it provided. There were two principal contracts, one for Aberdeen City Council, and one for Aberdeenshire Council, which the respondent referred to respectively as the City contract and the Shire contract.

34. On 17 January 2018 a meeting of the respondent's Board of Trustees was held. A minute of it was prepared afterwards which was reasonably accurate.

35. One issue discussed at that meeting was the operation of contracts by the respondent and the entity, on which the claimant gave a report. The City contract was in relation to running schools' buses, which had been run on a licence held by the respondent, known as a section 19 licence. It was not possible to continue to operate that way, following a challenge in court in relation to that licensing system, and it was considered necessary to have an "Operator's Licence", referred to in documents as an "O Licence", in order to do so. It was understood by the respondent that they could not hold both a section 19 licence and an O licence. The respondent required to maintain a section 19 licence for other operations.

36. The claimant proposed that the entity was to be used for the purpose of holding such an O Licence to allow continued operation of the buses being used for the City contract, with each of the three buses used on that contract requiring to have its own O-Licence. The entity held an O Licence which it used to assist in the operation of the Shire contract. The intention was that the respondent would continue to hold the contract with Aberdeen City Council, which had about three years still to run, and to grant a sub-contract to the entity under which the entity would undertake much of the work in servicing the principal contract. The intention was that the respondent would continue to own the buses used for the City contract and lease them to the entity, with some of the

respondent's staff considered to be assigned to the operation of the City contract being transferred to the entity, and with certain other as yet unresolved aspects of the management of that contract to be performed by the entity.

37. No written sub-contract for that proposed arrangement was prepared at any stage. The outline arrangements for the sub-contract were not agreed between the respondent and the entity beyond those outined in the paragraph above.

38. The contract issued by Aberdeen City Council to the respondent had a prohibition against sub-contracting without its express permission. Indications had been given that the Council were supportive of the sub-contract, but formal permission had not been granted and the documentation for that not completed.

39. In order to be able to have the entity's O Licence extended to cover the buses to be used in the proposed sub-contracting arrangement, the Traffic Commissioner, who regulated such licences, required evidence of sufficient funding within the party seeking the O Licence in respect of each bus. There was a concern that the entity did not have sufficient funds or assets to meet the requirements for funding, which was understood to be for a sum of £29,550 for all three buses involved. The entity had fluctuating sums in its current account, of about £10,500 and in its deposit account of about £13,000, at or around the time of that meeting. If there were not sufficient funds held, and evidence of the same able to be produced, the Traffic Commissioner would not grant the O-Licence to the entity, and the proposed sub-contract could not take place. As the respondent could not itself operate the contract, as it was not able to hold the O Licence, the City contract would be required to terminate. It provided turnover to the respondent of about £120,000 per annum.

40. There was a discussion as to options for addressing that required level of funding, including the raising of finance by the entity itself, by overdraft facility, and a loan to it by the respondent, at the board meeting, but no conclusion was reached at it.

41. Following the meeting, in the period up to about 7 Mach 2018, it was agreed in principle by separate discussions between Board of Trustee members in a series of meetings, calls and emails, that the respondent would loan the entity the sum of £10,000, to be repaid by 31 March 2018 so that it did not appear as a loan due to the respondent by the entity in the accounts for the end of the financial year on 31 March 2018. This agreement was noted in italics in the minute of meeting.

42. The use of an italicised type on the minute indicated that it was not a part of the formal minute of the meeting.

43. The italicised entry added in reference to the loan of £10,000 the following

> "It will be repaid in full to DACB on 31st March [2018] (for the end of the financial year) at which point DAB Plus should have the O licence extension and the agreements for the contracts. At this point we will invoice DACB (in advance) for the management fee to run the contracts and this will cover the required amount until the income cash flow appropriately increases".

The reference to "we" therein was to the entity, although the minute was a meeting in relation to DACB, the respondent.

44. On 6 February 2018 the claimant wrote to the members of the board of trustees of the respondent and stated the following:

> "So unless anyone disagrees …and if so, please let me know within the next 24 hours. I will be transferring a 2 month loan of £10,000 to DAB Plus from Dial-a-Community bus. This will be kept in a specific account within DAB Plus and be appropriately segregated from any normal funds. It will be repaid in full to DACB on 31st March (for the end of the financial year) at which point DAB Plus should have the O licence extension and the agreements for the contracts. At this point we will invoice DACB (in advance) for the management fee to run the contracts and this will cover the required amount until the income cash flow appropriately increases."

45. Neither the minute of the meeting on 17 January 2018 nor the email of 6 February 2018 stated what the management fee would be, and did not specify what the "required amount" was, or how it would be assessed. The claimant did not receive a reply to her email of 6 February 2018.

46. The loan of £10,000 was made by the respondent to the entity shortly after 6 February 2018 (on a date not given in evidence). It was held by the entity in a reserve account number 00710438.

47. The minute of the meeting on 17 January 2018 also had an entry headed "Signatories", which for the respondent added as signatories to the bank accounts Sean Reynolds, Jayne Fraser and Spencer Critten. It added "The staff and Rachel can sign/counter-sign checks up to a value of £5,000. Anything over that must be authorised/signed by a Board member/Director."

48. The minute of that meeting also had reference to a possible further trustee being appointed, namely Mr Roy Milne. Mr Milne is not a relative of the claimant. He was a director of a company in the oil and gas industry, and had offered through the Chamber of Commerce to be a non-executive director for charities or similar organisations. He met the claimant initially to discuss his possible involvement with the respondent in late January 2018.

49. On 31 January 2018 after Mr Milne met the claimant he emailed her formally to express an interest in the "voluntary position of Non-Executive Director" at the respondent. On 2 February 2018 he met Ms van den Akker to discuss the proposal. She considered that he would be suitable to be appointed to the board (it was not clear whether that was to be either as trustee, or director, or both). It was agreed that Mr Milne attend the next meeting of the board of trustees of the respondent to meet them and discuss further his potential involvement.

50. The next meeting of the board of trustees of the respondent was on 14 March 2018. It was held at the offices of Mr Milne at the company of which he was a director and employee, Global SCS. At the start of that meeting Mr Critten who

acted as Chair welcomed Mr Milne to the meeting and thanked him for the use of his office.

51. Mr Milne was not at that meeting appointed a director of the company, or a trustee. He was present in order to consider his appointment, and was able to participate in the discussions. He was included in a number of emails sent after it had taken place.

52. Those attending the meeting were the claimant, Mr Critten (trustee and director), Ms van den Akker (trustee) and Mr Milne. The claimant attended but not as a board member of the respondent either as trustee or director. Mr Milne attended as a prospective board member. Apologies had been tendered by Ms Norma Thomson, director and trustee, and Mr Grant Keenan, trustee.

53. There was a discussion as to the proposed sub-contract of the City contract which was brought forward as Ms van den Akker could not stay for all the meeting. The claimant had prepared some costings, as she explained to the meeting, but did not have them with her and it was agreed that she would provide them to the trustees after the meeting, and meet Mr Critten to discuss them.

54. There was a discussion as to a proposal to follow up on the repayment of the loan of £10,000, the result of which was thought by the claimant to leave the entity with less than the required £29,550 of funds, by payment by the respondent to the entity of a management fee, in advance, in respect of the proposed sub-contract. That was the proposal that the claimant had advocated for, and she contended that £10,000 was the appropriate sum for that management fee. Although Mr Critten had concerns, during the meeting he indicated his assent to that proposal, as did the others present.

55. Also discussed at the meeting was a question as to the General Data Protection Regulation requirements for the respondent. Mr Milne, it was agreed, was to submit from the company of which he was a director a price for the necessary work so that that price could be assessed as to whether it was more financially or organisationally sensible to do the work in house or

outsource it. That issue was then agreed to be one that would be discussed further between the claimant and Mr Critten.

56. On 15 March 2018 Mr Critten sent an email to the claimant and Mr Milne setting out his understanding of some of the financial matters from "the board meeting", which included.

> "in relation to costs of o licence change although Rachel had figures they weren't available for meeting so agreed that Rachel and myself would agree these at the earliest opportunity but again I'm mindful of timescale".

57. On data protection it noted that Mr Critten would speak to the claimant including about "the possibility of outside assistance and weighing cost of this up"

58. On 16 March 2018 the claimant emailed Mr Critten, Mr Milne and Ms van den Akker to forward to Ms van den Akker the email of 15 March 2018, she having not been a recipient, and to send to them what she termed Action Points from the meeting on 14 March 2018, rather than having "heavily detailed minutes". She asked if she had missed anything adding "Spencer we seem to be in agreement with the basic points which is good." She added that she would "not be asking the Board to review individual service moves or tenders" as they were she stated operational decisions not strategic ones. She added "We as a board have better things to work through". The email was not sent to Ms Thomson the director, nor Mr Keenan the other trustee, neither of whom had attended the meeting.

59. The Action Points document was attached. It had the heading "Action points from the Board meeting on Wed 14th May". The reference to May was in error, and the correct date was 14 March 2018.

60. The Action Point for the City Contracts sub-contract from DACB to DAB Plus noted under "To do" that she was to pass on the figures for "recharges" to the board. Against "Progress" as a heading for that item was noted in italics "due to FCR being imposed on DAB Plus, these figures are no longer current and therefore won't be passed on. However a strategic document showing the reasoning and the reconsidered processes will be submitted."

61. The reference to FCR was to full cost recovery, by which all costs borne by the respondent or the entity were to be calculated and charged against the party benefitting on an accurate basis for the financial year to 31 March 2018, and subsequently. Until then the respondent had paid for the full cost of the salaries of staff who had partly worked for the entity, and assets or facilities used by the entity, and the intention was to ensure that the accounting arrangements were more accurately divided between them.

62. There was also an entry for "DACB/DAB Plus loan for city contracts", which recorded that the claimant was "to ensure the repayment of the loan to the respondent on 31 March [2018]", and "also to ensure payment of a 'management fee' from DACB to DAB Plus to cover costs which will replace this loan. As per the agreement from the last meeting." Under "Progress" was recorded "In process".

63. On 22 March 2018 at 00.44 and therefore after midnight, Mr Critten emailed the claimant further regarding comments she had made about full cost recovery. He commented on the lack of correlation as he saw it between the full cost recovery between the respondent and entity, and the costs of the service being sub-contracted to the entity from the respondent. He sought further information and a strategic document that had been referred to for the "full proposed costs of this contract". He also said that until the figures were shared he "would suggest that no monies are transferred from DACB to CAB in relation to this contract"

64. On 22 March 2018 at 10am the claimant emailed Mr Ronnie Birnie an external accountant engaged by the respondent. She attached three documents, one as to FCR, one a Strategic Document on intercompany charges for the Aberdeen City Council contract and one "a full breakdown of how those charges work". (Those documents were not identified as being in the bundle before the Tribunal.)

65. In her email to Mr Birnie she referred to an earlier meeting that they had had. She did not refer to a management fee, but said "my thinking is that if [the entity] is now going to pay on a FCR basis, this profit is actually needed by [the

entity] as operational surplus in order to cover running costs and if [the respondent] insists on keeping it, they are in effect double dipping (or words to that effect)."

66. Mr Birnie replied the following day at 11.50. He set out an understanding from previous notes that there could be "an advance charge" to the charity from the entity, and funds managed to allow the entity to retain the funding needed for the Traffic Commissioner. He indicated broad approval to her proposal.

67. On 23 March 2018 at 13.41 the claimant responded to the email from Mr Critten with a copy to Ms van den Akker, Mr Keenan, Mr Milne and Ms Thomson, and referred to her having input from the respondent's accountant. She attached the email trail with Mr Birnie, without the documents she had sent to him. She said that he had "reviewed exactly the same information the Board received." She stated that "unless the rest of the Board disagree I am going to consider the matter closed…..the internals of any operational work should not be a Board discussion, if anyone wants to question the strategy then I'm more than happy to have the discussion. As I have said before, any deeper than that and we're wandering into operational decisions, and that's not the right area for a Board to be working in".

68. There was no reply to the claimant's email of 23 March 2018 either from Mr Critten or any of those who had received a copy. The claimant had not attached any of the documents she sent to Mr Birnie. None of the recipients of her email asked for them.

69. On 26 March 2018 Mr Critten emailed Ms Thomson to say that although he had asked the claimant for proposed costs "she seems reluctant to do so". He said that until they had some idea what the charity will be paying he was reluctant to authorise the payment, by which he meant the proposed £10,000 management fee.

70. On 26 March 2018 the claimant met Ms Jayne Fraser the respondent's Finance Officer. The claimant informed Ms Fraser of the decision taken on 14 Mach

2018 to repay the loan and to transfer the sum of £10,000 as a management fee to DAB Plus.

71. Ms Fraser on that date emailed Ms van den Akker as a director of the entity to request approval for the repayment of the loan.

72. Ms Fraser understood that the sum for the management fee was above the level of the claimant's authority and asked for confirmation of authority. The claimant shortly afterwards produced the minute of the meeting on 17 January 2018 on which she had marked with highlights what she considered to be the relevant parts. The claimant considered that that was sufficient and told Ms Fraser to make the payment of £10,000. Ms Fraser acted on the instruction given by her line manager, the claimant, and completed a form on that date with the respondent's bank, using an online facility, in terms of which the sum of £10,000 was to be transferred from the respondent to the entity on 3 April 2018.

73. Ms Fraser printed out that form, and the claimant wrote on it by hand "As per minute February meeting". There had not been a February meeting in 2018, and the reference was intended to be to the meeting on 17 January 2018. The claimant wrote that on 26 March 2018 as a basis for the instruction to act given to Ms Fraser.

74. Ms Fraser later that day emailed Mr Critten attaching the bank transfer for £10,000 from the respondent to the entity, to be effected on 3 April 2018 together with the minute of the meeting on 17 January 2018 with entries on that proposed issue highlighted, which she had been given by the claimant as evidence of the authority when she had asked for that. She sought email authorisation from Mr Critten.

75. Mr Critten replied to acknowledge Ms Fraser's email on 27 March 2018 and late on 28 March 2018 emailed to her further to state that he was "unable to authorise the payment at present as although we did discuss a potential management fee you will note from the minutes no amount was discussed or agreed". He said that he could not "authorise an amount of a payment that I

know nothing about, this would be in breach of GDPR and potentially our own internal anti money laundering rules."

76. Ms Fraser forwarded that email to the claimant on 29 March 2018 when she came in to the office. No transfer of the sum of £10,000 had by then been effected as the online form completed had a date of transfer of 3 April 2018. It would have been possible that day, or a day before 3 April 2018, to have withdrawn, or amended, the transfer form to the bank to recall the instruction to transfer the sum of £10,000 on 3 April 2018, or change its amount, but that was not done. Mr Critten did not instruct Ms Fraser or anyone else to do so, and Ms Fraser herself did not do so on her own initiative.

77. On 29 March 2019 the sum of £10,000.29 was transferred from the entity's account to the account of the respondent, being repayment of the loan of £10,000 that had previously been made by the respondent to the entity and 29 pence of interest. It had been authorised that day by Jacqueline van den Akker acting as a director of the entity in an email to Ms Fraser. Ms Fraser had then instructed that transfer to repay the loan made to the entity by the charity with the bank.

78. As at 29 March 2018 following that repayment of loan, the entity had the sum of £15,431.89 in its current account, the sum of £0.40 in a reserve (otherwise referred to as deposit) account number 00710438 and the sum of £14,483.76 in a reserve account number 00605189.

79. On 30 March 2018 Global SCS, the employer of Mr Roy Milne, invoiced the respondent for £1,200 plus VAT for works in relation to a GDPR audit carried out earlier that month. The work had been instructed by the claimant. Two days' work had been undertaken on 27 and 28 March 2018. The claimant had done so without having other costings from other providers. She had considered that it was more cost effective to instruct Global SCS than doing so by using an in-house resource, although no documentation for that assessment was before the Tribunal.

80. Empire (referred to below) were quoting their clients £600 for one day's work for a GDPR audit at about that time.

81. On 2 April 2018 the claimant emailed Mr Critten about the message he had sent on 28 March 2018, stating her disappointment, commenting that the transfers had been checked with the accountant and "the Board has agreed to them". She failed to see where there was a breach of GDPR or the anti money laundering policy. She objected in the strongest possible terms and sought a written apology.

82. On 3 April 2018 the respondent's bank, acting on the form Ms Fraser had earlier completed, transferred the sum of £10,000 from the respondent's account to the reserve account of the entity number 00710438 which increased the credit in that account to £10,000.40.

83. There was no written record of approval for that transaction by a director.

84. Mr Critten discovered on 3 April 2018 that the bank account balance of the entity was £10,000 higher than he expected that day. He thought initially that it was because the loan of £10,000 had not been repaid, but when he checked the statement for the account realised that the loan had been repaid on 29 March 2018 in a sum slightly over £10,000, and that there had been a further payment to the entity of the amount of £10,000 on 3 April 2018. He asked Ms Fraser about it, and she explained that the claimant had instructed it. He then called Ms Thomson to check whether she had authorised it as a director, and she confirmed that she had not.

85. Ms Thomson then sought advice from Empire Law at Work, with which the respondent had a contract for HR and employment law advice ("Empire").

86. On or about 3 April 2018 Mr Critten was asked to approve payroll for the month of March 2018 although the payment for that had already been made. The payroll had included 20 hours of overtime which had been claimed by the claimant, and had been paid to her by the end of March 2018, after she had approved payment for that overtime herself.

87. He commenced an investigation into that issue. He went to the claimant's desk in the respondent's office at Maud, and found a large number of what he took to be timesheets. He took copies of those from November 2016 to March 2018 and returned them. He then carried out an examination of them. He discovered that claims for overtime had been made for attendances at meetings of two organisations, one being CTA, the other SSE. CTA is the Community Transport Association. SSE is the School for Social Entrepreneurs.

88. He made further enquiries about those. He was told by the respondent's Company Secretary Maureen Stephen that the CTA work had been agreed to be during the claimant's own time, and that there was a minute about that. The minute, dated 12 May 2014, stated "The Directors supported Rachel's acceptance of a Trustee/Directorship of CTA UK given that she will undertake the role in her own time and they congratulated her on her appointment…"

89. Mr Critten met Ms Thomson on 4 April 2018 to discuss matters and take further advice from Empire. It was decided that it was appropriate to suspend the claimant to allow an investigation into the matter. They did not consult other board of trustee members before doing so.

90. Mr Critten handwrote a document on 6 April 2018 to authorise transfer of the £10,000 back to the respondent, which was signed by Mr Critten and Mrs Thomson on behalf of the entity. It was passed to Ms Fraser to use if needed. It was never however actioned, such that the sum of £10,000 remained with the entity in the reserve account. At any time Mr Critten or Mrs Thomson could have taken steps to have it returned to the respondent, but did not do so.

91. No invoice was prepared for the management fee, either by the claimant, Ms Fraser, or any other person.

92. A meeting was held with the claimant on 7 April 2018, a Saturday, at the respondent's office at which she was informed of her suspension. The minute of that meeting is a reasonably accurate record of it. The allegation made against the claimant was that a transfer of £10,000 had been effected outwith

the level of authority and without the necessary approvals. It was said that the respondent was “looking to recover this sum.” She was instructed not to speak to fellow employees without approval of Mr Critten or another senior manager. Access to the company’s IT system was then disabled. The claimant’s laptop, an asset of the respondent, was obtained. The claimant stated that she could not be prevented from speaking to her friends.

93. Mr Critten gave a communication to employees of the respondent on 9 April 2018 to inform them of the investigation and that the claimant would be taking a period of time away from the office. He wrote to the claimant to confirm her suspension on 10 April 2018, and explained that Empire were to conduct the investigation

94. Mr Milne sent an email to Mr Critten complaining about the treatment of the claimant (which was not before the Tribunal). Mr Critten replied on 9 April 2018 asking him to confirm his position in relation to the respondent, and Mr Milne replied that day to claim that he was a “Trustee, approved by Proxy by the Board in January 2018”. That was not the case. Mr Milne claimed that the respondent had breached the Employment Act 1995, as he referred to it, leaving it in a high risk situation he claimed, and suggested a resolution in the hope that the claimant did not pursue a claim of constructive dismissal.

95. In the period to 10 April 2018 Mr Critten carried out an informal audit of the time sheets, referencing them against meeting records for the claimant held electronically. He concluded that she had claimed for CTA and SSE meetings, such that if they were over the 7 normal hours of work, the excess was claimed as overtime. He believed, having undertaken that audit, that rather than have hours owed to the claimant she had undertaken 258 hours less than was contracted for in the period of his search.

96. The difference primarily arose as he did not consider that the hours spent on CTA and SSE work was work carried out for the respondent.

97. On 10 April 2018 the respondent wrote to the claimant to confirm her suspension and the terms in relation to that, which included not making contact

with their staff without permission from Mr Critten or a more senior manager. It was signed by Mr Critten as Finance Director.

98. At some point after her suspension the claimant asked a colleague Alan Brown to obtain for her what she said were personal possessions she kept in a drawer at the respondent premises, which included timesheets and her notebook also kept there. He did so. The timesheets included those that Mr Critten had seen and copied.

99. The claimant replied to the suspension letter on 13 April 2018 in which she asked for the return of her laptop. She also complained at the manner of her treatment and its lack of fairness, together with the impact on her health. She requested to take a companion with her to future meetings including an investigation meeting. The email was sent to all board of trustee members.

100. Mr Critten replied on 17 April 2018. He said that he was sorry for the impact on her health. He stated that the laptop "has been removed so as not to hinder our investigative process. It will be returned to you in due course." He asked her to attend an investigative meeting on 23 April 2018 and set out further allegations against her. He confirmed that she could bring her trade union representative or husband to that meeting.

101. Ms van den Akker emailed the claimant on 17 April 2018 to confirm that she had signed off on the repayment of the loan of £10,000 by the entity, and that she was a signatory on the bank account for the entity only.

102. On 18 April 2018 Mr Critten emailed the claimant attaching the respondent's Handbook. He did not accept her request for return of her laptop stating that it was company property. He stated that the investigation meeting would be held by Ms Noble of Empire, and that he would not attend it.

103. On 18 April 2018 Mr Keenan emailed the claimant and asked if she wished to meet. She confirmed that she did and they met the next day at the private residence of Mr Keenan. Mr Keenan and the claimant had a good relationship, and he was concerned as to whether the decision to suspend her was an appropriate one.

104. There was a lengthy exchange of emails between the claimant and Ms Noble, and partly with Mr Critten, with regard to the arrangements for the investigative meeting, and requests by the claimant. The claimant made a series of demands for documents. Ms Noble stated on 10 May 2018 that there were timesheets available for the claimant to collect, but that the laptop "has not been finished with". The claimant replied the same day to comment that if the timesheets were those taken by Mr Critten from her drawer they were no use and complained again about the lack of access to her laptop.

105. In an email, the date of which was not stated on it, the claimant listed all documents she sought. She received a large number of items from the respondent, but not all of those she had requested (the detail of which was not given in evidence)

106. Ms Noble conducted separately an investigation into issues which arose. She interviewed the following witnesses and took statements from them: Ms Jayne Fraser (18 April 2018), Ms Sue Foster (undated)

107. In due course the investigation meeting with the claimant was rearranged for 23 April 2018, and took place on that date. The claimant was accompanied by her husband David Milne. The minute of that meeting is a reasonably accurate record of it. At it the claimant maintained that she had been authorised by the board to pay a fee of £10,000 to the entity from the respondent at a meeting on 14 March 2018 and added that "Roy, Jacqueline and Spencer were at the meeting." She added "it would be £10k initially and we would sort it out later. The traffic commissioner could ask us so it needed to be in the bank." On the overtime she referred to her contract, and said that she put it through as "we had a grant to use in February so I put it through as overtime." She accepted that she had authorised her own overtime in March 2018. In relation to TOIL she did not accept that 7 weeks since January 2017 was excessive. In relation to the GDPR cost, she said that Mr Milne was to provide a quote but it might be better to do it within the respondent as "the person who would do it had just started." She had been happy with the quote from Mr Milne's company, and instructed that to conclude it before the end of the financial year on 31 March

2018. She had not checked that with the board and added “maybe that was a mistake.”

108. On 23 April 2018 Mr Brown resigned with immediate effect in response to a message from Mr Critten about his (Mr Brown) having removed property from the respondent on behalf of the claimant.

109. Ms Noble conducted further interviews with Ms Maureen Stephen (30 April 2018), and an email exchange with Ralph Greig on the same date.

110. In late April 2018 an informal meeting involving Mr Critten, Ms Thomson, and Mr Keenan took place at the offices of Empire. Mr Critten and Ms Noble gave a brief overview of the investigation that they were undertaking and confirmed that it was in relation to more than the issue of the unauthorised payment, but included a claim for overtime that had not been authorised, and for time off in lieu which had also not been authorised, as well as other matters. The board members present were at that stage content that matters were proceeding reasonably and that the suspension should not be lifted. No written record of that meeting was made.

111. Mr Critten with the assistance of Ms Noble made further investigations. They together produced an Investigation Report, which had 39 Appendices.

112. It included an email sent by Ms Thomson to the claimant on 1 December 2015, in reply to a message from the claimant on 26 November 2015 which had asked about accrued 59 hours of time in lieu, and in which she had asked if this was to be taken by the end of the year or paid in lieu. Ms Thomson had replied “You will need to take your time back as no way is there money for overtime. Perhaps you need to look at time management so you do not have this dilemn[a].” It also included a minute of a meeting on 15 December 2015, attended by the claimant and trustees of the respondent, which recorded “Maureen expressed concern at the amount of TOIL hours Rachel [the claimant] had accumulated and asked that some time is taken to explore why this has occurred and put measures in place to ensure it doesn’t happen

again." The reference to Maureen was to the former secretary of the respondent, Maureen Stephen.

113. Mr Critten decided that the issue should proceed to a disciplinary hearing.

114. A letter calling the claimant to that meeting was sent on 2 May 2018, signed by Mr Critten and drafted by Empire. It contained 7 allegations, summarised as follows:

(i) Instructing a payment of £10,000 without authority

(ii) Overtime and TOIL misuse; overtime not approved, TOIL to a value of 257 hours in the period 2017 – March 2018 taken without authority and inappropriately recorded.

(iii) Salary payments to family

(iv) Expenses paid to her and her family

(v) Failure to procure adequately re GDPR work which could be considered a conflict of interest

(vi) Other directorships held

(vii) Breach of trust and confidence, later clarified to refer to the request of a member of staff to remove confidential paperwork from the respondent's premises

115. The letter gave warning that if established that "may be considered Gross Misconduct under the Company's Disciplinary Rules and your employment may be summarily terminated."

116. The Investigation Report and its appendices were shortly afterwards provided to the claimant. Emails between the claimant and Ms Noble continued with regard to issues around the investigation and disciplinary meeting arrangements. The meeting was rescheduled for 16 May 2018 as confirmed by letter dated 3 May 2018.

117. On 3 May 2018 the claimant's laptop was sent by the respondent to a company named Tech Serve which provided IT services. An initial report from them shortly thereafter noted that about 1,000 emails had been deleted from it relating to the period 2016 - 2018. Attempts to recover them had been

successful, it was stated. (It was not established in evidence who had caused the deletions).

118. The laptop was not provided to the claimant at any stage following her suspension as the respondent was concerned to preserve any evidence. They did not allow her to examine its contents either alone or under supervision.

119. On the same date the date of the disciplinary hearing was changed to 16 May 2018 after the claimant's companion was not available for the original date, and a letter of 3 May 2018 was sent to the claimant to confirm that.

120. The claimant sent a series of emails to Ms Noble in the days that followed that letter, seeking additional information for the hearing.

121. On 8 May 2018 Ms Noble emailed the claimant with the investigation report which had been provided to her earlier, a year planner and a request to cease and desist sending what she described as hourly emails with requests for information. She sought a single list of documents being sought.

122. The claimant prepared what she stated were minutes of the meeting on 14 March 2018, by hand, and sent them to Ms van den Akker and Mr Milne on 10 May 2018. Mr Milne replied "Approved" and Ms van den Akker shortly afterwards with "That is how I remember the discussions at the meeting" both on the same day. The handwritten minute included the following:

> "There was good discussion around this and some issues culminating in an agreement that the loan of £10k from DAB Plus to DACB would be repaid on or before 31st March. There would then be a £10k mgmt. fee paid in advice to DAB Plus by DACB to cover costs over 2018/19. This would keep the bank balances at the levels required by the Traffic Commissioners and thereby keep us operating legally."

123. On 10 May 2018 the claimant was asked by letter to attend a second investigation meeting, held on 14 May 2018. It related to matters not before the Tribunal.

124. On 11 May 2018 the claimant emailed Mr Keenan, Mr Milne and Ms van den Akker about her working hours, on average an extra 5 – 7.5 per week, and asked if that was unusual or unnecessary. Only Mr Keenan replied, on the following day, stating “That doesn’t seem unreasonable to me.”

125. On 16 May 2018 the disciplinary hearing was held. It was chaired by Ms Lockhart, who is a qualified solicitor. Ms Thomson was in attendance as a representative of the respondent. The claimant was accompanied by a fellow employee Andrew Imray. A member of staff from Empire attended to take notes. Documents that the claimant had obtained, including statements for Alan Brown and Sean Reynolds amongst others, were provided to the respondent.

126. The minute of that meeting is a reasonably accurate record of it. The claimant produced a number of documents at that meeting, which included her handwritten notes of the meeting on 14 March 2018 in the form of a minute of it, a schedule of financial figures for the respondent and entity, and documents relating to her claim for overtime and TOIL.

127. At the commencement of the meeting Ms Lockhart stated that Ms Thomson would be the decision-maker. In relation to the issue of authority, the claimant referred to handwritten minutes of the meeting on 14 March 2018 she had prepared and said that Ms van den Akker and Mr Milne “have stated that they are true”. The claimant did not know when the transfer was made, when asked about that. Ms Thomson stated that “major decision needs to be all directors” in relation to the issue of authority. The claimant generally maintained the position she had taken at the investigatory meeting.

128. On 18 May 2018 Ms Lockhart sent an email to Ms Thomson and Mr Critten seeking additional detail. Mr Critten replied on 22 May 2018 with his responses to that email. He was not aware of the detail of what was required for a quorum, he confirmed who had been present at the meeting on 14 March 2018 but stated that Ms van den Akker had left early and he alone could not pass any motion due to lack of numbers. He did not accept the handwritten minutes from the claimant. He said in relation to GDPR “what was agreed was that we were

to compare costs between doing this process in house and doing with Global SCS. These comparisons were then to come back to board for approval."

129. Ms Thomson did not reply in writing, but was copied on Mr Critten's reply.

130. On 30 May 2018 Ms Thomson wrote to the claimant with her decision following the disciplinary hearing, although the letter bore the date 23 May 2018. It had been drafted by Ms Lockhart following discussions with Ms Thomson when she explained her decision and the reasons for that. The draft had then been revised by Ms Thomson. The letter was hand delivered to the claimant at a meeting on 30 May 2018 at the offices of Empire. She was distressed after reading it.

131. In the letter Ms Thomson held that allegation 1 relating to instructing a financial transaction of £10,000 without authority and in excess of her own authority had taken place, stating that it was very unlikely that it had occurred as the claimant had alleged, partly as Ms van den Akker had left "half way through that meeting", referred amongst other matters to Mr Critten's email of 22 March 2018, and stated "In spite of receiving this email from the Chair of the Board you made the transfer on the 27th March 2018." that allegation 2 relating to overtime and Time off in Lieu (TOIL) had been established and giving the reason for that in the letter, that part of allegation 4 relating to payment for two flights for her daughter and expenses in February or March 2018 had been established, allegation 5 relating to a conflict of interest had been established, allegation 6 relating to other directorships and allegation 7 relating to having another employee remove confidential paperwork had also been established. She held that allegations 1 and 2 amounted to gross misconduct, and that allegations 3 and 4 led to the breakdown of trust and confidence. Allegation 5 was held established and said to have eroded the mutual trust and confidence in the employment relationship. She made no mention of allegations 6 and 7 in that connection. There was reference to the claimant's record and length of service. She confirmed the decision to dismiss without notice. She made reference to the right of appeal.

132. That decision was taken by Ms Thomson herself, with advice and support by Ms Lockhart. It was not a decision procured by Mr Critten. Ms Thomson passed away prior to the commencement of the Final Hearing.

133. The claimant appealed the decision to dismiss her by email dated 30 May 2018. A reply was sent by Jill Turner, a qualified solicitor of Empire on 18 June 2018, setting an appeal hearing on 21 June 2018 to be conducted by Grant Keenan, Board Member of the respondent.

134. The appeal hearing took place on 21 June 2018, and the claimant produced a written statement for that appeal. The claimant was accompanied by Sean Reynolds. Ms Turner appeared with Mr Keenan. She is a qualified solicitor. There was no formal minute of that appeal produced, but handwritten notes were provided and are a reasonably accurate record of it.

135. The decision on the appeal was communicated to the claimant by Mr Keenan by letter dated 29 June 218, after he had spoken with Mr Critten and Ms van den Akker. He rejected the appeal, and upheld the original decision in all respects. He considered that allegations 1 and 2 had been established, that there had been gross misconduct, and that dismissal was the appropriate penalty. On allegation 5 he considered that Mr Milne was being considered for a trustee position and there was a potential conflict of interest she should have been aware of. He concluded;

> "I am satisfied that the matter was dealt with properly and fairly at the Disciplinary Hearing and that the correct decision was made at the Hearing and consequently I am unable to uphold your appeal."

136. Mr Roy Milne was not appointed as a member of the Board of Trustees of the respondent, or as a director of it. He withdrew from consideration for the role he had earlier emailed the claimant about following Mr Critten's questioning of his status at the meeting on 14 March 2018.

137. By the end of March 2018 the respondent had underspent on a grant from Aberdeenshire Council, in a sum of about £3,000. Attempts had been made

before then to reduce the underspend by making claims where permissible, including for trustee's expenses.

138. The claimant claimed 20 hours of overtime in March 2018, and approved that amount herself. The amount for overtime paid to the claimant, gross of deductions, was £361.40. It was paid with her salary payment at the end of that month.

139. The value 257 hours, or approximately seven weeks of TOIL taken by the claimant in the period January 2017 to March 2018 was approximately £4,700 gross.

140. The respondents received indirect benefits from the claimant's roles at CTA and SSE, including advance notice of developments, risks, opportunities for grants or contracts, and otherwise.

141. When employed by the respondent, the claimant had net earnings of £564.73 per week.

142. At the date of termination of employment she was 49 years of age.

143. The claimant worked longer hours for the respondent than required under her contract, and had worked the 20 hours of overtime she claimed payment for in March 2018.

144. The claimant did not apply for or receive any benefits following the termination of her employment.

145. Following the termination of her employment the claimant looked for employment opportunities in the charity sector on the internet. She applied for a role as General Manager in about June 2018 and a role as CEO in about July 2018, both with charities. She was unsuccessful in each of them.

146. She decided in or around June 2018 to establish her own community transport company. A limited company was formed in June 2018 called RM Transport Ltd. It was subsequently superseded by the formation of a community interest

company (CIC). The name of the CIC was changed to North East Transport Training (NETT). RM Transport Ltd is in the course of being wound up.

147. The claimant is the director of NETT. It provides driver training, consultancy and transport services. It commenced trading in October 2018. Its financial year is to 31 August 2019. It is not currently making a material profit. It is not clear whether it will make a material profit, or if so when and to what extent.

148. Its income on an annual basis is likely to be about £26,300 made up of fees for DI training of £17,000, fees for CPC training of £6,000, receipts from MIDAS of £800, and other income of £2,500. It has received a grant to meet the hire purchase costs of a bus.

149. Its expenditure on an annual basis is likely to be about £22,700 made up of insurances of £3,000, maintenance costs of £3,000, fees to Mr Brown as a subcontractor of £11,000, fees paid for CPC approvals of £1,500, accountancy fees of £1,100, fuel costs of £1,300, DVLA costs for tests of £2,000, rent for the use of a room of £200 and uniform costs of £200.

150. In light of the low level of profit it is unlikely that the claimant will be able to draw income from NETT for the foreseeable future.

151. On 1 November 2018 the claimant commenced employment for two days per week with the Guide Dogs for the Blind Association (GDA). Her net pay at GDA is the equivalent of £160.65 per week, and is for 14 hours per week.

152. The claimant would have secured a role of Transport Manager or similar in the private sector at a wage no less than that paid by the respondent within six months of the termination of her employment had she sought that role. She did not do so as she wished to remain in the charity sector.

Respondent's submissions

153. Ms Buckle argued strongly for the respondent that there had been a fair dismissal, and one that was not wrongful. The following is a basic summary of her submission.

154. She argued that the evidence of the respondent should be accepted, including that of Mr Critten over that of the claimant, Ms van den Akker and Mr Milne. She argued that the respondent had acted within the band of reasonable responses. She cautioned the Tribunal against substitution. She referred to the fact that the respondent is a charity, with limited resources and no HR department. They had sought advice and support from Empire. There had been a substantial investigation, with Ms Noble spending over 90 hours on that and Mr Critten also taking substantial time in his role for that. There had been a full investigation report compiled, and sent to the claimant. The disciplinary hearing had been properly conducted. The claimant had a companion with her. Ms Thomson had been the decision maker. There was further enquiry after the meeting and the decision taken, confirmed by letter. The claimant had appealed, and that had been heard by Mr Keenan. He had listened to all that she had said, and reviewed matters fully. Additional enquiries had been made by him including of Ms van den Akker and Mr Critten. He had refused the appeal.

155. She argued that dismissal was fair. She referred to the cases of ***Buzzoli Food Partners Ltd UKEAT0317/12, Polkey, Burchell and Jones*** (referred to above), ***Semple Fraser LLP v Daley UKEAT 50045/09,*** and ***Bryant v Sage Care Homes UKEAT 453/11.***

156. She argued that there had not been a breach of contract, but if there was the notice period was the statutory one.

157. She made submissions as to contribution, and the financial award if any were to be made. She argued that a combination of Polkey and contribution meant that there ought to be no award. She made reference to ***Sandwell & West Birmingham NHS Foundation Trust v Westwood UKEAT 0032/09*** and ***Montracon v Hardcastle UKEAT/0307/12***.

158. She argued that there had been a failure to mitigate and referred to section 123(4) of the 1996 Act.

Claimant's submissions

159. Mr Burnside argued strongly that there had been an unfair dismissal. Again the following is a basic summary of the submission made. He noted that matters had started as a single allegation, that there had been seven allegations, and now three. He argued that there was ample evidence of authority being given to the claimant for the management fee payment. He referred to the minutes of the meeting on 17 January 2018, and the Action Points document for the meeting on 14 March 2018. He referred to the handwritten minute of the latter that the claimant had also produced, and which Ms van den Akker and Mr Milne had said accurately recorded the discussion over that fee. It made no sense for the claimant to have acted without that authority. There was no benefit to her. He argued that Ms Fraser was not accurate about dates, and that the instruction to her had been given on 16 May 2018.

160. He argued that the overtime issue had been accepted by the claimant, but that her TOIL had not been excessive. She worked long hours. The average of the TOIL was about five hours per week. No records had been falsified.

161. The claimant and Mr Critten were not well disposed to each other. The claimant had avoided allegations against him, but made comments after questions by Ms Buckle. Mr Brown had spoken of a bullying culture. Mr Critten's evidence was not to be accepted. When a question was raised about the suspension by Mr Milne, he asked in effect who he was. It was clear that his evidence that Ms van den Akker had left the 14 March 2018 meeting before the discussion over the management fee was wrong.

162. Ms Noble had made inappropriate comments about the claimant, including manipulative, aggressive, scary and that she was unquestionable. She had not been impartial. Ms Lockhart had been more than the chair, she had been the decision maker. Of 135 questions or statements made, 111 were from Ms Lockhart and 24 from Ms Thomson. He referred to ***Ramphal v Department of Transport UKEAT/0352/14,*** in particular paragraph 56***.***

163. The failure to interview two witnesses to the meeting rendered the dismissal process flawed. The appeal had not remedied matters. It would not have changed the outcome. Mr Keenan was doing what Mr Critten wanted. There had been multiple procedural defects and the band of reasonable responses test had not been met.

164. He argued that there had been no contribution to the dismissal, and that the claimant had mitigated her losses. He did not accept that the claimant had failed to act on a reasonable instruction from Mr Critten, a director. The duty to mitigate was a qualified one. She had been in the charity sector, and was reasonable to wish to stay in it. There could be income from her new business in future.

The law

(i) The reason

165. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act").

166. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Conduct is a potentially fair reason for dismissal.

Fairness

167. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

168. That section was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done

to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

169. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?

(ii) Was that belief reasonable?

(iii) Was it based on a reasonable investigation?

170. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
>
> 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;
>
> the function of the Industrial 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."

171. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

> "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

172. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

173. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

174. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. One aspect may be relevant to the present case, although its terms in this regard are very basic:

> "4.3(4) "Employers should carry out any necessary investigations to establish the facts of the case.
>
> 23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence…. "

175. ACAS also issued a Guide on Discipline and Grievances at Work. It does not have the status of a Code, but has comments that provide a measure of guidance, and does so in more detail than the Code. Under the heading "investigating cases" is the following:

> "When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigation will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against."

Under the heading "General questioning and discussion" in the context of the disciplinary hearing is stated:

> "You should
>
> - Use this stage to establish the facts
> - ……Ask open-ended questions, for example "What happened then?" to get the broad picture. Ask precise, closed questions

requiring a yes/no answer only when specific information is needed.

- Do not get involved in arguments and do not make personal or humiliating remarks….."

Wrongful dismissal

176. Where the employer terminates the contract there is an entitlement to notice in the absence of repudiatory conduct by the employee. That is a breach of contract claim, and the statutory period of notice is 12 weeks for someone with the claimant's service, which is the same as the notice period in the contract of employment. The onus falls on the respondent to prove that there had been a repudiatory breach of contract by the claimant that entitled them to accept that repudiation and terminate the contract without notice. That falls to be determined on the balance of probabilities. Whether or not there was such repudiation depends on the facts of the case, as proved, and the terms of the contract itself.

Remedy

177. In the event of a finding of unfair dismissal, a basic and compensatory award may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. In respect of the latter it may be appropriate to make a deduction under the principle derived from ***Polkey,*** if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair.

178. The Tribunal may reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

179. In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct."

180. A claimant has a duty to mitigate her loss under section 123(4), by taking reasonable steps to keep loss to a minimum. What is reasonable is a question of fact and degree.

181. It is for the employer to prove any failure to mitigate – ***Ministry of Defence v Hunt [1996] IRLR 139.*** It was considered in ***Cooper Contracting Ltd v Lindon UKEAT/0184/15*** in which the then President of the EAT noted that the issue of reasonableness is determined taking account of the views of the claimant but that it is the Tribunal's assessment that applies. It may be reasonable to set up in business rather than to seek employment as was found in ***Garden Hill v Roland Prosper Technologies Ltd [1982] IRLR 498***, in which the claimant had been the sole employee and managing director of a company in a specialised business and set up a new business to replace income from that role.

182. In the event of a finding of breach of contract the measure of loss is the loss sustained during the period of notice to which the claimant is entitled. There is a duty to mitigate that loss.

Observations on the evidence

183. Spencer Critten was a credible witness. He had 25 years' experience in corporate and commercial banking and then joined the respondent as a volunteer. He clearly had concerns over what he understood had happened, and acted out of genuine concern for the charity. There were however areas of concern in relation to the reliability of some aspects of his evidence. There was clearly a poor working relationship with the claimant. Mr Critten did wish to become involved in issues of detail, which the claimant resented as it involved what may be termed a more detailed management of her than had been the case previously. The email to Ms Fraser refusing her request for permission to

make the payment was in terms that were somewhat odd, in that it suggested that he was not aware of matters, when clearly there had been discussions on the matter and he was aware of the background to the proposal, if not all or any the figures to quantify the management fee. The reference to GDPR and anti money laundering in that email was not fully explained in his evidence, and likely not to have been made with any careful consideration as to why such provisions were engaged, if they were at all. At the suspension meeting with the clamant he had referred to the respondent seeking recovery of the sum of £10,000, but in fact it was not done, despite his being aware of the payment on 3 April 2018, and being able then and afterwards to instruct the return of that sum.

184. His evidence about the 14 March 2018 meeting was also challenged, as discussed below, and I have preferred the evidence of other witnesses. I was also unable to accept his evidence in relation to part of allegation 5. It was notable that although he had been present at the meeting on 14 March 2018 when securing a quotation from Mr Milne's company had been discussed he sought to blame the claimant for what was alleged to be a conflict of interest in proceeding with it. I did not consider that allegation to be supportable given the circumstances. What was a proper matter to raise was the failure to refer back to him later, but I considered that the attempt to make this issue seem more serious affected the overall assessment of reliability.

185. It is also worthy of comment that many allegations were originally made following the investigations in which he was involved, but by the time of the hearing only three remained. Whilst Ms Buckle had explained that that had been in error by her for a part of it, referred to above,

186. Andrew Imray, a witness for the claimant, gave brief evidence in relation to how time off and overtime was managed, and his evidence was credible and reliable. He had also been present at the disciplinary hearing.

187. Melanie Noble gave evidence in relation to the investigation she carried out with Mr Critten's assistance. The investigation was a complex and difficult one, and must be considered in that context. She did however use rather pejorative

language at times in her evidence, and did not really consider alternatives to the guilt of the claimant. She referred to finding “other financial irregularities” very early in the process, which tended to indicate that her mind was closed from an early stage. She alleged that the claimant had lied about the meeting on 14 March 2018, but had not made a full enquiry in relation to that by speaking to all those present, or the precise mechanism of the payment. She accepted that in hindsight she should have spoken to Jacqueline van den Akker, but alleged that she had been brought to the board by the claimant, inferring that she was partial towards the claimant because of it, and that she had not been a very active board member. There was no evidence produced for either assertion, and it did confirm the impression of a lack of impartiality in the investigation.

188. Susan Lockhart acted as Chair for the disciplinary hearing and was the person who gave evidence as to the decision to dismiss following the sad death of Ms Thomson. She was very clear in her evidence that Ms Thomson had been the decision maker, and was generally both a credible and reliable witness. She gave evidence in a candid and straightforward manner. She accepted that with hindsight it would have been appropriate to have interviewed Ms van den Akker and Mr Milne in relation to the issue of authority. Her acceptance of that was to her credit. She considered however that management fee had been paid on 27 March 2018, which was what the investigation report had stated, had not fully investigated or considered the sequence of events in relation to the payment of the management fee, and had accepted Mr Critten’s evidence as to the 14 March 2018 meeting on the basis of emails, where those emails were not I consider conclusive over issues in dispute. Interviewing witnesses present was something that was clearly called for, as noted below, but not done. On the issue of whether she or Ms Thomson had been the decision-maker I accepted Ms Lockhart’s evidence that Ms Thomson had done so. I did not consider that Ms Lockhart had improperly influenced that decision in any manner.

189. Grant Keenan was a witness who was I considered both credible and reliable. He is a volunteer for the respondent, who runs his own company. He was

friendly with the claimant and emailed her to suggest a meeting. He had initially questioned the decision to suspend, but was satisfied with the explanation then given. He had heard and then refused the appeal as he was also satisfied of the reasonableness of the decision from what he had been provided with. He did not seek a full statement from Ms van den Akker or Mr Roy Milne in relation to disputed matters, however, nor the detail of precisely how the transaction had been undertaken.

190. The claimant was clearly passionate in what she believed, and did not consider that she had acted wrongly. She was at times prone to exaggeration, such as when she said in relation to the events in March 2018 that she had "a hundred million things to do", evasive in her answers on occasion, providing at times unnecessarily lengthy commentary or adding detail that was not asked for, and very dismissive of the complaints against her, even those she accepted at some stage as having at least some responsibility for. She was very keen on her own way being followed and thought she could tell others higher up the management line what to do. In the email she sent on 16 March 2018 for example she referred to what "we as the board" ought not to be doing, which was not accurate as she was not a board member, but also not appropriate for a person in her position. She did not have an accurate understanding of the Articles, or how the respondent should operate, yet sought to define what the role of a director or trustee was against her own role in the email of 23 March 2018, and to found on the Articles in her evidence. She did not do what had been agreed as to the provision of figures and further discussions with Mr Critten about them, or for the GDPR work. She had a poor relationship with Mr Critten, and said that she sought to avoid meeting or discussing matters with him. Whilst I accepted some of her evidence, there were other areas where I was not able to. As I shall come to, I considered that she was wrong in alleging that Mr Critten had been persuaded to agree the proposal on 14 March 2018 by Ms van den Akker and Mr Milne, that she had told Ms Fraser to make the payments on 16 March 2018, that Mr Mline's company had given discounted rates, and about not receiving an email from Ms Thomson, amongst other matters. In a number of respects her evidence was not I considered reliable.

191. Jacqueline van den Akker was I considered a very impressive witness. She was a volunteer for the respondent. She is a Director of an oil and gas recruitment company, and has a post graduate qualification in HR management. She joined the respondent in October 20217. She was present at the meetings on 17 January 2018 and 14 March 2018. She referred to the finding of the 6 February 2018 email and the understanding that that expressed. She had met Mr Milne, but considered him a guest at the latter meeting, with a view to his being invited to join the board. She did not recall any dissent over the £10,000 management fee proposal, nor any need to persuade Mr Critten. She said, "I think everyone present agreed to this action." I considered that she was not partial for or against either the claimant or Mr Critten, had a good understanding of the circumstances of the respondent and the events underlying the meeting on 14 March 2018 and was likely to be the most reliable witness in relation to disputed events.

192. Roy Milne was also an impressive witness. He had recently been approached to join the respondent as a volunteer. He was a director of a company. He attended the meeting on 14 March 2018 and recalled that he was welcomed to the meeting as a director. The weight of evidence was that he did so for consideration to join the board at some stage. He had received the minutes of the meeting on 17 January 2018 in advance of the meeting. He thought that he was a director from that meeting onwards, which was understandable from his perspective not least as he was copied in on emails afterwards, although I have found that he was not in fact appointed as a trustee or director at that meeting. He did not consider that there was any dispute as to the management fee proposal, nor any persuasion required of Mr Critten. He confirmed Ms van den Akker was present for that part of the discussion. He had offered a quotation for GDPR work from his employer, which had not been a discounted rate.

193. Alan Brown was a former police officer who was clearly being honest. He gave evidence as to his own experiences as a Chair of the Trustees of the respondent, but had ceased to be so from 2014. He had a poor working relationship with Mr Critten, who he described as a bully, and had left the

organisation not content with the manner in which he, or the claimant, had been treated.

Discussion

194. This has been a very difficult case to decide. There was a great deal of evidence both written and oral, and much it was fiercely disputed. Not all of it was relevant, and not all documents that might have been relevant were provided in the bundle. The parties did take somewhat extreme positions in relation to matters at issue.

195. It was clear that the claimant and Mr Critten did not have a good working relationship. There were many allegations made against the claimant, but of those three were argued before the Tribunal. Those that were not argued had included allegations that amounted to dishonesty. The claimant was alleged to have lied within the investigation report, and that background meant that emotions were heightened for some of those who gave evidence.

196. It is worthy of comment that the respondent is a charity, and many of those who gave evidence are volunteers who are not paid for the work they carry out. The claimant was an employee, who was of course paid for being so, but it was also clear that she worked long hours to seek to develop the respondent, and had done so throughout her long service with them.

197. There were some surprising matters that emerged from the evidence and consideration of the case. They included that

(i) the entity had sufficient funds at the end of March 2018 not to need the management fee at least at that stage,

(ii) the management fee was not paid on 27 March 2018 as had been suggested in the investigation report, but on 3 April 2018,

(iii) it was not repaid to the respondent once the issue of authority for it arose,

(iv) the Board of Trustees, acting as the Management Committee, was four in number but should have been seven, and five was the quorum for its meetings,

(v) there was a lack of clarity in the roles of trustee and director, and

(vi) there was some confusion between the respective functions of the respondents and entity as separate organisations, for example at the meeting on 14 March 2018 which spent much of its time addressing issues from the perspective of the entity, but was minuted as a meeting of the respondent.

(i) Reason

198. The reason for the dismissal was a belief on the part of the respondent that the claimant had been guilty of gross misconduct. It was clear that that was their reason, and that much was not in dispute. Conduct is a potentially fair reason for dismissal.

(ii) Fairness

199. The fairness or otherwise of the dismissal then fell to be assessed, having regard to the law as set out above. There was a belief that misconduct had taken place, and the focus was on whether there had been a reasonable investigation, whether that led to a reasonable basis for the belief in gross misconduct, and whether dismissal was within the range of penalties open to a reasonable employer. In considering those issues, it is important to remind oneself to avoid substitution of one's own view of how to handle matters for the decision of the respondent. The band of reasonableness applies to all stages, including the investigation. It is only if the respondent strays outside that band that there may be a finding of unfairness.

(a) Reasonableness of Investigation

200. I shall comment on each of the allegations separately, and then consider matters overall.

(i) Lack of authority

201. There were a number of matters that required consideration:

(i) The investigation report did not narrate accurately the precise circumstances of the transaction for the management fee of £10,000. It

did not include documents that could, and should, have been obtained, which were provided to the Tribunal. In particular that includes the transfer form that was dated 26 March 2018 and had the claimant's handwriting on it. That led to material inaccuracies. One was that Ms Fraser in her statement referred to the payment of £10,000 on 27 March 2018 stating "but it had gone through to the bank". The report concluded that the transfer had taken place on 27 March 2018, probably because of Ms Fraser's statement. Whilst the transfer form had gone to the bank on that date, the payment had not been made on that date as it was not due for payment until 3 April 2018. That led to a finding in the decision letter that was simply wrong, that the payment had been on 27 March 2018, when it had in fact been 3 April 2018.

(ii) Although there was a dispute over what had been said at the meeting on 14 March 2018, when the claimant claimed that she had been given authority to proceed with the management fee, no statements were taken from two witnesses present at the meeting, the claimant arguing at the investigation meeting that she had at that meeting been given authority to make the payment of £10,000. Whilst Mr Critten denied that that authority had been given, contradicting the claimant, in my judgment all reasonable employers would have sought statements from Ms van den Akker and Mr Milne on this important disputed point of fact. The former was a director of the entity. There was no suggestion that she would not give a statement. The latter's status was later in some dispute, but there was no reason to consider that he too would not give a statement. They were both present at the meeting and in a position to help to establish the facts. Had that been done, the decision-maker would then have full evidence to base the decision on. It is considered further below. What was striking however is that the investigation report nevertheless concluded that the claimant had "lied ….producing minutes that were not factually true". That comment was made without the evidence of two present, who later supported the accuracy of that minute.

(iii) The statements that were taken were not full. That for Ms Fraser was particularly limited. It was simply not clear from it what had happened in

relation to the giving of the instruction to make the payment of £10,000 for the management fee, when that was, what exactly had happened with regard to it, and what documents there were. The bank transfer form was not provided until the second week in evidence, when Ms Fraser gave evidence. She had not initially been intended by the respondent to do so. The claimant alleged that she had authorised it on 16 March 2018. Ms Fraser gave evidence to the Tribunal on a number of matters that were not covered by her witness statement, not least the events on 26 March 2018 and the transfer form being dated for payment on 3 April 2018.

(iv) Ms Noble had formed an opinion highly critical of the claimant, and had done so at an early stage of the investigation. She described the claimant as “manipulative” for example. Her evidence to the Tribunal indicated that she had been seeking evidence of the claimant’s guilt with a mind having decided on that as the outcome at an early stage. It was not an impartial investigation in light of that. The failure to interview the two witnesses at the 14 March 2018 meeting was evidence of that closed mind.

(v) The claimant had requested access to her laptop. The respondent did not permit this, concerned at the report of the deletion of over 1,000 emails. That concern was understandable to an extent. It would however have been practicable to allow the claimant access to it under supervision, either by someone from Empire, a member of staff of their technical consultants, or one of the respondent’s own staff. That would have safeguarded the laptop. The claimant was at a disadvantage in not being able to carry out a search of it. I do not consider however that it can be said that no reasonable employer would have acted in that manner given the apparent deletion of a large number of emails

(vi) The disciplinary hearing was held by Ms Lockhart as Chair, and she is a qualified solicitor. Whilst of itself that is not a matter that leads to a finding of unfairness, it did mean that the respondent had at that meeting someone with legal qualifications and experience, and the claimant had a work colleague who did not. The meeting was conducted almost entirely by Ms Lockhart, who asked the vast majority of the questions. The

questions were at times not open ones, but challenged the claimant in a manner not unlike cross examination. The questioning did not indicate an entirely open mind. One example is a comment that the replies were "defensive", and another is the repetition of the same point on three occasions. Whilst there were further investigations undertaken after the meeting, the outcome of those investigations, particularly the reply from Mr Critten on a series of questions, was not put to the claimant for her comments, and the two witnesses referred to above were not asked for witness statements or otherwise interviewed.

(vii) The information available to the employer in order to make a decision was not I consider all that was reasonably obtainable, and should have been obtained by any reasonable employer. I consider that no reasonable employer would have acted as the respondent did in relation to this allegation.

(ii) Overtime and Time Off In Lieu (TOIL)

202. The claimant approved her own overtime, amounting to 20 hours. She accepted that that was wrong. She said both that it was an error brought about by the volume of work at the time, and somewhat contradictorily that she had no excuses for doing as she had done. There was a dispute over an earlier incident as to overtime, and the claimant claimed not to have received an email from Ms Thomson. For the reasons given below, that claim by the claimant did not appear to be likely to have been the case. The investigation into this issue however was within the band of reasonableness.

203. On TOIL the respondent had considered timesheets, on their own printed forms, which the claimant said were her own records. There was not however any material dispute over the hours that had been taken, being about 250 over a period of 15 months from January 2017 to March 2018. The earlier documentation indicated that the claimant should manage her use of TOIL, so as to keep the amount low. It emerged that the real issue was whether the claimant had had the time being taken agreed as work time, not personal time.

There was no document to establish that, but the claimant was asked about it. The investigation into these issues was within the band of reasonableness.

(iii) *Procurement*

204. There was little documentation available on this issue. There was no procurement policy. The record of the meeting on 14 March 2018 from Mr Critten in his email the next day was basic, but covered when he said that there was to be comparison between the external figure and doing it in house, discussion with the claimant, and that then being taken to the board. The claimant said in the investigation meeting in relation to her failure to discuss the quotation with Mr Critten before instructing Global SCS that it "may have been a mistake". The claimant thought that she was to compare a quotation from Mr Milne's employer with doing the work internally. She claimed that his company gave a discounted price, but he did not say that in evidence, he stated that it was simply the normal or "template" price. I preferred his evidence, which had not been sought within the investigation. The claimant accepted that she had not obtained another external quotation, but stated that that was not required. That is correct, but what was required was further discussion, which she did not have. The investigation into that matter was also I consider not within the band of reasonableness.

(iv) Conclusion

205. I consider that, considering all of the issues collectively, the respondent had not conducted an investigation that a reasonable employer could have done. There were material omissions on the question of acting without authority in particular which had been the catalyst for suspension and investigation. Most of the time in the hearing was taken in relation to it, and it appears to have been regarded by the respondent as the most significant of the allegations.

(b) Reasonableness of belief

206. The ***Sandwell*** case, which Ms Buckle had referred to in submission, commented on the test for what may amount to gross misconduct which was if the breach by the employee "was so serious that it amounts to gross

misconduct." It could either be gross misconduct or gross negligence. The issue was also considered in ***Mbubaegbu v Homerton University Hospitals Foundation NHS Trust UKEAT/0218/17***. The EAT there held that a series of individual acts, not themselves sufficient, can cumulatively amount to gross misconduct when taken together. There was also reference in that case to ***Neary v Dean of Westminster [1999] IRLR 288*** in which it was stated that the "conduct must undermine the trust and confidence which is inherent in the particular contract of employment."

(i) Lack of authority

207. In my judgment, the respondent did not have a reasonable belief that there had been a lack of authority. That is as there was a failure to seek witness statements from two of those present on 14 March 2018. The two who had provided their recollections of what happened, being the claimant and Mr Critten, differed very substantially on that. Given that, it was or ought to have been obvious to any reasonable employer that seeking evidence from those other two present as to what had happened was necessary if there was to be a fair investigation and decision emanating from that.

208. Had those statements been taken, then relying on the evidence given to the Tribunal, any reasonable employer can only have concluded that at the very least the claimant had a reasonable basis for her belief that she had authority. In my judgment what is most likely to have happened at the meeting is that there had been endorsement given to the proposal to have a management fee of £10,000 by all of those present, including Mr Critten. The evidence of Mrs van den Akker was clear on this, and compelling. Both she and Mr Milne were clear that she was present during that part of the meeting, and that did not accord with Mr Critten's evidence that she had left before that matter was discussed. In my judgment all reasonable employers would have concluded that the clear preponderance of the evidence, which included that of Ms van den Akker a trustee, was to the effect that there had been agreement to proceed with that management fee, and a contrary finding was not one that a reasonable employer could have come to.

209. If the board of trustees had approved the proposal, as I find did occur, the claimant had a basis for instructing Ms Fraser to make the payment. She either had that authority, as I find she did subject to what follows in relation to the Articles, or at the very least a reasonable basis to believe that she did. There are however further aspects to consider.

210. Firstly, the claimant sought in evidence to raise the issue of the Articles of Association. They had not been put to Mr Critten or Ms Lockhart in their evidence in any detail. Reading them, however, it appears to me that the Management Committee, which is the body referred to by the respondent as a board of trustees, requires to have seven members, as a minimum, and five for a quorum for a meeting. On the basis of those Articles the claimant's claim of having authority is flawed, as the meeting was not quorate. There were only two trustees present at the meeting on 14 March 2018. Whilst Article 68 provides that acts done by the Management Committee or any of its members may be valid even if there had been some defect, that is not of assistance to the clamant, who was not a member of the Management Committee.

211. Secondly, the role of a director is to "ratify" decisions. Giving that word its normal, and a sensible, meaning, and having regard to the practice of having director approval for payments (evidenced by Ms van den Akker as director of the entity authorising the repayment of the loan, which although by the entity not respondent was in respect of an organisation treated at times as if one single one with the respondent; Mr Critten asking Ms Thomson whether she had approved the payment when he discovered that on 3 April 2018, and Ms Thomson's statement in the disciplinary meeting as to the role of the director), I consider that the issue of a management fee was one that a director could decide to consider independently of the management committee, and do so even if a party to the trustees decision. That was fortified by the agreement at the meeting that the claimant would provide the figures that she had and discuss them with Mr Critten. There was a legitimate purpose to his doing so, and they should have been provided to him then discussed.

212. These however are somewhat technical issues which were not a part of the reasoning for the decision to find that there had been lack of authority, nor put to the claimant in her evidence. The respondent, a small charitable organisation, did not follow the precise terms of their Articles. When asked about the process to appoint a director, the claimant was not aware of what it was for example, although there is a procedure within the Articles. There was something of a lack of clarity within the whole organisation of the roles of director and trustee, and those terms were on occasion used interchangeably. Similarly the respondent and entity were not always treated as separate organisations, with the meeting on 14 March 2018 considering matters from the perspective of the entity but minuted as a meeting of the respondent. No minute of a meeting of the entity was produced in evidence.

213. My conclusion is that, although technically the claimant may not have had the requisite authority, the meeting on 14 March 2018 had given her approval to proceed with the management fee, such that it was reasonable for her to have acted on that, but that there was intended to be discussion about the management fee itself, which was to be “sorted out” further at a later stage as she later put it, and that required her to do what had been agreed and provide figures to Mr Critten and discuss them.. The matter of the management fee still required work, deciding precisely on the related issue of full cost recovery, as did the sub-contract the terms of which had not been concluded.

214. It was a surprise to find that there were sufficient funds at the end of March 2018 such that the fee was not necessary to provide the funding required by the Traffic Commissioner. It may have been required at a later point depending on how the entity operated, but the transfer could have been made on the same day if that position was reached. That point was also not made by the respondent when deciding to dismiss and was not put to the claimant in cross examination.

215. Separately from the issue of authority the seriousness or otherwise of that transaction being effected required consideration, as to whether or not that might amount to gross misconduct. The payment of £10,000 was discovered

the same day it was effected, 3 April 2018, but not reversed when doing so would have been very easy to achieve. It could have been carried out that day, or any subsequent day, but was not. That led to the conclusion that even if it had not been made with authority it was not the wrong step to have taken. There was no loss of funds, nor any risk to funds. In short, the respondent considered that there was a reasonable basis to leave the payment as it had been made. That issue also arises in respect of penalty and is addressed below.

216. I conclude that no reasonable employer would have believed that the claimant had committed an act of gross misconduct when instructing the payment of the management fee.

(ii) Overtime and TOIL

217. The claimant did not dispute that she had approved herself payment for 20 hours of overtime in March 2018. She claimed that was a mistake. If simply a mistake, as Ms Lockhart conceded, that would not be gross misconduct. Mrs Thomson considered that it was gross misconduct, in the sense of being more than an error and Ms Lockhart stated that it was Mrs Thomson's view that the act was a deliberate one.

218. There had been earlier discussions about both overtime and TOIL in late 2015, which Mrs Thomson provided a handwritten statement on which was part of the investigation. She had also produced an email she said had been sent. The claimant denied receipt of it. It had been sent to the right email address. It appeared to have been sent at a particular time of day, in response to a message from the claimant a few days earlier.

219. There were discussions at board level, and minutes were produced regarding the issue. The claimant knew or certainly ought to have known at that time that there would not likely be further approval of overtime to be taken as pay rather than TOIL. As a general manager, she knew or ought to have known that the management of TOIL and overtime required care, and that overtime would not be paid without both specific authorisation and good reason.

220. I concluded having reviewed all the evidence that the claimant did receive the email from Mrs Thomson, and I reject her evidence to the contrary. She was not accurate on a number of other important issues, as recorded above.

221. I consider that she had not made simply an error in approving her own overtime, but acted as part of a pattern of believing that she was able to decide matters for herself. Overtime was claimed without authority, but that was not a part of the list of offences of gross misconduct. Whilst not conclusive, as the list were examples only, that is one factor to take into account.

222. The value of the time was £369.40 gross, which was a little over 11% of the standard monthly salary. The amount is not therefore especially high, but it is as much an issue of principle as of amount, and the context is that the respondent is a charity. On the other hand the sum was claimed by the claimant within an underspend on grant, such that in reality it was paid from grant funds. The issue is finely balanced, but I have concluded that as there was no loss to the claimant, no dispute but that she did carry out the overtime work, and no attempt to conceal it with the payroll details being submitted to Mr Critten for approval, no reasonable employer would have regarded the issue as one of gross misconduct.

223. The second aspect of the second allegation was in relation to TOIL. The contract of employment required approval by her manager. The claimant argues that that position changed. What was produced to support that is a statement from Mr Greig, the former chairman, and evidence from Mr Brown another former Chairman. Matters had however changed from their time, and that evidence was not conclusive of itself. There was other evidence of approval for TOIL being required, including in the statement of Mr Reynolds that she tendered to support her appeal.

224. It is not disputed that the hours were in fact worked. The real dispute centred around whether the claimant had approval to work for CTA and SSE, and that this was work time not personal time. In each case the claimant stated that the respondent had a benefit from the work she did, such that in relation to CTA whilst it had started as a role in her own time it ended as being working time.

There was however nothing produced by her in writing to state when that was discussed, if ever, no minute or similar document to record that, and she was not able to recall in evidence any detail of having agreement on that issue.

225. The recording of the time off was very loose indeed. It was an issue that the claimant said was managed on trust. There was no evidence of any formal process or procedure that was applied to the claimant, and although some evidence of actual approvals being given, that may have been partly after the event as well as in advance of any issue arising. Overall, I consider that the issue of TOIL was part of the pattern of the claimant deciding for herself what should happen, in that she believed that she was entitled to the TOIL, and that in doing so she did not have specific authority.

226. The total time involved had a value that was more substantial, of over £4,000. The evidence was that Mrs Thomson regarded that as gross misconduct. This was a decision that I have concluded was one that no reasonable employer could have taken. There was an absence of proper control of management of TOIL, although the need for control was noted in late 2015. The respondent had derived benefit from the claimant's roles in the organisations, and had permitted the position to remain as loose as it was.

(iii) Procurement

227. The final issue was allegation 5. The Action Points and earlier email from Mr Critten indicate that the claimant was to assess a price from Roy Milne's company, against doing the work in house. There was no written evidence in writing that the cost of doing the work in house was assessed, although the claimant claimed that she had done so. The indication in her evidence was that she instructed Mr Milne's company because there was a balance of grant monies to use up. That though was not what had been discussed at the board meeting and agreed with her, and it was clear that once the quotation was received the matter should have gone back to Mr Critten for discussion, as she had acknowledged at the investigation meeting. It was part of the same pattern of the claimant making decisions herself when she ought not to have done so. This was the areas she suggested that the board, including herself in that, had

better uses of time for. Finally, there was a relatively short timeframe to complete the GDPR work, and proceeding without a second quotation was not the main issue, it was the failure to refer back to Mr Critten. The context was however that the sum was relatively moderate, and at two days' work was the same as the daily rate charged by Empire, such that there was no loss to the respondent. This however is I consider the least significant of the allegations, and I do not consider that a reasonable employer could regard it as gross misconduct.

(iv) *Conclusion*

228. Taking all these matters into consideration collectively, I have concluded, on balance, that no reasonable employer would have held the belief that there had been gross misconduct. There is an issue over the claimant not following instructions, or acting on what had been agreed, on more than one occasion. That was not the allegation made against her at the time by the respondent but was part of the evidence. I have been concerned particularly over the issue of overtime. Claiming overtime and authorising that herself was wholly wrong, but must be placed in the context of the underspend on grant which meant that the respondent did not in effect pay the sum, together with there being clear evidence of the claimant working long hours for the benefit of the respondent. The TOIL issue had not been managed adequately, and whilst evidence of specific approval being given to the claimant to take the time not as personal but as work was not presented by her, there was at least an indirect benefit to the respondent of the work being carried out. Considering those issues together leads to a number of matters which would cause any employer concern. I have found this a particularly difficult issue, but consider that no reasonable employer would have believed that they amounted to gross misconduct.

229. For completeness I require to add that I did not derive assistance from some of the authorities Ms Buckle provided on the issue of fairness in general. ***Buzolli*** concerned procedural flaws in relation to a warning and failure to give notice of the possibility of dismissal, but where the substantive decision was a

fair one, ***Semple*** concerned redundancy and the band of reasonable responses, and ***Bryant*** was an argument over perversity. The facts and issues in those cases were not comparable with those in the present case in my opinion.

230. I should also refer to the appeal against the decision to dismiss. I do not consider that that affected matters materially. It did not cure the defects with the investigation that I have referred to above, or make any real difference to the issues of the basis for the belief set out above.

Reasonableness of penalty

231. The issue of penalty is addressed independently of that of gross misconduct. In ***Britto-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*** the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and a previous unblemished record.

232. The issue is whether a reasonable employer could have decided to dismiss, and is closely related to the question of whether or not there had been gross misconduct. Had there been sufficient to entitle a reasonable employer to believe that there had been gross misconduct, I do not consider that dismissal was within the range of reasonable responses.

(i) Authority

233. The case under allegation 1 had a number of factors to consider in relation to penalty. Firstly, there was no loss to the respondent, as the monies could have been transferred back at any time, indeed the transfer had been raised in advance by Ms Fraser to Mr Critten. Secondly, whatever else the position in relation to governance was, the claimant clearly believed that she was doing the right thing, had authority to do so, and that if the transfer of funds was not made that could materially and detrimentally affect both the respondent and entity. There was a reasonable basis for the claimant to act to a large extent,

even if in fact there were sufficient funds in the accounts of the entity at the end of March 2018 such that, at that point at least, further funds were not necessary to satisfy the Transport Commissioner. Account should also be taken of the fact that Mr Critten in his email did not instruct that there be no payment, but used the word "suggest". Thirdly, the proposals had been discussed in general after the meeting on 17 January 2018, and set out in an email from the claimant on 6 February 2018, without challenge or indeed response at that time. Fourthly, in her email of 23 March 2018 the claimant set out her position, and stated that she would proceed unless it was a matter raised by other board members, none of whom did so. The instruction to Ms Fraser was made after that. Finally the claimant has at least been consistent in arguing that she had agreement from the meeting on 14 March 2018 to proceed, and I have found that at that meeting the proposal was agreed to.

234. As referred to above, much of the detail of the narrative of material facts was not set out clearly within the investigation report, and was discovered during the course of the hearing. It was also striking that although the claimant wished there to be sufficient funds of £29,550 within the entity to meet the requirements of the Traffic Commissioner, in fact there were those funds in place after repayment of the loan, and before the transfer on 3 April 2018 took place. In short, despite her predictions of dire consequences if there were insufficient funds, both for the entity which would not receive the licence and her own reputation, there were none. Even if an audit had taken place, the funds were in place as at the end of March 2018 within the entity. The claimant did not appear to realise that, but nor did the respondent.

(ii) Overtime and TOIL

235. Allegation 2 is made out in part, in respect of overtime being paid without proper authority and the lack of approval for CTA and SSE work being taken in working hours. Taking a payment for that overtime, without having the authority of another person as was required, was not the simple explicable error that the claimant alleged. She treated it rather in an offhand manner in her evidence, as if just saying that it was a mistake on her part were sufficient

for it to be discounted as a minor matter. I have considered this issue in some detail, but have concluded that it is not sufficiently serious to entitle any reasonable employer to dismiss for the same reasons as given on whether or not there was gross misconduct. Taking all the evidence into account, whilst there was a breach of process, and the issue is one of some importance, I do not consider that dismissal is within the range of reasonable responses for a reasonable employer.

236. The matter of TOIL is one where the respondent had managed matters very loosely, and had permitted that to continue without introducing rigour either in process or recording. Whilst the claimant had taken TOIL which had not been actively authorised, the work she did for CTA and SSE did in fact benefit the respondent, at least indirectly. In each respect there were connections to the work she carried out for the respondent, such that it was not simply for her own personal benefit, or interest. I do not consider that dismissal was within the range of reasonable responses for this matter.

(iii) Procurement

237. Allegation 5 is an issue of negligence at worst. It is not a matter that can appropriately be labelled one of trust and confidence as was attempted. There was no written procurement process, and at worst the claimant failed to revert to Mr Critten about the relative benefits of in house work or Mr Milne's company. He may have wished to seek a second quotation but time was relatively short to complete work by the end of the financial year. There was no gain by the claimant, and the decision was taken in circumstances where seeking external assistance was not unusual. It was a relatively minor matter which could not justify dismissal.

(iv) Conclusion

238. Taking all matters together, I considered whether there was sufficient to entitle a reasonable employer to dismiss summarily.

239. There was something in the suggestion that the respondent had been seeking evidence to use against the claimant to secure her dismissal. I would not use

the term “witch-hunt” which was suggested in cross examination, but it is notable that there were a large number of allegations levelled against the claimant at various stages, some involving allegations of dishonesty, but only three were left before the Tribunal, and they have been addressed in the manner above. There was no conflict of interest in the procurement issue, but it was noteworthy that the claimant was blamed for this issue when it had been discussed at the meeting and the approach of having a quotation from Mr Milne’s company agreed by all present, including Mr Critten.

240. The assessment as to penalty does require to take into account of the claimant’s long and unblemished service.

241. I conclude that dismissal was not within the range of reasonable responses open to the respondent.

Overall conclusion on fairness

242. The dismissal was unfair.

Was there a breach of contract?

243. Separately the question arises as to whether the respondent had proved on balance of probabilities repudiatory breach by the claimant. This is not an issue of reasonable belief, but likelihood. In my judgment the respondent had not discharged the onus on it. The likelihood is that the claimant had been given authority at the meeting on 14 March 2018 to instruct the payment of the £10,000 management fee for the reasons set out above. In my judgment, Ms van den Akker’s evidence is the best that there is on what happened at that meeting, and I accepted it as credible and reliable. She did not consider that Mr Critten had been persuaded to agree the proposal, as the claimant had said herself. She was however clear both that she had been present for this aspect of the meeting, and that the fee had been agreed as proposed.

244. Mr Milne was also I considered both credible and reliable. He had been approached to be a director of a charity, in addition to his principal role at his employer. He had experience of governance issues. He was attending his first

formal meeting on 14 March 2018, and on that date met Mr Critten for the first time. He did not become involved to a great extent in the detail of the discussion over the management fee. He also did not consider that Mr Critten had been persuaded to agree to the fee, and that it had been agreed at the meeting.

245. I do not consider that the technical absence of authority in light of the terms of the Articles is sufficient in the question of breach of contract. The claimant was neither a director nor trustee. It was not for her to apply the Articles. The respondent had also not founded on the issue either at the time or before me, nor raised the issue in cross examination. The claimant had at least a reasonable basis on which to instruct the transfer as set out above, and that despite the email from Mr Critten with the "suggestion" that the transfer is not made.

246. I consider that the issue of overtime is not itself sufficient to amount to a repudiatory breach, given the context of an underspend on grant such that it was in reality funded by a third party, and there was no question but that the time had been spent. The issue of TOIL was I consider largely the result of loose management of that matter by the respondent, and the GDPR quotation matter was I considered overall a minor one.

247. Taking all of the issues collectively I do not consider that there is sufficient to amount to repudiation.

Polkey

248. The essence of the question is whether a reasonable employer could have dismissed the claimant summarily for the matters that would have been held to be within its reasonable belief, but following a different procedure. There are three issues, a measure of failure to follow reasonable instructions, approving her own overtime and TOIL and the handling of the GDPR quotations. In my judgment all reasonable employers would conclude that none of those individually could amount to gross misconduct which could justify dismissal, at that time, and nor do they collectively. I do not consider that a reduction on the

Polkey principle is appropriate accordingly. What may have happened had there not been a dismissal at that time is a matter I consider under the assessment of loss.

Contribution

249. The test for whether to hold that there has been contribution by the claimant is set out above. As ***Sandwell*** makes clear the conduct of the employer is irrelevant to this issue. The issue is not one of reasonable belief, but of fact and whether or not on a balance of probabilities the claimant did so act as to cause or contribute to the dismissal. I shall again consider matters individually, then collectively.

(i) Authority and following instructions

250. I have found that there was a basis for the claimant to believe that she had authority to instruct the transfer. The real issue appeared to me rather more to be one of the claimant not acting as agreed or following instructions. She wished to do things her own way. She thought that the management fee should be £10,000, although earlier she had suggested it might be £7,700 and she did not appear to have checked what sums were at that stage in the accounts of the entity. She had sought advice from the accountant, but that was at best advice, and the decision about it was a different matter.

251. She did not react well to Mr Critten's questioning of her. She did not do what had been agreed on 14 March 2018 to provide him with the figures, and then discuss them. She said that she preferred to email him, and said in answer to a question in cross examination that she had been bullied by him. She used the word "dangerous" in relation to him, which was at best an exaggeration. She said that he would "destroy the companies", which again was at best an exaggeration. I did not accept that these allegations were justified.

252. Clearly their working relationship was by March 2018 a poor one. Mr Critten was however a director. He was making enquiries that he was entitled to make. There were justified concerns over the amount of the management fee, and the claimant's Action Points document noted that she would provide figures.

She herself decided not to do that. That was wrong. It was not for her to decide not to do so.

253. Ms van den Akker and Mr Keenan did not consider that they had seen any Strategic document. The claimant said that it had been provided to the board. It appeared to have been sent to the accountant on 22 March 2018, but I concluded that Ms van den Akker was likely to be right when she said that she had not seen that document. I take from that that the claimant did not send those documents to the board, and both that she ought to have done so and was wrong when she claimed by email that she had. Nevertheless, none of those who received that email asked for a copy.

254. The claimant made reference in evidence, as noted above, to the Articles of Association in attempting to argue that the decision made on 14 March 2018 was binding unless the trustees changed it. The Articles did not support her position. There was also confusion within the company as to the distinction between the board of directors and board of trustees. The meeting on 14 March 2018 included the claimant, Ms van den Akker and Mr Milne, none of whom were directors. It had apologies from Mr Keenan and Ms Thomson. Mr Keenan was a trustee not director. Ms Thomson was both. I consider that the meeting on that date was one of the board of trustees, rather than of the directors. The charity was a small organisation, with volunteers and 16 staff. The organisation chart in the Handbook refers to the role of the trustees sitting above the claimant as general manager. They in practice operated as the Management Committee.

255. The Management Committee, or board of trustees required in the Articles to be of at least seven and not more than twelve. There were not seven trustees at any stage. The quorum for a meeting of the Management Committee when transacting business was five, but only two present.

256. I consider that the claimant was wrong to base her actions and remarks on the presumption that the meeting on 14 March 2018 led to a decision taken by the board (she said of directors but it was of trustees as found above) and could

not be contradicted by Mr Critten. Her email seeking to tell Mr Critten what the limits of his authority were was, I consider, insubordinate and inappropriate.

257. The only director of the respondent present at that meeting was Mr Critten. He had an overall role to ratify decisions of the Management Committee. I consider that that was more than simply to rubber stamp decisions. The issue of the O-Licences and sub-contract was a material one, and beyond the day to day management of the company.

258. Technically therefore the Management Committee was not sufficient in number. It could not take the decision that the claimant sought to rely on – there were insufficient members of it under the Articles. But this was a relatively small organisation, and such failures of governance are not entirely unusual. What is unusual however is a General Manager acting as if a Trustee, and seeking to direct a trustee and director as to what he can or cannot do.

259. Although the claimant referred to "we as a board" in her email of 16 March 2018, Mr Critten's evidence as to who was on the board as director or trustee or both was not challenged. In addition, the Articles provide at Article 51 that "under no circumstances shall any employee of the Company,,,,,,,be a member of the Management Committee". The claimant nevertheless acted rather as if she was a Chief Executive Officer with wide management powers of decision. She was not in such a post, she was a General Manager.

260. On the basis that there was a meeting of the trustees, a decision on an operational matter was one that carried significant weight. But it was not determinative, and in any event further work was required such that the claimant ought to have provided the figures afterwards as she had agreed to.

261. I also noted that the claimant sent an email on 8 January 2018 on financial and business issues not to Mr Critten, despite his role as Chairman and Finance Director. That appeared to me to be a deliberate attempt to exclude him.

262. On the other hand, he was meeting Ms Fraser without her, and when on 23 March 2018 the claimant sent the email trail with the accountant to those who had been at the meeting, Mr Critten did not ask for any further document.

263. I required to consider whether the claimant was correct that she had instructed Ms Fraser to carry out the transactions on 16 March 2018, or Ms Fraser was right that it was 26 March 2018. In my judgment Ms Fraser is very likely to be correct. That date is consistent with the bank transfer form, which the claimant wrote on, and can only have done so on or after 26 March 2018 as that is the date it bears, and Ms Fraser's email to Mr Critten of 26 March 2018 sending it to him. Ms Fraser said that she had done so at the same time, and the written records indicate that that is right. It Is also notable that in her email of 23 March 2018 the claimant did not refer to having already instructed Ms Fraser to carry out the transaction. That would have been surprising as an omission if that had already taken place.

264. The claimant was asked to explain the transfer document with her writing on it dated 26 March 2018, and did not do so well. She said that it would have been in a pile of invoices and other documents, she would not have read the date, and had referred in her own handwriting to February minutes meaning January ones. But that document has a date on it of 26 March 2018 and I consider confirms Ms Fraser's evidence that she was given only the January minute, and not also the March Action Points, which the claimant said she had done. Her handwritten remark does not refer to the Action Points document, which in any event is not a minute.

265. The manner of the claimant's communications was also somewhat abrupt at best, and insubordinate at worst. She sought to define herself what matters were for her, and what was for the board, and in one to Mr Critten said she would regard the matter closed if others on the board did not agree. If a board member, and director, decided to do something or not, that was a matter for them. If a decision was or might be changed, that was a matter for them. The claimant had not done what had been agreed, in providing figures, and was indicating that she would not do so. That concerned Mr Critten. That was also at a time before the end of March, and there were still days left to resolve matters without them escalating. The claimant required to act on reasonable instructions given to her, and she did not.

266. This does require to be seen in the context however that Mr Critten did not take any step to change the £10,000 payment that was made, either on 3 April 2018 when he found out, or later. It also requires to be considered in the context of the claimant not deriving any personal benefit, and believing that she was acting in the best interests of both the respondent and entity. There was a need to address matters on an arms-length basis, the respondent being a charity and the entity not, and there was something of a loss of the sight of that distinction. The higher any management fee, the better matters were for the entity, but not the charity. It is not simple to justify a management fee, for a year in advance, when there is as yet no consent to subcontracting formally in place, no sub-contract drafted let alone formally in place, and no clarity on what the services were precisely to be.

267. I considered whether the claimant's actions in asking Mr Brown to remove items from her desk were improper. She had been instructed not to speak to staff when suspended, as had the staff on 9 April 2018. The claimant had replied to state that she could not be prevented from speaking to a friend. That is so, where the conversation is in relation to issues outside work. An employer is however entitled to give reasonable instructions, and the claimant procuring the removal of items from her desk which went beyond purely personal ones and included her timesheets was I consider wrong. The suggestion that those documents were her own and not those of the company was I consider both wrong, and not realistic. They were on the company template. They were a record, however informal, of time off in lieu. They related to work issues. But the evidence was available to Mr Critten, and overall I did not consider this issue to be a material one.

(ii) Overtime and TOIL

268. I did not accept the claimant's evidence that she had not received Ms Thomson's email.. I consider that the claimant must have known that overtime would only exceptionally be paid and required authorisation.

269. The amount of that overtime was 20 hours, which equates to £369 gross or £268.74 net. That sum is not especially high, and payment came from the

underspent grant, but this is not only a matter of amount but also of principle. The claimant ought not to have authorised her own payment of overtime. She knew or ought to have known that that was wrong. Her attempt to down-play its significance, and claim that she had not received an email from Ms Thomson, were of some concern.

270. She did on the other hand have long and unblemished service. She had played a major role in the growth of the respondent. There was evidence not challenged that she did not claim all the hours she could have.

271. TOIL is rather different. As General Manager one can expect a degree of trust on such matters, but there does require to be at least some expectation of reasonableness in how matters are handled, and recorded. The claimant appears to have thought that she could do as she wished, and did not require to answer to anyone for that. I consider that that extreme position is not the correct one. Any manager would be expected to be able to justify what time was taken off, when, if the issue was raised.

272. The average TOIL was 5 hours per week over the 15 month period. That is set against a 35 hour working week, and evidence that the claimant worked at weekends and during the evenings from time to time. She had a busy workload, particularly in the early months of 2018 with a number of issues that required attention. I do not consider that her working hours over the standard 35 from her contract were excessive, and although their recording and management was very relaxed indeed, there was no evidence of any system that the respondent had put in place to manage it. The real issue is whether the hours for CTA and SSE were for the respondent or not. There was no direct evidence of any approval. As indicated above, the claimant decided herself when the time became work not personal, and that was not appropriate. But given all the circumstances had approval been sought I consider that a reasonable employer would have done so, as there was a benefit to the organisation, and that that would have then covered the TOIL in the period in question.

(iii) Procurement

273. The respondent did not have a procurement policy. The work was for a sum within the general level of authority the claimant had of up to £5,000. But Mr Critten had expected from his email of 15 March 2018 to have discussed matters with her, and she proceeded without doing so. She suggested in an email that it was not a matter for the board, but that was not a matter for her to decide, and was contrary to the agreement at the meeting. She had received one quotation which she claimed was discounted, but I have held was not. It was not clear why using the internal resource, which would have been of little or no cost financially but taken time from other matters, was not the better option, and there was no written document on that matter. Overall the claimant should have sought approval, but the suggestion by the respondent that this was a breach of trust and confidence is not supportable. It was another failure to communicate with Mr Critten, but a failing at the low end of the scale.

(iv) Conclusion

274. Taking all these issues into consideration I must assess the issue of whether there was a contribution and if so what that should be. There are competing factors at play and it is not an easy task. I leave out of account the failures of the respondent.

275. Guidance on the assessment of contribution was given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260,*** which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal, and I consider that the issue is one of fact and degree dependent on the circumstances of the case.

276. Taking into account all set out above, I consider that the claimant was materially at fault, and assess the level of her contribution at 60%.

Mitigation

277. The respondent argued that there had not been mitigation, as the claimant did not seek full time employment in the private sector, and had she done so would have earned more than with the respondent. When she did start employment it was part time. She had commenced a new venture that was making very limited profits, she did not draw an income from it, and she had decided on a course of action that she wished to for her own benefit, to paraphrase the argument.

278. The claimant did seek two positions, but said that she did not want to succeed with the second, and started to think about setting up her own community transport business. She had always been in the charity sector. Whilst her decision to pursue that course may be understandable, the law requires her to take reasonable steps to mitigate her loss if she is claiming compensation. I consider that she did not do so. She said in evidence that she "chose to found a social enterprise….money does not motivate me…Community transport makes me happy". Her schedule of loss states that she does not expect to draw an income from the business for the foreseeable future. I consider that it was a project that she chose to start for her own enjoyment rather than to seek to replace lost income. That distinguishes her position from that of the claimant in ***Garden Hill.*** In that case the business was set up specifically to replace the pre-dismissal income.

279. Had she sought employment in the private sector as a Transport Manager or similar, she would have secured a role within six months, and then be paid more than the salary had been with the respondent. I do not consider however that she was required to do so to mitigate loss. She had worked in the charity sector for a very substantial period. It was reasonable I consider to expect employment within that same sector.

280. In my judgment, it is reasonable to proceed on the basis that it would have taken her the same time as it did to commence her role with the GDA to find new employment on the basis of full time work. Had she mitigated her loss, income on a full-time salary would have been secured, which I consider would

be a pro-rata increase of that from GDA, and I have set out the calculations below.

Remedy

(i) Basic award

281. This is calculated in accordance with section 119 of the Employment Rights Act 1996. The claimant had 18 years' continuous service and was 49 years of age at the date of termination. Subject to section 122 the entitlement, where her pay was above the statutory maximum for these purposes of £508 per week, is £11,176.

282. Section 122(2) of the Act entitles the Tribunal to reduce that sum where it would be just and equitable to do so, in light of the conduct of the claimant. For the reasons set out above I do consider that there was such conduct, which is set out under the heading "Contribution". I consider that the appropriate reduction is 60%, the sum of £6,705.60, and the net basic award I make is £4,470.40.

(ii) Compensatory award

283. This is calculated under section 123 of the Act, and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that is attributable to action taken by the employer." The provision as to mitigation is at sub-section (4), and the reduction for contribution to the dismissal by the action of the complainant under sub-section (6).

    (i) 12 weeks' notice is awarded below, and there is therefore no loss for this period under this head of claim.

    (ii) Thereafter, in the period to the start of the GDA job, 22 August to 1 November 2018, a total of 9 weeks the loss is at £564.73 per week = £5,082.57.

    (iii) There is then an earning differential as the notional income from new employment is less than the pre-dismissal income. If the claimant worked five days per week, not two, with the GDA and at the same rate of pay, then for a 35 hour week her earnings would

have been £401.62 net per week. The differential to her earnings with the respondent is £163.11 per week. I consider that a period of loss from then onwards of 26 weeks is appropriate given all the circumstances, in particular the claimant's pattern of not acting on agreements reached and her poor relationship with Mr Critten, such that there is likely to have been a fair dismissal by the end of that period. The finding is made on the principle from ***Devis v Atkins [1977] AC 31.*** The sum for that period on that basis is £4,204.86

(iv) The claimant argues for an award for loss of statutory rights of £500. She does however have her new business, and there was limited vouched evidence provided as to its net financial position. Her new employment is for two days per week. In light of the circumstances, I consider it appropriate to make an award of £250 under that head.

(v) The total of £9,573.43 is then calculated less the contribution of 60% for the reasons set out above, the sum of £5,744.06, and the net compensatory award I make is £3,829.37

284. The total of the basic and compensatory awards is the sum of £8,299.77.

(iii) Breach of contract

285. It was agreed that the notice period was the statutory minimum for someone with the claimant's continuous service of 12 weeks, with pay at £564.73, which is a sum of £6,776.76. There was no failure of mitigation during that period in light of all the circumstances as set out above, as I consider that it would be likely to have taken the claimant a longer period to obtain new employment after dismissal than the notice period. I therefore award the sum of £6,776.76 as damages for breach of contract.

(iv) Total

286. The total award of all the awards is £15,076.53.

(v) Benefits

287. The claimant stated that she had not received benefits, which I accept, and the recoupment provisions are not therefore engaged.

Conclusion

288. I answer the issues identified above as follows:

(i) What was the reason for the claimant's dismissal? Her conduct

(ii) If potentially fair, was the dismissal unfair under section 98(4) of the Employment Rights Act 1996? Yes

(iii) Was the claimant wrongfully dismissed and entitled to notice pay? Yes

(v) In the event of any finding in favour of the claimant what award should be made? The total sum is £15,076.53.

(vi) In that regard, (i) did the claimant contribute to her dismissal, and if so to what extent and (ii) had the claimant mitigated her loss? (i) The claimant had contributed to her dismissal to the extent of 60% and (ii) she had failed in part to mitigate her loss.

289. There are some aspects of the judgment which were not canvassed in submission, in particular in relation to terms and effect of the Articles and the funds that the entity held in its accounts at the end of March 2018. In the event that either party considers that this causes injustice and wishes to make further submissions, this may be done by way of an application for reconsideration under rule 70.

290. Finally, I would like to thank all three solicitors for their conduct of this lengthy and difficult case.

Employment Judge: **Alexander Kemp**
Date of Judgment: **08 July 2019**
Date sent to parties: **10 July 2019**