



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Maria Paul

**Respondent:** The Black-E (a private limited company with number 01056472)

**Heard at:** Liverpool                      **On:** 15, 16 and 17 July 2019

**Deliberation:** 26 July 2019

**Before:** Employment Judge Hoey

## REPRESENTATION:

**Claimant:** Mr Millet (solicitor)

**Respondent:** Ms Grace (counsel)

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unlawful deduction of wages is dismissed upon the claimant's withdrawal of said claim.
2. The claimant was fairly dismissed and her claim for unfair dismissal fails.

# REASONS

1. This was a claim for unfair dismissal presented on 16 August 2018. Initially the claim was for both unfair dismissal and unlawful deduction of wages but at the start of the Hearing the unlawful deduction of wages claim was withdrawn by the claimant. The claim for unlawful deduction of wages is accordingly dismissed upon withdrawal.

2. Both parties were represented by solicitors at the three day Hearing with submissions concluding around 5pm at the end of day three. I was presented with a bundle of 544 pages.

3. I heard evidence from the claimant and two witnesses, the Hires Manager and a former Trustee, and for the respondent I heard from the Director/co-founder of the respondent, the investigator, the Vice Chair and three Trustees: one who dealt with the dismissal hearing, one who dealt with the appeal hearing and one who dealt with further procedure.

### **Issues**

4. The claim was that the claimant had been unfairly dismissed, which was disputed by the respondent. The issues had been agreed between the parties and were:

- (1) Was there a potentially fair reason for dismissal, namely matters relating to conduct?
- (2) Did the respondent have a genuine and honestly held belief as to the claimant's misconduct?
- (3) Did the respondent genuinely believe on reasonable grounds that belief?
- (4) Had the respondent carried out as much investigation as was reasonable?
- (5) Did the respondent act fairly and reasonably in dismissing for that reason (namely did the dismissal fall within the range of reasonable responses), taking account of equity, size, administrative resources and substantial merits of the case?
- (6) Given the claimant was not seeking reinstatement or re-engagement what, if any, compensation would be due, the parties having agreed that this hearing would only determine any contribution of whether the claimant would have been fairly dismissed in any event?

### **Findings of Fact**

5. I make the following findings of fact on the basis of the evidence which I heard and the papers within the bundle to which I was directed. I make these findings based on the balance of probabilities, and reference to page numbers is to page numbers within the bundle.

### **Background**

6. The respondent is a registered charity in the UK responsible for a Community Arts Project. It is housed in a building which is over 200 years old. The organisation is very small with around four full-time staff.

7. The claimant began to work for the respondent in November 2009. She was engaged as Youth Arts Manager and was subsequently promoted to become Assistant Director in April 2013 and then Deputy Director in June 2016. As Deputy Director her duties comprised management and strategy issues. The Director was on occasion absent by reason of ill health and on such occasions the claimant required to carry out the Director's duties. The claimant continued to carry out the tasks as Youth Arts Manager while undertaking the management roles.

8. The claimant had never raised any issue or concern in relation to her workload (until the events set out below) and she had an unblemished disciplinary record.

9. The claimant had a very good working and personal relationship with the Director which had endured for 10 years.

10. The Director was absent from work due to being unwell from 8 October 2017 until late December 2017. The claimant, as Deputy Director, was responsible for taking on duties he would have carried out. These were set out by a member of the Personnel Committee and included line managing staff and overseeing the general day to day running of the building.

11. The claimant approached one of the trustees saying that she felt she lacked the authority of being Director. The Board agreed to appoint the claimant as Acting Director in the period from October 2017. The claimant was told she could approach the trustees if she needed any assistance whilst Acting Director.

12. The claimant was not provided with a written contract of employment but there was a disciplinary policy at page 262.

13. The respondent's organisation was run by a Board of Trustees which delegated the day-to-day running of the organisation to its Director and other staff. From October 2017 when the claimant was Acting Director she had ultimate responsibility for the organisation.

14. The Hires Manager within the organisation was responsible for booking acts and shows and dealing with the commercial arrangements in connection with such events.

15. The Hires Manager had been recruited by the claimant in March 2017 and the claimant had prior knowledge of the post-holder. The claimant line managed the Hires Manager, albeit the Hires Manager was very experienced. The claimant accepted that she line managed the Hires Manager in a communication to the Board (page 133) even although this was later denied by her.

16. As Deputy Director the claimant had supported the Director and was responsible for line managing the Hires Manager on a day-to-day basis, although such management was not on a detailed basis. Most hires and hire fees were discussed between the Hires Manager and the claimant with mutual agreement being reached.

17. In July 2017 the daughter of the Hires Manager was Production Manager for a pantomime which entered into an agreement with the respondent to provide a December show. This was the largest ever production for the respondent and was a very significant event given the income, publicity and number of people attending.

#### **The contract between the production company and the respondent**

18. The Hires Manager negotiated a contract (on behalf of the respondent) with the Production Company and agreed an income share arrangement.

19. I require to determine whether or not the respondent reasonably concluded that no written contract was entered into between the Production Company and the respondent. I find that the respondent was entitled to conclude there was no written contract signed by both parties. The claimant had been asked repeatedly for this document, as had the Hires Manager, and neither had produced it at any stage in the proceedings. Given the significance of this production (the largest the respondent had housed) I do not find it credible that no copy would have been taken and retained or that no signed copy could ever be produced.

20. The claimant argued that she had signed the contract in the presence of the Hires Manager who also signed it. She then said in her appeal meeting that the Hires Manager was in fact on holiday and the Hires Manager did not sign the contract. She produced a draft contract which appeared to have the Hires Manager's electronic signature on it.

21. On the balance of probabilities, I have concluded that there was no contract in place and it was reasonable for the respondent to so conclude.

### **Bespoke risk assessments**

22. With regard to the existence of bespoke risk assessments for the event, I also require to decide whether or not the respondent could reasonably conclude no bespoke risk assessments had been carried out for the event in question.

23. These were documents that had been requested from the claimant and Hires Manager. What was provided by the claimant was a generic document. The respondent obtained specialist IT input which suggested it had been created on 12 February 2018 and modified on 17 February 2018. The claimant alleged this was when it was saved to the computer but this explanation had not been given to the respondent during the disciplinary process. The claimant did not comment upon the IT evidence the respondent obtained during the disciplinary process. It was reasonable for the respondent to accept the IT evidence and find no bespoke risk assessments were in place for the particular production.

24. The claimant argued that there had been day-to-day risk assessments updated but these were not held on file and were not produced. I prefer the evidence of the respondent and find they were entitled to conclude no such documents were in place at the relevant time.

### **The incident**

25. The claimant, up until 31 December 2017, had an excellent relationship with the Trustees (some of whom she considered her friends) and the Director of the organisation (who was a close friend of the claimant). This changed on 31 December 2017, which followed the last day of the pantomime, when a leak was discovered in the respondent's building which had damaged the flooring. It was clear from this moment on that the relationship between the claimant and the respondent had fundamentally altered. There was no prospect of the claimant returning to work from that moment on.

26. The claimant had carried out the role of Acting Director well and she was settled until 31 December 2017.

27. On 31 December 2017 the leak within the building housing the respondent had occurred. The Director tried to deal with the matter internally. There had been a short meeting with the claimant and the Director on 3 January 2018 at which the claimant appeared angry towards the Director.

28. This leak had the potential to be catastrophic for the respondent given the specialist nature of the floor. The Director believed the damage could potentially cost £30,000. He was concerned about this and wanted to ensure the respondent was protected. He was concerned that the claimant was not similarly concerned about ensuring the respondent was as protected as it could be.

### **Claimant meets Director**

29. On 5 January 2018 the claimant was asked to meet with the Director. The Director, upon seeing the claimant, realised that she appeared to be extremely angry and he chose to record that meeting covertly on his mobile phone. The claimant was extremely angry and used offensive language to the Director repeatedly, which caused him considerable concern. The Director was seeking information as to what had happened in his absence and in connection with the event in question, together with concerns as to the financial position. The claimant said at this meeting:

“So, you know what? It’s done. I’m going to find a new job and I’m done. I don’t have to sit and listen to anything else.”

30. The claimant believed that her work had been undermined and that she did not receive any support from the Director. The Director was extremely surprised given the close relationship that had existed and was not clear why the claimant’s position had changed. The claimant had not raised these concerns before.

31. It was the Director’s view that the claimant appeared no longer fully supportive of the respondent and appeared to be supporting the Production Company, which the Director believed could have been responsible for the leak. The Production Company had attached something to the floor around the area where the damage had been caused. The Director believed that company had been responsible for the damage. He believed CCTV footage supported that position. Loss Adjusters were investigating. The claimant was concerned not to apportion blame until proof had been obtained and she did not wish to make any assumptions. The Hires Manager had a family member involved in the production.

32. Following that meeting and in light of the damage which had appeared to the respondent to have been caused by the production of the company having placed nails into the floor which appeared to have pierced a pipe, an investigation was undertaken. The investigation was commenced, by the Director, to look at what had happened in his absence.

### **Claimant cannot work with the Director**

33. The claimant called Ms Glean on 5 January 2018 saying that she was resigning. She said she felt that she was not supported by the Director. Ms Glean spoke with the Director who stated that upon his return to work and having had a discussion with the claimant on 3 January 2018 the relationship had fundamentally changed.

34. On 9 January 2018 Ms Glean sent an email to the claimant seeking to find a solution that would allow the claimant to return to work and allow dialogue to take place. The claimant was given 2 week's paid leave. Ms Glean was seeking to identify a way to allow the claimant to return to work. Given the size of the respondent, it was not likely to find a way in which the claimant could work without working alongside the Director.

35. At this stage, the investigation in relation to the issues that had arisen had begun which identified a number of concerns in relation to the claimant's conduct during her time as Acting Director.

### **Disciplinary process**

36. One of the trustees, Ms Glean, was Chair and member of the Personnel Committee. She was tasked with dealing with the process involving the claimant and the issues. (and she sought legal advice as required). She followed the disciplinary procedure set out at page 262. Ms Glean oversaw the process and took responsibility for communicating the outcome at each stage of the process with the claimant.

37. The Personnel Committee was responsible for ensuring different trustees heard the disciplinary hearing and the appeal hearing. The committee comprised Ms Harper, Mr Cullen and Ms Glean.

### **Suspension**

38. The claimant was suspended on 24 January 2018 (page 209). This was a precautionary measure determined by the Personnel Committee (having taken employment law advice). The claimant was at this time off work sick and her fit note had covered her to the period 12 February 2018 (which was later extended to 13 March 2018).

39. The suspension letter explained that an investigation was being undertaken and set out the specific allegations.

### **Claimant's response to allegations**

40. On 17 February 2018 (page 249) the claimant sent a 2 page response including attaching copies of the contract and risk assessments (which she had received from Ms Connell, but accepted she had not checked).

41. The contract she attached was the contract signed electronically only by the Hires Manager but no one else. She also said that the risk assessment had been done (which was a generic document) and that she had made payments to staff. The claimant accepted she authorised the relevant payments (although payment was made by another person).

### **Investigation**

42. The Director had been appointed to investigate matters and report back on the position in relation to what had happened in his absence. The Director's role was to set out the factual position to allow the trustees to decide what, if any, further action was needed.

43. On 18 February 2018 (page 230) an 11 page report was provided which sets out a number of serious allegations in relation to the claimant. These allegations are as follows:

“(1) You appeared to have failed as the Deputy Head to ensure that prior to [production company] commencing preparations for their event, three key tasks under your remit had not been undertaken. These are:

(a) A full risk assessment to be conducted;

(b) A contract between the parties was in place; and

(c) The contract sums to be collected in advance of the event commencing.

As you are aware, they may have caused substantial damage to the floor which will cause a substantial loss of income over the next 3-6 months.

(2) Without proper authorisation you have authorised large payments to a number of sessional workers and freelancers: an unusually large deficit has been reported in the management accounts.”

44. In that report further details are given as to the allegations and in particular details as to finance are found at pages 220-223. It is set out that the claimant appears to have paid significantly more than the agreed rate in respect of sessional workers. This included the claimant's boyfriend who was alleged to have been paid three times the normal rate for one day's work in October and November. Dates (and further details) are given in the report.

45. The Report included 2 documents. One was from Ms Glean (page 225) which set out the background and her communications with the claimant, given Ms Glean was Vice chair. She concluded her document by noting that there appeared to be sufficient information obtained during the investigation process to remit matters to a disciplinary hearing. The other document was from Ms Harpe setting out her interactions with the claimant.

46. The Director had concluded that the matters arising ought to be remitted to a disciplinary hearing to be determined. It was his view that the claimant ought to have been liaising with the Hires Manager to ensure the contract and risk assessment were all in place for the production. The investigation appeared to show that there was no signed contract in place and that the risk assessments had not been done specifically for the event. The Director spoke to the finance manager and noted that the claimant appeared to have authorised payments in breach of the respondent's policy (which were detailed in the Report). He had also spoken with the Hires Manager and included his response in the Report. He did not prepare separate witness statements from these individuals but included his findings in this Report in relation to the matters that he was investigating.

**Claimant is updated**

47. On 24 February 2018 Ms Glean advised the claimant at page 233 that the investigations were concluded. A copy of the Report was included and the claimant was asked for her comment together with any mitigating factors. The letter specifically stated that she could provide her own evidence or witness statements.

### **Trustees are updated**

48. Ms Glean had updated the trustees as to the situation by confidential communication on 7 March 2018 (page 256). That noted that Ms Connell, Hires Manager, had resigned and that the claimant had been suspended. The communication also noted that the damage to the floor appeared to have been the responsibility of the Production Company. The trustees were updated as to the position regarding the claimant.

### **Disciplinary meeting**

49. A disciplinary hearing was fixed for 16 March 2018 to which the claimant was invited by letter (at page 260) which again contained the Report which set out the allegations and issues. The claimant was given another opportunity to provide any written response (having declined to do so following the previous letters).

50. The claimant did not attend this meeting as she was unfit to attend. The panel considered whether to proceed and decided they would. The trustees had come from Liverpool and London and had no prior involvement in the matter.

51. The panel noted the claimant had been given an opportunity to provide a written statement to address the allegations (in addition to the investigation stage). She had not initially done so and the invite letter offered the claimant another chance to provide a response. She chose not to do so.

52. The panel had been determined by the Personnel Committee and comprised 3 trustees, Ms Benjamin, Ms Malcolm and Mr Cullen.

53. The disciplinary hearing took place on 16 March 2018, and the minutes appear at page 277. Although the claimant did not attend, the panel looked at each allegation and the information the claimant had provided in detail.

54. The panel concluded that there was no risk assessment or contract in place and that the claimant appeared to authorise payments (including to her boyfriend) which were above the agreed rate (for which she had no authority).

55. The provisional view was taken that as Acting Director the claimant was responsible for the allegations.

56. The claimant had been asked to provide the written contract and risk assessment and had not done so at the time. The signed contract had not been produced. There was no evidence of the risk assessment being in place at the time since it appeared to have been created on 12 February 2018 and modified on 17 February 2018. The risk assessment would have addressed putting nails into the floor.

57. During the investigation information had been obtained by an IT expert at page 154 which appeared to show that the risk assessments were created after the

event. The IT report stated the risk assessment document appeared to be created on 12 February 2018 and was modified on 17 February 2018. This was some months after the event in question. Although the claimant had been given this information, she had not provided any explanation.

58. The claimant had authorised payments set out in the Investigation Report which were significantly above the agreed rates. No explanation had been given. There was also a large deficit in the management accounts.

59. Mr Cullen had stated that “I’m not sure where we go from here. It’s obvious from the evidence we have before us that it appears that Maria is definitely guilty of gross misconduct. We can find no evidence from her response that would lead us to believe that she had reasons for not carrying out her duties as the acting director.”

60. The panel reached a “preliminary view on the evidence” and concluded that the claimant was grossly negligent and termination of employment would be appropriate. This was, however, expressly stated to be “subject to the claimant getting another opportunity to address the allegations”.

61. By email of 20 March 2018 (page 283) a solicitor on behalf of the respondent asked the claimant for any written representations in response to the allegations to ensure the panel has all the available evidence and that she let the respondent know if she wishes to rely on any witnesses or documents. The claimant declined to do so.

### **Claimant given further chance to respond**

62. Given the claimant had been unable to attend the first hearing, the panel wished to give the claimant a further opportunity to present her response. The panel wanted the claimant to provide a response to specific questions and on 21 March 2018 at page 287 four additional questions were sent to the claimant for her to answer, including why there was no signed contract, risk assessment or insurance policy in place, steps taken to avoid a conflict of interest given the Hires Manager’s daughter was the Production Manager, why neither a risk assessment nor contract was produced prior to the production commencing, and an explanation for the payments and rates of pay. The claimant was given a further opportunity to provide any representations as to the issues and allegations.

63. The panel asked the Director to consider the response and provide an up dated position which he did on 3 April 2018 (p308). The position was:

- (1) The claimant believed that there was a risk assessment in place and it was ongoing. She argued she had already produced this. The respondent’s position was that this was the document which the IT experts had advised was created after the event in question, a point the claimant had not addressed at all.
- (2) The claimant argued the contract with the Production Company was in place and this was the one she produced. This only had an electronic signature from Ms Connell and no one else. No signed contract was ever produced.

- (3) The claimant was asked why there were no risk assessments in place or why the contract was not in place at the time. She did not provide a response to this.
- (4) The claimant was asked why she made the payments that had been set out in the investigation document. Her response was that the payments were at the agreed rates. There was no suggestion that the claimant had not authorised the payments in question. She failed to engage with the allegation substantively.

64. On 10 April 2018 (page 324) the respondent sought the claimant's comments given their review of the allegations. This was a further chance for the claimant to provide her substantive response.

65. On 12 April 2018 (page 328) the claimant decided that she would take no further part in the proceedings asking that a final decision be made. She did not provide a response to the issues that had arisen.

### **Panel make a decision**

66. The disciplinary hearing was reconvened on 17 April 2018 (page 328A). Only two of the trustees were able to make that meeting (as Mr Cullen was absent). The panel proceeded to deliberate and reached consensus.

67. The panel concluded that they believed the risk assessment (that the claimant had emailed) was fraudulent given the dates from the computer system; they concluded that there was no risk assessment in place. They also concluded that as the signed contract had not been produced in November 2017 and was still not produced. They concluded that the claimant had three months as Acting Director and had failed in this respect.

68. The panel also concluded that there were large payments in respect of which there was no authorisation, and the claimant had not addressed the specific point. This showed, in the panel's view, a failure on the part of the claimant, and they concluded that "clear gross misconduct has occurred in terms of the large sums which were authorised as well as not ensuring that the right paperwork, contractual agreements, risk assessments, were completed and completed before production". They concluded that the claimant "is definitely guilty of both charges; she evaded answering the question".

69. On 26 April 2018 (page 332) a dismissal letter was issued upholding both allegations. The panel found no evidence to support the contention a full risk assessment and/or contract was prepared, provided and signed off, and they concluded that the claimant had, without proper authorisation, made a large number of payments in respect of which there was no explanation. They also noted the deficit in the management accounts.

70. The claimant was given the right to appeal.

### **Appeal**

71. The claimant appealed against her summary dismissal (page 340). The appeal panel comprised 2 different trustees. The claimant's appeal was on 2 grounds, namely that the process was unfair and unprofessional and that the panel was not impartial as they comprised the Director's friends.

72. The minute is found at page 350 and the papers the panel considered are at pages 506 and 507. The appeal hearing took place on 30 May 2018. The minute is at page 350.

73. The claimant argued that it was not her responsibility to micromanage the Hires Manager. She maintained the contract had been in place and risk assessments were issued. She refused to engage with the specifics as to the reason for her dismissal.

74. The claimant was angry and upset during the appeal meeting. She did not provide any response to the issue as the fraudulent nature of the risk assessment which appeared to have been created after the date it was alleged it existed. There was no further engagement by the claimant as to the sums she is alleged to have authorised. She was annoyed the panel sought to discuss the specific allegations and wished to focus on her two grounds.

75. The panel deliberated on 15 June 2018 (page 358), noting that no new evidence had been produced, that the claimant had refused to answer the questions put to her and that she had ignored the question about the fraudulent document, and accordingly upheld the decision to find her guilty of gross misconduct and for her dismissal to be confirmed.

76. The panel met on 23 June 2018 (page 358) to confirm their decision.

### **Appeal dismissed**

77. The outcome letter (page 360) dated 28 June 2018 dealt with each part of the claimant's appeal. It found that the Trustees were impartial and a fair process had been carried out. The disciplinary process had been followed. There was no evidence provided by the claimant to support that point.

78. The panel noted that although the claimant had not appealed against the allegations themselves, they did seek to address them. The claimant had provided no new evidence in relation to the allegations nor her response. She had not engaged with the questions and had still refused to explain the position in relation to the dates of the risk assessment.

79. The claimant's dismissal was confirmed. There was no new evidence presented by the claimant and the panel was satisfied the decision that was taken was correct. The appeal failed.

### **Grievance**

80. The claimant had raised a grievance which dealt with similar matters to that contained in the disciplinary process and that had taken place a number of years previously. The respondent advised the claimant on 26 April 2018 the matters would be dealt with via the disciplinary process. The claimant did not pursue this further.

## The Law

81. Section 98 (1) of the Employment Rights Act 1996:-

“In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show: -

- (a) the reason (or if more than one the principal reason for the dismissal); and
- (b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

82. Section 98(2) of the Employment Rights Act 1996:-

“A reason falls within this subsection if it... relates to the conduct of the employee”.

83. Section 98(4) of the Employment Rights Act 1996:

“Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer): -

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
- (b) shall be determined in accordance with equity and the substantial merits of the case”.

84. In accordance with the tests set out in ***British Home Stores Ltd v Burchell*** 1980 ICR 303 the Tribunal must consider:-

- (i) Did the respondent believe the claimant was guilty of misconduct?
- (ii) Did the respondent have in its mind reasonable grounds upon which to sustain that belief? and
- (iii) At the stage at which that belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?

85. Range of reasonable responses:-

- (i) When assessing whether the **Burchell** test has been met, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to

consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

- (ii) The starting point should always be the words of section 98(4) themselves. In applying the section, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted.
- (iii) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether 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. However, the band is not infinitely wide and is not a matter of procedural box ticking.

86. The Tribunal must not substitute its decision for that of the employer and must look at the matter through the lens of a reasonable employer: could a reasonable employer have carried out the procedure that was undertaken, and could a reasonable employer have dismissed for the reasons relied upon in this case? In other words, it is important not to substitute the Tribunal's decision for that of the employer, and the matter must be looked at in the round to decide whether or not the respondent acted reasonably: **Sainsburys v Hitt** 2003 IRLR 23 and **Secretary of State v Lown** 2016 IRLR 22.

87. As it is not a criminal trial, the employer does not need to prove the guilt of the employee beyond reasonable doubt – it is sufficient that the employer acted reasonably in treating the misconduct as a sufficient reason to dismiss in the circumstances known to the employer at the time.

88. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (**West Midland v Tipton** 1986 ICR 192).

## Compensation

89. In addition to a basic award (Section 119) Employment Rights Act 1996, Section 123(1) Employment Rights Act 1996 provides for a compensatory award which 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 (capped at a year's pay).

90. Contributory conduct:-

(i) Section 122(2) Employment Rights Act 1996 states:

Where the Tribunal considers that any conduct of the claimant before the dismissal ... was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly

(ii) Section 123(6) Employment Rights Act 1996 states:

Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion regard to that finding.

### ***Polkey***

91. Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a Tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

### **Decision and Discussion**

92. I shall deal with each of the issues that require to be determined by the Tribunal in turn.

#### **Genuine and honest belief which was reasonably held?**

93. The claimant accepts that the reason for her dismissal related to her conduct, which is a potentially fair reason and so the first issue is whether the respondent had a genuine and honestly held belief as to the claimant's misconduct.

94. The claimant also fairly accepts that the respondent genuinely held the belief but argues that the belief was not reasonable nor honestly held. This was essentially because the claimant believed that the respondent had closed its mind to anything other than dismissal and the investigation and approach taken was unreasonable in light of that approach.

95. The first issue relied upon by the claimant in the submissions made on her behalf was the fact that the Director investigated matters. It was contended that it was unreasonable to have him involved given the dispute that had arisen, as manifested at the meeting on 3 and 5 January 2018. It was suggested that someone

truly independent ought to have been tasked with the investigation. It was alleged that he had already concluded the claimant was not going to return.

96. While it was clear that the two individuals were in dispute, I do not consider that the Director's involvement in the investigation was unfair. He fairly noted that his involvement was to identify the facts and report matters to the trustees. His role was to be objective and present findings, not his opinion. By and large that was what he did.

97. Even if he was in dispute with the claimant, he identified the key issues and sought to fairly reflect the factual position in his Report. The size and resources of the respondent is important. Clearly a perfect employer would have conducted matters differently but that is not the test. A reasonable employer would ensure that an investigation is undertaken that seeks to establish the facts. The Director in this case was in fact best placed to do so given his knowledge of the organisation and procedures particularly in light of the size of the employer and its resources. The involvement of the Director and the outcome of his investigation was not unreasonable.

98. The fact the Director had carried out the investigation was not something about which the claimant had raised concerns during the disciplinary process. It is also not clear what the claimant says would have been different had someone else investigated the matter. The facts were identified by the Director – the absence of the contract and risk assessments and the claimant's authorisation of the payments. Anyone else investigating the issues would have identified the same facts and the same position would have been arrived at.

99. The claimant argues that the scope of the investigation was unduly narrow and more steps should have been taken. In particular, it was submitted that statements should have been taken from the 2 employees with whom the Director spoke during his investigation. I accept a perfect employer would have done so but I do not find that the Director's approach in this matter given the circumstances was unreasonable. He set out in his Report the facts that he discovered from these individuals. There was nothing suggested by the claimant that would have made any difference. The Director decided to focus the issues in dispute and rely only on the facts germane to the issues he was to investigate (and no go beyond that). Such an approach was reasonable.

100. The allegations that emerged following the investigation were self-evident. It was alleged that the claimant had not carried out 3 key tasks for which she was ultimately responsible and that she had authorised payments that were excessive. The Report prepared by the Director set out the dates of the payments and gave sufficient detail to ensure the claimant knew what the allegations and issues were.

101. I accept the respondent did not provide a detailed breakdown nor detailed statements from the individuals but the Report is sufficiently detailed and comprehensive to provide the claimant with fair notice as to exactly what was alleged.

102. The specific payments are set out at pages 220 and 221. The claimant fairly accepted in cross examination that she had authorised these payments. She had not previously challenged the payments – which are set out in some detail in the Report.

While another member of the team would physically pay the amounts, it was her responsibility to authorise the payments and ensure the sums are legitimate. There was no suggestion as to what additional information the claimant needed in order to fully understand the specific allegations (and nothing had been sought).

103. In any event there was no suggestion during the disciplinary process that the claimant did not have enough information in order to fully respond. Instead she chose not to engage with the specifics of the allegation and alleged that the payments were legitimate. Unfortunately the claimant did not provide the detailed response that she provided to the Tribunal on day 2 of her cross examination to the respondent at the time. Her position was that the payments were in accordance with the policy but she did not explain her reasoning, despite the clear information provided in the Report and subsequent adjustments, that appeared to show significant increases in sums being paid, including to those close to the claimant.

104. The fact the specific invoices were not included in the Report does not render the investigation unreasonable. The claimant knew in advance the days in question and the nature of the payments and why the respondent considered the sums to be excessive. She did not suggest more information or breakdowns were needed. Enough information had been set out that gave the claimant sufficient notice of the concerns the respondent had. They sought the claimant's specific explanation which did not materialise during the disciplinary process.

105. From the evidence led before the Tribunal, it is highly likely that even if the respondent had the response the claimant gave in her evidence, the outcome would in all probability have been the same. The sums appeared to be contrary to what the respondent ordinarily paid for the days in question. She also appears to have paid more to those who were close to her, including her boyfriend.

106. It was also not unreasonable for the respondent to put the allegations to the claimant in the way they did, without convening an investigation meeting with her first. The claimant was given around 9 specific opportunities to set out her response during the disciplinary process. The failure to afford an investigation meeting was not unreasonable and in any event is unlikely to have made any difference given the claimant's approach at the time to these matters. There was no suggestion from the claimant that an investigation meeting would have resulted in a different outcome.

107. The claimant also argued that it was unreasonable not to interview the Hires Manager and include her statement in the Report. A reasonable employer might well have done so but equally I do not think it was unreasonable to have done what the Director did in this case. He asked the Hires Manager to produce the documents. Nothing was forthcoming. The claimant knew what the respondent sought. The claimant had also been told that she could provide witness statements or other documents. If she believed that further discussions with the Hire Manager would have provided more information she could have raised this. She did not do so. The question is whether or not the approach taken was reasonable. It is not a counsel of perfection and the approach taken was reasonable.

108. It was not unreasonable for the Director to include the result of his discussions with the individuals in question in his Report which gave the claimant fair notice of the issues that he had found during his investigations. The facts that were gleaned

were straightforward and no further detail was needed. The claimant was given the important information to ensure she knew what the respondent's concerns were.

109. The fact that the Director also sought specialist IT advice in connection with the risk assessment document underlines the length to which the respondent went to ensure the investigation was thorough and fair. The information they obtained suggested the document was prepared later than suggested. It was not unreasonable for the respondent to rely on this. If the claimant had an alternative explanation or wished other enquiries to have been undertaken she was given a number of opportunities to raise this. She did not do so.

110. It was also suggested that Ms Glean's involvement throughout the process was unfair and unreasonable. Ms Glean as Vice Chair, a layperson and trustee, had a difficult job to do. She was not part of the panels but equally had to ensure that the respondent's policy was followed and the relevant parties (including the claimant) were kept up to date.

111. It is not surprising she states in her document that was included with the Report that the Director had decided that there was sufficient material to proceed to a disciplinary hearing since the evidence that he had obtained clearly required an explanation from the claimant. No decisions had been taken at that stage as the matter was still being considered.

112. Ms Glean's involvement in the process was not unreasonable. She was not part of the panel that decided to dismiss or dismiss the appeal. She took no part in the substantive decision.

113. I find that the respondent had an honest belief which was genuinely held as to the claimant's misconduct. The evidence from the disciplinary and appeal panel and the correspondence makes it clear that the respondent did its best to obtain the claimant's response to each of the concerns that had arisen. Regrettably the detail was not forthcoming from the claimant. The respondent genuinely and honestly believed in the guilt of the claimant.

**Did the respondent have reasonable grounds for that belief?**

114. The claimant challenges the composition of the panel arguing that the trustees involved were all favourably disposed towards the Director and were unlikely to challenge him. I do not think that is a fair criticism. The respondent is a small organisation that depends upon trustees. The Personnel Committee is formed to ensure some degree of separation of powers exists and that committee did its best given the challenging circumstances facing the respondent to create a fair panel. The Committee wanted to ensure a fair panel was convened to be as fair to the claimant as possible.

115. The claimant candidly accepted that she had a good relationship with Ms Glean but this changed once the disciplinary process progressed. Trustees have clear responsibilities. It is natural for trustees to have pre-existing relationships with staff, as much as other staff have relationships with each other. There was no evidence that the relationships were anything other than professional. The composition of the panel was reasonable.

116. The panel at both the disciplinary hearing and appeal stage comprised independent persons. Those persons carried out their role diligently and to the best of their ability. There was no bias or inappropriate discussion or unfairness. None was in fact specifically suggested. The evidence showed that the claimant was given a fair chance to set out her response, which would have been fully considered. For example the appeal panel sought to engage with the claimant on the specific allegations even although the claimant did not wish to do so.

117. The involvement of Mr Cullen was not in my view unreasonable. He was part of the process given his role on the Personnel Committee and background. The fact he was part of the team that decided to suspend the claimant does not mean he determined the claimant's guilt. The suspension was a precautionary suspension and the accompanying letter makes it clear that no decision had been made. It was not perfect but it was not an approach that no reasonable employer would take.

118. The minutes and outcome letters show that the persons in question carried out their job diligently and fairly. Each member reached their own view on the information before them. It is difficult to see how they could have reached a different decision on the basis of the information they had at the time. They acted within the band of reasonable responses.

119. It was also alleged that the disciplinary hearing panel failed to properly analyse the allegations to determine what precisely the claimant had done wrong. It was suggested there was an assumption that the claimant was guilty and no assessment took place as to the precise conduct of the claimant. It was suggested that the panel essentially assumed the claimant was guilty and therefore it was gross misconduct and dismissal was a certainty.

120. I think that is an unfair criticism of the panel which took its role seriously both in terms of whether or not the claimant was guilty of the allegations in question and as to what a reasonable outcome should be. The panel looked to the claimant for her response to each of the allegations which had been set out in detail. The claimant had been told that the first allegation related to her being Acting Director and as such she ought to have ensured the risk assessments were in place and the contract had been signed and retained. The second allegation was that the claimant had allowed payments to be paid that were excessive.

121. The panel looked at each allegation in turn. They looked at what the claimant had provided and they did analyse that detail. Their conclusions were entirely reasonable. No signed contract had been produced, despite the time that had passed and the risk assessment document was generic and appeared to be post dated. No specific response had been given to the panel by the claimant to justify the payments set out in the Report which on the face of it appeared excessive.

122. The panel did not assume the claimant was guilty but provided a fair chance for the claimant to provide a response. They analysed the information they had and reached a view. Their provisional view was not unreasonable. There was no response from the claimant that dealt with the key issues. While a reasonable employer might well have waited for the claimant to return to fitness before convening the panel, the respondent gave the claimant a large number of opportunities to provide her response. The decision had not been pre-determined. Had it been so, such opportunities would not have been afforded to the claimant.

123. The fact the claimant had already provided a written response suggested the claimant was capable of doing so. Regrettably the claimant had suffered significant health issues but these were not fully raised at the disciplinary hearing stage. The claimant candidly accepted in cross examination that she could have defended herself a lot better and it took a number of months before she was able to do so (by which stage her appeal had been heard). The respondent acted reasonably from the information that the claimant had given.

124. Had the claimant explained the serious issues she had, and their impact upon her involvement in the process, the outcome may well have been different. But from the information the respondent had, and given the lack of engagement by the claimant and the lack of response to the key outstanding factual issues, the respondent did the best it could and acted reasonably. The respondent fully engaged with each of the allegations and properly analysed the substantive issue in each case. Their conclusions were reasonable from the information before them.

125. It was not unreasonable for the panel to conclude that the claimant was guilty of gross misconduct, both on a provisional basis and upon conclusion of its deliberations. I am satisfied that the panel had only reached a provisional conclusion at the first hearing. They fairly took into account each point the claimant raised and then asked specific questions to seek the claimant's response. Those were the key issues that required clarity, the claimant having thus far failed to fully engage.

126. Different employers act in different ways but that does not mean one is unreasonable. The panel did not specifically advert to the fact that the claimant was in an Acting role and that no specific training had been provided. Equally, there was no specific training suggested by the claimant either during the disciplinary process or at Tribunal that would have made a difference. The respondent was a small organisation and the claimant had been Depute Director and Assistant Director for a number of years. The claimant did line manage the Hires Manager and the issues in question did happen when she was in charge. The organisation was small and it was obvious that the claimant had only been carrying out the role for the period in question. She had attended Trustee Meetings before and the position had been set out by Ms Glean.

127. The panel acted reasonably in reaching the conclusions that it did from the responses provided by the claimant and from the information that it had. The allegations were clear and their seriousness was self-evident.

128. Counsel for respondent referred to **Adesokan v Sainsburys** 1017 IRLR 346 where the Court of Appeal found that where the issue is whether or not the claimant was in repudiatory breach of contract, the focus is on the damage to the parties' relationship (whether in relation to dishonesty, deliberate action or gross negligence). The panels' focus on this case was in relation to the specific allegations (as set out in the Report) and in relation to the claimant's actions and the impact that had upon her relationship with the employer. It was not unreasonable for the panels in essence to conclude that by her conduct (from the information they had before them) all trust and confidence within the employment relationship had been destroyed.

129. The issues did give rise to misconduct. The claimant could and ought to have ensured that the relevant documentation was in place. While the Hires Manager might have dealt with these issues on a day to day basis, the particular show was of

such significance to the respondent that it was the claimant's responsibility to ensure the relevant matters had been dealt with.

130. As a charity, the sums in question in relation to the second allegation were significant. Even a small amount of money can have a large impact. The financial position of the respondent had worsened, which ought by itself to have placed the claimant on notice as to the importance of checking the financial position and ensuring all payments were properly paid. That was one of the key roles of Acting Director. The claimant had authorised payment for individuals that was considerably in excess of the relevant rate. Such conduct went to the root of the employment relationship.

131. The appeal panel gave the claimant a further chance to set out her position. Any issues that arose as a result of the disciplinary panel could have been revisited given the fact the appeal panel was receptive to revisiting each of the allegations but the claimant did not engage in that process.

132. In all the circumstances I find that the respondent did have reasonable grounds to believe the claimant was guilty of gross misconduct and did act reasonably in so concluding.

### **Reasonable investigation**

133. The claimant argues that the respondent had not carried out as much investigation as was reasonable.

134. I note above that in my view the respondent did not act unreasonably in asking the Director to investigate matters. He spoke with the relevant persons and ensured that his Report set out the key outcomes of his investigation. The Report is far from perfect and a perfect employer would have carried out a different investigation but ultimately what was done was reasonable. The claimant was given proper notice of the specific issues and further information could have been sought if felt necessary. There is no suggestion that such information would have made any difference.

135. There was also no suggestion that the outcome would have been any different had other individuals been interviewed. For example, the Hire Manager sought to explain the date on the risk assessment as being the date she saved the document to her machine but there was no reason why the document required to be saved rather than simply forwarded. The IT report suggested that the document was created after the event. It is entirely possible that the respondent would have continued to have relied upon the IT report despite the Hire Manager's explanation.

136. Mr Cullen's involvement throughout the process was also not unreasonable in my judgment. The respondent is a small organisation with very limited resources. He reached a provisional view with which his fellow panel members agreed. The claimant criticises his involvement and then criticises the fact he was not present during the panel's final deliberations. The remaining panel members reach a reasonable conclusion when they meet again, absent Mr Cullen, from the information before them.

137. The conclusion they reach was reasonable from the information in their possession. The conclusion accords with what Mr Cullen (and the other members) had reached on a provisional basis. There was no information provided by the claimant that could reasonably support any other conclusion and there was no suggestion of this by the claimant.

138. While there was no express consideration of alternative sanctions, it was clear that the panel's view was that the claimant was guilty of gross misconduct. She had been in charge and failed to ensure a contract was in place together with risk assessments. Those failures in themselves were very serious and could well have led to significant loss to the respondent. The claimant had also authorised excessive payments, itself a very serious issue given the nature of the respondent and raised serious issues as to trust. Both allegations had the potential to amount to gross misconduct in themselves and the panel did not act unreasonably in deciding to dismiss. While other employers might have considered demotion, I do not consider that it was unreasonable to have dismissed in this case.

139. From the evidence presented to the Tribunal, I am satisfied that even if the panel had explored alternatives to dismissal, it was clear that the panel would have opted for dismissal in any event. They were satisfied that the claimant's conduct was so severe so as to justify her dismissal. That was not an unreasonable outcome to reach from the information before the panel. The appeal panel also gave the claimant a further chance to raise any concerns she had.

140. In all the circumstances the investigation carried out fell within the range of reasonable responses open to a reasonable employer.

**Did the respondent act fairly and reasonably in dismissing for that reason (namely did the dismissal fall within the range of reasonable responses), taking account of equity, size, administrative resources and substantial merits of the case?**

141. The claimant argues that the appeal panel was confused in its approach. The minutes suggest that the claimant did not answer questions and the fraudulent document question was left unanswered. Rather than that being in a literal sense, I consider that the panel meant that as a whole, and during the entire disciplinary process, the claimant had failed to fully answer the allegations. At no stage had the claimant provided any response to the information obtained by the IT experts and she did not challenge their findings. Even at the appeal stage the respondent had no information from the claimant to suggest that the information the IT experts had provided was in some way unreliable. The respondent was entitled to take that information as accurate. The claimant had failed to provide any meaningful response to the payments she had authorised.

142. The claimant accepted in cross examination that her health situation was in fact for more serious than she had let on at the time. While she did place some information before the appeal panel, she did not suggest she needed more time or more information. She became frustrated with the appeal panel when they sought to ask her reasonable questions as to the allegations. She saw the appeal as a chance for her to put her issues forward (which focussed on general issues) and she did not wish to revisit the specific allegations. That was regrettable and again showed the lengths to which the respondent went to try and give the claimant the best

opportunity to explain what happened and give her response. She did not fully engage with the specifics, leaving the respondent with little information. I accept counsel for the respondent's submission that the respondent only made its final decision once it was clear the claimant was not prepared to fully engage with the process.

143. I accept that the claimant with hindsight would have dealt with matters differently. At the Hearing counsel for the respondent noted that there were 5 new issues that had been raised by the claimant that were not before the respondent until the Tribunal Hearing itself. The respondent can only proceed on the basis of the information it had at the time. While the claimant may well have had good personal reasons (unknown to the respondent) for not fully engaging and while she laboured under a misapprehension as to the respondent's desire to fully consider matters, the respondent did the best it could from the information presented to it at the time.

144. I have carefully considered each of the points made on the claimant's behalf challenging the decision to dismiss and I have carefully considered the evidence led and documents to which the Tribunal's attention was drawn. This is not a counsel of perfection and I am not permitted to substitute my view for that of the employer. I have considerable sympathy for the claimant, as did the respondent. The respondent required to consider the information that it reasonably had at the time during which the process was ongoing. It did so and it did so reasonably. I must decide whether or not this employer acted fairly and reasonably in all the circumstances taking account of its size and resources and the equity and merits of the case.

145. I accept that the claimant's livelihood was at stake and she was performing a challenging role. She had lengthy service with the respondent. Clearly the event in question had a serious impact upon the claimant's view of the respondent, and its Director in particular. The respondent was under an obligation to investigate matters and make a decision upon the information that it had obtained and what the claimant provided.

146. The claimant had a very good working relationship with the respondent and the Director until the events in this case unfolded. Regrettably the claimant's health was affected. For good reasons she did not seek to fully engage with the respondent but she failed to ensure she placed before the respondent all relevant information which could have assisted her case. She accepted that it was not until some months later that she was ready to address the issues. She had presented some detailed written responses and attended the appeal hearing to address the points she wished to address, all of which was taken into account fully.

147. The respondent had given the claimant a large number of opportunities to detail her explanation. She became frustrated and felt that the outcome was predetermined and as a result failed to fully engage with the issues and provide a substantive response. In my view her dismissal was not predetermined and in fact the continued attempts by the respondent to seek information from the claimant, was a reasonable and thorough attempt to get sufficient information from the claimant to enable a fair conclusion to be reached. I am satisfied the respondent carried out a fair investigation which had at its heart, finding out what happened, and whether the claimant could assist them in explaining the alleged failures that had emerged during the investigation.

148. The claimant accepted in cross examination how serious the allegations were, not least given the nature of the production, the involvement of young people and the public and the potential risks that could arise. The risk assessments and contract were key issues, and issues for which the claimant was ultimately responsible. The fact the respondent is a small charity intruding with public funds underlines the importance of ensuring appropriate financial management. These were matters under the claimant's control for the period in question.

149. The claimant was given clear information as to the specifics of each allegation. The Report sets this out in detail as a whole. The claimant was given the chance of seeking more information or providing her own witnesses or documents. She could have asked further issues to be considered if she felt the investigation was unreasonable. She did not do so.

150. The respondent reasonably concluded from the information before it that the claimant was responsible for the failure to ensure risk assessments were carried out and a signed contract was in place. The claimant said she was present when the contract was signed. No copy was ever produced. That contract existed to protect the respondent in event of damage. The failure to ensure a copy was provided together with the failure to ensure up to date risk assessments were retained were themselves acts of gross misconduct.

151. The failure to ensure payments were paid at the appropriate rate, and not excessive, was also an act of gross misconduct. The claimant was ultimately responsible and ought to have known the importance of keeping the financial position of a small organisation on a sound basis. She authorised payments which were outwith the norm and was unable to provide the respondent with a reasonable explanation and to why she did so. The claimant accepted in cross examination that paying someone the sums in question would be compelling evidence of gross misconduct. I agree.

152. I must avoid substituting my view and instead I must consider whether a reasonable employer could have carried out the procedure the respondent did and whether the decision to dismiss fell within the band of reasonable responses from the information before the respondent. I accept the respondent was not perfect and other employers would have acted differently. Ultimately, I require to determine whether in all the circumstances the decision to dismiss was within the range of reasonable responses open to a reasonable employer in light of the facts of this case.

153. The claimant had a clean disciplinary record and she was clearly a trusted employee. Nevertheless the misconduct in question was of sufficient severity and from the information before the respondent at the time in question, the respondent acted fairly and reasonably in treating her actions as sufficient to dismiss, taking account of the size, resources, equity and merits of the case.

154. Her dismissal was therefore fair.

**Not just and equitable to award any compensation**

155. Had I been required to determine the matter, I would have found that the claimant contributed to her dismissal by 100% and that no compensation should be awarded in light of my findings in fact above.

156. It would not have been just and equitable in all the circumstances to award any compensation.

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Employment Judge Hoey

Date 31 July 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 August 2019

FOR THE TRIBUNAL OFFICE

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