EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100593/2020

Hearing Held by Cloud Video Platform (CVP)
On 19, 20, 21, 22 January and 17, 18, 19 February 2021

Employment Judge P O'Donnell

Ms A Tait	**Claimant** **In person** **Represented by** **Ms L Hunter** **Solicitor**
Break The Silence	**Respondent** **Represented by** **Ms A Gell** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant was dismissed as defined in section 95(1)(c) of the Employment Rights Act 1996 and that such dismissal was unfair. The Tribunal awards the Claimant the sum of £17,307.98 (Seventeen thousand, three hundred and seven pounds, ninety-eight pence) as compensation for unfair dismissal.

REASONS

Introduction

1. The Claimant has brought a complaint of constructive unfair dismissal. This is resisted by the Respondent.

2. The hearing was conducted remotely by way of Cloud Video Platform (CVP).

Case management issues

3. At the outset of the hearing and on later days, some issues of case management arose as set out below.

4. First, Ms Hunter made a request to ask the Claimant supplementary questions as evidence-in-chief relating to issues which arose from the Respondent's witness statements. This was opposed by the Respondent's agent who indicated that she understood these issues arose in relation to a letter sent to the Claimant by Mr Ogilvy on behalf of the Respondent and so were not unforeseen. In response, Ms Hunter explained that her questions related to issues which were expanded on in the witness statements provided by the Respondent's witnesses relating to the Claimant's sickness absence and to the identity of a service user whose name was not given in the letter but was in witness statements.

5. The Tribunal considered that it would be appropriate for both sides to be allowed the opportunity to ask supplementary questions in evidence-in-chief in relation to issues which arose in the witness statements from the other party which had not been anticipated. The Tribunal considered that this would be in keeping with the overriding objective and would ensure that all relevant evidence was heard. This was not a case where supplementary statements were ordered and there was no guarantee that such issues would arise in cross-examination allowing for them to be addressed in re-examination.

6. Second, the Claimant sought to lodge a further witness statement and lead evidence from an additional witness, Lyndsey Philips. This had been the subject of a written application and objection lodged before the hearing.

7. On behalf of the Claimant, Ms Hunter submitted that this evidence was relevant as it went to accusations of financial irregularity which the Respondent sought to rely on as saying there could be a fair dismissal. She accepted that the application was made late in the day and the need for this witness was only identified when she went through the statements with the Claimant ahead of the hearing. She submitted that there was no prejudice to the Respondent who have had time to take instructions on what was a short statement.

8. The Respondent objected to the application on the basis of its timing and the relevance of the evidence. The information in the statement was not known to the Respondent at the time of the events and so could not impact on the fairness of the dismissal.

9. The Tribunal queried whether the evidence would be relevant to the issue of remedies in the sense that it may go to the question of whether the Respondent could have fairly dismissed the Claimant at some later date. Ms Hunter agreed that it was but that it also went to the issue of whether there was a dismissal and whether the Respondent had raised issues with the Claimant which they knew to be not fair and just.

10. The Tribunal noted that the issues regarding the timing of the application and what had been said by both sides in writing and at the hearing. The Tribunal did consider that the evidence was relevant to the issues to be determined and that the Respondent had had the opportunity to take instructions. The Tribunal considered that it would be in keeping with the overriding objective to allow the witness to be heard.

11. Third, Ms Gell indicated that Ms Cairns was sitting in the hearing as the person giving her instructions on behalf of the Respondent and was also due to give evidence. She would, therefore, hear the evidence of the Claimant's witnesses. No objection was made by the Claimant to the presence of Ms Cairns. The Tribunal allowed Ms Cairns to attend the hearing before giving evidence on the direction that she should not discuss with any other witness any of the evidence which she hears before she gives evidence herself.

12. Fourth, at the start of the day on 21 February 2021, the Claimant sought to lodge additional productions being screenshots of Ms Cairns' Facebook page. It was submitted that these were posts made by Ms Cairns and so would be within her knowledge. In her witness statement, Ms Cairns makes assertions regarding the behaviour of the Claimant and these posts cast doubts on these. The reason for the delay in producing these was that it had not occurred to the Claimant's agent to check Ms Cairns' Facebook posts.

13. Ms Gell opposed the application on behalf of the Respondent given that this has come late. It was not clear what relevance these productions have to the issues in dispute; one was a year prior to the Claimant's resignation and others were six months before.

14. During this discussion, the presence of Ms Cairns was raised by Ms Hunter and the Tribunal asked her to leave the hearing given that there may need to be a discussion as to what questions may be put to her in cross-examination. This was done on the basis that Ms Gell would be allowed to take instructions if so required.

15. Ms Hunter drew the Tribunal's attention to the terms of the ET3 at paragraphs 3.1 and 3.2 of the paper apart and submitted that Ms Cairns' statement does not address these averments. The additional productions go to the veracity of these averments and Ms Hunter sought to put these to Ms Cairns.

16. In response, Ms Gell submitted that the ET3 has been lodged since early 2020 and witness statements had been exchanged in September 2020. These posts are in the Claimant's knowledge. The Respondent had not been asked for further and better particulars on the averments. Ms Gell did not see the direct relevance of these productions.

17. The Tribunal took into account the following matters:-

    a. The productions which the Claimant sought to lodge have come very late in the day and during the course of the hearing.

b. The issue to which they relate had been in play since the ET3 was lodged and, at the latest, when the witness statements were lodged four months ago.

c. The Tribunal was not satisfied with the explanation for the lateness of the productions.

d. The Tribunal did not consider the Claimant was prejudiced if the productions were not allowed as the witness can still be cross-examined on the veracity of the averments.

18. With these factors in mind and considering the overriding objective, the Tribunal refused the application.

Evidence

19. The Tribunal heard evidence from the following witnesses on behalf of the Claimant:-

a. The Claimant.

b. Lyndsey Philips (LP), who rented a room at the Respondent's premises for a short period.

c. Anne Reid (AR), a member of the Respondent's board.

d. Caroline Harrison (CH), a member of the Respondent's boar

20. The Tribunal heard evidence from the following witnesses on behalf of the Respondent:-

a. Marilyn Cairns (MC), the Chair of the Respondent's board.

b. Lynn Burns (LB), the Vice-Chair of the Respondent's board.

c. Lesley Craig (LC), the Respondent's Head of Income Generation at the time of the events of the case and now the Respondent's co-CEO.

d. Sharon Belshaw (SB), the Respondent's Clinical Lead at the time of the events of the case and now the Respondent's co-CEO.

21. Evidence-in-chief was given by way of witness statements with some supplemental questions. There was also an agreed statement of facts.

22. There was an agreed bundle of documents prepared by the parties. References to page numbers below are references to the pages of that bundle.

23. There were matters of fact which were in dispute between the witnesses for both sides. The Tribunal has had to address those which involved coming to a view on the credibility and reliability of the evidence given by the witnesses.

24. The Tribunal found the Claimant to be a reliable and credible witness. She gave evidence that was both internally consistent and consistent with the documentary evidence. She was willing to accept matters which were adverse to her case when these were put to her in cross-examination. There was nothing which caused the Tribunal to question the veracity of her evidence.

25. LP gave evidence on a very narrow issue around the renting of an office in the Respondent's premises. The Tribunal found her to be reliable and credible in relation to the evidence which she gave. There were no particular inconsistencies between her evidence and the documentary evidence presented to the Tribunal. However, her evidence was only of relevance to the one issue to which she spoke.

26. The Tribunal considered that AR was also a reliable and credible witness. She was challenged on certain matters in cross-examination and the Tribunal considered that there was nothing in that which undermined her as a witness. Again, her evidence was internally consistent. She could only speak to certain matters such as the events of the AGM in June 2019 and the EGM in September 2019.

27. Finally, in terms of the Claimant's witnesses, the Tribunal found CH to be reliable and credible. The evidence which she gave was limited in scope similar to AR's evidence being particularly focussed on the events after the announcement of the co-CEO role leading up to and including the EGM. The Tribunal considered that there was nothing in her evidence which caused it to doubt the veracity of her evidence which was consistent with the documents.

28. Turning to the evidence of the Respondent's witnesses, there are a number of issues of general application which the Tribunal will address first before commenting on the individual witnesses as their evidence has to be considered in the light of these general issues.

29. First, the Tribunal noted that there were several items of relevant documentary evidence which were not produced by the Respondent.

    a. A copy of the Respondent's disciplinary policy was not produced in circumstances where there was an issue about whether the Respondent could suspend the Claimant. Such policies tend to set out terms relating to suspension.

    b. A copy of the Respondent's sickness absence policy was not produced in circumstances where it was relevant evidence; one of the matters relied on by the Claimant was that a letter issued to her by the Respondent asking her not to attend the premises until she had a back to work interview was not normal practice. MC asserted that she believed that this was consistent with the Respondent's absence policy but she also asserted that she would not be involved in such operational matters. LC also asserted that a return to work interview was company policy. If a copy of the policy had been lodged by the Respondent then the Tribunal could have been taken to this in evidence to clarify the position.

    c. LC asserted that she had produced a handwritten note of a meeting between her, MC and the Claimant on 19 August 2019. There was a factual dispute as to the detail of what happened at this meeting and a

contemporaneous note of the meeting would have been relevant evidence for the Tribunal to take into account. The Tribunal was not satisfied with the explanation from LC why she had not produced these which was simply that she had bad handwriting and had incorporated the notes into her witness statement. However, the lack of the actual notes meant that the evidence could not be tested.

d. During the course of her oral evidence, MC sought to dispute the Claimant's evidence that there were almost daily telephone calls between them by making reference to her phone account which she was accessing online whilst giving evidence remotely. There was, quite rightly, an objection to this by the Claimant's representative which was sustained. The Tribunal considers that the issue of the frequency of contact between MC and the Claimant was clearly in issue. The Tribunal could not understand, and no explanation was given, why these phone records were not lodged as evidence.

e. In evidence given in cross-examination, MC raised the existence of written complaints by staff about the Claimant made some time in 2018 in the context of the averments in the ET3 that the Claimant was the one, not MC, who behaved in an aggressive manner. These were not lodged and, indeed, were not put to the Claimant when she was cross-examined.

30. Whilst the Tribunal could understand if there was an unanticipated matter which arose in the course of the hearing and which explained why documents relevant to such a matter were not lodged. However, all of these matters were clearly relevant to issues which were in dispute in the case and the Tribunal considers that there is a real question as to why the Respondent did not produce these documents in the bundle.

31. Second, and related to the first issue in that it relates to evidence being absent, none of the witness statements lodged as the evidence-in-chief for the Respondent's witnesses make any mention of a meeting between the four of them on the evening of 15 August 2019 at which LC and SB made various

complaints about the Claimant. The only reason the detail of this meeting emerged at the hearing was because it was mentioned very briefly in MC's email of 16 August 2019 (p89) announcing the creation of the co-CEO role and the witnesses were asked about it in cross-examination.

32. Given that this meeting occurred the night before MC, without any prior consultation or discussion with the Claimant, informed the Claimant of the re-organisation creating the co-CEO role and that the email at p89 links the meeting to the creation of the co-CEO role then the Tribunal finds it astonishing that none of the Respondent's witnesses raised the fact of the meeting on 15 August in their evidence-in-chief. The Tribunal considers that any reasonable person must have realised the significance of that meeting in the chronology of the case and can reach no other conclusion that the Respondent's witnesses were seeking to hide the detail of that meeting from the Tribunal.

33. The terms of the email at p89 clearly links that meeting with the decision to create the co-CEO role and so the Respondent and its witnesses must have realised that this creates the impression that one is the cause of the other. The Tribunal would, therefore, have expected the witness statements to address the issue and explain why that meeting caused the Respondent to decide to create the co-CEO role.

34. In this regard, the Tribunal also bears in mind that, when the issue was put in cross-examination, the Respondent's witnesses sought to deny a link between the meeting and the decision to create the co-CEO role. This stands in stark contrast to the clear terms of the email at p89. Again, the Tribunal considered that, if that meeting was not being said to have led to the creation of the co-CEO role, the witness statements would have addressed that contradiction.

35. The failure by the Respondent's witnesses to mention the 15 August meeting in their evidence-in-chief goes beyond the fact of the meeting and there is no detail as to what was discussed. This is important as the matters listed in the

Ogilvy letter are said to flow, at least in part, from what is raised in the 15 August meeting. However, as will be apparent from the findings in fact set out below, a significant number of those matters are not addressed in the evidence-in-chief of the Respondent's witnesses. The Tribunal is not, therefore, in a position to make findings of fact about matters for which there is no evidence and that is relevant to its consideration of the substantive issues in this case, in particular whether the Respondent's actions in relation to the Ogilvy letter are capable of being the last straw contributing to any breach of trust and confidence and whether there was reasonable and proper cause for those actions.

36. Third, there was content in the witness statements which was not evidence; all of the witnesses expressed a view as to whether or not the Claimant had been constructively dismissed. Whilst the witnesses are entitled to their opinion, this is nothing more than an opinion and is not evidence. Ultimately, this is an issue to be determined by the Tribunal after making findings of fact and applying the law to those facts. The Tribunal put no weight on those opinions.

37. With those issues in mind, the Tribunal will set out its view on the individual witnesses for the Respondent.

38. The Tribunal did not find MC to be a reliable or credible witness. She frequently fell into the habit of not answering the question being put to her in cross-examination instead making a statement or seeking to anticipate what she thought was going to be put to her. She had to be reminded several times, including multiple interventions by the Tribunal, to answer the question that was being put.

39. The Tribunal also found some of her evidence to be evasive. The Tribunal has already set out the fact that she sought to assert that asking employees not to attend the workplace until they had a return to work interview was company policy whilst also seeking to avoid commenting on the fact that this

had never happened with any other employee by saying this was an operational matter with which she would not be involved/

40. Another example related to the communication of the Claimant's resignation. MC had asserted that she did not consider that the Claimant had resigned as soon as possible after receiving the letter from Mr Ogilvy. She was taken to an email at p123 from the Claimant to her on 27 September 2019 which was in simple terms referring to an attached letter. It was put to her that the letter of resignation at p124 was the attachment to which the email referred and she replied that she could not be sure as there was no reference. The Tribunal asked MC if she recalled the email which she said she did and whether she received an attachment with it to which she replied she could not remember an attachment. The Tribunal then asked if there had been no attachment whether she did anything about that to which she replied that she did not.

41. The Tribunal considers that MC was being very evasive in this exchange in an attempt to maintain her assertion that the Claimant did not resign almost immediately after receipt of the Ogilvy letter (which was clear from the dates of the Ogilvy letter and the Claimant's email). The Tribunal does not consider that a Chair of an organisation would do nothing on receiving an email from the CEO of that organisation which was said to have had an attachment but none was attached. The Tribunal considers that in normal circumstances it would be reasonable to expect that MC would reply indicating that no attachment had been received. The expectation would be even higher in circumstances where the CEO is on sick leave and the organisation had just instructed a solicitor to commence a disciplinary investigation. MC's response that she did nothing was simply not credible.

42. The Tribunal also considered that certain elements of MC's evidence was not entirely consistent with the Respondent's pled case. It was the Respondent's case as set out in the ET3 that, rather than MC, it was the Claimant who behaved in an aggressive and bullying manner to such a degree that, by December 2018, MC had decided not to meet with her alone.

43. This is entirely inconsistent with the undisputed fact that MC met with the Claimant alone and in her own (MC's) home on 16 August 2019 to inform the Claimant of the co-CEO role. Given that this was being presented to the Claimant for the first time and it would reasonably occur to an employer that it could be potentially controversial, it seems very strange that MC would arrange to meet with the Claimant alone when she had, allegedly, been avoiding doing so for 8 months.

44. Further, the Tribunal considered that evidence given by MC as to why she had allegedly reached the decision not to meet with the Claimant alone was not credible. MC did not address this issue at all in her witness statement and so was invited to give examples of the Claimant's aggressive behaviour and the behaviour which led to her reaching the decision not to meet alone with the Claimant. MC gave the following examples:-

    a. At a staff development day in 2018, after the staff had left, the Claimant was angry about certain complaints made by staff member during the day.

    b. The Claimant's conduct during a meeting with MC on 19 August 2019.

    c. The fact that the Claimant appeared to be angry after her suggestion about buying a hamper business was rejected at a Board meeting in February 2019.

    d. At the same meeting, the Claimant allegedly stormed out during that meeting when MC asked for the bank statement to be produced for her to sign.

45. The Tribunal did not consider that these were particularly egregious examples of aggressive behaviour, with one example not being directed at MC at all, such as to explain a need for MC to avoid being alone with the Claimant. However, more importantly, three of the four alleged examples took place after December 2018 when the ET3 says MC made the decision to not be alone with the Claimant. These cannot possibly form any basis for any alleged decision made in December 2018.

46. The Tribunal did not consider that these assertions about the Claimant were credible given the lack of any real evidential basis to support what was being advanced in the ET3 and the issues outlined above. In this regard, the Tribunal does note that allegations of bullying by the Claimant were raised in the witness statements by LC and SB which it will address below when discussing their evidence.

47. In relation to the evidence of LB, the Tribunal noted that she also had to be asked to answer the question being put to her on a few occasions although less frequently than MC had to be. However, there was one intervention by the Tribunal that it considered significant; LB was being asked in cross-examination about the decision to hold the EGM and who had made this. The Tribunal considered that LB was being evasive in her answers to the Claimant's representative in trying to suggest that it was a decision of the Board to hold the meeting to discuss the issues in the Ogilvy letter. It was quite clear from the documentary evidence in the form of the email correspondence between Board members at pp89, 92-93, 95, 102, 104, 106 & 108 that the desire of Board members to meet was driven by concerns around the announcement of the co-CEO role and the Claimant's subsequent absence. The Board members were entirely unaware of the issues in the Ogilvy letter until the EGM itself. The Tribunal directed LB to answer the question to which she responded that it was MC who made the decision.

48. LC provided an extensive witness statement and a considerable amount of what was said in it was directed towards criticisms of the Claimant in terms of her performance in the role of CEO and conduct generally. However, the Tribunal did not place significant weight on this as very little of it was put to the Claimant in cross-examination. For example, paragraph 2j of the statement makes vague reference to the Claimant illustrating no duty of care to staff and failing to focus on strategic issues amongst other broad criticisms. None of these were put to the Claimant in any detail in cross-examination. Similarly, at paragraph 2m, LB expresses a view that the Claimant was unhappy with staff having trustee mentors because the Claimant did not want

staff developing relationships with Board members. This was not put to the Claimant.

49. The Tribunal also considered that, on occasion, a position was asserted by LC that was somewhat disingenuous. For example, she sought to say that what was discussed at the meeting on 15 August 2019 were not criticisms of the Claimant but criticism of her actions (or inaction). With all due respect, this is to split the finest of hairs. Similarly, it was said in paragraph 2j of LC's statement that the Claimant had "extensive" absences in 2018 (a reference to the Claimant breaking a finger in April 2018 and then her foot in May 2018) but the evidence from the Claimant, which was not significantly in dispute, was that she used remote access to work from home during the time when she was not physically able to attend the office. The assertion by LC created the impression that there were long periods in 2018 when the Claimant was not working but this was simply not correct.

50. SB's witness statement was relatively short and cross-examination was restricted to relatively narrow issues. However, similar to LC, there were elements of SB's evidence which were disingenuous at best. At paragraph 6b of her statement, SB makes a broad assertion that the Claimant *"continually manipulated, undermined and bullied*" her giving an example for being sent on a trip to Liverpool which she describes as being coerced into taking. However, she did not actually take this trip despite the statement being in terms which clearly suggested she had. To her credit, she accepted that the wording of her statement was misleading when this was put to her in cross but the fact remains that the original wording sought to create a false impression.

51. The statement goes on at paragraphs 6c-g to make further allegations against the Claimant. However, none of these matters were put to the Claimant in cross-examination and so the Tribunal does not place any real weight on this evidence.

52. Taking into account all the issues set out above, the Tribunal considers that, where there is a dispute of evidence, the Tribunal prefers the evidence of the

Claimant's witnesses. When viewed as a whole, there are issues, set out above, with the reliability, credibility, adequacy and relevance of the evidence led by the Respondent which do not apply to the evidence led by the Claimant.

Findings in fact

53. The Tribunal made the following relevant findings in fact.

54. The Respondent is a charity set up in 2004 to help support survivors of rape and childhood sexual abuse. It was founded by Kate Short who the witnesses all referred to as "the Founder".

55. The Claimant has been employed by the Respondent as CEO from 3 August 2015. Prior to that she worked for the organisation on a voluntary basis from 2006. She was on the Board of Trustees from 2008 and was acting chair in August 2015 prior to being appointed CEO.

56. MC was appointed as chair from 3 August 2015.

57. Both the Claimant and MC considered that they had a good working relationship initially.

58. The charity had grown over time with increasing numbers of clients seeking its assistance. To assist in dealing with the increasing volume of work involved in running the charity, the Board created a number of sub-groups towards the end of 2018 and start of 2019 which would meet in addition to meetings of the whole Board; the HR sub-group, the fundraising sub-group and the finance, operations and governance sub-group ("FOG").

59. The FOG group was comprised of the Claimant, MC, LB, LC and SB. In January 2019, the Board decided to look at restructuring the organisation and this was delegated to the FOG group to discuss.

60. A meeting of that group was held on 11 February 2019 and the minutes of that meeting are at p48. The Claimant presented two possible restructuring options at that meeting. The organisational plan for one of these is at p227

and shows a structure with no CEO and, rather, the head of income generation and the clinical lead reporting directly to the Board. The other option was to keep the current structure but change some of the reporting lines within it.

61. The first option was rejected at the meeting on 11 February 2019 and was not discussed again. The other option was to be discussed at the same time that performance appraisals took place.

62. The Respondent held its AGM on 3 June 2019. The vote of thanks to staff was given by LB and further comments were made by MC. Between the two of them, they gave thanks to each individual member of staff except the Claimant. This was commented on by Kate Short to AR. AR stood up at the end of the meeting and delivered a vote of thanks to the Claimant. She did so on her own accord and not as part of any planned vote of thanks.

63. The Claimant's contemporaneous handwritten notes at pp78-85 records contact between her and MC regarding various issues on dates in July and August 2019.

64. On 15 August 2019, MC and LB met with LC and SB in the evening. At this meeting, LC and SB made a number of complaints about what they perceived to be the actions and failings of the Claimant in her role as CEO. The meeting ended with MC stating to LC and SB that she would deal with these issues. No evidence was led by the Respondent's witnesses as to the detail of the complaints raised against the Claimant at this meeting.

65. On 16 August 2019, MC asked the Claimant to meet with her. It was agreed that they would meet at MC's home. At this meeting, MC stated to the Claimant that she had decided to reorganise the Respondent and create co-CEO roles which would be occupied by the Claimant and LC.

66. This was the first time the co-CEO role was raised with the Claimant. It had not been discussed at any FOG meeting or individually with the Claimant prior to 16 August. No mention was made of it being put in place for a trial period. The Claimant indicated that she did not consider this to be a good idea but MC informed her that it would be going ahead.

67. After the meeting, MC informed LC of the decision.

68. MC sent an email at 13:58 on 16 August 2019 (p89) to LB and two Board members, Anne Fraser and Liz Kelly. The email read as follows:-

"Lynn and I met with Lesley and Sharon on Thursday evening [that is, 15 August 2019] *and, as a result I decided that the most appropriate structure was having co Chief Executives. I met with Alison* [that is, the Claimant] *this morning and spoke to Lesley thereafter. Both agreed to be co Chief Executives with effect from 2 September 2019. I will issue a statement to the trustees after I meet with Alison and Lesley to work out logistics on Monday."*

69. Over the weekend of 17/18 August 2019, the Claimant gave further thought to what was being proposed and decided that this was unacceptable behaviour by MC. She spoke to the founder of the charity, Kate Short, and with AR who both agreed with her.

70. It was arranged by the Claimant that Ms Short would attend the Respondent's offices on 19 August 2019 for a meeting between the Claimant, MC and Ms Short. At the outset of the meeting, the Claimant read out a statement she had prepared at the weekend. In this statement she stated that she believed that MC's decision making was flawed and that her actions were leaving the Respondent vulnerable. The Claimant stated to MC that she felt that these actions verged on bullying and was negligent and damaging. She called on MC to resign. The Claimant did not raise her voice or shout at MC during this meeting.

71. MC refused to resign and the meeting concluded on that.

72. The Claimant, MC and LC then met to discuss the co-CEO role. The Claimant indicated at that meeting that she did not consider this to be a good idea but MC stated that it would be going ahead. The meeting proceeded and it was common ground that the Claimant was quiet for the remainder of the meeting, making little comment.

73. On 20 August 2019, the Claimant sent a text to MC and LC (p177) explaining that she had visited the doctor that morning and had been signed off sick for two weeks. The Claimant remained on sick leave up to the end of her employment with the Respondent.

74. MC sent an email to all members of the Board at 08:34 on 20 August 2019 (p90) informing them that the re-structuring process was almost complete and giving details of what had been taking place. At the end of the email, it states that *"Lesley Craig and Alison Tait will become co-Chief Executives effectively from the first of September 2019"*. Nothing is said in this email about this structure being in place for a trial period.

75. This prompted a chain of email correspondence between Board members at pp89, 92-93, 95, 102, 104, 106 & 108 in which different members expressed surprise at the announcement of the co-CEO role and the lack of discussion about it. There was a general consensus that a meeting of the Board should be convened to discuss this development although, given this was during the summer holiday period, there were difficulties in finding a suitable date.

76. On 29 August 2019, MC sent an email (p111) to all Board members that an extraordinary meeting of the Board (EGM) had been arranged for 6pm on 2 September 2019. No agenda or reason for the meeting was given other than a reference to the most recent email sent by MC to all trustees (that is, the email at p90). Both AR and CH were of the understanding that the EGM was being called as a result of the issues raised in the email correspondence amongst the Board members and the request for a meeting to discuss what had happened.

77. At the outset of the EGM, all Board members were asked to sign a confidentiality agreement before the meeting could proceed (the agreements signed by CH and AR are at pp113 and 114, respectively). This had never been done at any previous Board meeting.

78. LB led the meeting and informed the trustees that the purpose of the meeting was to discuss issues with the Claimant as CEO. AR left the meeting shortly after it started as she felt very uncomfortable at the circumstances in which she found herself. She informed the meeting that she intended to resign and that the Claimant should be present to defend herself.

79. The meeting continued and a number of criticisms of the Claimant were raised. The Board were informed that LB and MC wished to carry out an investigation and had spoken to a law firm (Turcan Connell) about instructing them to do so.

80. The decisions and action points agreed at the EGM were recorded in a handwritten minute prepared by LB and signed by the Board members present (p112). This recorded that it was agreed that contact would be made with Turcan Connell to discuss them conducting an enquiry and that the Claimant could not return to work until such time as any investigation was completed and that *"suspension on full pay as appropriate"* was applicable given the allegations.

81. The Claimant learned that the EGM had taken place from AR and CH on that same day.

82. No communication was sent to the Claimant after the EGM which stated that she was suspended.

83. On 4 September 2019, the Claimant was unable to access her work email; she had tried to do so on her tablet and was receiving a message asking for her log-in details. The Claimant, and other employees, had long had remote access to their emails and the Claimant had used this to work from home during previous absences.

84. The Respondent had reset the password on the Claimant's email account because this was not known to others and so they could not access her emails in her absence to ensure anything important was being addressed. No attempt to contact the Claimant and ask for her password or otherwise discuss this with her was made before the reset was done.

85. MC wrote to the Claimant by letter dated 13 September 2019 (p117) informing her that, when she was fit to return to work, she should contact either MC or LB to arrange a "back to work" interview. She was informed that until such an interview had taken place then she "*must*" not enter the Respondent's premises.

86. A letter in these terms had not been sent to the Claimant when she had periods of absence in 2018. A letter in these terms had not been sent to any other employee who had been absent.

87. By letter dated 25 September 2019, Mr Ogilvy of Turcan Connell wrote to the Claimant. A copy of the letter is at pp120-121 and will be referred to as "the Ogilvy letter".

88. The letter opened by explaining that he had been instructed by the Respondent to investigate certain matters and that he wished to meet with her to discuss these. The letter goes on to set out 15 matters which are to be discussed. The letter then explains that this is not a disciplinary process but, rather, an investigation. It explains that it was considered that the investigation should not be done internally and, instead, the Respondent considered they should instruct someone unconnected to the charity to give the Claimant an assurance of impartiality. It concluded by explaining that it would be the relevant sub-committee of the Respondent's Board who would decide on further action.

89. The Tribunal has set out below the evidence which it heard about the matters listed in the Ogilvy letter and what findings in fact in relation to these matters from the evidence:-

a. *"The invoicing relative to funding in respect of the East Ayrshire Council's contribution to 'the Provision of a Counselling Service for Survivors of childhood rape and sexual abuse to North Ayrshire Council and East Ayrshire Council' contract".* The statements of the Respondent's witnesses do not address this issue and do not set out any explanation why this required investigation. In cross-examination, LC explained that this related to funding where the first tranche had been paid but later payments were not paid immediately because a quarterly invoice had not been submitted.

b. *"The disaster recovery and business continuity plan".* It was an ongoing issue that the Respondent's disaster recovery plan required updating and this was outstanding at the point when the Ogilvy letter had been sent. The Tribunal considered that there was some confusion on the Respondent's part as to how long the issue had been outstanding; the only witness who gave a date in their statement was LC who said that the issue had been discussed since May 2016; when the issue of the plan was put to the Claimant in cross-examination what was put to her was that the plan was done in 2016 and was subsequently in need of updating; in cross-examination, MC stated that there needed to be an explanation why it had taken 5 or 6 years to update this but that period long pre-dates the Claimant's employment and contradicts both what LC says and what was put to the Claimant. Given the issues which the Tribunal has with the reliability of the evidence given by the Respondent's witnesses and these contradictions, it finds that the issue was one which had been ongoing for a period (this is not disputed by the Claimant) but does find that the Respondent's witnesses sought to exaggerate the length of that period in their evidence.

c. *"The giving of feedback to funders and in particular North Ayrshire Council".* There was no direct explanation as to what this matter related in the evidence-in-chief of the Respondent's witnesses and why it required explanation. The witness statement of LC at paragraph 5n makes reference to the Claimant raising the issue of funding at performance reviews with Council funders but does not expressly link that to this matter. The witness statement of LB makes

reference to a meeting with North Ayrshire Council which she attended with the Claimant and LC in February 2019 at which the Council raised issues about a lack of information on outcomes. The Tribunal concluded that this item relates to that meeting insofar as it refers to the North Ayrshire Council. There was no evidence led as to any issue with the provision of feedback to other funders.

d. *"Your proposed review of contracts of employment for staff at Break the Silence".* This was another matter which was not addressed by the evidence-in-chief of the Respondent's witnesses and no explanation was given in their witness statements as to why this required investigation. The Claimant gave an explanation in her evidence that the HR sub-group was reviewing job descriptions and MC's email of 20 August 2019 (p90) makes reference to these revised job descriptions being in place at that point in the context of the restructuring process that had been going on throughout 2019. The evidence available to the Tribunal does not allow it to make any findings of fact as to what was to be investigated and why.

e. *"The provision of the wrong figures to the Robertson Trust".* No evidence was led before the Tribunal regarding this matter. LB's witness statement did make reference to the Claimant not providing figures to funders and blaming it on another member of staff but this did not expressly link that allegation to this matter. In her evidence, the Claimant denied that she had provided wrong figures to the Robertson Trust. Again, given the lack of evidence, the Tribunal could make no findings of fact regarding the nature of this issue and why it required investigation.

f. *"How you focus strategically on events which may impact on Break the Silence such as, for example, The Michael Jackson Documentary".* None of the Respondent's witnesses gave any evidence about this issue and so the Tribunal could make no findings of fact as to what matter was to be investigated.

g. *"Preparedness to send out press statements in response to events which impact upon or relate to the work carried out by Break the Silence".* Again, the Respondent's witnesses gave no evidence about this issue and why it was to be investigated. The Claimant gave evidence that she believed that it related to LC's desire to have standard statements that could be used to respond to media articles. The Claimant had spoken to a PR professional about this who had advised against this.

h. *"Financial controls and in particular:-*

i. *"Your level of authority and whether you have ever exceeded that level of authority".* The witness statement of LC stated that she did not believe that the Claimant had sought the necessary authority for certain payments. She gave no further detail about any alleged wrongdoing by the Claimant in respect of this issue and so the Tribunal could make no findings in fact as to what this relates.

ii. *"Recent cash withdrawal from an autoteller by a member of staff using a bank card in the name of the Founder".* This was reference to a bank card which had been taken out in Kate Short's name and was used by a member of staff to purchase stamps and office supplies when Ms Short was CEO. It was used by this member of staff to purchase supplies for a cooking group. When it came to the Claimant's attention that this had happened, she spoke to the member of staff about it and advised her not to do this again. The Claimant had informed MC of this incident at the time.

iii. *"Security for personal identification numbers and bank cards generally".* The Respondent's witnesses did not give evidence in relation to this matter and so the Tribunal could make no finding as to whether this related to the issue above or was a separate matter.

iv. *"Policies and procedures relating to handling cash particularly cash donations".* Again, the Respondent's witnesses gave no evidence to what this issue was. The Claimant did give evidence that LC was drawing up new procedures for this but did not comment further. The Tribunal could not make any findings in fact as to what matter was to be investigated and why.

v. *"Maintaining a robust, detailed cash receipt register".* This was a further matter on which the Respondent's witnesses gave no evidence and so no findings of fact could be made as to what was to be investigated.

i. *"The allegation that you publicly sought out and greeted a service user in breach of that service user's right to confidentiality which caused embarrassment, discomfort and anger to the service user".* This relates to an incident in May 2018 when the Claimant attended a puppy training class at which a service user was also in attendance. After the class and outside the building in which it occurred the Claimant spoke to the service user on her own to apologise and offer to not attend future classes to avoid any difficulties. The Claimant reported the encounter to the service user's counsellor the next day. The matter was not raised with the Claimant again until the Ogilvy letter. It was said that the service user complained but no detail of the complaint was given in evidence.

j. *"The process in applying for and maintaining disclosure checks for staff, Trustees and counsellors to commence and/or continue activities".* There was no dispute between the parties that some work had been required to ensure up-to-date disclosure checks were in place. There was, however, inconsistent evidence between the Respondent's witnesses as to how long this had been required; LB stated in her witness statement that it had been going on for years but gives no more detail than that whereas LC's witness statement sets

out that she had identified on or before 6 May 2019 (ahead of an audit at the end of May) that some checks needed updating (although she does not say how many and what needed updated). The only document to which the Tribunal was taken that makes mention of the disclosure checks is MC's email of 24 June 2019 (pp72-73) which states that it was unacceptable that the audit went ahead with disclosure checks missing. It mentions that is was unacceptable "*in light of previous incidents"* but no evidence was led as to what this refers. The Tribunal, in the absence of any evidence from the Claimant on how long the issue had been ongoing, prefers the more precise dates given by LC and finds that this had been an issue raised on or before 6 May 2019.

k. *"The allegation that you failed to immediately order a defibrillator after the appropriate research had been carried out and the procurement of such had been approved".* This relates to a decision made by the Respondent to purchase a defibrillator for use at the Respondent's premises if required. At the FOG meeting in June 2019, it was agreed that the Claimant would take advice on the best model to purchase from Dr Crawford McGuffie of NHS Ayrshire & Arran (confirmed in an email from MC to the Claimant, LB, LC and SB dated 24 June 2019). By email dated 22 July 2019 (p74), the Claimant confirmed to LC that AR had informed her that the Kilmarnock branch of Bank of Scotland was holding a raffle on 10 August 2019 to raise funds for the purchase of the defibrillator. The Respondent's position was that the Claimant had been instructed to purchase this immediately whereas the Claimant's position was that she was waiting for the funds to be raised to cover the purchase. The Tribunal prefers the Claimant's version of events; it has already set out above why it prefers the evidence of the Claimant and her witnesses as a whole and, in this instance, there was no note, minute or any correspondence produced by the Respondent recording a clear instruction to the Claimant to make the purchase immediately regardless of the funds being available.

l. *"The subletting arrangements which you made in relation to 16 College Wynd. I wish to discuss the insurance implications, landlords' consent, the terms upon which you agreed to sublet, measures taken by you to protect the confidentiality of service uses, details of income/rent received, and details of how this was recorded".* This matters relates to the letting of a room in the Respondent's premises by LP from January to April 2019. This was arranged between the Claimant and LP who made donations to the Respondent in return for use of the room. The arrangement was originally for 6 months but ended early. LP spoke to LC about this to ensure that she had no objections and none were made. Both MC and LB were aware of LP using the room during the period when she did so. Neither of them raised any issue or concerns about the arrangement prior to the Ogilvy letter. LB had discussed the matter with the Claimant and gave evidence that she accepted the Claimant's explanation although the situation did not sit well with her. The issue of sub-letting parts of the premises had been discussed between the Claimant and the landlord when the Respondent had moved into its present offices and he had agreed.

m. *"On 19 August in front of the Founder and within earshot of members of staff it is understood that you shouted at the Chair of the Board of Trustees and acted generally in an intimidating manner. I would like to understand your perspective on this".* The Tribunal has made findings in fact above as regards what occurred at this meeting and, in particular, that she did not raise her voice.

n. *"The allegation that you failed to follow company procedures in relation to reporting your absence due to illness, your current absence from work without permission and your attendance at various events whilst on sick leave".* The allegation regarding the reporting of the Claimant is a reference to her use of a text message on 20 August 2019 to advise that she had been signed off sick rather than a phone call. The evidence from the Respondents did not address what was meant by

the Claimant being absent "without permission". The Claimant provided sick notes from her GP covering her whole absence. The Claimant did attend two events during her absence; one for Ayrshire Business Women and one for the Association of Scottish Business Women Awards, both of these are organisations of which the Claimant has been a member for some years.

o. *"It is understood that you are currently running your own business as ACT Business Services and I wish to discuss the extent to which this and other positions which you hold and have held have impacted upon your work at Break the Silence".* Again, the evidence-in-chief of the Respondent's witnesses do not give any information as to what issues or concerns were being raised in relation to this matter and why they required to be investigated. The Respondent was aware that the Claimant had her own business before becoming CEO. The Claimant had scaled that back when she took up her employment with the Respondent.

90. On 27 September 2019, the Claimant sent an email to MC (p123) enclosing her letter of resignation (p124) which was dated 27 September 2019. The Claimant gave 4 weeks' notice. She did not give a reason for her resignation. A hard copy of the letter was also sent by post.

91. On the same day, the Claimant sent an email to Mr Ogilvy (p122) advising him that she would not be able to meet with him on the dates suggested in his letter of 25 September 2019.

92. The Claimant remained unfit for work until March 2020. After that she secured part-time work with CH's firm. She also undertook pieces of work through her own business.

Claimant's submissions

93. The Claimant's agent made the following submissions which were then produced in writing.

94. It was submitted that there were four key matters which cumulatively resulted in a fundamental breach of contract by the Respondent in relation to the implied term of mutual trust and confidence.

95. These four matters were the difficult managerial approach taken by MC to the Claimant; the demotion of the Claimant on 16 August 2019; the suspension of the Claimant (including blocking access to emails and preventing access to the office); the letter from Mr Ogilvy.

96. Ms Hunter went on to set out the factual matters on which the Claimant relied in saying that MC had a difficult managerial approach. The Tribunal does not propose to rehearse those in detail but, in summary, it was said that the Claimant had sought assistance as the charity grew but that what was done was by MC over time was to take greater control of the work done by the organisation. This manifested in increasing contact between MC and the Claimant in terms of telephone calls and reference was made to the Claimant's handwritten notes at pp78-86 as evidence of the frequency of these calls. It was submitted that these notes were provided to Ms Hunter by the Respondent who retrieved them from their offices and form contemporaneous notes. The Claimant was not challenged as to their accuracy and it was submitted that MC's response to this issue was unsatisfactory.

97. It was submitted that the evidence from the Claimant and her witnesses was credible and reliable. The Claimant gave consistent evidence and was willing to make appropriate concessions. This was contrasted with the evidence of MC which was, it was submitted, presented real challenges. Reference was made to the evidence given by MC about receipt of the Claimant's letter of resignation which is set out in detail above by the Tribunal. It was put to the Claimant's witnesses that they were all friends of the Claimant which Ms Hunter submitted was irrelevant.

98. In contrast, it was submitted that SB's witness statement was intemperate in how it described the conduct of the Claimant and was slightly misleading in

its description of the Liverpool trip. It was also submitted that LB and LC were also difficult witnesses due to their desire to criticise the Claimant.

99. Ms Hunter went on to submit that the Respondent's position on the relationship between the Claimant and MC was difficult to reconcile; the ET3 states that in 2018 MC decided she would not be alone with the Claimant due to her behaviour but that her evidence-in-chief did not explain this at all and in cross-examination she could not give a satisfactory explanation providing only two examples. It was further submitted that, when asked in cross, MC said she had a good relationship with the Claimant and the other witnesses thought so too.

100. It was submitted that MC placed more pressure on the Claimant over time as shown in the notes at pp78-86.

101. In relation to the Respondent's AGM in 2019, it was submitted that MC and LB agree that the Claimant was not thanked but that all other staff were. The founder of the organisation commented on this "glaring omission" to AR.

102. The second issue was the decision to demote the Claimant by appointing LC as co-CEO. It was said by Ms Hunter that it was simply unsustainable for the Respondent to argue that this appointment was anything but a criticism and demotion of the Claimant. It was submitted that the evidence shows that this was "knee-jerk" reaction to complaints from SB and LC made at a meeting the night before.

103. It was submitted that the Claimant had been in sole charge of the organisation and was the line manager of LC. In promoting LC, the Respondent was diluting the Claimant's power and prestige. She was the boss and she was now no longer the boss; that can be nothing more than a demotion.

104. Ms Hunter submitted that the suggestion that there had been 9 months of consultation was shown by the evidence to be inaccurate. It was the evidence of LB that MC first raised the co-CEO idea with her in a telephone call on the morning of 16 August 2019. Reference was also made to the

email at p89 in which MC said that she had made the decision to create a co-CEO as a result of the meeting with LB, SB and LC on 15 August 2019.

105. The clear evidence from the Claimant was that the co-CEO plan had not been discussed; this was put to her repeatedly in cross and she consistently denied it. It was her evidence that a restructure was being discussed but a co-CEO model was not part of that. Further, it was accepted by MC and LB that the model suggested by the Claimant at p237 which abolished the CEO role was discounted immediately by the FOG group (p48).

106. It was submitted that the clear evidence of the Claimant that the decision had been made and that it was a fait accompli with no-one, not even members of the Board, being allowed to question the decision. The evidence on MC about a probation period should be discounted because this is different from a trial period and was a standard contractual term.

107. There had been no mention of the meeting on 15 August 2019 in the pleadings or the witness statements but it was submitted that it was key to the issue. Rather than seeking to resolve the issues being raised by SB and LC at the meeting, it was submitted that MC took the decision to proceed with the co-CEO roles. This amounted to an acceptance of the complaints by SB and LC and denied the Claimant a right to reply.

108. The decision was made by MC with no consultation with the Claimant or the Board. It was submitted that the consternation of the Board can be seen in the emails in the bundle (pp89-93, 95, 102, 104 & 108). MC suggested that the matter was devolved to the FOG group but there was no consultation with that group either.

109. Turning to the third issue of suspension, it was submitted that it was the clear decision of the Board at the EGM to suspend the Claimant; this is what was minuted at the meeting (p112). The decision to hold an EGM where the only

item for discussion was essentially the removal of the Claimant was said to be a further example of a breach of the duty of trust and confidence.

110. Ms Hunter submitted that MC and LB took the difficult position of denying that a suspension had occurred which did not chime with the facts. CH's evidence was said to be convincing on this point when she said that the Claimant was "100% suspended" and that she left the meeting certain of this. The Respondent could not produce anything which countermanded the unequivocal minute of the meeting.

111. It was submitted that the Respondent's actions after the EGM were in line with a suspension and that it was clear to the Claimant that she was *de facto* suspended. She had access to her emails removed; her evidence and that of LC was that this was not a standard practice during absence. LB's explanation as to why the Claimant was not phoned and asked for her password was that it would not be appropriate to contact someone who was off sick. However, this stands at odds with the decision to then have Mr Ogilvy invite her to a disciplinary investigation meeting. There was no explanation why the Respondent did not have the Claimant's emails automatically forwarded to someone in the organisation which would have allowed them to deal with them without removing her access.

112. The Claimant was denied access to the Respondent's premises and this was submitted to be consistent with a suspension. MC gave evidence that this was decided at the EGM and it was submitted by Ms Hunter that this was a suspension. The Respondent took steps to change the door and alarm codes when the Claimant was absent which it was said was in line with there being a suspension of the Claimant.

113. It was submitted that the absence of any evidence showing that the decision made at the EGM had been reversed demonstrates that it had not. The Claimant was suspended; this was unlawful and a breach of contract in itself. The Respondent's suggestion that there was no suspension because no

process was followed simply makes things worse for them; there was no meeting to discuss the suspension, no opportunity for the Claimant to argue that suspension was not appropriate and no right of appeal.

114. Turning to the final issue relied on, Ms Hunter submitted that the Ogilvy letter was clearly the first step in a disciplinary process and that it is disingenuous of the Respondent to suggest otherwise. It was submitted that the matters raised in the letter, being a mix of conduct and capability issues, were either inaccurate, trivial or matters which Mr Ogilvy had no locus to raise. There was no attempt made by the Respondent to assess where the Claimant was fit to attend such an investigatory meeting in circumstances where she was absent due to stress. Viewed objectively, this letter was a final straw.

115. It was submitted that it was inappropriate for the Board to set Mr Ogilvy up as someone to whom the Claimant had to justify her competence and conduct. The Respondent had an HR sub-group and an HR specialist on the Board who could have carried out any necessary investigations. The fact that parties knew each other was irrelevant; in the vast majority of such processes in many employers the parties will know each other. The Respondent was not a tiny organisation and had the resources to deal with an investigation.

116. In any event, it was submitted that the entire process was tainted by the inclusion of matters which were unfounded or unfair. It may have been different if the Respondent had restricted to issues for discussion to those which it was legitimate to do so but they did not.

117. It was said that MC's evidence in relation to the disaster recovery plan showed that this was a piece of work which was in progress when the Claimant went off ill and, indeed, had still not been completed by the time of the pandemic. It was submitted that this showed it was inappropriate to include this in the Ogilvy letter.

118. Similarly, in relation to the review of contracts of employment, it was the Claimant's evidence that this was only discussed at the beginning of August 2019 just a few weeks before she went off sick. It was submitted that it was inappropriate to include this item in a list of potential disciplinary issues.

119. As regards the item relating to the Claimant's own business, MC accepted in cross-examination that she had been aware of this for some years and that the Claimant had scaled this back when she became CEO. It was submitted that there was no legitimate reason for this to appear in the list of issues to be discussed.

120. Ms Hunter went to highlight further issues which she submitted that were inappropriate for inclusion in the matters to be investigated.

121. She also submitted that certain matters were historical such as the contact with a service user. This was something which occurred some 16 months previously and both SB and LC were aware of it. It was unfair for this to be raised after such a long time.

122. The submissions for the Claimant go on to set out the basis on which it is said that other items on the list of matters to be investigated in the Ogilvy letter are said to be inappropriate or unfair. These include the Claimant's alleged conduct at the meeting on 19 August 2019, the sub-letting of an office to LP and invoicing of funders. For the sake of brevity, the Tribunal has not set out these submissions in detail but they have been noted.

123. Ms Hunter summed matters up by submitting that the Ogilvy letter was not a legitimate step taken to commence an investigation. Rather, she submitted that it was a last straw because of the circumstances in which it had been sent, being part of a chain of conduct by the Respondent and containing unfair and ill-judged allegations.

124. Taking all of these matters together, it was submitted that this was sufficient to amount to a breach of the obligation of mutual trust and confidence.

125. Ms Hunter submitted that the Claimant resigned in response to the breach having submitted her letter of resignation almost immediately on receipt of the Ogilvy letter. She made references to the timing of emails on 27 September 2019.

126. The submissions then went on to set out the law. For the sake of brevity, the Tribunal does not propose to set this out in detail especially where it duplicates what the Tribunal has set out below as the relevant law.

127. The submissions set out the relevant cases on the duty of trust and confidence and it was submitted that, viewed objectively, the actions of the Respondent as set out above amount to a course of conduct over time which breached that duty.

128. Ms Hunter went on to set out the law relating to the "last straw" principle and submitted that the Ogilvy letter, although not being enough on its own, was capable of amounting to a "last straw" when viewed in the context of the other matters on which the Claimant relies.

129. In particular, Ms Hunter highlighted what was said by Lord Dyson in *Omilaju v Waltham Forest LBC* [2005] IRLR 35 at paragraph 14.5 that a relatively minor act can be sufficient to entitle an employee to resign where it is the last straw in a series of incidents.

130. In relation to the issue of suspension, Ms Hunter submitted that the Claimant was suspended and made reference to *London Borough of Lambeth v Agoreyo* [2019] EWCA Civ 322 as authority for the proposition that suspension can breach the implied term of trust and confidence where there is no reasonable and proper cause for this. Ms Hunter argues that there was no reasonable and proper cause for the Claimant's suspension at the EGM. If the Tribunal was not with her that the Ogilvy letter was the last straw then the suspension was capable of being so and the Claimant resigned three and a half weeks after that which was not an unreasonable delay.

131. In terms of remedy, Ms Hunter made reference to the Schedule of Loss lodged on behalf of the Claimant. She submitted that any argument by the Respondent that the Claimant would have been fairly dismissed is lacking merit on the basis that there was nothing in the issues listed in the Ogilvy letter which amounted to a fair reason to dismiss and MC had accepted in cross examination that there were no matters at the time of the EGM that amounted to gross misconduct.

132. It was submitted that any argument that dismissal would be fair on the grounds of "some other substantial reason" was flawed. The Claimant's evidence was that she had wished to work for the Respondent until she retired and there is no reason to conclude that she would not have done so.

133. Further, there was no basis for any *Polkey* reduction. The Respondent has not explained what items were gross misconduct or what conduct by the Claimant had contributed to her dismissal.

134. Finally, there was no basis for saying there was a failure to mitigate loss where the medical evidence submitted shows that the Claimant was unfit for work until March 2020.

135. In rebuttal of points made in the Respondent's submissions, Ms Hunter said the following:-

    a. The submission that suspension was capable of being the last straw was not the Claimant changing her case but Ms Hunter, as her representative, making submissions on the law.

    b. Any suggestion that the Claimant would not have accepted an investigation by MC is irrelevant; the Board is more than just MC.

    c. The submission by the Respondent that if the Claimant fails to prove one act then the case fails is wrong as a matter of law. Reference was made to *Lewis v Motorworld* and it was submitted that each incident need not amount to a repudiatory breach but rather it was

question of whether there was a series of actions which entitled the Claimant to resign.

d. There was evidence from CH and AR that the EGM was called to discuss removing the Claimant.

e. The letter at p117 was not phrased as a request that the Claimant not enter the premises but, instead, used the word "must".

f. MC's evidence does not support the submission that the employment relationship was fractured as a result of the meeting involving the founder on 19 August 2019. She emailed the other trustees (pp92-93) after this meeting to inform them of the restructure and that it would involve the Claimant and LC becoming co-CEOs. It was submitted that this is not the action of someone where the relationship was destroyed.

g. There was no evidence that the Claimant would not have been paid her full salary if she had not resigned and remained off sick.

Respondent's submissions

136. The Respondent's agent made the following submissions which were then produced in writing.

137. The submissions began by outlining the Claimant's position that there were four matters which she says led to the breakdown in the working relationship and mirrors what is said above in the Claimant's submission.

138. Ms Gell then initially focuses on the issue of the last straw and refers to the *Omilaju* case as authority for the proposition that if what is said to be the last straw is not capable of contributing to the series of acts which are said to amount to the fundamental breach then there is no need to examine the earlier matters.

139. It was submitted that the Ogilvy letter did not amount to a last straw nor was it a breach of the implied duty of trust and confidence. The Claimant's case must, therefore, fail.

140. Ms Gell argued that it was entirely reasonable for the Respondents to insist on the Claimant taking part in an investigation and that the Claimant would not have accepted an investigation by the Chair given what is said by the Claimant in pursuing the claim. The Respondent had real and genuine concerns regarding the Claimant's actions and sought to establish the facts. This was entirely legitimate and the Claimant was given the opportunity to answer the points being raised but she did not choose to do so and resigned instead.

141. It was submitted that the Claimant had failed to show that the Ogilvy letter, as the last straw, had contributed to the breach of trust and confidence.

142. The submissions made reference to the terms of the ET1 as to what was the last straw and what was said in the Claimant's witness statement on the same issue. It was submitted that the Claimant's position was inconsistent as to whether the last straw was the letter in itself or the fact that it listed 15 issues to be discussed. What was in the Claimant's mind when she resigned was, therefore, not clear.

143. It was submitted that it was reasonable to instruct a third party to investigate in a small charity with many personal connections. The fact that the investigation could have been carried out in a different way does not make the way in which it was approached was a breach of contract or last straw.

144. Further reference was made to *Omilaju* to the effect that an innocuous act could not amount to a last straw. However, it was submitted that this was not part of a disciplinary process and if the Claimant mistakenly thought that it was then it cannot be a last straw. In any event, it was fair for the Respondent to commence a disciplinary process. The case of *Kaur* (below) was relied on

for the proposition that a disciplinary process, properly followed, cannot be a repudiatory breach of contract.

145. The submissions then turn to the question of whether there had been a fundamental breach of contract and it was submitted that there had not. The test was an objective one and the question is whether the Respondent's actions had destroyed or seriously damaged trust and confidence.

146. It was submitted that the Claimant had not led evidence from which the Tribunal could reasonably conclude that there was a course of conduct which, viewed cumulatively, amounted to a repudiatory breach. Each act had to be examined and if the Claimant fails to prove one act then it must fail.

147. In relation to the working relationship with MC, it was submitted that the Claimant had not demonstrated that MC had acted in the fashion described in the skeleton submissions lodged in advance of the hearing. She had not shown that MC's behaviour amounted to a repudiatory breach of contract in terms of being capable of destroying or seriously damaging trust and confidence.

148. It was denied that the Claimant had been demoted and Ms Gell submitted that the ET1 was disingenuous in not stating that there had been an 8-month consultation period involving the FOG group which had been delegated the task of restructuring the Respondent's organisation. The Claimant was part of that group and so had been part of the discussions about restructuring.

149. In particular, the Claimant had suggested a structure with no CEO and two managers reporting to the Board. This was dismissed by the FOG group but, it was submitted, this planted the seed with MC who researched a co-CEO structure and found it to be usual practice. This ultimately led her to present this to the Claimant.

150. The implementation of this restructuring was put on hold when the Claimant was on sick leave. The Respondent considered this to be an additional role

and it was put to the Claimant as a pilot. The Claimant was not being demoted.

151. It was submitted that the actions of the Respondent in relation to the restructuring did not amount to a breach, or contribute to a breach, of the implied terms of trust and confidence.

152. Turning to the issue of suspension, it was submitted that the Claimant was not suspended and could not have considered that she was. Ms Gell set out the position that information had come to light from the meeting on 15 August 2019 that required to be looked into and a meeting of the Board was needed to decide a way forward. This was the reason why the EGM on 2 September 2019 was called and if Board members had thought this was for another meeting then that was nothing more than a misunderstanding.

153. It was submitted that the decision to suspend had to be viewed in the context of the words “as appropriate” in the minute.

154. The Respondent took control of the Claimant’s emails due to what Ms Gell described as operational concerns as set out in the evidence. If the Claimant needed access to her emails then she could have asked for this.

155. It was submitted that the letter of 13 September 2019 asking the Claimant not to attend the office was not suspension. It was a prudent step to ask a senior employee to have a return to work interview before returning to the office.

156. In relation to these issues around the alleged suspension, it was submitted that none of them were a breach, nor did they contribute to a breach, of the implied term.

157. As regards the Ogilvy letter, it was submitted that instructing an independent person to investigate matters relating to a senior employee cannot amount to a breach of trust and confidence.

158. Turning to the issue of there being a series of acts, it was submitted that the actions of the Respondent did not meet the test set out in *Malik* when looked at objectively. In any event, given the Claimant's conduct, the Respondent had reasonable and proper cause for their actions. Ms Gell again submitted that if the Claimant failed to prove one act complained then her claim must fail and that she had failed to prove all acts amount to a repudiatory breach.

159. Ms Gell then went on to address the fairness of any dismissal if that was found by the Tribunal. She set out the relevant statutory provisions and then submitted that there was a potentially fair reason for dismissal being some other substantial reason that the Claimant's relationship with the Respondent could manifestly not continue. Specifically, the Claimant's actions on 19 August 2019 in arranging a meeting with MC to which the founder was invited where MC was ambushed by the Claimant demanding her resignation. It was said that this was divisive and an attempt to damage MC. These were not the actions of a CEO who would remain in post.

160. The submissions then went on to set out further detail of the basis on which it was said that employment relationship was unsustainable. It was submitted that the Respondent had acted reasonably in treating this reason as sufficient to justify dismissal.

161. Turning to the issue of remedies, it was submitted that if the Tribunal found that there was an unfair dismissal then a *Polkey* reduction should apply at 100% of the compensatory award given the Claimant's attitude and actions towards MC which indicated that she would not have remained in post for long.

162. It was also submitted that compensation should be reduced to reflect the Claimant's failure to follow the ACAS Code of Practice relating to the Claimant's failure to meet with Mr Ogilvy and resign instead.

163. Ms Gell then went on to address the issue of a reduction of compensation for contributory fault. She set out the relevant statutory provisions and submitted that the Claimant's actions including the meeting on 19 August 2019, the matters listed in the Ogilvy letter and her reaction to that letter all contributed to her dismissal. It was submitted that a reduction of 100% would be appropriate.

164. In relation to the Schedule of Loss, it was submitted that the Claimant should not be awarded compensation for loss of wages during the period when she was unfit for work. The Claimant was only entitled to recover damages caused by dismissal itself and not the manner of dismissal.

165. Further, it was submitted that the Claimant had not shown that she had made efforts to find full-time employment closer to her level of earnings with the Respondent. She had, therefore, failed to mitigate her loss.

166. In rebuttal of matters raised in the Claimant's submissions, Ms Gell submitted the following:-

a. No weight should be placed on the Claimant's handwritten notes which do not show MC being in contact every day.

b. SB had accepted that she should have phrased her description of events around the Liverpool trip differently.

c. There was evidence around the Claimant being aggressive at the meeting when the purchase of the hamper business was discussed.

d. No weight should be given to the Claimant not being thanked by name at the AGM.

e. Emails had been lodged to show attempts to arrange a Board meeting to discuss the co-CEO role.

f. Just because a different approach could have been taken in relation to access to the Claimant's emails does not mean that what the Respondent did was wrong.

g. There was evidence that the door and alarm codes were still the default codes.

h. The Claimant's submissions were the first time that it has been said that suspension was a breach in itself. The Claimant's case had always been pled as a last straw case.

i. LC had not exaggerated the facts of the meeting on 19 August 2019.

j. The Respondent's witnesses were credible and reliable.;

Relevant Law

167. Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee.

168. Section 95(1) of the 1996 Act states that dismissal can arise where:-

"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

169. The circumstances in which an employee is entitled to terminate their contract by reason of the employer's conduct is set out in the case of *Western Excavating v Sharp* [1978] ICR 221. The Court of Appeal held that there required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:-

a. There must be a fundamental breach of contract by the employer

b. The employer's breach caused the employee to resign

c. The employee did not delay too long before resigning thus affirming the contract

170. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.

171. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that an employer would not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

172. The "last straw" principle has been set out in a range cases with perhaps the leading case being *Lewis v Motorworld Garages Ltd [1985] IRLR 465*. The principle is that the conduct which is said to breach trust and confidence may consist of a series of acts or incidents, even if those individual incidents are quite trivial, which taken together amount to a repudiatory breach of the implied term of trust and confidence.

173. The "last straw" itself had to contribute something to the breach even if that is relatively minor or insignificant (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833).

174. The *Kaur* case also set out practical guidance for the Employment Tribunal in addressing the issue of whether a claimant had affirmed the contract in the context of a "last straw" case:-

"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju v Waltham Forest LBC [2005] IRLR 35*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation ….)*

(5) Did the employee resign in response (or partly in response) to that breach?"

175. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

176. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is "some other substantial reason".

177. This category of potentially fair reason is open-ended and so long as it is not whimsical or capricious (*Harper v National Coal Board* [1980] IRLR 260) then it is capable of being a substantial reason. Further, the reason *could* justify the dismissal then it will be a substantial reason (*Kent County Council v Gilham* [1985] IRLR 18, CA).

178. In a constructive dismissal case, the reason for dismissal is the reason for the breach of contract by the employer (*Berriman v Delabole Slate Ltd* [1985] ICR 546, CA).

179. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

180. In considering s98(4), the Tribunal should take into account all relevant factors such as the size and administrative resources of the employer. There are two

matters which have generated considerable case law and which are worth highlighting

181. First, there is the question of whether an employer has followed a fair procedure in dismissing the employee. The well-known case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 it was held that a failure to follow a fair procedure was sufficient to render a dismissal unfair in itself (although the compensation to be awarded in such cases may fall to be reduced to reflect the degree to which the employee would have been fairly dismissed if the procedural errors had not been made – the so-called "Polkey" reduction).

182. Second, the Tribunal needs to consider whether the dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

Decision

183. The Tribunal has approached the case on the basis that the appropriate test for whether there has been a dismissal as defined in s95(1) of the 1996 Act is that laid down in *Western Excavating.* The Tribunal will address the three elements of that test in turn.

184. In the event that the Tribunal finds there was a dismissal then it will turn to the issue of whether any such dismissal was fair and, if not, will then address the issue of remedy.

Was there a fundamental breach of contract by the respondent?

185. The Claimant seeks to argue that there had been a breach of the implied duty of trust and confidence arising from the conduct of the Respondent relying on the "last straw" principle.

186. For the sake of brevity, the Tribunal will use the shorthand phrase "destroy the employment relationship" or "destroy trust and confidence" to describe the *Malik* test. For the avoidance of doubt, however, the Tribunal, in using that phrase, does still bear in mind that any conduct relied on by the Claimant can meet the test if it does not destroy but seriously damages the relationship.

187. The Claimant relies on four broad categories of conduct which she says destroyed her trust and confidence in the Respondent; the relationship between her and MC; the events surrounding the introduction of the co-CEO role; what is described as the Claimant's suspension; the letter from Mr Ogilvy. The Tribunal will consider each of this but it does bear in mind that it requires to look at these matters as a whole in considering the "last straw" principles.

188. In this regard, the Tribunal does not agree with the submission made on behalf of the Respondent that if the Claimant failed to prove one act then her case must fail. This appears to suggest that if the Claimant did not prove that one of the matters relied on actually happened then the whole claim must fail. The Tribunal is not aware of any authority for this proposition.

189. The Tribunal considers that the question which it requires to address is whether, on the facts found, there was a course of conduct (which may consist of separate, unconnected acts that do not on their own amount to a breach of contract) that when, taken as a whole, amount to what the Tribunal does consider to be a repudiatory breach. It is perfectly possible for the Tribunal to find that an individual incident relied on by the Claimant did not occur (or did not occur as described by the Claimant) but still go on to find that, viewed objectively, the acts which it does find occurred are capable of cumulatively meeting the *Malik* test.

190. If, on the other hand, Ms Gell was suggesting that the Claimant had to prove that all of the matters relied on amounted to a repudiatory breach then the Tribunal also considers that this is not correct as a matter of law. The last

straw principle as set out in the authorities above is very clear that the individual incidents do not require to be repudiatory breaches in themselves. Indeed, they do not need to be a breach of contract. The question for the Tribunal is that set out above as to whether the acts found by the Tribunal cumulatively destroy the employment relationship.

191. First, there is issue of the relationship between the Claimant and MC prior to 16 August 2019. In considering this, the Tribunal bears in mind that there is a fine line between robust management and conduct which can contribute to a loss of trust and confidence. This has to be viewed objectively and an employer has to be able to manage their employees (even if those employees do not like how they are managed) so long as the employer does not cross the line in managing their staff in such a way that breaches the implied duty of trust and confidence.

192. Further, the Tribunal was also conscious that it needed to be aware of the possibility that certain actions by MC were now being viewed by the Claimant through the prism of the later matters such as the co-CEO role and the Ogilvy letter. It is entirely within human nature for someone to re-visit past events and come to a view about them, not held at the time, based on later events. In some instances, it will be legitimate for someone to do so where the later events provide context but in other instances those past events can come to be misinterpreted. The Tribunal has had to balance those issues in assessing the conduct of MC up to 16 August 2019.

193. It was clear to the Tribunal from the findings in fact which it has made that there was objective evidence of something amiss in the employment relationship. Perhaps the most striking example of this was the Respondent's AGM in 2019 where thanks were given to all but the Claimant by name. In this the Tribunal prefers the evidence of the Claimant's witnesses for reasons outlined above and finds that the Claimant was the only person not mentioned by name by either LB or MC. The Tribunal considers it was telling that Kate Short raised this issue and that AR felt compelled to rectify the omission of

the Claimant as this shows that it was noticeable that the Claimant had not been named. The Tribunal considers that the fact that people other than the Claimant thought something was wrong at the time is objective evidence of a notable omission.

194. However, this goes beyond that one incident and it was clear from the Claimant's evidence and her contemporaneous notes that MC was in more regular contact with the Claimant than MC said in her evidence. The Tribunal does accept the Claimant's evidence that, from her perspective at least, MC was managing her more closely than she had in the past.

195. However, the Tribunal did not consider that there was sufficient evidence for it to conclude that MC was acting entirely unreasonably in this regard. It did not consider that there was enough evidence for it to find that MC would change her mind about an instruction on as frequent a basis as was being suggested. In any event, employers, like anyone else, must be allowed to change their mind if they re-consider matters.

196. If the conduct of MC was the only matter being advanced as amounting to the loss of trust and confidence then the Tribunal would not have considered that the *Malik* test was met. However, it was not the only issue and is said to form a series of acts culminating in a last straw. In that regard, the Tribunal does find that there were matters which were capable of contributing to a loss of trust and confidence, in particular the events of the AGM.

197. Second, there is the creation of the co-CEO role. In this regard, the Tribunal notes that there was no suggestion that the Claimant was to lose wages or to otherwise be "demoted" in the very strict sense of that word.

198. However, the Tribunal considers that any manager who was in charge of an organisation would consider that they had been as good as demoted if they were told that they were to have their responsibilities and authority shared with someone who, until that point, had been their deputy. At the very least,

this represents a dilution of such an employee's status and authority. To suggest otherwise, as the Respondent sought to do, is to fly in the face of human nature and common-sense. It is quite clear to the Tribunal that any reasonable employee in the same circumstances as the Claimant would be genuinely and understandably concerned about the employment relationship.

199. This is especially true when the circumstances in which this was presented to the Claimant are considered. The decision to create co-CEO roles came utterly out of the blue and apropos of nothing from both her perspective and when viewed objectively. There had been no previous discussions regarding this organisational model with the Claimant, at the FOG group or with the Board.

200. Further, the model was not being presented as a suggestion or a possibility about which MC wished to consult with the Claimant. It was presented as something that was going to happen. This was not a consultation about a possible change or an option to be discussed further; it was presented as a *fait accompli* which was announced to the rest of the organisation very shortly afterward.

201. Again, the Tribunal prefers the evidence of the Claimant on the issue of whether the co-CEO role was being presented as having a trial period for the reasons set out above as to why the Tribunal prefers the evidence of the Claimant and her witnesses. Further, the announcements made about the role in the week commencing 19 August 2019 said nothing about it being a trial. The plain reading of those documents is that this was a permanent change being enacted. The Tribunal considers that the contents of those announcements were a true reflection of the position.

202. In this regard, the Tribunal does not consider the fact that a probationary period is mentioned in the contract for the co-CEO role given that this was a standard clause in the Respondent's contracts of employment.

203. The Tribunal rejects the Respondent's argument that this model was one suggested by the Claimant. It was quite clear to the Tribunal that the Respondent and its witnesses were engaging in a revisionist approach to the facts in trying to suggest this. It is correct to say that the Claimant had suggested a model which had two people reporting to the Board but this was a model which saw the CEO role being removed altogether and the heads of service reporting directly to the Board. This is very different from what was being presented to the Claimant on 16 August 2019.

204. Further, the model in question was put forward by the Claimant in what was clearly an exercise in "blue sky thinking" where she was trying to present all options without any preconceived ideas. In any event, this option was clearly rejected by the FOG group and was not discussed again.

205. The Tribunal considers that the presentation of the co-CEO role to the Claimant on 16 August 2019, both in its substance and manner, was sufficient to meet the *Malik* test on its own. At the very least, the nature of the change being made and the fact that it came entirely out of the blue with no consultation would seriously damage the Claimant's trust and confidence in her employer if not outright destroy this.

206. The Tribunal does have to consider whether the Respondent had reasonable and proper cause for its conduct. In this regard, the Tribunal is conscious of the fact that an employer is entitled to run their business as they see fit and can re-organise if they so choose. However, it is not just the fact of the re-organisation that has to have a reasonable and proper cause but the manner in which the Respondent went about it.

207. In this context, the Tribunal notes that the FOG group had been delegated the task of looking at a re-organisation of the Respondent and this had been going on for some time. There was, therefore, a forum for discussion and consultation as well as adequate time for the co-CEO option to be discussed in that group of which the Claimant was a part.

208. However, that was not done at all. Taking the Respondent's evidence at its highest, the most that had happened was that MC and LB had discussed this. They did not discuss matters with the rest of the FOG group and certainly no discussion was had with the Claimant (or any other members of the FOG group) at any stage until 16 August 2019. The Tribunal certainly did not agree with the submission made by Ms Gell that there had been an 8-month consultation period. If that submission had been intended to suggest that the Claimant had been consulted about the co-CEO role in that period then it is simply wrong on the facts of the case; there had been discussions about reorganising the Respondent but, even on the Respondent's own evidence, the co-CEO role had not been discussed with the Claimant at all until 16 August 2019.

209. No explanation, let alone adequate explanation, was given by the Respondent's witnesses for this complete failure to consult with the Claimant about the co-CEO role.

210. The Tribunal does note the terms of the email at p89 which, on a plain reading, clearly suggests that the co-CEO structure was decided upon after the meeting between MC, LB, LC and SB on 15 August 2019. The Tribunal can well understand why it was put to those witnesses in cross-examination that the decision to create a co-CEO role was nothing more than a knee-jerk reaction to the complaints about the Claimant made by LC and SB at that meeting.

211. The Respondent's witnesses denied that this was the reason for what, on the face of it, was a sudden decision to create a co-CEO role. The Tribunal does not need to find that the Respondent had an improper and unreasonable cause for its actions but, rather, that they did not have a proper and reasonable one. This is a subtle but important distinction which means that the Tribunal does not have to form a view as to whether the co-CEO role was a reaction to what was said at the 15 August meeting. Rather, the Tribunal

has to assess whether the evidence shows that there was a proper and reasonable cause.

212. Given the utter lack of any explanation, let alone a satisfactory one, for the Respondent's failure to consult, the Tribunal does not consider that there is a proper and reasonable cause for this failure.

213. Further, MC gave no detailed explanation for why she considered this model to be one which should be adopted. She did say, in very general terms, that she considered this would be a model which would work for the Respondent. However, the only reason advanced for why it would work was the assertion by MC that she considered that the CEO role was too much for one person. When she was asked when she came to this view, she stated that it was when the Claimant had been off sick, a reference to the periods of absence in April and May 2018. The Tribunal did not find this to be a credible explanation given that those absences occurred 8 or 9 months before the FOG group started discussing reorganising the charity but there had been no mention of the role needing more than one person during those discussions. If MC had been thinking in those terms since April or May 2018 then it makes the complete lack of discussion or consultation with the Claimant even more inexplicable.

214. In these circumstances, the Tribunal did not consider that the Respondent had reasonable and proper cause for their conduct relating to the co-CEO model, both in relation to presenting it to the Claimant and in the manner in which this was done.

215. Turning to the third broad category of suspension, there is an unusual sequence of events in that there was a decision by the Board to suspend the Claimant which was never communicated to her but she was, in effect, excluded from the workplace.

216. There is a question mark over whether the Respondent could lawfully suspend the Claimant. The only mention of a power to suspend in the Claimant's contract relates to a power to do so during any notice period but there is no express power relating to any other period. There is a mention of disciplinary policy but this was not produced in evidence and, in any event, is said to be not contractual.

217. If the Claimant had been informed that she was suspended after the EGM then this was, arguably, a breach of contract. However, she was not told this and so, technically, the Tribunal does not consider that she could have viewed herself as having been expressly suspended.

218. This does not reflect well on the Respondent and those individuals involved. It goes directly against the decision of the Board made at the EGM and there is a question whether the officers who did not implement the decision were acting outside the authority given to them. Further, the Tribunal does agree that the Respondent had failed to follow a proper process in dealing with the Claimant (although it does note that the Claimant would not have known this at the time).

219. However, even if the Claimant was not technically suspended, this does not mean that the Respondent's actions during her absence prior to her resignation should not be considered by the Tribunal in assessing whether the Respondent had destroyed the employment relationship. In particular, despite the fact that the Claimant was not expressly told that she was suspended, the Respondent's actions are consistent with a suspension when viewed objectively.

220. First, there is the letter of 13 September 2019 instructing the Claimant not to attend the office until she had had a back to work interview. Whilst such letters are not unusual in some workplaces, this was the first instance in which a letter of this nature was issued to an employee of the Respondent.

221. No explanation was given by any of the Respondent's witness why it was considered appropriate to issue such a letter to the Claimant when no such letter had been issued to any employee in the past. MC sought to suggest that she believed that it was part of the Respondent's sickness absence policy but since she also indicated that she would not be involved in such operational matters and the Respondent had not lodged this document then the Tribunal was not prepared to make a finding of fact to this effect.

222. Second, there was the fact that the Claimant had remote access to her emails removed without any discussion or consultation. Remote access had been in place for some time and the Claimant had used it during previous absences to deal with emails.

223. The Respondent explained that they needed access to the Claimant's emails during her absence and so had to reset her password. On the face of it, this is a proper and reasonable explanation. However, there was no explanation why there was no discussion with the Claimant regarding access to her emails; the Claimant could have been asked for her password or, at the very least, she could have been made aware that the password was being changed.

224. The Tribunal considers that the Respondent's actions, being inconsistent with past practice, would raise a suspicion in the mind of any reasonable employee that they were being excluded from the workplace, particularly where these actions are being taken without any consultation or explanation.

225. Finally, turning to the issue of the letter from Mr Ogilvy which is said to be the final straw for the Claimant. The Tribunal is conscious of the fact that an employer is entitled to investigate any potential conduct or capability issues and take action where appropriate. Further, the use of an outside party to carry out investigations is also a common practice, particularly in circumstances where there is a small employer and those who might otherwise carry out such investigations are involved in the matters to be

investigated. Such actions by an employer are not inherently ones which would destroy the employment relationship or would be done without proper and reasonable cause.

226. However, the actions by the Respondent have to be viewed in the context of the facts of this case. The Ogilvy letter comes in circumstances where the Claimant had formed a view that there was a difficult relationship with MC, she had been presented, out of the blue, with what was a significant change in the organisational structure affecting her job, she had been told not to attend the workplace and had had her remote access to emails removed.

227. Further, the contents of the letter have to be taken into consideration. It contains a very long list of matters which are to be investigated. The sheer volume of issues which run to 15 matters with one matter being comprised of 5 sub-issues would, in itself, undoubtedly cause any reasonable employee a degree of concern.

228. However, there are further issues in relation to the matters being raised specific to those matters and these can be grouped together to some extent.

229. Some of these are matters which occurred some time ago and had, viewed objectively, either been resolved or were not apparent a problem at the time:-

a. Item 8(ii) related to use of a company bank card which had been addressed, resolved and was within the knowledge of MC who took no further action at the time.

b. Item 9 which related to an instance in which the Claimant had encountered a service user out with the Respondent's premises over a year earlier and which had been reported at the time to the service user's counsellor.

c. Item 12 which related to the renting of a room to LP was something which had been in the knowledge of both MC and LB for several months with no issues being raised by either of them.

230. Considered objectively, any reasonable employee who received a list of issues which included matters which had occurred sometime ago and had either been resolved or had not been an issue at the time would be unsurprisingly concerned that issues were being dug up to be used against them.

231. Other matters in the letter are, frankly, so vague and presented without context having never been raised as an issue with the Claimant before that it would be impossible for any reasonable employee to understand what was to be investigated:-

a. Item 6 talks about how the Claimant focuses strategically on events which might impact on the Respondent but gives no context as to what this is about beyond a simple reference to the Michael Jackson documentary.

b. Item 3 gives no detail of what issue or issues there has been with feedback to funders beyond a reference to North Ayrshire Council.

c. Item 5 does not specify what wrong information was given to the Robertson Trust and when it was given.

d. Item 7 is entirely silent as to what issues there have been with the issuing of press statements.

e. Items 8(i), (iii) (iv) & (v) give no context as to what issues there have been with the Claimant's financial authority, the handling of cash or the cash receipt registers.

f. Item 15 does not explain what issues there have been with the Claimant's other business or roles. These were known to the Respondent and no issue had ever been raised.

232. Item 14 relates to matters arising from the Claimant's absence. The first matter relates to the Claimant's failure to follow the Respondent's process for absence management in sending a text advising for her absence rather than making a phone call. As set out above, the Respondent's absence management was not lodged in evidence and so the Tribunal had no evidence to confirm this was correct. In any event, this appears to be no more than a technical breach of the process and the Respondent clearly knew that the Claimant was absent. In this regard, MC sought to deny that she received the text but the Tribunal did not find this credible.

233. The Tribunal does note that there were certain matters which might legitimately require some discussion with the Claimant. However, the Tribunal considers that the Ogilvy letter has to be viewed as a whole in assessing whether it contributed to the loss of trust and confidence and it would not be appropriate to deal with each item in the letter in a piecemeal fashion as to whether each item contributed (or not) to the destruction of the employment relationship (or whether there was reasonable and proper cause for each item). It was quite clear from the Claimant's evidence that it was the letter as a whole which caused her to consider that she could no longer work for the Respondent and so that is how the Tribunal has approached this.

234. The Tribunal does consider that the letter has contributed to the loss of trust and confidence when the factors set out above are taken into account. In particular, the sheer number of items to be investigated, the historical nature of certain items, the fact that certain matters had been resolved or had been known about with no issue taken and the vague nature of others are all matters which any reasonable employee would consider unjustified even if certain of the matters within the letter might not create such an impression on their own.

235. Turning to the question of whether there was reasonable and proper cause for sending the letter in the terms that it was, the Tribunal reiterates the point that the Tribunal considers that this requires to be considered as a whole and, as such, it is not satisfied that there was a proper and reasonable cause for the letter to be framed in the terms that it was.

236. The Tribunal found the evidence from the Respondent's witnesses to be unsatisfactory in relation to the matters listed in the Ogilvy letter for the following reasons:-

a. No evidence-in-chief was led at all to explain what was in issue in relation to items 1, 4, 5, 6, 7, 8(iii), 8(iv), 8(v), 14 (in relation to the assertion that the Claimant was absent "without permission") and 15.

b. The Respondent's witnesses did give some evidence, either indirectly in their evidence-in-chief or in cross, regarding items 3 and 8(i).

c. No evidence was given why it was considered appropriate to raise issue 9 when it had occurred some 16 months previously.

d. No evidence was given as to why it was considered appropriate to raise issue 8(i) when both the fact of it and its resolution had been within MC's knowledge but she had not taken action at the time.

e. No evidence was given why it was considered appropriate to raise issue 11 in circumstances when both MC and LB had been aware of the arrangement for some months and had not taken raised it at the time.

237. There was no evidence available to the Tribunal from which it could conclude that the Respondent had properly applied its mind to what issues genuinely required investigation. There was no evidence led by the Respondent as to the detail of the complaint raised in the 15 August 2019 meeting and so the

Tribunal can make no findings as to which of the matters raised in the Ogilvy letter arose from what was said at the meeting and which were added later; items 13 and 14 almost certainly did not arise at the 15 August meeting as they did not occur until later so they must have been added either by MC or LB.

238. If all the other matters in the Ogilvy letter arose in the 15 August meeting then the Tribunal can only draw the inference that the complaints by LC and SB were accepted, unthinkingly and uncritically, by LB and MC. There was no evidence that they sought further details of the complaints in order to fully understand the issues.

239. The only issue about which there was evidence of it being raised at the 15 August meeting is the issue with the contact with the service user which LB confirmed in cross-examination was raised at the meeting. However, when she was then asked whether she asked when this incident occurred, she replied that she did not think this was relevant. The Tribunal considers that this goes towards showing that not only was she not applying her mind to what issues genuinely need to be addressed but that she was not interested in doing; the detail of an incident is highly relevant to whether it requires investigation.

240. It was clear from the evidence that no discussion of the detail of the issues was carried out at the EGM. LB simply presented the issues as needing investigation and there was no discussion by the Board as to what issues were appropriate to take forward.

241. Finally, the Tribunal does note that the Respondent took over 2 weeks to take action about these issues by calling the EGM. In the meantime, the creation of the co-CEO role was announced and this was to go ahead with the Claimant occupying one of the posts; there is nothing in the actions of MC or LB in the intervening period that suggested that there was an issue with the Claimant's conduct or performance. The Tribunal cannot reconcile the Respondent's actions the days immediately following 15 August in which, on the face of it,

the appeared to be quite happy for the Claimant to continue in a senior role with the fact that, on their own evidence, they were aware of a large number of matters which they considered required investigation.

242. In this regard, the Tribunal does draw the inference from the facts found that it was the correspondence between Board members seeking a meeting to discuss the events in August that prompted MC to decide to hold the EGM. Taking account of that correspondence and what was said in MC's email calling the EGM, any objective observer could only conclude that the EGM was being called to discuss the announcement of the co-CEO role.

243. Looking at this correspondence as a whole, and taking account of the factors described above, the Tribunal considers that it is very difficult to resist drawing the inference that this was a case of the Respondent seeking to find as much as they could to criticise the Claimant whether there were grounds to do so or not. Indeed, the Tribunal does draw such an inference and considers that this was not a measured approach to what might be genuine concerns about the Claimant's conduct or performance.

244. In these circumstances, taking into account all the matters set out above, the Tribunal does not consider that the Respondent has led sufficient evidence to satisfy the Tribunal that it had reasonable and proper cause to have Mr Ogilvy issue the letter of 25 September 2019 in the terms in which it was issued.

245. Further, the Tribunal was also not satisfied that there was reasonable and proper cause for the investigation to be passed to an external solicitor. The Tribunal could well understand why MC and LB may not wish to be involved in any investigation but there was no evidence led from the Respondent's witnesses as to why this could not have been done by other Board members particularly given that there was an HR sub-group set up by the Board and an HR professional on the Board. Indeed, the evidence given as to the discussion at the EGM which led to the appointment of Mr Ogilvy does not disclose any real discussion as to the appropriateness of an outside person being appointed

to investigate. It was simply presented to the Board and they agreed to it without any debate. The Tribunal does not consider that the Respondent had properly applied its mind to the question of what would be the most appropriate course of action in this regard.

246. Taking all of these four broad matters as a whole, the Tribunal considers that the conduct of the Respondent was such as to seriously damage, if not destroy, the trust and confidence between it and the Claimant. Introducing such a significant change to the organisation directly impacting on the Claimant without any prior discussion or consultation is, for reasons outlined above, sufficient on its own to destroy the employment relationship. However, the subsequent conduct of the Respondent in excluding the Claimant from the workplace and having a letter issued to her in the terms of the Ogilvy letter were further matters which, viewed as a whole, would seriously damage, if not destroy, trust and confidence for the reasons outlined above. The Tribunal considers that the Ogilvy letter did contribute to that loss of trust and confidence and so is capable of being the last straw for the reasons set out above.

247. The Tribunal does not consider that the Respondent's actions had reasonable and proper cause whether looked at separately or as a whole. The Tribunal has addressed this issue in relation to the separate issues above but taken them as a whole the Tribunal does not consider that there is any evidence from which it could conclude that the conduct viewed as a whole had a reasonable and proper cause. Indeed, the Respondent did not seek to explain its actions as a whole and, rather, sought to do so in relation to the separate issues. This is understandable given the different explanations advanced for the separate issues.

248. In these circumstances, the Tribunal does consider that the Respondent had fundamentally breached the contract. In particular, the Tribunal considers that the Respondent had breached the mutual obligation of trust and confidence by acting, without reasonable and proper cause, in a manner likely to destroy or seriously damage the employment relationship.

Did the Respondent's breach cause the Claimant to resign?

249. Although the Claimant's letter of resignation did not set out the reasons for her resignation, the Tribunal heard evidence from the Claimant as to why she resigned. As stated above, the Tribunal found the Claimant to be a credible and reliable witness. The Tribunal, therefore, had no hesitation in finding that the Claimant resigned for the reasons given in her evidence, that is, the loss of trust and confidence in the Respondent arising from the conduct of the Respondent culminating in the letter from Mr Ogilvy on 25 September 2019 .

250. Indeed, there was no evidence to suggest any other reason for her resignation. The Respondent did not lead any evidence or advance any argument that the Claimant resigned for some reason other than the alleged breach of contract. To be fair to the Respondent, an argument was made that the Claimant's position on what amounted to the last straw was inconsistent but this sought to draw a distinction between the Respondent having instructed a solicitor to intervene as set out in the ET1 and the receipt of the letter from that solicitor as put in the Claimant's witness statement rather than suggesting that the Claimant had some other reason entirely, unconnected to the matters she sought to rely on, for her resignation.

251. In these circumstances, the Tribunal finds that the Claimant resigned as a result of the breach of contract by the Respondent.

Did the Claimant affirm the contract?

252. The Claimant resigned by letter and email dated 27 September 2019 after receipt of the letter from Mr Ogilvy dated 25 September 2019. No argument was made by the Respondent that there was any delay by the Claimant in resigning and the Tribunal considers that that was a sensible position given that it is very difficult to see any basis on which it be said that the Claimant delayed in her resignation.

253. The Tribunal finds that there was no delay by the Claimant in resigning and that she had not affirmed the contract.

Conclusion – was there a dismissal?

254. The Tribunal considers that there was a dismissal as defined in s95(1)(c) of the 1996 Act because there had been a fundamental breach of contract by the Respondent in the circumstances set out above. The Claimant resigned in response to that breach and did not affirm the contract by delaying in resigning.

Was the dismissal fair?

255. Given the Tribunal's findings in relation to whether or not the Claimant was dismissed, it is necessary to address the issue of whether this dismissal was fair.

256. There is always some degree of artificiality in an employer trying to give a reason for a dismissal which they say did not take place but the Tribunal follows the approach in *Berriman* and has considered whether there was a fair reason for dismissal by assessing the reason for the breach of contract.

257. The Tribunal also recognises that it has already addressed the reasons for the Respondent's conduct in applying the "reasonable and proper cause" element of the *Malik* test. There is clearly an overlap in the two issues although they are different legal tests.

258. The Respondent has advanced "some other substantial reason" as the label applied to the potentially fair reason with the actual reason being the breakdown in the working relationship. The Respondent relies on the conduct of the Claimant in calling the meeting with Ms Cairns and the founder on 19 August 2019 (and her alleged conduct in that meeting) in this regard and argues that the working relationship could manifestly not continue as a result of this. In other words, the "some other substantial reason" was the breakdown in the working relationship.

259. However, the difficulty for the Respondent is that that reason cannot possibly explain the whole of their conduct giving rise to the breach of contract. In particular, it cannot be the reason for the decision to create co-CEO roles and the manner in which that was presented to the Claimant as these occurred before 19 August 2019.

260. It is correct to say that it is possible for the Respondent's actions after 19 August 2019 to be by reason of a breakdown in the working relationship caused by the Claimant's conduct on that date. However, there is no clear evidence that this was the reason, or principal reason, for the Respondent's conduct. At most, the conduct of the meeting on 19 August 2019 was one of the matters which Mr Ogilvy had been asked to investigate but it was not given any more prominence or import than the other fourteen matters listed in his letter. It is clear from the evidence that this was not the sole reason for the Respondent's actions after 19 August 2019 and it was not the main reason for the Respondent's actions but was one of many.

261. In these circumstances, the Tribunal is not satisfied that the Respondent has discharged the burden of proof in showing that there was a potentially fair reason for dismissal in circumstances where the reason relied on could not be the reason for the whole of their conduct giving rise to the breach of contract and where it was not the sole or principal reason for the remainder of that conduct.

262. The Tribunal, therefore, finds that the Claimant's dismissal was unfair.

Remedies

263. There were a number of issues that the Tribunal required to determine in considering what compensation it would be just and equitable to award in respect of the claim for unfair dismissal.

264. First, the Respondent had submitted that a deduction should be made for contributory fault on the basis that the conduct of the Claimant had contributed to her dismissal.

265. One of the matters said to have contributed to the dismissal was the Claimant's reaction to Mr Ogilvy's letter of 25 September 2019. The Tribunal does not consider that that can possibly amount to contributory conduct; the reaction in question was to resign and it was this which gives rise to the constructive dismissal of the Claimant. It simply cannot be correct that an employee who resigns in response to a fundamental breach of contract is considered to have contributed to the dismissal that flows from that.

266. The second matter said to contributory conduct is the Claimant's alleged conduct on 19 August 2019. The Tribunal has already addressed above the fact that this cannot be a reason for the Respondent's conduct prior to that date in the context of the reason for dismissal and so the Claimant cannot have contributed to that.

267. Further, the Tribunal has made findings in fact regarding the Claimant's conduct on 19 August 2019 and does not consider that this was of a nature that could be considered to be improper or blameworthy so as to be capable of amounting to contributory conduct. The Claimant sought to raise her concerns about the conduct of MC in a reasonable and temperate manner; MC may not have liked the fact that she had been challenged but the Tribunal does not consider that the Claimant improperly in doing so.

268. Finally, the Respondent relies on the Claimant's alleged conduct giving rise to the matters in the Ogilvy letter. The Tribunal has set out above its views on those matters above in the context of whether there was a repudiatory breach and has concluded that there was no reasonable and proper cause for the Respondent seeking to investigate matters in the terms on which it sought to do so.

269. In these circumstances, the Tribunal considers that there is simply not enough of an evidential basis for it to conclude that the Claimant had engaged in the kind of blameworthy conduct that gives rise to contribution. The historical nature of certain of the allegations, the vague nature of others and the fact that still others seem to have had no basis is simply not enough for the Tribunal to conclude that the Claimant had contributed to her dismissal.

270. The Tribunal could not see any basis on which it could conclude that any actions of the Claimant had in any way contributed to the Respondent's conduct giving rise to the fundamental breach of contract.

271. The Tribunal did view the submissions made on behalf of the Respondent in this regard to be more in the way of submissions that it would be "just and equitable" to reduce the compensation awarded to the Claimant because the employment relationship was going to come to an end in any event given the asserted breakdown in the working relationship. This is not a *Polkey* or contributory conduct reduction but, rather, a broad application of the test the Tribunal should apply in deciding compensation.

272. The Tribunal did not consider that there was a sufficient evidential basis for it to reach a conclusion that the employment relationship would have inevitably terminated had the Claimant not resigned when she did. In this regard, the Tribunal bears in mind that it is the relationship between the Claimant and the Respondent which is to be considered rather than individual relationships although the relationships between the Claimant and individuals within the Respondent organisation are important. Whilst it might be said that the Claimant and MC would, at some point, no longer be able to work together, MC is not the person who employs the Claimant.

273. There is always a degree of speculation in assessing these matters and so it is important for the Tribunal to consider what evidence it has before it to support such speculation. There was no evidence from which the Tribunal could conclude that individual relationships had irretrievably broken down let alone

that the overarching employment relationship had done so. For example, there was no evidence that the individual relationships could not have been repaired.

274. The Tribunal was not prepared to make any deduction on this basis in such circumstances.

275. Second, the Respondent submitted that no award for loss of wages should be made because the Claimant had not mitigated her loss.

276. The burden of establishing a failure to mitigate loss lies with the Respondent; the Claimant was not challenged in cross examination as to what steps she could have taken to find work beyond that which she had secured nor was any evidence led by the Respondent as to employment opportunities which the Claimant could have pursued which, if successful, would have secured alternative employment at a higher rate of pay than the Claimant had secured.

277. This was not a case where the Claimant had done nothing to find new work; she had been declared unfit for work for a period and has secured part-time employment once she was fit to return to work.

278. In the circumstances, the Tribunal was not satisfied that the Respondent had shown a failure to mitigate by the Claimant and so no deduction would be made in relation to this.

279. Third, the Respondent argued that compensation should be reduced under the *Polkey* principle. However, that principle would only apply where the Tribunal had found that the Claimant's dismissal was unfair due to a procedural error but that the Claimant could have been dismissed fairly if such an error had not been made. In this case, the Tribunal found that there was no potentially fair reason for dismissal at all and so the principles of the *Polkey* case have no bearing.

280. Fourth, there was a question as to what loss the Claimant should be awarded up to the date when she became fit for work. The schedule of loss lodged by the Claimant sought loss of wages at her normal pay. The Respondent argued that the Claimant was not fit for work during that period and should not be paid at the full rate of pay.

281. The Tribunal considers that any compensatory award should put the Claimant in the position she would have been in had she not been dismissed. The terms of the Claimant's contract regarding sick pay states that she is entitled to four weeks' full pay and then four weeks' half pay when absent due to sickness. The Tribunal does not consider that there was sufficient evidence to suggest that the Respondent would have done anything other than act in accordance with the terms of the contract. In these circumstances, the Tribunal considers that any loss of wages for the period when the Claimant was unfit to work should be calculated on the basis of what sick pay the Claimant would have received if she had remained in employment.

282. Fifth, and finally, the Respondent sought a decrease in the compensation in relation to a failure by the Claimant to follow the ACAS Code of Practice. This was in relation to what was said to be a failure by the Claimant to engage with the disciplinary investigation process and agree to meet with Mr Ogilvy.

283. It is correct to say that the Claimant did not engage with that disciplinary process but it is important to view this in the context of the whole factual matrix. The Tribunal has held that the letter from Mr Ogilvy was the last straw giving rise to a fundamental breach of contract. If the Claimant had delayed in resigning and had engaged with the disciplinary process then it could have been said that such action affirmed the contract.

284. The Claimant was, therefore, in a very difficult position where, no matter what choice she made in terms of engaging with the investigation, she would face a potentially adverse consequence for her case.

285. The question for the Tribunal under s207A(3) of the Trade Union & Labour Relations (Consolidation) Act 1992 is not just whether there has been a failure to comply with the relevant Code of Practice but also whether such failure is unreasonable.

286. In this case, the Tribunal does find that there was a failure by the Claimant to follow the relevant Code but that such a failure was not unreasonable in the circumstances of the case where the Claimant was faced in an invidious position that no matter what she did, her choice would have potentially adverse consequences.

287. It should be made clear that the Tribunal is not saying that these were matters in the Claimant's contemplation when she made the decision to resign. There was certainly no evidence to that effect. Rather, the Tribunal is taking account of all the circumstances of the case in assessing the reasonableness of the Claimant's actions and that must include the matters outlined above

288. Turning now to the calculation of the award to be made and starting with basic award. The Claimant was 59 years of age when she was dismissed and had been employed with the Respondent for 4 complete years. The maximum week's wage which applied at the time of the Claimant's dismissal was £525. She was therefore entitled to a basic award of 6 weeks' wages at £525 per week = **£3150**.

289. Turning to the compensatory award, there are a number of heads of damages; loss of wage to the date of the hearing; loss of pension contributions to the date of the hearing; future loss of wages; future loss of pension contributions; loss of statutory rights. The Tribunal will address each of these in turn before considering whether the statutory cap applies.

290. The Claimant sought damages for loss of wages from the end of her employment with the Respondent up to the date of the hearing (which is taken as 1 February 2021). These losses fall into two separate periods:-

a. The first is the period up to 1 March 2020 when the Claimant was unfit for work. As stated above, the Tribunal has held that such losses should be based on what the Claimant would have received in terms of sick pay had she been still employed by the Respondent. Given that the Claimant had exhausted her contractual entitlement by the end of her employment, the Tribunal finds that there were no losses in this period. This also means that the recoupment provisions do not apply as this was the period when the Claimant was in receipt of state benefits.

b. The second period is 1 March 2020 to 1 February 2021 when the Claimant was fit for work. The Tribunal agrees with the submission made in the Claimant's schedule of loss that the sum which should be used to calculate these losses should be her net wage and the pension contributions she made.

291. The Tribunal therefore calculates the Claimant's gross loss of wages on the basis 11 months at £2134.02 amounting to £23474.22.

292. The Claimant's earnings in her part-time employment and self-employment need to be deducted from this sum. The Claimant earned £666.67 in March and April 2020, £1151.04 in May, June and July 2020 and then £1121.04 from August 2020 onwards. The differing amounts reflect an increase in the hours the Claimant was working and then a small decrease in hours. This amounts to £11512.70 in total earnings in the Claimant's part-time employment.

293. The Claimant also earned £4004 in self-employed earnings in the same period through her own business.

294. The Claimant's net loss of earnings for the period from the end of her employment up to the date of the hearing is **£7957.52.**

295. The Claimant also sought damages for loss of the pension contribution made by the Respondent. There was no evidence before the Tribunal that such contributions would have been made when the Claimant had exhausted her entitlement to contractual sick pay and was effectively on nil pay. The Tribunal

therefore calculates the loss of pension contributions over the same 11 month period as it has done for loss of wages to the date of the hearing. The sum awarded is, therefore, calculated as 11 months at £80 a month totalling **£880.**

296. The Tribunal considered that the period of six months for future loss sought by the Claimant is a reasonable and appropriate period for this calculation. Given that the country is still experiencing the economic and social impact of the Covid pandemic, the Tribunal considers that there are real difficulties in individuals securing employment in a short period. Added to that, the nature of the job done by the Claimant, being at a senior level, is not one where there are likely to be a large number of job opportunities. Taking account of these matters, the Tribunal considers that 6 months is an appropriate period for future loss in relation to both wage and pension losses.

297. In terms of wage loss, the Tribunal considers that there needs to be a deduction to reflect the earnings which the Claimant is likely to receive in the period of future loss. In the 11 months from 1 March 2020 to 1 February 2021, the Claimant earned £15516.70 which is an average of £1410.61.

298. The Tribunal calculates the gross loss of future wages at £2134.02 for 6 months equalling £12804.12 less £8463.66 (6 months at £1410.61 per month) amounting to a net award of **£4340.46**.

299. The Tribunal also awards **£480** (6 months at £80 per month) for loss of future pension contributions.

300. The Claimant sought **£500** in respect of loss of statutory rights and the Tribunal considered that this was an appropriate sum to award in respect of this head of compensation.

301. The total unadjusted compensatory award is, therefore, **£14,157.98**. This is less than the Claimant's annual earnings and so the statutory cap does not apply.

302. In these circumstances, the Tribunal makes a total award (basic award and compensatory award) for unfair dismissal of **£17,307.98** (Seventeen thousand, three hundred and seven pounds, ninety-eight pence).

Employment Judge: Peter O'Donnell
Date of Judgment: 11 March 2021
Entered in register: 18 March 2021
and copied to parties