



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100319/2020 (V)

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Held via Cloud Video Platform (CVP) on 28 and 29 July; and 7 August 2020

Employment Judge M Robison

10 **Mrs J McTaggart**

**Claimant
In Person**

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Community Maintenance & Environmental

**Respondent
Represented by
Miss J Hamilton -
Chair**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment of the Employment Tribunal is that the claim is dismissed, the claimant having failed to discharge the burden of proof on her to show that she had been dismissed.

REASONS

1. Following a case management preliminary hearing, it was agreed that a final
30 hearing in this case should be listed to take place remotely by way of video conference. The issues for determination in this case are whether or not the claimant is entitled to redundancy pay and whether or not the claimant is entitled to notice pay. There were also two preliminary questions for initial determination, that is whether the claimant was dismissed or whether she
35 resigned; and whether the claims have been lodged within the statutory time limits.

2. This hearing was conducted remotely on Cloud Video Platform (CVP). On the first day of the hearing I heard evidence on oath from the claimant, and from Mrs Hamilton for the respondent, who affirmed. As there was some confusion over the order and timing of witnesses, and their availability, I also heard
5 evidence on the second day from the respondent's witness, Ms A Coulter, who affirmed.
3. The Tribunal had been due to hear evidence from the claimant's witness, Mrs M Levett, but due to unforeseen circumstances, it was not possible to hear her evidence on the second day. Accordingly, a third date was set to hear that
10 evidence and parties' submissions, that was 7 August 2020.
4. Although that date was set for the convenience of Mrs Levett, she subsequently wrote to the Tribunal to advise that she was no longer prepared to give evidence on a voluntary basis. I invited Mrs McTaggart to seek a witness order if she thought that appropriate, but she declined. Consequently,
15 this decision is based only on the evidence heard from the three witnesses.
5. The parties had lodged a number of productions. The claimant had not numbered her productions, which I numbered during the course of the hearing C1 and C2. The respondent's productions are referred to by page number. The respondent lodged a number of additional documents on the morning of the
20 second day, which I numbered 25 to 28. Parties also referred to a not insignificant number of documents which had not been lodged, and were not lodged during the hearing. The claimant advised that she had had a problem with her computer and many had been lost. Self evidently, I was not able to take those documents into account in my deliberations.
- 25 6. Although parties were asked to exchange witness statements, it was clear that neither Mrs McTaggart nor Miss Hamilton understood how witness statements should be set out. Although they confirmed that what they had produced they wished to be taken into account as their evidence, I required to undertake extensive questioning of both Mrs McTaggart and Miss Hamilton with a view
30 to making appropriate findings in fact to which to apply the relevant law. Ms Coulter, who affirmed, also submitted a witness statement, and was asked

supplementary questions by Miss Hamilton and cross examined by Mrs McTaggart.

7. There were a number of technical difficulties throughout the hearing which hampered progress and I would wish to thank the parties for their patience and
5 forbearance.

Findings in fact

8. The respondent is a charity which has provided support to disadvantaged, unemployed people through a series of projects since it was established in or around 2004, first as a voluntary community group, then as a community
10 interest company (2007) and latterly as a company limited by guarantee (2009).
9. The respondent organisation is funded from various income sources, including the Lottery. Latterly, the organisation worked on three main projects, the gardening project, the Coalfields project and the “remakery” project. Only the
15 “remakery” project had Lottery funding.
10. The claimant has been involved with the respondent organisation in its various legal forms since its inception and was described as a “founder”. She led the organisation throughout her involvement, and latterly was employed as the project manager, and most senior employee in the organisation, leading the
20 organisation under the direction of a board of directors/trustees.
11. From around 2010, there were four trustees, who met less and less frequently. Latterly, the claimant would communicate with them largely by e-mail and telephone but found it difficult to get them to attend meetings to deal with the running of the organisation. As at July 2018, there were three trustees, namely
25 Martin Derrick, Marion Levett and Kate Whitton. There were however no meetings of the board after July 2018.
12. The claimant’s hours increased over time, until she was working full-time and earning around £32,000 gross per annum, which equated to £2,069 net per month.

13. On occasion when the organisation was low on funds the claimant would forgo her salary, making up payments due when funding allowed.
14. In or around October 2018, in consultation with Mrs Levett and Ms Whitton, it was agreed that the claimant would reduce her hours to 30 hours per week, and her pay reduced to around £29,000 gross per annum, that is £1,935 net per month. She advised that the reason for this was that she was campaigning to be elected as a councillor, and that campaign was successful and she was elected in March 2019.
15. The number of employees increased over time, with the organisation employing up to 11 members of staff at one point. As at October 2018, the organisation employed three members of staff on the gardening side, with two additional members of staff in the office, namely the training co-ordinator, Lorna Holmes and an office manager who dealt with finances, Duncan Cairns.
16. The organisation also engaged accountants who were paid monthly for payroll services and annually for an audit.
17. Latterly, the claimant did not however take an interest in the finances. She said that during 2019 she was “locked out” of the bank account, so was not aware of the organisation’s financial situation.
18. It therefore came as a surprise to her that the organisation found itself in dire straits financially in or around July 2019. When she was eventually able to access the income and expenditure accounts, the claimant found that there was a massive discrepancy between what she expected and the available funds. She became aware that there was virtually no funding left at all. She initially put that down to the fact that it had been a very wet spring and summer which meant that income was not being generated as usual.
19. The claimant’s last salary was paid on 15 July 2020. She stopped taking a salary at that point. She lent money to the organisation to ensure that the salaries of other staff could be paid.
20. On 23 August 2019, the claimant contacted Anthea Coulter of Clackmannanshire Third Sector Interface (CTSI) to get advice about how to

deal with the situation. CTSI is an organisation funded by the Scottish Government to assist third sector community voluntary organisations such as the respondent.

21. She advised Ms Coulter that the organisation had no funds left, and that she was not aware of the reason for that. She was not able to advise how much was in the bank. There were however at that point six members of staff on the payroll, including the claimant. Ms Coulter contacted Mr Cairns who advised that there was only £4.18 in the bank (although Ms Coulter did not herself at that time see the bank statements).
22. Ms Coulter was extremely concerned. She contacted the claimant first thing on Monday 26 August and arranged to meet her at 2 pm that day with a view to assisting her to deal with the crisis. She advised Mrs McTaggart to get in contact with the trustees and to update them on the situation.
23. At the meeting with the claimant, also attended by Ms Homes and Mr Cairns, proposals were made about a plan to secure the organisation in the immediate future, and in particular to allow the organisation to pay the staff on the payroll. Mrs McTaggart agreed that Ms Coulter should contact Mr Stephen Cox, area funding officer at the National Lottery, to ascertain if it was possible to have an advance on the next year's funding in order to pay staff in the immediate future.
24. Ms Coulter proposed, and Ms McTaggart agreed, that two members of gardening staff should be made redundant.
25. Ms Coulter contacted Mr Cox who agreed to meet her immediately. He was able to make a proposal regarding Lottery funding. Ms Coulter e-mailed Mrs McTaggart (at 4.35 on Monday 26 August) confirming that the Lottery could make a three month advance payment but this had to be done immediately as they were closing down their finance system to move to a new one and the last payment for a month had to be made on Friday 30 August. This could be for no more than a quarter of what they were due to get in year two of the lottery grant ie £12,695 – leaving £50,992 for year two.
26. Proposals for going forward with reduced staff were put together by Ms Coulter, called a "recovery plan". That recovery plan was sent to Mr Cox at 09.22 am

on 27 August because it required to be considered at a meeting that very day if it was to be approved before the shut-down of the Lottery bank account (which was a unique circumstance).

27. On 27 August at 09.38, Ms Coulter sent an e-mail to the claimant, enclosing a copy of the recovery plan asking “let me know this is ok – I needed to get it to Stephen first thing but hope that it covers it and you are happy with this”.
28. The recovery plan related only to the “remakery” project because that was the only project which was Lottery funded. It proposed three roles, namely project co-ordinator (16 hours to be filled by Duncan Cairns), remakery trainer (21 hours) and training coordinator (in which role Lorna Homes would continue with hours reduced to 16). This meant that the organisation had to “[pull] back from delivering gardening and maintenance services with immediate effect”.
29. The recovery plan stated that, “Jane McTaggart, Cmee project manager who is now a recently appointed SNP councillor for Clackmannanshire Council, steps aside to concentrate on her new role. Jane has recognised now that there are areas of interest that conflict and may be having a detriment on the work of Cmee, as it engages regularly with the council”. It also stated that “Cmee project coordinator will provide financial management and will continue to retrieve outstanding owed debts currently sitting at £2,990”.
30. On or around 27 August, Mrs Levett contacted Ms Coulter to advise that she wanted to make changes to the outline agreement that had been submitted. Ms Coulter understood her to tell her that it was intended that the claimant would be kept on.
31. That same day, 27 August, Mrs McTaggart attended at the home of Mrs Levett. She had prepared a letter for her to sign. That letter was headed “notice of termination of employment” and dated 27 August 2019. It stated as follows:
- “It is with deep regret that, as a direct result of essential, and unavoidable, changes within the structure of the company, we must inform you that your position as Project Manager, will cease with immediate effect. Any salary, accrued holidays, redundancy and other money owed to you is acknowledged by us. However, at this time, we are not in a position to pay you. It is our sincere

intention to honour these payments if, and when, the company is in a more secure financial position. We thank you for your devotion to the company over the past 15 years and we recognise your value to the company, the staff and the third sector in general in Clackmannanshire during that time. We know that the trainees and customers you've helped over the years are grateful for the dedication, commitment, and service you have provided for them. We sincerely wish you the very best in your future endeavours".

32. The letter was signed by Marion Levett and stated to be "on behalf of the C-MEE Trustees".

10 33. By e-mail dated 28 August at 08.14 to Mrs McTaggart and Mr Cairns, Ms Coulter stated "could trustees meet as soon as possible so that a minuted meeting of decisions based on the recovery plan can be made and finalised. This can be changed along with discussions with you, Marion and Lorna yesterday but on no account can money from the Lottery be spent on anything else other than the listed items – nothing on redundancy for other staff that has to come from the other earnings so they will have to wait. I need complete reassurance on that from the trustees and Duncan as administrator. We also need an AGM set". She advises that if there are to be any changes to the plan following the meeting of trustees then Mr Cox would require to be notified as soon as possible.

34. By e-mail dated 29 August at 09.29 to Mrs McTaggart and Mr Cairns, Ms Coulter advised that she had spoken to Mr Cox at the community breakfast the previous day [28th] and he made her aware that "the trustees were wanting to make some alterations to the recovery plan around roles/wages and he is happy with that and just needs it revised and resubmitted but that the envelope stays the same. I said they will be meeting shortly and that will be done by them". She asks finally, "did you get a meeting time for the trustees sorted".

35. Later that day, Ms Coulter sent an e-mail to the claimant at 4.06 stating that she had spoken to Mrs Levett, and confirmed that Mr Cox was "happy for changes to be made within the envelope – he could not authorise any more funding than that level either for this year that was the maximum".

36. That continued, "I have spoken to Marion and checked and explained the computer system issue and that was the maximum amount and that I only talked to you on last Friday and Stephen on Monday and the issue of the payment came up by him. I did send the plan to you on Tuesday morning too and it could have been circulated or pulled back – there was still time before end of the day on Tuesday. She knows that there can be now some changes and that I have said that to Stephen and he is keen to have them involved as much as possible as am I. The trustees can decide to return the money too if they want. Marion is going to call back later and we can discuss any further help they may need from CTSI and what Julie can help with to support the trustees".
37. On 3 September Ms Coulter got in touch with Mrs Levett and the claimant about arranging a meeting to make some further decisions on the recovery plan but that meeting was cancelled. Ms Coulter was notified that one of the other trustees, Ms Whitton, was stepping down.
38. On 10 September, the claimant e-mailed Ms Coulter stating, "Marion [Levett] told me that she's planning to step down but I've not received any formal confirmation. I told Marion that I would only remain here, as a volunteer, for a few more days, by which time those members of staff who are remaining, should be able to just carry on. That remains my position. Marian's decision is unfortunate but that is Marian's choice. I've been unable to get an answer from Martin's phone and I've been to his door but didn't get an answer. Kate has already resigned, so I don't know what happens now".
39. On 16 September, at 09.08 the claimant e-mailed Ms Coulter in response to an e-mail which Ms Coulter had sent to the claimant on Friday [11th September [not lodged]. In that e-mail Ms Coulter asked the claimant a series of questions, which she repeated in her e-mail and answered, as follows:
- "I'm really feeling quite disturbed by it all, right now. I sense a growing divide and I really don't want this to cause a rift between us but I'm quite confused by your e-mail. I explained in my email my reasons for not attending the meeting – I felt it would be more productive to have a meeting with those who are included in the new proposals. I don't think its appropriate that I should relay*

any information, as you made it clear that the new proposals do not include a project manager. And that is fine, but it means that I have no right to represent the employees. I remained, for a short time, in a purely voluntary role to act as a conduit for the trustees as they have been left out of the process. Anyway,
5 I'll answer the points you raised in your email, in clear terms and with no intend to offend."

40. She then set out the questions which Ms Coulter asked, and her replies:

1. *Have you resigned your position as chief executive to your board members – Marion and Martin are still active board members according to Companies house this afternoon?* A: My post was project manager, not chief executive,
10 but either way, I've not resigned, my post is no longer available under the new proposal. You, yourself made that clear when you told me you were very sorry but you had to be brutal – there was no money to continue my post and I could not be included in the future plans. As I said at the time, that's fine; but I didn't
15 resign, I was let go and my post was ended with immediate effect. I told you that I wouldn't stand in the way of that but, I repeat, I didn't resign. Marion signed my termination letter to that reflect that. Marion resigned Friday 13th, and I updated the details on companies house website. I also took my name off as the person with significant control, as that is no longer the case. I've tried
20 to contact Martin multiple times, without success.

2. *Have you notified the staff that you are leaving? I thought you were staying on to help support the transition and through this period of adjustment over the next few months?* A: the staff were aware of my pending departure – it was
25 discussed at the meeting you had with me Lorna and Duncan, when you also discussed the changes to Lorna and Duncan's posts. I wasn't asked to stay on over the transition. I don't think it would be helpful for me to commit to something that I may not be able to fulfill. I'm very willing to volunteer if I'm needed, and if I have the time to do so but, as you pointed out in an earlier
30 email, I can concentrate on other things now and take heart from the fact that the organisation is in a transition phase, with jobs protected. I have no bad feeling about the changes and I'd want to help if I can be of use, but I can't

take any responsibility. That wouldn't be fair to Lorna and Duncan as they begin to develop their new roles.

5 *3 Have you notified OSCR - as we have advised in an earlier email of a notifiable event – this can cover a number of issues but is a positive step by a charity to seek help from OSCR if for example there is a lack of trustees or a monetary issue? They are always keen to help.* A: I've not contacted OSCR. As I said, Marion only resigned on Friday and, as our constitution states a minimum of 2 trustees, OSCR wasn't an issue before then.

10 *4. CTSI only helped to secure some advanced funding ahead of the close down of the Lottery computer system to help tie Cmee over for three months and as discussed that 'advance' can be changed to suit the needs of the business over the next three months and beyond. Have you revised the recovery plan for resubmission to the Lottery? Are you not considering continuing the business of Cmee ie the gardening/decorating business – as I said Alloa First are keen to have the service for two days a week.* A: I haven't done anything with the Lottery application, as I'm not aware of what was discussed with Stephen, so I didn't want to interfere with that. At the risk of repeating myself; my post isn't included so I don't think I should make changes on behalf of those who are included. I did make you aware that I was unhappy with the new proposal being sent to me, having not been involved in the process. I made no decisions around the gardening and decorating. You told me to let 2 people go immediately, one being John. As he did the decorating work, that had to end. As Scott is the only other full-time employee, he had to stay. Therefore, Alan's part-time post was terminated. You also told me to concentrate on the remakery work for three days per week, and that Alloa First were offering 2
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is only available until end of October, I don't know how that's going to be a viable alternative. I don't know what the plans are in the new proposal to offset that loss from November onward.

5 5. *Have your debtors been notified ie HMRC?* A: HMRC have agreed to a payment plan. Duncan arranged that a couple of weeks ago. The other large debtors are myself and Bob, which I told you about. As far as I know, the only other monies outstanding are payments in lieu of notice, unpaid salaries and redundancy payments. I don't know how, and if, those will be honoured in the future.

10 6. *CTSI are here to support only – if the trustees as well as yourself want our advice, we are here to help and get additional advice from OSCR but it is not our position to run your organisation – it was an unusual situation with the Lottery computer issue which you agreed to and understood at the time and allowed you to pay wages.* A: With respect, CSTI have acted on behalf of Cmee and Cmee trustees without their knowledge. The proposal was presented and accepted before any discussion could take place. I know what you've said about the lottery computer etc but the facts remain the same. I asked for support and assistance; you offered to contact the Lottery and CRT on our behalf. I had no input into the content of those discussions. I did call you to highlight issues that had been raised with me, including my concern around the new proposal being in my name. I'd imagine that will need to be amended now..."

20 41. Ms Coulter replied that same day in an e-mail at 15.23, explaining that Cmee were only able to pay staff from grant funding provided by the Lottery as of 26th August, and that was why she suggested that they released staff who were not paid for by the Lottery based on their redundancy policy. She suggested that other staff could be kept on and paid fully but with the sacrifice of her salary in the recovery period but that could have been a chanced to have her salary included at least for three months, but that would mean making someone else redundant or cutting their hours because there was not enough to pay them all. She confirmed that it was a matter for the trustees to have made the decisions on the Monday/Tuesday. She thought this would buy time and allow them to source other funding and attract new trustees. She concluded, "I had thought you would have wanted to stay on through that period but appreciate that now you want to step aside from your email received today and as a staff member is understandable – but with your trustees also stepping down at the

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5 same time it makes it very difficult now to manage the charity out of this situation. However, we will do our best and hope that we attract in some new trustees this week with the skills to help the staff and set out an action plan to deliver the project and continue Cmees really valuable work. CTSI staff certainly will do its best as they always do and I know the Cmee staff will also be a huge asset doing forward”.

42. On 23 September, new board members who had been approached by CTSI and who had agreed to become trustees, met informally. Ms Coulter agreed to be an interim trustee, and the other trustees appointed were Miss Hamilton, Mr 10 Kenny Dickson, Mrs Sheila McGhee and Ms Maria Malcolm.

43. The claimant contacted ACAS on 14 October 2019.

44. The claimant continued to undertake work for the organisation on a voluntary basis until 20 October 2019.

15 45. On 24 October 2019 the first board meeting of the new trustees took place, who took over responsibilities for the operation of CMEE in the absence of a project manager. The board of trustees immediately discovered financial irregularities which led to a full investigation, which covered the broad areas of finances, overall governance and the employment position of Mrs McTaggart.

20 46. By e-mail dated 14 November 2019, the claimant wrote to Ms Coulter asking, “I wondered if yourself and the board had discussed my redundancy any further and if you can provide me with an updated position on that? There’s also the question of the outstanding loan? I’d appreciate any information you can provide”.

25 47. This was forwarded to Miss Hamilton by Ms Coulter who responded 15 November 15.09, as new chair, advising of the investigation and inviting her to an interview.

30 48. The claimant sent an e-mail in response dated 15 November 2019, declining to be interviewed and stating “I find your suggestion of weak management and financial irregularities very offensive...the issues uncovered of late had no involvement from me...I have my redundancy letter which is signed and dated.

If I am forced to take this through the tribunal route, I will. But it should be noted that this is something I did not want to do to an organisation that I started 15 years ago and put my heart and soul into, attracting over a million in funding and never looking for anything other than to fill a need in the county I love. However, the tone of your letter has now coloured my view”.

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49. On 13 December 2019, Mrs Levett was interviewed by Mr Dickson and Ms Coulter as part of the investigation into financial irregularities. She confirmed that she was not aware of any board meetings taking place after June 2018. She said during that interview that she had never met any of the other trustees. She said that she was told by Mrs McTaggart that in her role as trustee she would not require to attend any meetings. She said that she got a call from Mrs McTaggart to say that she was stepping down because of her commitments to the council, during which call the claimant said that she did not think they could sustain for another year without getting funding. She confirmed that she was not aware of any meeting of the board to consider the redundancy process. She confirmed that she had signed the redundancy letter, which she was told was a termination letter, but that she had not read it, as she was simply asked to sign it. She said that she did not realise that it was anything to do with redundancy.
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- 20 50. In January 2020, following the investigation, the claimant and the finance officer Duncan Cairns were found guilty of gross misconduct by the respondent.

51. The claimant lodged a claim in the employment tribunal on 19 January 2020.

Claimant's submissions

- 25 52. Mrs McTaggart submitted that the respondent had not offered any evidence which supports their position. The respondent's case is based on hearsay and assumptions made by Ms Coulter and those who were latterly appointed as trustees.
53. The evidence of what Ms Coulter says that Mr Cairns said, that she was never in the office, is also hearsay, and there is no proof of that. Further the respondent admits that they knew nothing of the workings or the day to day
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activities of the organisation prior to her asking for support. They have made assumptions which are not supported by the evidence. She would not have asked for support if she had known that she had done something wrong and it would be discovered, which would have been a strange position to put herself in.

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54. The evidence shows that her post had ended. There was no mention of it in the forward plans, and Ms Coulter said in evidence that the post no longer existed and the activities which had been done no longer existed. There was no mention of her post in any of the paperwork, and that proves that the post was redundant.

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55. She had presented a redundancy letter, which had been signed by Mrs Levett. Ms Coulter said that it was not valid because there had been no board meeting, but there had been phone calls. In any event, Ms Coulter had accepted Mrs Levett's agreement to the lottery proposal without a board meeting and without agreement of the other trustees.

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56. Although the respondent relies on the outcome of the investigation, the investigation report has not been lodged, and it would have been if it had been important to their case.

57. The respondent should have lodged the recording of the transcript of Mrs Levett's interview if they had wanted to rely on it, but what they have lodged are a few random unsubstantiated extracts, which have neither been confirmed nor refuted since Mrs Levett has not given evidence.

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58. The claimant relies on the redundancy letter as proof of her claim; which was willingly signed by Mrs Levett and not as a result of her demands.

25 59. Following her departure, the post no longer existed. She volunteered after the termination of her employment through loyalty and she would not have done so if she was concerned that something would be discovered. There was ample time for the respondent to resurrect her post between the ending of her employment and her departure but that did not happen.

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Respondent's submissions

60. Miss Henderson for the respondent submitted that it was accepted by the board that Mrs McTaggart had done outstandingly good work for more than a decade, and they accepted that she had repeatedly not paid herself.
- 5 61. However, since March 2019, when she reduced her hours, there was a lack of activity, as illustrated by the fact that there were no board meetings and the Coalfields project just stopped, no grant applications were submitted, and no outputs by the project manager.
62. The organisation stopped paying the claimant in July 2019, and they regard
10 that as the point that she moved into an unpaid position.
63. Given the proposals to deal with the crisis, there were two posts which were available to Mrs McTaggart, the project officer role, which covered the activity she was then doing, and a second role also linked to the lottery project which Mrs McTaggart could have undertaken. Ms Coulter spoke to Mrs Levett about
15 that, and confirmed that the claimant could have taken one of these roles, and she understood that is what Mrs Levett had advised, but Mrs McTaggart did not take up either of those roles.
64. She submits that the redundancy letter is invalid, because it was not authorised by the board, whose role it would have been to make the claimant redundant.
20 Mrs McTaggart accepted in evidence that it was the board which had the authority to make her redundant and not CTSI. However, there were no board meetings from June 2018, so there could have been no discussion or agreement of the board before Mrs Levett signed the letter, so she had no authority to do so.
- 25 65. Further Mrs McTaggart continued to work for the organisation after the letter had been signed; and Mrs Levett reported to Ms Coulter on the day after the letter had been signed that Mrs McTaggart was staying on. She carried on as a volunteer until 20 October 2019. Mrs McTaggart herself stated in an e-mail to Ms Coulter in mid- September that she was staying on.

66. Miss Henderson questioned the timing of the lodging of the claim by Mrs McTaggart. The new board was unaware of the redundancy letter until November, which was three months after it was allegedly signed. This makes it hard not to be suspicious of Mrs McTaggart's motives given that this was when she found out that the new trustees had become aware that money had been paid from the respondent to another company of which she was a director. Further, Mrs McTaggart did not request a redundancy payment until 14 November, which was one month after she had approached ACAS; which was before she had even asked for her redundancy pay.
67. Miss Henderson submitted that Mrs McTaggart had resigned; that her post was not redundant; that she had the option to take up one of two posts but did not do so. She admits she wrote the letter herself, but she had no authority to do so, and the organisation did not make her redundant.

Tribunal deliberations and decision

68. Although I found Mrs McTaggart generally to be a credible witness, she was not reliable in relation to certain passages of evidence, where I thought that she was evasive, and was not fully candid about her actions or her rationale for them.
69. I accepted the evidence of Miss Henderson as credible and reliable, although she was not of course a key witness, not having been on the board of trustees as the time which was the focus of this hearing. I also found Ms Coulter to be a credible and reliable witness, and accepted her evidence.
70. In this case, I did not hear evidence from Mrs Levett, whom I indicated I believed was a key witness but in respect of whom the claimant declined to seek a witness order after she refused to give evidence on a voluntary basis.
71. Further, my deliberations were also hampered by a dearth of documentary evidence, with a number of documents referred to not lodged.
72. I can only take into account, in coming to my decision, the evidence which I heard and the documents which were lodged.

73. Mrs McTaggart said on more than one occasion that she was pursuing this claim in the employment tribunal to clear her name and restore her reputation. I advised her, on more than one occasion when she sought to introduce evidence which I considered to be irrelevant to the question for determination, that the employment tribunal can only adjudicate on relevant claims, and in this case, a claim only for redundancy and notice pay. I added that it was not part of my role to adjudicate on any wider disputes between the parties.
74. An employee may be entitled to a redundancy payment in circumstances outlined in section 139 of the Employment Rights Act 1996. That section states that a dismissal will be classed as a dismissal by reason of redundancy “if the dismissal is wholly or mainly attributable to – (a) the fact that his employer has ceased or intends to cease (i) to carry on the business for the purposes of which the employee was employed by him; or (ii) to carry on that business in the place where the employee was so employed; or (b) the fact that the requirements of that business – (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish”.
75. In a claim for a statutory redundancy payment, it is the employee who has to prove first, on a balance of probabilities, that there has been a dismissal. Although there is a statutory presumption that a dismissed employee claiming a redundancy payment has been dismissed by reason of redundancy, there is no presumption that an employee has been dismissed in the first place. Thus, if an employee fails to prove that he or she has been dismissed, any claim for a redundancy payment will fail.
76. In this case, as it transpired, the key issue for determination was whether or not the claimant had been dismissed or whether she resigned.
77. I did not find the answer to that to be clear cut. The claimant’s position was that she was dismissed, and that she did not resign.
78. The claimant argued that the respondent had failed to put forward evidence to support their position (that she had resigned). She submitted that their

conclusions were based on assumptions and hearsay. I did however hear from Ms Coulter, who was a relevant witness, and I accepted her evidence as credible and reliable. Although the Tribunal did not hear evidence from Ms Levett, the respondent had lodged a transcript on an interview with her when Ms Coulter had been present, and she was able to confirm that the transcript of the recording was accurate.

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79. But in any event, and crucially as it turns out in this case, the burden of proof is on the claimant to show that she was dismissed, and not on the respondent to show that she resigned. This is a preliminary matter which requires to be determined before the question of whether and what level of redundancy pay may be due.

80. I therefore looked to the evidence which had been led by the claimant. The claimant's position was that she had not resigned and I had to consider whether she had proved that, and specifically that she had been dismissed.

15 81. This case was a difficult case to determine. There were a number of reasons for that, not least because I did not hear evidence from Mrs Levett and there was a dearth of documentary evidence. But further, it is quite clear that there has been a failure on the part of the organisation to implement best practice when it comes to human resources, if not the requirements of employment law itself.

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82. There is the situation of the claimant who, it was agreed, had on occasions not taken a salary. I assumed that was made up at some time but I heard no evidence about that. I heard evidence that she had loaned money to the organisation to ensure the other staff could be paid, which is admirable, but it does not reflect well on the running of the organisation. I am bound to say that I cannot escape the fact that the fault for much of this lies at the door of the claimant. She was the project manager and most senior member of staff at the organisation. She was the person on record as having significant control. Despite that, she failed to take responsibility for the organisation's finances.

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30 When she realised that there was no money left, she appears to have absolved herself of any responsibility for dealing with the crisis, blaming Ms Coulter and

Mr Cox when she was the person responsible for any re-structuring proposal and arranging for that to be approved by the board of trustees.

- 5 83. It was her responsibility to ensure that the board met and that the requirements of employment law were adhered to. As a result of the failure to follow good employment practice, the date on which the claimant's employment terminated is not clear. The claimant in her ET1 states that it was 23 August. The so-called redundancy letter is dated 27 August. The claimant was last paid on 15 July. The respondent suggests that was the date she resigned. However, both are agreed that she stayed on as a "volunteer", although there is no agreement about the date when she ceased to be a "volunteer".
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84. As the most senior member of staff, with a link to the board, it was the claimant's responsibility to deal with the redundancies. It was her responsibility to ensure, if she were to be made redundant, that the correct procedures were followed. Those correct procedures would self-evidently require the board to meet and to make decisions about the proposed restructuring and any redundancies. I accepted Ms Coulter's evidence that she acted only in an advisory role and sought to encourage the claimant to obtain the endorsement of the board for the decisions which were being made.
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85. It seemed to me that the reason that this was such a difficult case to determine was also because the claimant was seeking to "hedge her bets" in arranging for Mrs Levett to sign the letter, so that she could "use" it if she thought that she needed to. While it may be admirable that she did not want to take redundancy pay from the organisation if that would otherwise mean that it was unsustainable, it does not reflect well on her that the restructuring and redundancy process was not entirely transparent as it ought to have been.
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86. She did not however produce the so-called "redundancy letter" to the new trustees as soon as they were appointed, although there was no reason not to do so if she had been legitimately dismissed by the organisation and entitled to a redundancy pay.
- 30 87. It seems that it was only when the new board of trustees decided to undertake an investigation into the management of the organisation that Mrs McTaggart

decided to produce the letter and sought to rely on it. She clearly took exception to the suggestion that the organisation had been mis-managed, although she was not prepared to co-operate with the investigation.

5 88. Miss Henderson suggested that the time frame in which the claimant claimed events had happened said something about the claimant's motives. I thought there was something in that. I noted that the claimant approached ACAS on 14 October for advice, but she did not pursue her claim for redundancy pay at that time. Indeed, she did not pursue her claim for redundancy pay until November, and this was after she was informed that an investigation into the management
10 of the organisation was being undertaken.

89. The claimant's stressed in evidence that she had not resigned. The respondent's evidence in this regard was however unclear. Mrs Levett is stated to have said in the interview on 13 December that the claimant told her she was "stepping down". Although the Tribunal did not hear evidence from Mrs
15 Levett, the Tribunal heard evidence from Ms Coulter who had been present at that meeting, and confirmed that the notes were a transcript of a recording and that they were accurate.

90. However, when I specifically questioned Ms Coulter on the question of whether she understood that the claimant had resigned at that meeting, her evidence
20 was uncommittal. She did not say in terms that she had resigned. Of the reference to Mrs McTaggart in the proposal to the lottery she seemed to suggest that she thought that it was appropriate for the claimant to step aside, but not that she in fact had resigned. In fact, she said that Mrs Levett had told her that the intention was for Mrs McTaggart to stay on, notwithstanding the
25 lottery proposals.

91. The claimant in submissions stressed that the evidence made it clear that her role of project manager no longer existed in the new plan. There was a focus at the hearing on who had authority to sign off the new plan, but what was clear is that it was not Ms Coulter, or CTSI. But that is in any event by the by if the
30 claimant was not in fact dismissed.

92. It is the claimant's position that she was dismissed. However, the so-called redundancy or letter of termination was signed by only one of the trustees who said that she was asked to sign it by Mrs McTaggart and not only did she not write it, she did not even read it. As a single trustee, who said that she had not
5 attended any board meetings, nor even met any of the other trustees, I accepted Miss Henderson's submission that she had no authority to sign that letter "on behalf of C-mee" in any event.
93. I take the view that only the board had authority to dismiss the claimant. There was no evidence that a decision had been made by the board that the claimant
10 was to be dismissed. Ms Coulter made recommendations about restructuring, made in good faith and with a view to rescuing the organisation, and it seems to me that at the time that would have been viewed as a successful intervention. But she stressed and I accepted her evidence that she was giving advice, assisting with a rescue package as an intermediary, and that all
15 decisions and proposals had to be made and ratified by the board of trustees.
94. Given these background facts, I came to the view that I had not heard sufficient evidence to allow me to conclude that the claimant had been dismissed, but then nor did I hear evidence that the claimant had resigned.
95. In these unusual circumstances I took the view that I had to fall back on the
20 burden of proof which lies with the claimant. It is for the claimant to prove, on the balance of probabilities, that she was dismissed, before any question of whether there was a redundancy situation was determined.
96. I had in mind, when coming to my conclusion, the decision of the Court of
25 Appeal in the case of *Morris v London Iron and Steel Co Ltd* 1987 IRLR 182 (which was an unfair dismissal claim). In that case the Court of Appeal acknowledged that a tribunal may be forced to reach the conclusion that they do not know what side of the line is to be drawn from the findings in fact based on the evidence heard, and in the exceptional case, the tribunal must fall back on the burden of proof, and if the claimant fails to put forward evidence to
30 support her contention that she has been dismissed, then the tribunal may have to dismiss the claim because the claimant has failed to discharge the burden on them.

97. I conclude therefore that this is an exceptional case where I have not heard sufficient facts to allow me to conclude, either way that the claimant was dismissed or that she resigned. The burden of proof resting with the claimant, which she has failed to discharge, I have no option but to dismiss her claim.

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Employment Judge: M Robison
Date of Judgement: 31 Aug 2020
Entered in Register: 01 Sept 2020
and copied to parties

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