



EMPLOYMENT TRIBUNALS

Claimant: Ms Mags Pawson

Respondent: Ore Community Centre (The Charity)

Heard at: London South Tribunal **On:** 16th &
17th August 2021 **and** 17th September 2021 **by:** CVP

Before: **Employment Judge Clarke (sitting alone)**

Representation

Claimant: Mr Michael Foster (Solicitor)

Respondent: Mr Graham Finegold (Locality)

WRITTEN REASONS

Introduction

1. The Claimant was employed by the Respondent as the Centre Manager for the Ore Community Centre. She was dismissed on 10th January 2020 and notified ACAS under the early conciliation procedure on 21st January 2020. The ACAS certificate was issued on 4th February 2020.
2. By a claim presented to the employment tribunals on 8th April 2020 the Claimant complained that her dismissal was unfair. Her primary grounds for asserting that the dismissal was unfair are: (1) procedural unfairness in the process and (2) the dismissal was substantially unfair on the facts, including that the sanction of dismissal was in any event too harsh.
3. The Respondent resists the claim asserting that it dismissed the Claimant for some other substantial reason, namely a breakdown in the employment relationship and trust between the Claimant and the Respondent. It denies the Claimant's complaints and asserts that that it acted fairly and reasonably and

that the decision to dismiss was within the band of reasonable responses and was proportionate.

4. The hearing took place over 3 days on 16th and 17th August 2021 and 17th September 2021. At the conclusion of the hearing, an oral judgment and reasons were given. The Tribunal found that the Claimant was not unfairly dismissed. No request was made for written reasons but following promulgation of the judgment, the Claimant made a request for written reasons by letter dated 29th September 2021.

The Evidence

5. At the Hearing, the Claimant was represented by Mr Michael Foster and gave sworn evidence. She also called sworn evidence from Ms Sheila Thomas, Mr Terry Fawthrop and Ms Shirley Medhurst. Ms Mary Whawell provided a short statement adopting the evidence of Ms Thomas but was not available to give oral evidence.
6. The Respondent was represented by Mr Graham Finegold, who called sworn evidence from Mr Gary Rolfe, Ms Linda Smith, Mr Steve Manwaring and Mr Finegold himself.
7. I was referred to, and considered, documents contained in a bundle comprising 248 pages and witness statements from each witness who gave oral evidence. References in square brackets hereafter are to the page numbers of this bundle. I was also provided with, and referred to, an Amended Schedule of Loss dated 5th February 2021, a list of job applications made by the Claimant, an undated letter from Sheila Thomas regarding the seniors lunch club, skeleton arguments from both the Claimant and the Respondent and final written submissions from the Claimant.
8. At the conclusion of the evidence both Mr Foster and Mr Finegold made oral submissions on liability.

The Issues for the Tribunal

9. At the start of the hearing the list of issues relating to liability was agreed between the parties to be:
 1. Was the Claimant dismissed for a potentially fair reason within Section 98 of the Employment Rights Act 1996? The Respondent relies on Some Other Substantial Reason (combination of breakdown in employ relationship & trust between parties) which is a potentially fair reason (s.98(2)(b) ERA).

2. Did the Respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the Claimant? This is to be determined in accordance with equity and the merits of the case (s98(4) ERA).
3. Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances?
4. If the Claimant's dismissal was unfair, is the Claimant entitled to a Basic Award and/or a Compensatory Award, and, if so, should there be any of the following adjustments:
 - i. A reduction in the Compensatory Award on the basis the Claimant has mitigated or failed to take all reasonable steps to mitigate, his loss?
 - ii. Any adjustment to the Compensatory Award as a consequence of any failure (by either side) to follow procedures under the ACAS code?
 - iii. Any reduction or limit in the Compensatory Award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with *Polkey*? and/or
 - iv. Any reduction in either award to reflect any contributory fault on the Claimant's behalf towards his own dismissal?
10. The parties agreed at the outset of the hearing to deal first with the issues related to liability as set out above with issues relating to remedy to be heard following the judgment on liability. In the event, as the Claimant was found not to have been unfairly dismissed at the conclusion of the hearing on liability, no remedy hearing took place.

Relevant Law

11. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of complaint to the Tribunal under section 111.
12. The Claimant must show that she was dismissed by the Respondent under section 95 but in this case, the Respondent has admitted that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 10th January 2020.
13. Section 98 of the 1996 Act deals with the fairness of dismissals. There are 2 stages that the Tribunal must consider.
14. Firstly, the Respondent employer must show either that it had a potentially fair reason for the dismissal within section 98(2) or that it dismissed for some other substantial reason ("SOSR") of a kind such as to justify the dismissal of an employee holding the position which the employee held (s.98(1)). The burden of proving the reason for the dismissal is placed on the Respondent.

15. Secondly, having established the reason for the dismissal, if it was a potentially fair reason, or SOSR the Tribunal has to consider whether the Respondent acted fairly or unfairly in dismissing for that reason.
16. Section 98(4) of the 1996 Act deals with fairness generally and provides that the determination of the question of whether or not the dismissal was fair or unfair, having regard to the reason shown by the employer:
 - (a) depends upon whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.
17. There is a neutral burden of proof in relation to the general test of fairness.
18. The Respondent relies on SOSR for dismissing the Claimant, namely there having been a breakdown in the employment relationship and a loss of trust and confidence between the Respondent and the Claimant.
19. It is well-established that there is in all employment contracts an implied term of mutual trust and confidence (whether or not there is also an express term) and that a loss of trust and confidence can amount to SOSR.
20. In cases of SOSR, the reason needs to be both substantial and genuinely held (see *Harper -v- National Coal Board 1980 IRLR 260 EAT*).
21. Reasons for SOSR dismissals may include elements of conduct or capability, particularly where the basis is the breakdown in the relationship of trust and confidence (see for example in *Perkin v St George's Healthcare NHS Trust 2006 ICR 617, CA*, and *Wright v Ruddle Merz Water Services Ltd ET Case No.1800438/17*) and there may be a fine line between whether the dismissal is for SOSR or for conduct or capability. Some cases may be appropriately framed as either, as for example in *Brudzinski v Nottinghamshire Healthcare NHS Foundation Trust ET Case No.2602025/17*.
22. What is reasonable within s. 98(4) depends on the particular circumstances of the case but will generally require a reasonably fair procedure to be followed (though not necessarily one which accords with the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") – see below).
23. In addition, where the SOSR is a breakdown in the employment relationship, if the employer's conduct contributed to that breakdown, this is likely to be a highly relevant factor in determining the reasonableness of the dismissal - *Marshall v Parkway Entertainment Company Ltd ET Case No.2600168/17*
24. The Tribunal will also have to consider the nature of the breakdown, the prospects of repairing the relationship and whether there were any viable alternatives to dismissal.

25. In considering all aspects of the case, including those set out above, and in deciding whether or not the employer acted reasonably or unreasonably within section 98(4) of the 1996 Act, the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances.
26. It is also immaterial how the Tribunal would have handled events or what decisions the Tribunal would have made. The Tribunal must not substitute its own view for that of the reasonable employer – ***Iceland Frozen Foods Limited –v- Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited –v- Hitt [200]3 IRLR 23, and London Ambulance Service NHS Trust –v- Small [2009] IRLR 563.***
27. Procedural reasonableness is usually assessed by reference to the ACAS Code and unreasonable failure to follow the Code may result in an adjustment of compensation under S.207 and s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992. Whilst the Code may not be applicable to all SOSR dismissals, where the substance of the dismissal falls within the intended remit of the Code (misconduct or capability) and in cases where the employer relies upon the breakdown of mutual trust and confidence (in particular where the employer had initiated disciplinary proceedings relating to conduct prior to the dismissal) the ACAS Code will apply but it may not be appropriate to impose a sanction for failure to comply (see ***Hussain -v- Jurys Inns Group Ltd EAT 0283/15 EAT, Phoenix House Ltd -v- Stockman 2017 ICR 84, EAT and Lund -v- St Edmund's School, Canterbury 2013 ICR D26***).
28. In any event, the ACAS Code is to be had regard to but is not a prescriptive list of actions which must be followed in all circumstances. The ACAS guidelines themselves specifically indicate that that the Tribunal may take the size and resources of the employer into account and that it may not be practical for all employers to take all of the steps set out in the Code.
29. Contributory fault may be present in cases involving a breakdown in the trust and confidence (see ***Perkin v St George's Healthcare NHS Trust 2006 ICR 617, CA; Butcher v Salvage Association EAT 988/01; and Huggins v Micrel Semiconductor (UK) Ltd EATS 0009/04***).
30. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.
31. Section 122(2) provides:

“Where the Tribunal considers that the conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.”
32. Section 123(6) provides:

“Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

33. In determining whether any deduction should be applied to either part of the Claimant’s award as a result of contributory fault, The Tribunal must first identify what conduct on the part of the Claimant could give rise to contributory fault. The Tribunal must then also consider whether any such conduct was culpable, blameworthy or unreasonable and whether the blameworthy conduct caused or contributed to the dismissal to any extent.

Relevant Findings of Fact and Associated Conclusions

34. The Respondent is a small charity operating a community hall, the Ore Community Centre (“the Centre”) in which a wide range of small community groups and/or organisations run their operations. These have included playgroups, a lunch club for older residents and many more activities, as can be seen on the September “What’s On” List [75].
35. The Respondent’s board of trustees (“the Board”), usually consisted of 5 trustees (“the Trustees”) at any one time, although the individual trustees and the number varied slightly over the relevant period. All the trustees were unpaid and offered their time voluntarily. All brought different qualities to the Board but none were specialists in employment law and none had professional qualifications to provide anything other than a small degree of supportive expertise to the Respondent. They were mainly either unemployed, retired and fairly elderly or in full-time employment elsewhere and assisting the charity in their free time.
36. A lot of hard work had gone into making the Ore Community Centre a success and it was a valuable resource for the community. However, the Respondent was only capable of operating as a result of a lot of good will on the part of the trustees, the Centre manager and the groups using the Centre and, as with so many such small charities, it was run on a shoestring budget and had extremely limited resources, both in terms of personnel and finance. Most of the Respondent’s funds were tied up in the building itself and were not accessible, as shown by its accounts [215-228].
37. The Claimant started her employment with the Respondent on 6th April 2009 as the Centre Manager. She had a contract of employment [34 - 38] which gave her job title as “Centre Manager” but neither her contract nor any separate document clearly set out her job description, the nature of her role, her responsibilities or her reporting structure. She was expected to work up to 25 hours per week over the course of the week as necessary to perform her job satisfactorily and was paid on a per hour basis.

38. For the majority of her employment until its termination on 10th January 2020 the Claimant was the sole employee of the Respondent, although for short periods there was also a Deputy Centre Manager.
39. One of the biggest areas of contention between the parties in this case was the degree of responsibility the Claimant had in her role of Centre Manager and the division of responsibility for various aspects of the running of the Centre between the Claimant and the Trustees.
40. I heard a substantial amount of evidence from the numerous witnesses regarding the Claimant's role and responsibilities. There was a significant degree of diversion between the evidence from the different sources.
41. None of the witnesses gave uncontroversial or uncontested evidence. In the main I was satisfied that they were doing their best to assist the Tribunal and give honest answers to the questions they were asked and an honest account of what happened to the best of their ability. However, the events about which they gave evidence occurred some time ago and in the intervening period England was hit by the Coronavirus pandemic, which has impacted everyone and had a profound effect on many people. I found that in the case of most of the witnesses, their memories of what now appeared to be distant events had faltered somewhat such that the majority of witnesses gave evidence that was neither complete, consistent or reliable.
42. Further some of the witnesses, in particular Mr Fawthrop (who was also implicated in the failings which ultimately led to the Claimant's dismissal), gave evidence that was not in my view entirely impartial.
43. I found both the Claimant and, to a lesser extent, Mr Rolfe, to be somewhat defensive witnesses and the Claimant's evidence was coloured by the emotion she felt and her strong belief that she had been poorly treated throughout the disciplinary process, starting with her suspension.
44. The witnesses whose recollections I found to be the most straightforward, comprehensive, credible and reliable were Mr Rolfe and Mr Finegold and consequently I preferred their evidence where it differed significantly from that of other witnesses.
45. Piecing together all of the evidence I received, I find that the various Trustees in place throughout the period of the Claimant's employment bore the legal responsibility for the obligations of the Respondent. Some of the individual trustees also took active responsibility for some aspects of running the centre. Mr Fawthrop held the role of Chair of the Board for many years until mid 2019 and during that time he took overall supervisory responsibility in respect of both the Claimant and the activities and running of the Centre. Another trustee had responsibility for overseeing the financial books which were compiled on a day-to-day basis by the Claimant.
46. However, on a day-to-day basis and for the majority of the time, the Claimant was the only member of the Respondent (and where she was not, she was the

most senior employee) on site at the Centre. She held the job title of Centre Manager and that was how she described herself. It was the role she was required to undertake and went far beyond merely taking bookings and opening the doors.

47. Her role involved keeping the Centre running smoothly and included taking bookings, record keeping, financial business, and day to day responsibility for health, safety, safeguarding, maintenance and repairs.
48. Although she was not the only person responsible for health, safety, safeguarding, maintenance and repairs (legal responsibility ultimately resting with the trustees) she was the one who had the relevant information and/or knowledge necessary to discharge the responsibilities effectively and she had the ability (and indeed exercised that ability on several occasions) to incur expenditure and independently arrange for relatively minor works or repairs. She was only required to revert to the Board for more major issues. The Trustees relied substantially on the Claimant to either do what was required to comply with the Respondents obligations or to draw their attention to the matters which required action and were beyond her abilities or authority.
49. The Claimant, over her tenure as Centre Manager undoubtedly met many of the requirements of her role and the Centre developed into a valuable resource for the community it served.
50. However, by mid 2019 a number of real difficulties had arisen for the Respondent. It was being faced simultaneously with demands, investigations or requirements from a number of regulatory or statutory bodies in respect of matters concerning the operation of the Centre.
51. There were also a substantial number of complaints that had been made about the Centre.
52. In particular:
 - (i) Correspondence regarding complaints had been received from Hastings Voluntary Action (HVA) [53-54]. Some of the complainants (rightly or wrongly) felt that complaints made to the Respondent itself (via the Claimant) either had not been dealt with appropriately or they had little confidence that they would be dealt with appropriately if made to the Claimant.
 - (ii) By a letter dated 22nd November 2018 [55-58] the Charity Commission had raised concerns about the management and operation of the Centre, and in particular about safeguarding.
 - (iii) The Local Authority, in particular the Children's Safeguarding Unit, wrote in February 2019 in respect of concerns regarding safeguarding [48-52].
 - (iv) A report from East Sussex Fire & Rescue department following an inspection [61-64] raised 19 points of required action in respect of fire safety matters in the physical building and training of people operate within it by various dates between 17th July 2019 and 17th September 2019.

- (v) An Environmental Health letter dated 4th July 2019 [66 -68] raised 10 items of concern regarding food safety and security and various works that were required as a high priority.
53. In March 2019 the Claimant contacted Locality on behalf of the Respondent, seeking support in respect of some of these difficulties, particularly complaints handling and safeguarding. Locality is a network which provides Lifeboat Support for local communities and organisations such as the Respondent.
54. Additionally in March 2019, a new trustee, Mr Rolfe, joined the Board.
55. The perfect storm of all these matters arising at same time inevitably put the Board under pressure and it was apparent by mid-2019 that there was a need for a change in practice at the Respondent in respect of the way in which their Centre was run.
56. This was affirmed by the recommendations made by Jane Dodson of Locality who met with the Respondent on 22nd March 2019 and 17th April 2019. Her actions, advice and recommendations are set out in a report dated 1st November 2019 [92-114].
57. Around mid 2019 Mr Rolfe took over the role of Chairman of the Board from Mr Fawthrop.
58. One of the areas of concern regarding the Respondent raised by HVA, the Local Authority and the Charity Commission related to safeguarding. A significant body of complaints and concerns compiled by HVA [53-54] related to safeguarding concerns arising from the alleged conduct of one of volunteers, referred to during these proceedings as “MH” both inside and out of the Centre.
59. This was a matter which particularly concerned Mr Rolfe, who had a background in safeguarding. The incidents recorded in this list led to the Board taking the decision to ban MH from the centre. Mr Rolfe sent an e-mail to the Claimant on 2nd September 2019 [76] setting out the background, the Board’s decision and the steps she was meant to take. There was however clearly some misunderstanding about the instructions because Mr Rolfe thought at one point that a direct instruction had been given to Claimant to have no contact with MH and that does not appear in the instructions to her in the e-mail of 2nd September 2019 or any subsequent correspondence.
60. Matters came to a head between the Trustees and the Claimant after Mr Rolfe became aware that the Claimant had attended a lunch event away from the Centre (but during her working hours) at which MH was present. Mr Rolfe considered that in attending the event she had acted contrary to a direct instruction (although in fact she did not and all parties are now agreed that she did not) but also that she had undermined the Trustees as she had met someone who banned from the Centre during a working day at which she was at the Centre.

61. As a result of this, the Claimant was called into a meeting on 18th September 2019 with Mr Rolfe and Mr Manwaring (of HVA) at which this and various other matters were discussed. At the end of that meeting the Claimant was suspended.
62. It is clear from the notes of that meeting [79-80] that the incident of the Claimant having lunch with MH was not the only matter of concern to the Trustees at that point in time. It was made clear to the Claimant that there were a number of areas of concern regarding the management of the Centre (including the Claimant abiding by and following through on decisions of the Trustees, financial issues, poor systems and record keeping, overall safety of the building, safeguarding of Centre users and complaints about the conduct and attitude of the Claimant) and that the Trustees would be investigating all those matters.
63. The meeting was followed up by a letter dated 26th September 2019 [82-83] which referred to both the allegation that the Claimant had willfully disregarded a formal written instruction from the Trustees not to have contact with MH and also to the recent investigation into serious complaints that had highlighted a number of concerns about the overall management of the Centre. This was not a particularly lengthy or entirely helpful document but it did make it clear that the Claimant's suspension was for more than merely meeting MH in contravention of a direct instruction which, as noted above, was later found not to be the case. The suspension letter was also careful to clearly point out that her suspension was considered to be a neutral act and not a disciplinary matter in itself and was to facilitate the investigation and to enable matters to progress.
64. In view of the Respondent's limited resources, the Trustees decided to seek outside assistance regarding this potential disciplinary matter. Having first sought and secured funding for outside assistance they then instructed Mr Finegold from Locality to undertake an independent and impartial investigation into the various matters of concern relating to the Claimant and how she was running the Centre and to produce a report. The report was to enable the Trustees to determine whether or not they should commence disciplinary proceedings against Claimant. This was a substantial step taken by the Trustees to try to ensure a fair process.
65. Mr Finegold was entirely independent of the Trustees and had no axe to grind. He undertook a thorough and impartial investigation which included receiving written accounts, reviewing documents and interviewing the Claimant at length on 2nd December 2019. He subsequently produced a balanced report [127-187] which covered both the concerns raised about the Claimant and also her concerns (raised in a written grievance that she had submitted to Mr Finegold at the start of his investigatory meeting with her).
66. That report consisted of a 7-page summary plus a number of appendices, the largest of which consisted of the notes of his investigatory interview with the Claimant. Those notes of interview had been submitted to the Claimant who had made a number of corrections/additions and it was the amended version which was contained within the report. The report made a number of findings including that:

- (i) The Claimant's meeting with MH at lunch was not in direct contravention of any written instructions but could be perceived as undermining.
- (ii) The building had been allowed to fall into a dangerous state of repair for which the Claimant bore shared responsibility with the Trustees.
- (iii) Over the 5 years since 2014 (when the Council ceased to have any responsibility for these matters) the Claimant appeared to have taken little or no action in relation to fire safety.
- (iv) The Claimant seemed reluctant to address environmental health concerns, blaming others and seeming unwilling to see that the Respondent had responsibilities in this area.
- (v) Although the Claimant had undertaken to oversee some remedial work, there were concerns about her passive approach.
- (vi) Safeguarding was a critical area given the Centre's work with vulnerable people and the Claimant had shown little regard for ensuring the safety of people, particularly, but not solely, where MH was involved.
- (vii) The Claimant had little understanding of the basic principles of safeguarding and had shown poor practice both at a fundamental level (around values) and at an operational level (by failing to investigate safeguarding concerns properly or in a timely manner and apparently encouraging someone not to report an incident).

67. Mr Finegold's report concluded that there was a case for a disciplinary hearing to be held on the grounds that there were concerns over the Claimant's ability to provide a safe environment for users of the Centre. Also, that the concerns could be serious enough to warrant dismissal given the nature of the work at the Centre. Nevertheless, he made it clear that whether or not to pursue disciplinary action and the ultimate outcome of any such action were matters for the Trustees. It gave advice on how to proceed procedurally in the event either that the Trustees chose to instigate disciplinary action, or that they did not and also made recommendations as to how to deal with the Claimant's grievance.
68. There was a significant delay between the Claimant's initial suspension and Mr Finegold's investigatory report. Neither party bears the entire blame for that delay.
69. On the one side the Respondent did not act particularly expeditiously, although I accept Mr Rolfe's explanation that the Respondent had to seek and secure funding before they could instruct Mr Finegold and that that took some time and contributed to the delay. Equally, there were also delays in setting up the investigation meeting with the Claimant partly as a result of Claimant having had to have surgery and a subsequent period of recovery, but also partly because she was upset about her suspension from a job she clearly loved and wished to continue doing and she directed many of her efforts to opposing that suspension rather than engaging with the process that the Trustees were trying to put in place. There was a significant amount of correspondence which passed between the Claimant and the Respondent and/or Mr Finegold before the investigatory meeting took place **[81-89 & 115-126]**.

70. In the meantime, the Claimant, being upset by her suspension from the job she loved, had instructed Mr Foster to represent her. He had written on her behalf to the Respondent's on 11th November 2019 challenging the Claimant's suspension **[209-210]**.
71. Following Mr Finegold's report the Trustees decided to instigate disciplinary proceedings against the Claimant. There was discussion as to who should sit on the disciplinary panel. At that time there were essentially 4 available trustees being supported as to the appropriate procedures by Mr Finegold. The Trustees ultimately decided that 2 Trustees should sit on the disciplinary panel and 2 should be held in reserve to hear any appeal.
72. Following discussions, the Trustees chosen to sit on the disciplinary panel were Mr Rolfe and Ms Smith. The decision that it should be these 2 Trustees was reached for reasons of both practicality and because they were the Trustees available and willing to be involved at that stage.
73. Although Mr Rolfe was undoubtedly the driving force behind trying to reform the management of the Centre and bring it more in line with what was legally required, and he had instigated to some extent the investigation of the Claimant, I do not find in all the circumstances that it was inappropriate for him to be part of the disciplinary panel.
74. Whilst there may have been a degree of tension between the Claimant and Mr Rolfe in respect of whether and express instruction had been delivered to the Claimant about not meeting MH, Mr Finegold's investigation decided that there was not. From that point onwards that was acknowledged by Mr Rolfe and the allegation played no further part in the disciplinary process. That it did not corroborates both the independence of Mr Finegold's investigation and the reasonableness with which Mr Rolfe approached the disciplinary process.
75. The Respondent had limited resources, both in terms of finance and personnel. There was no evidence produced which showed that the Respondent had any viable alternatives.
76. Mr Rolfe was not, as Mr Foster suggested, acting as CPS, judge, juror and prosecutor of the Claimant. Although he had given information to the investigator, he did not himself conduct that investigation or direct its course. The investigation had been outsourced to an independent external investigator. Having heard from Mr Rolfe I have no hesitation in finding that both he and the other Trustees were operating in good faith and trying to put together an objective and reasonable procedure within the confines of the limited resources available to them. I am also satisfied that they achieved this.
77. Following receipt of Mr Finegold's investigatory report, the Respondent moved promptly in deciding to take disciplinary action and arranging a disciplinary hearing. Any delay in this period was due to Christmas.
78. By a letter dated 18th December 2019 **[211-212]** the Respondent invited the Claimant to attend a disciplinary hearing on the 8th January 2020. It accepted Mr

Finegold's finding that there was no evidence that the Claimant met MH in contravention of specific instructions but referred to the findings in Mr Finegold's report, concerns about her management practice in the areas of safeguarding, fire and environmental safety and stated that the concern of the Trustees was the overarching issue of safety at the Centre. A copy of Mr Finegold's report was attached to the letter.

79. The letter also advised the Claimant that the disciplinary panel would consist of Mr Rolfe and Ms Smith (one of the other Trustees) and that Mr Finegold (as the independent investigator) would be present to answer any questions. It advised her of her right to be accompanied at the disciplinary meeting, warned her that the allegations were serious and could result in a formal warning or dismissal and stated that in the absence of any formal policy, the Respondent would be using the ACAS Guide for Discipline and Grievances at Work. It further acknowledged the grievance the Claimant had raised and advised that the grievance would be heard at the same time as the disciplinary hearing, but that Mr Rolfe would not participate in that part of the hearing.
80. Following the Respondent's, there followed a series of correspondence between Mr Foster (on behalf of the Claimant) and the Respondent comprising 2 letters from Mr Foster, 2 responses from the Respondent to Mr Foster and a further letter from the Respondent to the Claimant herself **[213 – 214 & 230-234]**.
81. In that correspondence Mr Foster raised no issue as to the composition of the disciplinary panel. This was a surprising omission given that one of Mr Foster's primary reasons for asserting before the Tribunal that the dismissal was unfair was that the procedure was unfair as a result of the presence of Mr Rolfe on the disciplinary panel.
82. Issues were however raised by Mr Foster in the correspondence in relation to the lack of specificity of the allegations that the Claimant would face at the disciplinary hearing. He forcefully pressed his point that the information given was inadequate and repeatedly asked for additional details as to what the Claimant had done wrong, and in particular for specific dates and actions. He further stated that in the absence of clarification the Claimant would not be attending the disciplinary hearing.
83. The information sought by Mr Foster was not entirely forthcoming in the Respondent's responses and the Respondent could have constructively provided more detail. Instead, the Respondent repeatedly referred back to Mr Finegold's investigatory report and stated the Respondent's position that the issues the Claimant would face in the disciplinary proceedings were amply set out in the report, and in particular in the 7-page summary which formed the substance of the report.
84. In the final response sent by Mr Finegold on 7th January 2020 on the Respondent's behalf **[234]** Mr Foster was referred to the record of the investigatory meeting and that it had been agreed by the Claimant. Mr Finegold noted that the Claimant had acknowledged that the instances asked about had occurred and that it was disingenuous to suggest that she was unaware of them.

Also, that as she had already been able to engage with them at his meeting with her there was no reason why she should not also be able to do so at a disciplinary hearing. That correspondence also clearly stated that Mr Rolfe had confirmed that the disciplinary hearing would go ahead at 12 noon on 8th January 2020 and would proceed in the Claimant's absence if she did not attend. There was no response from either Mr Foster or the Claimant to that final correspondence.

85. The Claimant asserted before the Tribunal that she did not have sufficient time to review that correspondence and reach a decision as to whether she could attend the disciplinary hearing before it took place. I find that she did. Although the final response from the Respondent was sent out a little less than 24 hours before the disciplinary hearing, it contained no new or additional information which would have required detailed consideration, but merely referred back to material that the Claimant had already had for 3 weeks. Even had it done so, she could have either written or attended the hearing to state that she needed further time to consider those new matters and asked for the hearing to be adjourned. She did neither and simply failed to acknowledge the correspondence or take further issue with the hearing proceeding.
86. Having read Mr Finegold's report, I find that whilst the report was not detailed in the way that Mr Foster would have liked and which might have been appropriate had this been a disciplinary matter based on specific acts of misconduct, it nevertheless set out in sufficient detail the Respondent's areas of concern to allow the Claimant to adequately respond to them.
87. It was clearly a report into the Claimant's conduct not the wider activities of the Respondent (although it acknowledged wider failings of the Respondent and the difficulty in finding an exact dividing line between Claimant's responsibilities and those of the trustees because of the lack of job description). The wider aspects of the responsibilities of the trustees and the failings of the Respondent to have appropriate policies and the action the Respondent as a whole needed to take was addressed in a separate report of Jane Dodson of Locality, not that of Mr Finegold.
88. It was also not, as Mr Foster suggested, impossible to find the wood for the trees in Mr Finegold's report as a result of the length of the report. The main substance of the report was contained in the initial 7 pages, the remainder being appendices where some additional detail could be found. Those initial 7 pages clearly summarised the general nature of the Respondent's concerns and some of the specifics.
89. Although no specific acts of misconduct were alleged, the Respondent was not easily able to point to particular acts or omissions by the Claimant or provide a date or a time on which the Claimant had or had not done a particular action. That is unsurprising given the largely autonomous role of the Claimant, the lack of clear records kept by her and the lengthy period over which inaction had apparently led to the cumulative deficiencies in fire and food safety identified by the Fire Brigade and Environmental Health. Apparent from the report was that the Respondent was concerned about a general failing to manage the Centre appropriately and that there were a number of specific areas of concern.

90. The report referred to information already in the Claimant's knowledge regarding the various issues raised by East Sussex Fire & Rescue, Environmental Health, and the complaints about safeguarding. The safeguarding concerns were touched upon in the summary and had been the subject of extensive discussion with the Claimant during the investigation interview (the notes of which formed part of the appendices) when the Claimant was asked about a number of specific events regarding safeguarding and in particular the behaviour of MH. Despite not being given precise dates of the events it is clear from the Claimant's responses in interview that she nevertheless knew exactly what incidents were being referred to and understood at least to some degree why there were concerns about those events and her actions in relation to them.
91. The report also followed the Claimant's suspension meeting, which had also touched on the areas of concern and at which the Claimant had made comments about those concerns.
92. The Claimant chose not to attend the disciplinary hearing. There was no explanation for her absence beyond the letters from Mr Foster which pre-dated the Respondent's final correspondence of 7th January 2020.
93. I don't find that any deficiencies in the information provided to her about the nature of the allegations in advance of the disciplinary hearing were sufficient to justify her failure to attend and I found the Claimant's explanation as to why she chose not to engage with the process to be weak. Even if she had not been provided with the detail Mr Foster expected, the disciplinary hearing afforded an opportunity to go and find out and the access to the Trustees that she had been demanding but she chose not to take the opportunity. Had she done so and been faced with allegations she was unprepared for and could not respond to she could have asked for an adjournment, and she would have potentially been in a different position.
94. The disciplinary panel comprised Mr Rolfe and Ms Smith. Mr Finegold also attended as the investigatory officer and in an advisory role.
95. Ms Smith and Mr Rolfe considered whether or not to proceed with the disciplinary hearing in the Claimant's absence or to adjourn. They decided to proceed having reached the conclusion that an adjournment would serve no purpose as the Claimant was likely to continue not to engage and was unlikely to attend any adjourned hearing.
96. Notwithstanding that this was the first scheduled disciplinary hearing, and therefore the first time that the Claimant had failed to attend, I find that decision to be within the range of reasonable responses of an employer such as the Respondent taking into account all of the circumstances including:
 - (i) the somewhat combative stance taken by Claimant through her solicitors;
 - (ii) the Claimant's failure to address the substance of the Respondent's concerns in correspondence;

- (iii) the Claimant's failure to address the last correspondence dated 7th January 2020 from the Respondent or provide any subsequent reason for her non-attendance;
 - (iv) the Respondent's limited resources;
 - (v) the delay that had already occurred to this point;
 - (vi) the urgency of the need to resolve the situation expeditiously, in particular as it had been going on for some time, the Centre was without a manager and the Claimant was suspended on full pay.
97. The hearing therefore proceeded in the Claimant's absence. There was no notetaker present as the Respondent's limited resources did not permit that however handwritten notes were taken. Unfortunately, those notes were not available to the Tribunal.
98. Although Ms Smith had a poor recollection of what occurred at the hearing, Mr Rolfe and Mr Finegold gave more detailed and reliable evidence, which I accepted. Notwithstanding her poor recollection, Ms Smith was very adamant and believable that she was involved in the decision making process at that hearing and reached an independent decision following discussion. I find that she did not merely "rubber stamp" a decision taken by Mr Rolfe but participated fully and reached an independent conclusion based on the investigatory report of Mr Finegold.
99. I find that Mr Finegold provided some advice to Mr Rolfe and Ms Smith and suggested a range of options available to them but took no part in the decision making and the decisions regarding whether to proceed in the Claimant's absence and the outcome of the hearing were taken solely by Mr Rolfe and Ms Smith together.
100. Ms Smith gave oral evidence to the effect that she wasn't aware of Mr Foster's letter indicating that the Claimant would not be attending if further information as to the specifics of the allegations she would face not was not given. Mr Finegold gave evidence that she was in fact aware of the information even if she had not seen the letter. I preferred Mr Finegold's evidence as he gave an independent and straightforward account of what had occurred and clearly had a better overall recollection of events. Even if I am wrong regarding this, as further clarification had subsequently been sent on behalf of the Respondent subsequent to that letter (to which no further response had been received) I am satisfied that it would not have rendered the process unfair to the Claimant as awareness of the letter would have been unlikely to have made any difference to the decision to proceed or the outcome of the hearing for the reasons set out above.
101. After reviewing Mr Finegold's report and following discussion between Mr Rolfe and Ms Smith, they reached a unanimous decision to dismiss the Claimant. I find that the basis for that decision was their conclusion that there had been a breakdown in the relationship between the Trustees and the Claimant and the fact that they did not feel that there was any longer the requisite amount of trust and confidence between them necessary for the continuation of the employment relationship.

102. This was based on a combination of a number of factors including:
- (i) The numerous issues which had arisen at the Centre whilst the Claimant had been the Centre Manager (as set out at paragraph 52 above) and the severity of those issues;
 - (ii) The failings in the management of the Centre that those issues brought to light;
 - (iii) The Claimant's attitude (in particular regarding safeguarding) and failure to recognize that there was even the possibility that some of the problems at the Centre might be within the scope of her responsibility;
 - (iv) The Claimant's reluctance and ultimate refusal to engage with the Trustees (both prior to the disciplinary process and including her failure to fully engage with the disciplinary process and attend the hearing);
 - (v) The nature of the Centre and the significant risks potentially posed to vulnerable individuals by any failures of safeguarding, fire safety or food safety at the Centre;
 - (vi) The very high level of trust and confidence in the Claimant that the Respondent required as a result of the fact that she was the sole employee and the only person on site the majority of the time;
 - (vii) The lack of confidence that she could discharge the Respondent's requirements of a Centre Manager effectively in future and ensure that the Centre was safe for its users, particularly those vulnerable users (in particular as regards safeguarding); and
 - (viii) The lack of alternatives (such as transfer to another role or supervision of the Claimant) available to the Respondent given the limited resources of the Respondent and the fact that she was the sole employee.
103. Although the concerns considered within the disciplinary hearing raised elements both of misconduct and capability, I am satisfied that neither of these were the basis on which the decision to dismiss was based. Mr Rolfe and Ms Smith, did not rely on specific failings, rather an overall generalised failing to run the Centre to the necessary standard and a general absence of responsibility or action by the Claimant. The numerous issues the Respondent faced on multiple fronts in 2019 underpinned their conclusion that the Centre was not being run to the necessary standard and this and the Claimant's own behaviour through the investigation and disciplinary process contributed to their conclusions that there was no longer the requisite amount of trust between the Trustees and the Claimant necessary for the continuation of the employment relationship and that the employee-employer relationship had irretrievably broken down.
104. The Claimant had become defensive and argumentative to some extent during the process and had focused her attention and efforts in opposing the suspension and resisting the action that was being taken against her. She did not initially engage well with Mr Rolfe prior to her suspension or with Mr Finegold in advance of the investigatory interview and she did not fully engage with the disciplinary proceedings once they were instigated, taking issue instead with the way in which the allegations were put rather than trying to engage substantively with them. Her failure to attend the disciplinary hearing was a further example of her failure to engage.

105. The Claimant's unwillingness to engage with the process, failure to attend the disciplinary hearing panel and failure to notify them even after the last correspondence that she would not be attending (and the reason why not) only added to Mr Rolfe and Ms Smith's reasons for concluding this was an irredeemable breakdown.
106. The parties are agreed that following the disciplinary hearing on 8th January 2020 the Claimant was dismissed with immediate effect but with pay in lieu of notice by a disciplinary outcome letter dated 10th January 2020 [235-238].
107. The reason given for the dismissal in the dismissal letter of 10th January 2020 was that the Claimant had been in gross dereliction of her duties to provide a safe environment for users of the centre, specifically in relation to health and safety and safeguarding and the ultimate and irretrievable breakdown in the employment relationship between the Claimant and the trustees [238]. The letter also refers to various aspects of her conduct or the failings which were taken into account by the disciplinary panel. Those matters specifically referred to were all ascertainable from the 7 pages at the beginning of Mr Finegold's report.
108. Although the disciplinary outcome letter advised the Claimant that she had a right of appeal against the decision and gave details as to how she could exercise that right, the Claimant did not appeal the decision but made a referral to ACAS and then commenced these proceedings.
109. Having heard from Mr Rolfe, Mr Finegold and Ms Smith and considered the documentary evidence, namely the disciplinary outcome letter dated 8th January 2020, I find that the Respondent had genuinely lost trust in the Claimant's ability to provide a safe environment for users of the centre and to engage effectively with the Board and genuinely believed that the relationship between the Board and the Claimant had broken down and could not be retrieved.
110. I therefore find that the dismissal was for a fair reason within s.98, namely some other substantial reason comprising the irretrievable breakdown of the employment relationship arising from the loss of the Respondent's trust and confidence in the Claimant.
111. Also, that the Respondent's decision to treat that reason as substantial and to dismiss the Claimant was entirely within the range of reasonable responses, in particular having regard to the size and resources of the Respondent. The issues faced by the Centre were serious and the Respondent's concerns about the overall management of the Centre by the Claimant were justified by those issues. The extent of the breakdown was substantial in light of the Claimant's lack of engagement, and her focus on her perceived injustice of her suspension and her failure to fully engage with the disciplinary process and attend the hearing meant that there was little or no prospects of repairing the relationship and restoring the necessary trust.
112. I also find that it was within the range of reasonable responses for the Respondent to conclude that dismissal was the only appropriate outcome. Although the Claimant argued that dismissal was too harsh a sanction and some

lesser sanction should have been imposed, this argument is more appropriate to a conduct or capability dismissal, which I found were not the reasons for dismissal. The Respondent required a high level of trust and confidence in its Centre Manager as a result of the nature of its operation and the breakdown in the relationship between the Claimant and the Respondent was substantial and the Respondent, with objective grounds, believed it was irretrievable.

113. Even if I am wrong about this, I find that in all the circumstances, there were no other viable alternatives to dismissal. There were no alternative roles for the Claimant with the Respondent (she was the only employee) and there was no one who could reasonably take on a supervisory role in respect of the Claimant to the extent that might be required. A final warning was unlikely to have improved or repaired relations between the Respondent and the Claimant, to have changed the Claimant's underlying values or attitude to responsibility or resolved the issues regarding the management of the Centre. Clarification of the responsibilities of the Claimant's role might have assisted but was unlikely to have been uncontentious and the evidence did not suggest that it would have been effective given the Claimant's attitude (she expressed the view in evidence that she couldn't have borne responsibility for the majority of the matters which had arisen as issues as she wasn't paid enough to have responsibility and had sought to suggest that her role was largely limited to managing bookings and opening the Centre). Further training might have assisted the Claimant to better fulfil the role of Centre Manager had she been willing to accept the responsibility the Respondent's required of the person in that role but would not necessarily have restored the trust and confidence. In any event, whilst some training might have been available, it would have been unlikely to assist in repairing the relationship between the Claimant and the Trustee and training would most likely to have had to have been outsourced and there was no evidence that the Respondent had the resources for this.

114. I considered whether the Trustees might bear some blame in the breakdown of the relationship of trust and confidence. I find that over the previous years the Trustees had taken a fairly relaxed and informal approach to the management of this Centre both by themselves and by the Claimant. Further, they had not produced a job description or clearly set out their expectations of the role of Centre Manager. Nevertheless, I find that the Claimant must have been aware that she bore some responsibilities in areas such as health and safety (including repairs, fire and food safety and safeguarding) by virtue of her job title and her knowledge that she was the only employee and the only person from the Respondent consistently at the Centre on a day-to-day basis. There was no evidence that she had ever asserted that she lacked knowledge or experience to discharge those functions or had requested training. More importantly, it was not merely the issues at the Centre which led to the breakdown in the relationship between her and the Trustees and the loss of mutual trust and confidence but her attitude. For these reasons I conclude that the Respondent's conduct was not a material factor in the breakdown.

Overall Conclusions

115. For the reasons set out in detail above, I find that the reason for the dismissal was that the Respondent had genuinely lost trust in the Claimant's ability to provide a safe environment for users of the Centre and to engage effectively with the Board and the Respondent's genuinely believed that the relationship between the Board and the Claimant had broken down and could not be retrieved.
116. I also find that the Respondent had reasonable grounds for that loss of trust and belief and adopted a reasonable and fair procedure in dealing with the Claimant.
117. Whilst the delay between suspension and the disciplinary hearing was regrettable, I do not find that it led to any unfairness in the procedure. As indicated above, not only is it in fact the case that suspension is not a punitive measure but a neutral act, that is how the Respondent considered it. The Respondent paid the Claimant throughout her suspension and the Claimant has not asserted any detriment beyond her hurt feelings. As the Claimant was both the most senior and only employee, and there were concerns about numerous aspects of her performance, including concerns re safety and safeguarding, I find that there was clearly ample justification for her suspension for a period of time to allow a full and proper investigation and safeguard the Centre and its users.
118. I also do not find that the Respondent breached the ACAS Code as was alleged by Mr Foster for the reasons set out above and having regard to its size and resources. Also, the fact that it did not rely on specific acts of misconduct or lack of capability.
119. Even if I am wrong in my assessment that the Respondent adopted a fair procedure overall, applying the Polkey principle, I find that if the procedural defects asserted by the Claimant had been remedied by the Respondent there would nevertheless have been a very high likelihood that the Claimant would have been fairly dismissed in any event. This is because of the nature and extent of the management issues, the Claimant's attitude and lack of engagement with the issues and the Board and the Respondent's lack of resources. I would therefore have made an 80% Polkey reduction to reflect this if I had accepted that the procedure adopted by the Respondent rendered the dismissal unfair.
120. Although I have found that the Claimant was not justified in failing to attend the disciplinary hearing and that she failed to avail herself of the opportunity that was afforded to her by way of appeal against the disciplinary decision, I did not hear detailed submissions on whether the Claimant had breached the ACAS code by these actions and should therefore have been subject to an adjustment to any compensation for this reason. I therefore make no finding in relation to this.
121. In all the circumstances, I find that the Respondent's reason for the dismissal amounted to some other substantial reason and the Respondent acted fairly and within the range reasonable responses in treating the reason as sufficient reason to dismiss the Claimant.
122. Accordingly, I find that the Claimant was not unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.

123. Nevertheless, I have briefly considered whether, had I reached a different conclusion there should be any adjustments to the Claimant's award for contributory fault.
124. I identify the Claimant's conduct in failing to engage fully with the disciplinary process, attend the disciplinary hearing or appeal the disciplinary decision as potentially giving rise to contributory fault.
125. I do not find the Claimant's explanations for those actions to be compelling or exculpatory and consider her conduct to be culpable, blameworthy and unreasonable for the reasons set out above.
126. Accordingly, I would have found it appropriate, just or equitable to make a deduction from both the Claimant's basic and compensatory awards on the basis of contributory fault in the amount of 85%.

Employment Judge Clarke

Date: 6th January 2022