



# EMPLOYMENT TRIBUNALS

**Claimant:**  
**Miss C Frazer**

**Respondent:**  
**Pet Rescue  
Welfare  
Association**

**Heard at:**                    **Wales CVP**                    **On: 26<sup>th</sup> and 27<sup>th</sup> April 2022**

**Before:**                    **Employment Judge A Frazer (sitting alone)**

**Representation:**

Claimant:  
In person

Respondent:  
Ms J Whiteley  
(Solicitor)

## JUDGMENT AND REASONS

### JUDGMENT

1. The Claimant's claims for unfair dismissal under s.98 Employment Rights Act 1996, wrongful dismissal and unlawful deductions from wages (pension contributions) are well founded and shall succeed.
2. The Claimant's claims for unfair dismissal under s.103A Employment Rights Act 1996 and a failure to pay the minimum wage are not well founded and shall stand dismissed.

# REASONS

1. This is the hearing of the Claimant's claims for unfair dismissal under s.103A and s.98 Employment Rights Act 1996, notice pay, unpaid wages (failure to pay pension contributions) and a failure to pay the minimum wage. At the start of the hearing the claim for statutory sick pay was admitted and the Respondent calculated this to be £99.35 based on five days' pay, which was accepted by the Claimant. The parties informed me that the Respondent has already paid the Claimant accrued and unpaid holiday pay and two weeks' pay for failure to provide a s.1 statement further to the directions of EJ Howden-Evans dated 18<sup>th</sup> August 2021.

## The Issues

2. The issues to be determined were set out in the case management order of EJ Howden Evans dated 18<sup>th</sup> August 2021. I went through these with the parties at the start of the hearing. They were as follows:

### 2.1 Automatically unfair dismissal

- 2.2 Was the reason or principal reason for dismissal that the Claimant made a protected disclosure?

- 2.3 If so, the Claimant will be regarded as unfairly dismissed.

### 3. Ordinary unfair dismissal

- 3.1 The Respondent says that the potentially fair reason for dismissal was conduct. If so, the Tribunal will need to decide whether the Respondent had a genuine belief based on reasonable grounds after having conducted as much investigation into the matter as was reasonable in the circumstances.

- 3.2 The Tribunal will also consider procedural fairness and in this case whether there was a breach of the ACAS Code of Practice. I agreed with the parties that I would make a finding on this and then the extent of any uplift would be subject to representations in respect of remedy. There was no assertion that the Claimant had failed to comply with a grievance procedure.

- 3.3 The Tribunal will also assess whether the decision and the procedure were in the band of reasonable responses.

4. Contributory fault and/ or whether the Claimant would have been dismissed fairly had a fair procedure been followed or in any event ('*Polkey*').

5. Failure to pay the minimum wage

6. Notice pay

7. Unpaid pension contributions

## The hearing

8. I had a core bundle of documents and a witness bundle. That morning the a further bundle was forwarded on to me which was entitled '*further pleadings*'. In accordance with the timetable set by EJ Jenkins in his order dated 22<sup>nd</sup> September 2021 I was to have one hour reading time so I used this to read the witness statements. When I returned I sought to clarify what the protected disclosures were as this was not clear from the witness statements. It was clarified that the Claimant raised a grievance, that she wrote matters that were protected disclosures in the handover book and that she had had multiple conversations where she had raised concerns.
9. I heard from Reverend Summerfield for the Respondent, Carina Frazer the Claimant and a witness that she called, namely Charlotte Evans. During Reverend Summerfield's cross-examination Miss Frazer turned to a document which was in response to the direction for further information made by EJ Jenkins on 22<sup>nd</sup> September 2021. This specifically requested at paragraph 8 what the protected disclosures were including what did she say or write, when, to whom and how she said that it was a protected disclosure. Prior to this document being introduced I had to intervene as the Claimant was asking questions about matters which either appeared not to be in her witness statement or were not subject to a specified protected disclosure.
10. Having then seen the further information document I took some time to read it. This contained some detail about the protected disclosures but not all were specifically pleaded in response to EJ Jenkins' direction. I asked the Claimant whether I had intervened and stopped her questioning about anything that was in the document and she said no. Having looked through that document there had already been some questions which related to matters in it. The Claimant proceeded to ask questions of Reverend Summerfield and I had some questions too. Miss Frazer was called at the end of Day One and then Charlotte Evans was called. Miss Whiteley questioned both witnesses. I heard oral closing submissions and then reserved my decision. I have set out the submissions, the law and my findings of fact below.

## Submissions

11. The Claimant submitted that Reverend Summerfield had failed to follow the ACAS Code of Practice in dismissing her. The employer has to have reasonable grounds to believe in the employee's misconduct after having conducted as much investigation as was reasonable. This test was not met. The Respondent did not carry out risk assessments or have proper first aid facilities. This was raised on numerous occasions. Employees were not informed of the accident book and it was later only discovered by Charlotte. There were no fire alarms and there were not enough fire extinguishers. There was no fire safety log book. The Respondent did not provide evidence that she had any fire safety certificates. Staff were refused training courses. She said she would have provided if asked. If training was provided employees should not have to ask. It is the employer's responsibility to

provide training for employees. Staff felt forced to opt out of pension scheme. Staff were told the charity were short of funds but staff became aware that bequests donated to the charity were not being distributed accordingly. The Claimant raised concerns but was ignored. She put concerns in writing and these were dismissed. Staff were not paid holiday pay and sick pay.

12. On behalf of the Respondent it was submitted that the Claimant did not make any protected disclosures. She did not suffer any detriment. She was not unfairly dismissed or wrongfully dismissed and she did not suffer unlawful deductions from her wages. In order for a disclosure to be protected there must be a disclosure of information; the information must be in the reasonable belief tend to show one or more of the things listed at s.43B(1) ERA 1996; the disclosure of relevant information must be in the public interest; it must have been made by a worker in the manner that accords with scheme c to h and the act of disclosing must not amount to a criminal offence (**Simpson v Cantor Fitzgerald [2020] EWCA Civ 1601**). The Claimant produced a grievance of improvements required. Whilst she said that she raised disclosures orally the Respondent says that she did not. Conveniently for the Claimant a large number of disclosures were only made verbally and are not evidenced in writing.
13. The first page of the grievance is the only disclosure that could be considered to form a protected disclosure. The tone is too general. It does not refer to the Claimant or to pet rescue employees and all employees. The lists and comments in the book are just that. They are lists that the Claimant feels were needed. There cannot be enough information for them to form protected disclosures. At the time the list was made the Claimant did not believe that they were related to health and safety or legal requirements. It was only later she decided they were indicative of list of health and safety or legal. The list was because the Claimant didn't like the way R was running the rescue. The majority relate to repairs and cleanliness and not to staff or to the general public. It cannot be said that the items listed would affect the health and safety of individuals in any way nor that there was any belief that welfare of animals or people affected. It cannot be said that general remarks about cleanliness could reasonably be in public interest. In her messages she was purely saying these are the improvements required. She has said nowhere that they are in relation to legal obligations or health and safety. She was not even worried about staff safety. The Respondent went through the list and carried them out one at a time. The majority of disclosures significantly predate dismissal for gross misconduct and are unlikely therefore to have been the cause.
14. As concerned ordinary unfairness this was a small charity with three trustees. Only Rev Summerfield dealt with the running of the business. She witnessed all of the Claimant's behaviour. The Claimant would write lists of problems – not just handover lists of what needed doing. The tone was stand offish and rude. The Claimant became more and more unhappy with her job. The relationship went downhill. She was not carrying out the work required of her. Rev Summerfield warned the Claimant and gave her two weeks to improve. The Claimant left further rude messages complaining about the filth of kennels. It was a further perceived issue designed to aggravate Rev

Summerfield. The relationship had broken down completely and she was not following instructions. C admitted that from 2018 trust went and she had started to gather evidence. Reverend Summerfield dismissed due to continued insubordination. The Respondent being a small charity had witnessed behaviour first hand. She had been given a warning despite it falling into the gross misconduct category. When the Claimant's behaviour did not improve Reverend Summerfield dismissed her. There was no need for further investigation. It was reasonable to dismiss. She believed that the Claimant committed gross misconduct in the form of gross insubordination. She reflected but the decision did not change. The Claimant is not entitled to any notice.

15. The Claimant's hours were reduced and she was only required to work the reduced hours. Any additional hours were done of her own accord. She was paid for the number of hours. It was her responsibility to fill in her timesheets each week. The Respondent gave evidence that the bookkeeper would deal with wages. If she did work overtime she didn't advise the Respondent she had worked any overtime. There were no unlawful deductions made.
16. The relationship had broken down so entirely that were the Claimant not dismissed at that time she would have been dismissed in any event shortly thereafter due to that complete breakdown in the relationship.
17. There should be a reduction of compensation to reflect the fact the behaviour significantly contributed towards dismissal and by 100%.

## The Law – Unfair Dismissal

### Whistleblowing dismissal

18. Under s.103A there is an automatically unfair dismissal if the Respondent dismissed the Claimant for making a protected disclosure.
19. Under s.43B ERA 1996 the Claimant must have disclosed information and this can be orally or in writing. If it was an oral disclosure the Claimant must establish what was said, to whom and when. If written the Claimant must establish where was it written and who read it.
20. Under s.43C a disclosure is protected if it is made to an employer or other qualified person.
21. In **Kilraine v London Borough of Wandsworth [2018] EWCA 1436** at paragraph 35 Sales LJ held that '*in order for a statement or disclosure to be a qualifying disclosure according to this language it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).*'
22. An employee must identify what information was disclosed and how that amounted to relevant information. It must amount to information under the

law. The information must in the reasonable belief of the employee tend to show one of the following: that a criminal offence has been committed or is likely to be committed; that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which they were subject, that a miscarriage of justice has occurred, is occurring or is likely to occur, that the health and safety of any individual has been, is being or is likely to be endangered, that the environment has been, is being or is likely to be damaged or that the information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

23. It is not for the tribunal to decide whether in fact there has been a breach of health and safety or failure to comply with a legal obligation for example. It must decide whether the Claimant believed the information tended to show this and whether it was reasonable for the Claimant to hold that belief. The Tribunal must also decide whether the disclosure was in the claimant's reasonable belief in the public interest. In **Chesterton Global Ltd v Nurmohamed [2017] IRLR 837** it was held that the question for the tribunal was whether the worker believed, at the time he was making it, that the disclosure was in the public interest and if so, whether that belief was reasonable. While a worker must have to have a genuine and reasonable belief that a disclosure is in the public interest this does not have to be his predominant motivation in making it.

24. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323** Cairns LJ stated that '*a reason for the dismissal of an employee is a set of facts known by him or it may be beliefs held by him which cause him to dismiss the employee.*'

## Ordinary Unfair Dismissal

25. Under **BHS v Burchell [1978] IRLR 379** the test the Tribunal must follow is whether the respondent genuinely believed the Claimant was guilty of misconduct, whether such a belief was on reasonable grounds after having conducted as much investigation as was reasonable in the circumstances of the case. In accordance with **Iceland Frozen Food Ltd v Jones [1982] IRLR 439** the Tribunal is not to consider what it might have done but must assess whether the decision fell within the band of reasonable responses. This applies to the procedure as it does the actual decision to dismiss – **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23**.

## Findings of fact

26. The Respondent is a registered charity which consists of a boarding kennels, veterinary clinic, pet rescue shelter and pet food bank. Traditionally the income from the boarding kennels has helped to fund the running of the shelter to include the payment of staff employed by the shelter. The owner of the shelter is Reverend Summerfield who founded the centre in 2000. It became a registered charity in 2005. There are two other trustees of the charity – Leigh and Karen Haig.

27. The Claimant commenced work for the Respondent as a Kennel Assistant/ Kennel Supervisor on 24<sup>th</sup> November 2014. It is accepted that she was not provided with any written particulars of employment and the Respondent has already paid her two week's pay to reflect this in response to the direction of EJ Howden-Evans paragraph 8 of the Order dated 18<sup>th</sup> August 2021. The Claimant's normal working hours were 32 hours a week over four days.
28. Because of the restrictions imposed by the Government in response to the COVID pandemic in March 2020 the boarding kennels had to close. At that time there were three dogs, six cats, two tortoises and four caged birds permanently residing in the rescue facility. The charity had to use its reserves to fund the staff costs and the running of the shelter.
29. On 29<sup>th</sup> April 2020 Reverend Summerfield announced to staff – including to the Claimant – that from Monday 4<sup>th</sup> May the working hours would be reduced from eight to five hours and the new working pattern would be three hours in the morning and two in the afternoon. The Claimant responded by text on 1<sup>st</sup> May to state that in her view the new arrangements would not work. She stated that there was no way that they would finish the job properly by 1130 and then leave all the other tasks needing to be done and leaving the place 'looking like a tip'. The Claimant made a number of suggestions for acquiring extra funding. In response Reverend Summerfield reiterated that the kennels would not open and that the restricted hours would continue for some time.
30. The Claimant spoke to Reverend Summerfield about the need for two people to do the work. When asked about this under cross-examination she said that this was because there was a 'mountain of work' to complete.
31. The Claimant continued to attend work on the reduced hours. There was a handover book in the shelter which was a large diary. This was a system where, if there were any remaining tasks to complete or anything that the next person on shift or Reverend Summerfield needed to know, it was noted in the handover book.
32. Increasingly Reverend Summerfield found that the Claimant was being obstructive in her work in that she was complaining about tasks and not completing them as required, particularly cleaning. On the other hand the Claimant felt aggrieved as she felt that she was unable to carry out her duties effectively within the reduced number of hours. Reverend Summerfield's evidence, which I accepted, was that the Claimant was found to have written inappropriate comments in the handover book such as '*drain has more cracks in it than a district full of crackheads and looks like you'll get coronavirus just from touching it*' (see p.226 11<sup>th</sup> March 2020). Under cross-examination the Claimant was asked why she had written this and she said that she thought that if she had written this in a more colourful way Reverend Summerfield would remember and fix the problem.
33. At p.226 there was an instruction from Reverend Summerfield to the Claimant in response to a handover note about ordering medication for an animal which said 'you order what he needs'. In response to this the Claimant had written

*'well doh I'm telling the staff'*. At p.233 Reverend Summerfield had written *'Carina please don't moan about everything. There is a very good chance I may have to close altogether and am trying to keep the place open with no income.'* Under cross-examination the Claimant denied that she had said anything inappropriate but was merely trying to get Reverend Summerfield's attention. At p.238 the Claimant had written to another member of staff *'there's yet another bag of dirty washing for you Carlton, hope you're getting paid or your efforts since there are no offers of them getting done here or the shed getting sorted.'* The Claimant explained under cross-examination that she had written this as she felt that Carlton was being taken advantage of. On the other hand Reverend Summerfield felt that the tone of the comments was insubordinate.

34. On 12<sup>th</sup> May (p.240) Reverend Summerfield felt that the Claimant was unduly complaining about the work she had to do and indicated that she would be given notice if she refused to follow instructions. There is a note in the handover book to the Claimant which reads: *'Carina, If everyone else can sweep floors and do all their jobs. There is only you complaining if you can't or won't work as you have been asked then I will give you a week's notice from today plus a week in hand and you may leave this Wednesday it's up to you.'* The Claimant responded that she had no problem brushing or doing her job but her issue was that staff were no longer there during the time they would have spent making the place tidy by hoovering and mopping (p.240). At p.241 Reverend Summerfield noted that she would do the jobs that the Claimant did not have time for and asked the Claimant to leave a list for her.
35. On 25<sup>th</sup> May the Claimant complained in the handover book about dirty kennels to which Reverend Summerfield responded that that was what the steam cleaner was for. At the end of the page on the handover book the Claimant wrote, *'Listen, we're trying our best here with the time frame we've been given. I've got OCD so the filth of this place drives me mad but neither can we stay to sort it out properly or have enough time to use steamer whilst here, can disinfect and brush ok use steamer no time for both.'* At page 246 there is a comment in response from Reverend Summerfield which is arguably somewhat flippant: *'it is a shame that your OCD didn't kick in before when you were full time'*. She added *'steamer same as used in hospitals to clean theaters and wards so I am telling you to use it!'* By this point in time I find that Reverend Summerfield was frustrated as she perceived that the Claimant was not completing her instructions but instead was complaining about the work that she had to do instead of getting on with it. At the end of the page there is a note which reads *'sorry you are rude and I will not put up with it any more. I am giving you notice now.'* That is a contemporaneous note and I put weight on it as a reflection of what was going on in Reverend Summerfield's mind at the time she dismissed the Claimant. When cross-examined about this Reverend Summerfield stated that she did not like the Claimant's attitude because of her use of *'listen'*.
36. Reverend Summerfield put this communication in a text message to the Claimant in which she stated *'I am terminating your employment with immediate effect. Wash and return your uniform to the office by Thursday to*



*receive your pay and P45 on Friday 29/05/20.*' The Claimant then enquired why she had been dismissed and Reverend Summerfield sent her a text to say that it was '*a disregard to follow instructions and insubordination.*' She stated in the text that she had informed the Claimant about both issues before. The Claimant objected on the basis that she had done everything that day that needed to be done in the time limit that she could do it.

37. On 18<sup>th</sup> June 2020 Reverend Summerfield sent a letter to the Claimant to say that on 27<sup>th</sup> May the Claimant was dismissed from the Respondent due to continuous insubordination and a dismissive attitude and a total disregard to follow working practice instructions. That letter enclosed her P45 and a payslip. Under cross-examination Reverend Summerfield clarified that the failure to follow instructions was a failure to use the steam cleaner. She stated that in respect of insubordination her general attitude was antagonistic.

## **Protected disclosures**

38. The protected disclosures that the Claimant relies upon are set out in the further pleadings bundle at page 18. In her claim form the Claimant claimed that she believed her dismissal was automatically unfair as the dismissal was in consequence of her making a protected disclosure about health and safety issues and the animals that the charity purported to support having their care decreased. In his Case Management Order dated 22<sup>nd</sup> September 2021 EJ Jenkins made a direction for the Claimant to provide further information by 20<sup>th</sup> October 2021 to include details of what was the protected disclosure made, what did the Claimant write or say, when, to whom and how it amounted to a disclosure under one of the categories in s.43B. The Claimant produced a whistleblowing statement dated 20<sup>th</sup> October 2021 which appears at page 18 of the Further Pleadings Bundle and her alleged protected disclosures are set out from paragraphs 7 onwards.
39. Overall the Claimant has not set out all of the further information required of her with the requisite specificity but has in fact made general allegations of what she said to Reverend Summerfield. For example, at paragraph 7 she says that she mentioned verbally to Reverend Summerfield around June 2015 that she and other members of staff were entitled to paid holiday. At paragraph 8 she complains that staff were not given a uniform but she does not state what information she disclosed, to whom and how it amounted to a disclosure under s.43B. The allegation at paragraph 10 does not relate to her but relates to a list given to her manager not by her but by a vet in August 2019.
40. The Claimant refers to a grievance letter that she gave to her employer on 1<sup>st</sup> August 2019. She says in her statement that this highlighted that the employer was failing to comply with a legal obligation to which it was subject in terms of the holiday pay of employees but that it also referred to maintenance and health and safety issues. The grievance starts at page 7 and is headed 'staff welfare'. The first page highlights holiday pay, sick pay, double bank holiday pay and pension scheme. It goes on to say '*these are all basic employee entitlements that even 0 hour contract staff are eligible for!*

*Without any form of benefits or staff care why stay here and struggle when there are other places with the same job offering excellent employee benefits! Things need to change around here or this place will go under. Improvements are needed or new management needs to be put in place for this place to survive. Preferably who is genuinely interested in a business regarding animal care, who has experience and is willing to provide staff with the benefits they are legally entitled to.'* The next page is headed 'Improvements needed' and lists a number of matters that the Claimant claims need fixing, repair or improvement. It is in effect a snagging list.

41. In my finding the Claimant made a protected disclosure in her grievance dated 1<sup>st</sup> August 2019 in that she provided information to the Respondent which in her reasonable belief tended to show that it was failing to comply with a legal obligation to which it was subject, namely the obligation to provide basic employment entitlements. The requirement as to reasonable belief was made out at the time because the Respondent had not provided those entitlements as a matter of fact. The Claimant did complain about staff generally and not just her own employment contract. I consider that it was in the public interest for the Claimant to have raised these issues with her employer as it related to staff in general and the Respondent's general compliance with employment law as an employer. There is clearly a public interest in employers complying with employment law and I find that the Claimant reasonably believed that at the time.
42. At paragraph 12 the Claimant details her request for first aid training in 2016 and then complains about the lack of fire safety equipment on site. This is too general a statement and is not disclosure of information made to a specified person on a particular date and which tends to show in the Claimant's reasonable belief that her employer has failed to comply with a legal obligation or that the health and safety of an individual has been endangered.
43. The Claimant also stated that she contacted the Charity Commission on 9<sup>th</sup> August but does not detail the disclosure made. She then goes on to say '*I've questioned the manager on many occasions as to what exactly our funding is going on since it's not being used on the rescue improvements. I've also questioned the manager on how certain items have been purchased that shouldn't have been bought with the charities money and always told she funded it via her husband's pension.'* Again this is too general a statement and does not identify with sufficient particularity what exactly was said, when and to whom.
44. At paragraph 14 the Claimant states that on 30<sup>th</sup> September 2019 she raised concerns over animal welfare to Reverend Summerfield but does not detail what precisely she said and how that was a protected disclosure.
45. At paragraph 15 the Claimant complains that the Respondent set up a fundraising campsite. She says '*I stressed how safety of our animals could be compromised 25<sup>th</sup> July 2019'*. She does not state what was said precisely and how this amounted to a failure to comply with a legal obligation or a breach of health and safety in her reasonable belief. Again, there is a lack of specificity.

46. At paragraph 20 she mentions that her manager had set up a Facebook page which she says was full of rude and racist jokes. She states '*I verbally voiced my opinion on 4<sup>th</sup> May 2020*' but does not state what was said and how this amounted to a protected disclosure.
47. At paragraph 21 there is a reference to a note made in a handover book on 25<sup>th</sup> May 2020 wherein she says that she complained about the poor staffing levels and hour changes. I have considered the diary entry for Monday 25<sup>th</sup> May. This is a list of tasks that need to be completed. At entry 4 there is a comment that '*far too many dirty kennels needing cleaning. I ran out of time*' and '*better disinfectant for night kennels needed*'. The response to this from the Reverend Summerfield was that this was what the steamer was for and there was also a comment Reverend Summerfield made on this page for the Claimant to use a better tone when leaving her list as she sounded rude. The Claimant then went on to say that she had OCD and that the filth of the place drove her mad. She commented that she did not have enough time to use the steamer. Those comments on the list do not amount to a protected disclosure. It is not information which in the reasonable belief of the writer tends to show that a person is failing to comply with a legal obligation or that an individual's health and safety is being endangered. This is a list which puts the employer on notice about what remains to be carried out and there are complaints about the cleanliness of the environment but this falls short of being a protected disclosure.
48. At paragraph 22 the Claimant says that she mentioned danger of health and safety to an individual on various occasions when she was informed a member of staff was working alone but she fails to mention precisely what was said, to whom and how it amounted to a protected disclosure. At its highest she says '*I mentioned to Reverend Summerfield that the job requires two members of staff or injuries would occur*' but makes no mention of when she said it or what the context was.
49. The Claimant alleged that the Respondent has not been open about the use of legacies to the charity. Again, there is no evidence that this was raised to Reverend Summerfield as a protected disclosure and no specifics have been provided.
50. In the circumstances the Claimant has not proved that she has made any protected disclosures apart from the disclosure that she made to her employer on 1<sup>st</sup> August about her failure to provide basic employment rights. It is not enough for a claimant to say '*I raised on numerous occasions that there were problems*'. There has to be a proven disclosure of information with specifics of the disclosure that meet the requirements in the definition.

## **Reason for Dismissal**

51. I find that with regard to the evidence before me, the reason for dismissal was that the Respondent genuinely believed that the Claimant - by way of her use of comments and complaints in the handover book - was refusing to carry out

instructions and was being rude and insubordinate. I do not consider that the raising of a grievance nine months' prior had anything to do with the reason for the Claimant's dismissal. The evidence in the handover book clearly shows that the Claimant was objecting to the short timescale in which to keep the place clean following the change of hours. Reverend Summerfield found that the Claimant's tone was rude and genuinely perceived by the comments that she was writing in the book that she was refusing to follow instructions. I find that this insubordination and a failure to follow instructions is the reason for dismissal. In my finding the Respondent had a potentially fair reason for dismissal namely conduct under s.98(2)(b) of the Employment Rights Act 1996.

## Fairness of the Dismissal

52. Having regard to s.98(4) and the test in **BHS v Burchell** I find that Reverend Summerfield genuinely believed that the Claimant was being insubordinate and refusing to follow instructions. This was because the Claimant had made comments such as 'doh', 'listen' and comments in respect of the drains and about Carlton getting paid which would reasonably come across to an employer as insubordinate. There was no investigation but I find that there was evidence in the form of comments written in the handbook. However the Claimant was not given an opportunity to give her explanation for the behaviour by way of a meeting before she was dismissed. The Respondent was in breach of paragraphs 9 and 10 of the ACAS Code of Practice on Disciplinary and Grievance Procedures. She also did not have an opportunity to appeal pursuant to paragraph 26. I have had regard to the size and administrative resources of the Respondent. This is a small employer with limited resources. However giving employees an opportunity to have a say in response to any misconduct allegations is a basic tenet of industrial relations fairness and a means of gathering evidence via an investigation. The Claimant was not given this opportunity and so the investigation was also inadequate in relation to the test in **BHS v Burchell**.
53. Applying the 'band of reasonable responses' test I find that a reasonable employer would have held a meeting with the employee to get their response to the allegations of insubordination and misconduct before making a decision. I also find that an employer in those circumstances acting reasonably would have engaged someone who was not directly involved in the dispute – perhaps a trustee – as someone to whom the employee could appeal so that there was an inbuilt review process involving someone who may have been able to approach the situation with a more open mind.
54. I also find that dismissal was not within the band of reasonable responses in the circumstances as a reasonable employer would most likely have given its employee a final written warning with an opportunity to improve. The Respondent says that it did warn the Claimant but the note was akin to a threat of dismissal and not reasonably comprehensible by an employee as a formal written warning.

55. In my conclusion therefore the dismissal was unfair under s.98 Employment Rights Act 1996.

### **Contributory Fault, 'Polkey' and ACAS Uplift**

56. Having heard submissions on the above points I find that there was a deterioration in the relationship between the parties. Whilst there was evidence of a breakdown in the relationship from 2018, in my finding the principal reason was the reduction of hours. By way of her conduct the Claimant had agreed to continue working on the reduced number of hours but she was not satisfied with the arrangements.

57. In my finding the Claimant's conduct in the way that she wrote messages to the Respondent was in fact insubordinate and came across as rude or impolite. The difficulty in this case was that although the Respondent had attempted to give her some sort of warning about her behaviour it had not done this in the way that would be readily understandable as a warning by employees and there had been no process behind it. The Respondent saying that it was thinking about giving the Claimant her notice was not reasonably understandable as a warning on the grounds of conduct. The Claimant did not receive a letter explaining what the conduct was, what steps she needed to take to address that behaviour and what the consequences would be if her behaviour did not change.

58. However given that there was some evident insubordination by way of the comments written in the handover book I do find that the Claimant did contribute towards her dismissal and that this was to the extent of 50%.

59. In the circumstances given the deteriorating relationship between the Claimant and the Reverend Summerfield I also find that the Respondent, acting reasonably, would have fairly dismissed the Claimant for some other substantial reason (relationship breakdown) within the next three months and therefore any ongoing losses of earnings are limited to that period of time.

60. As for breach of the ACAS Code of Practice I find that there was a wholesale breach of the Code of Practice by the Respondent and that the uplift should reflect the maximum of 25%.

### **Wrongful Dismissal**

61. On the basis that the Claimant's conduct did not amount to gross misconduct I find that she was wrongfully dismissed.

### **Failure to pay the minimum wage**

62. The Claimant was initially contracted to work four eight-hour days a week, which was reduced to five-hour days after the COVID pandemic affected the Respondent's capacity to take dogs on to the boarding kennels. The Claimant would fill in timesheets every week which were then submitted to the Respondent's accountant and the hours calculated so that the weekly gross

and net pay calculations could be arrived at. The Claimant claims that on 29<sup>th</sup> April 2020 she was not paid the minimum wage. In my finding she was not required to work hours additional to those that had been required of her. Her hours were reduced on Monday 4<sup>th</sup> May. There is nothing on her payslips for the relevant period at p.121 to p.122 which shows that she was paid anything below the national minimum wage and I therefore dismiss this claim.

## **Pension Contributions**

63. The Claimant says that in October 2017 the Respondent presented employees with an opportunity to join the autoenrollment pension scheme, namely the NEST scheme. The Claimant says however that the Respondent effectively placed a barrier to staff joining the pension fund as it was put to them that if they wished to join they would have to pay both the employer's and employee's contributions. The Respondent denies this and states that the Claimant refused to join as she was on a basic wage so did not want any money coming out of her wages. The Claimant's evidence was corroborated by Charlotte Evans who stated that she was also told by Reverend Summerfield that if she wished to join the scheme she would have to pay both employee's and employer's contributions. On that basis the employees opted out.
64. Given the charity's limited resources and also given that there has been limited compliance by the Respondent with the requirement to provide employees with basic employment rights such as particulars of employment, I find that it is more likely than not that the Respondent did say that employees would have to fund the employer's pension contributions themselves. In effect that amounts to a refusal to pay employer's pension contributions. It is not a voluntary opt out by an employee. Arrangements made by employees and employers to prevent the operation of the scheme are unenforceable.
65. Under the Pension Act 2008 employers who employ employees who are between 22 and state pension age and who earn more than £192 a week have a duty to auto enrol employees into a pension scheme. In my finding it was an implied term of the contract of employment that the Claimant was to be paid her employer's contributions at 3 per cent per annum. Under s.13(3) the Respondent ought to have paid the minimum 3 per cent contributions on top of the Claimant's wage in her payslip. Having regard to the Deduction from Wages (Limitation) Regulations 2014 the Claimant is limited to two years' backdated payment from the date of the ET1.

---

Employment Judge A Frazer  
Dated: 24<sup>th</sup> May 2022

JUDGMENT REASONS SENT TO THE PARTIES ON 25 May 2022

FOR THE SECRETARY OF EMPLOYMENT  
TRIBUNALS Mr N Roche