



EMPLOYMENT TRIBUNALS

Claimant: David Perry

Respondent: Millstream Day Centre

Heard at: Reading (by video)

On: 12th, 13th and 14th July 2022

Before: Employment Judge Cline (sitting alone)

Representation

Claimant: In-person; assisted by Mrs Sandra Griffiths

Respondent: Mr Tufail Hussain (Consultant, Croner Group)

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not well-founded and is therefore dismissed.
2. The Claimant's claim for breach of contract is not well-founded and is therefore dismissed.
3. The Claimant's claim for unlawful deduction of wages is not well-founded and is therefore dismissed.

REASONS

Introduction

1. The Claimant, Mr David Perry, was employed by the Respondent charity as the part-time manager of a day centre for elderly and disabled people from 1st July 2013 until his summary dismissal, which took effect on 17th April 2019, the day after a letter was

sent notifying him of his summary dismissal on grounds of gross misconduct. It is of some relevance that, prior to this period of employment, the Claimant had worked for the Respondent as an unpaid volunteer and fundraiser for 40 years. He was 62 years of age at the date of dismissal.

2. The Claimant claims that his dismissal was unfair within Section 98 of the Employment Rights Act 1996 (ERA) and also that his summary dismissal was wrongful and in breach of contract as he was entitled to 5 weeks' notice. The Respondent contests the claims and says that the Claimant was fairly dismissed for gross misconduct and that this also entitled them to dismiss him summarily.
3. The Claimant was previously represented by solicitors during the initial stages of the proceedings but appeared in person at the final hearing. He was assisted (but not represented) by his friend, Mrs Sandra Griffiths. The Respondent was represented by Mr Tufail Husain of Croner Group. Sworn evidence was taken from the Claimant and from 5 witnesses on behalf of the Respondent: Mrs Geraldine Gault, Mr Robin Wadley, Mr Christopher Clarke, Mr Andrew Brooker and Mr Nicholas Duncan, all of whom were trustees of the Respondent charity at the relevant time. As well as the witness statements of all the witnesses, I considered a 396-page bundle of evidence that had been agreed between the parties. References to documents in this bundle will be by way of page numbers in square brackets, for example [123] or [4-7]. I made it clear to the parties at the outset that I may not necessarily have considered all the documentation put before the Tribunal and, as such, it was incumbent upon them to refer me to any specific documentation that they wished me to consider.

Issues for the Tribunal to Decide

4. Prior to the commencement of the hearing, I was provided with a draft list of issues by Mr Hussain on behalf of the Respondent. The list appeared to me to reflect appropriately the issues that would require determination and, as Mr Perry was not legally represented, I took some time to take him through them and to confirm his agreement, which he gave. As such, I adopted the relevant parts of the draft list in relation to the substantive elements of this claim as follows:

Unfair Dismissal

- 4.1. Was there a potentially fair reason for the dismissal?
- 4.2. In the event that the Tribunal finds that the fair reason was gross misconduct, did the Respondent act reasonably in treating that reason as sufficient to justify dismissing the Claimant?
 - a. Did the Respondent believe the Claimant to be guilty of the misconduct

alleged?

b. Did the Respondent have reasonable grounds for believing the Claimant was guilty of that misconduct?

c. At the time the Respondent held that belief, had it carried out as much investigation as was reasonable?

4.3. Did the Respondent act within the band of reasonable responses in treating the misconduct as a sufficient reason to dismiss?

Wrongful Dismissal / Breach of Contract

4.4. Was the Claimant dismissed in circumstances which breached his contract of employment? Specifically, was the Claimant dismissed in circumstances entitling the Respondent to terminate the contract without notice?

Deduction from Wages

4.5. Did the Claimant suffer any deduction(s) from wages properly payable to him?
The Claimant contends that he has not been paid in lieu of 14.24 hours accrued but untaken holiday entitlement at the effective date of termination.

4.6. If so, was any deduction:

- a. required or authorised by a statutory or contractual provision;
- b. previously consented to by the Claimant; or
- c. an excepted deduction?

Chronology / Findings of Fact

5. The relevant findings of fact follow below. Much of it is uncontentious but is important as context for later events. Where I have had to resolve any conflict of evidence, I will indicate how I have done so at the material point and have kept in mind throughout that any party who has the burden of proving a specific fact must do so on the balance of probabilities. I will not refer to page numbers in relation to every factual element, especially where it is uncontentious, but I have taken any such facts solely from the written and / or oral evidence of the parties.

6. As noted above, Mr Perry worked as an unpaid volunteer for the Respondent for many years prior to being formally employed by them in 2013, when he applied for the position of centre manager, which had recently become vacant. There was a change in trustees in October 2014, which was around the time that the Respondent's status had been changed to one of a charitable incorporated organisation and, as such, a

somewhat more formalised process of management and administration was seen by the trustees as being necessary.

7. One of the relevant changes that this amendment of processes brought about was that, as explained at paragraph 13 of Geraldine Gault's witness statement, "[i]t was decided to introduce a simple appraisal system, suited to a small charity, with some simple guidance on how to get the most out of appraisals". I highlight this point specifically because it was a clear feature of the case that Mr Perry and the trustees had, and still appear to have, very different perspectives on the need for these changes and the impact that they had on Mr Perry's role. Subsequent events and the parties' reactions to those events should, in my judgment, be seen in that context. One important example of this is the appraisal process and the background to it, which appears to have set the scene for what was to come.

8. Christopher Clarke was the chair of trustees for the year July 2014 to July 2015, during which time Mrs Gault was his vice-chair (and subsequently took over as chair). Mr Clarke's witness statement explains that he had known Mr Perry for many years and, when he took over as chair, he became Mr Perry's line manager, something which, initially, was welcomed by Mr Perry as providing more involvement than Mr Clarke's predecessor. Mr Clarke continues at paragraphs 8 to 11 of his statement:

However, it soon became clear that the Claimant is not easy to manage. The Claimant would prefer to have absolute control. In the main, he would pay lip service to requests from Trustees to make changes that we believe to be in the best interests of the centre and its members... The Claimant would generally agree to suggestions during face to face discussions, however, he would then fail to deliver on them on the basis that he was the manager and Trustees should not be involved... Consequently our relationship became somewhat strained as I felt that the Claimant was not prepared to be managed in the way that I deemed to be appropriate. These issues were addressed in a meeting with the Claimant on 30th March 2015.

9. When cross-examining Mr Clarke, Mr Perry only asked a small number of questions. The main one was to query what changes were expected of him during that first year, in response to which Mr Clarke explained that his feeling at the time was that Mr Perry did not feel comfortable, as someone who had been self-employed in his main working life (having worked as a plumber for many years), with other people making decisions and did not always deliver what was asked. For example, Mr Clarke said, Mr Perry was not comfortable with the use of a noticeboard being the main schedule for

volunteers and it not always being up-to-date such that, when Mr Perry was not present and someone had to be called in as relief at the last minute, it was not always clear what had been arranged.

10. Mr Perry's approach to this issue was such that it was unclear whether or not he was specifically challenging Mr Clarke's characterisation of their relationship and Mr Perry's alleged failure to carry out his role as required. Whilst it was clear from both Mr Perry's written and oral evidence that he rejected this characterisation in a general sense, when it came to specific allegations such as that above, it was often difficult to discern Mr Perry's position save for frequent assertions that "that simply isn't true" or the like. I do not say this as a criticism of Mr Perry, who ably represented himself with the assistance of Mrs Griffiths, but as an illustration of the difficulty faced when making factual findings in this matter.
11. In making this observation, I also note that Mr Perry was clearly rather impeded by the passage of time and by the absence of any written record of his own. It will be seen below that, as a result of the difficulties the trustees said they were experiencing in managing him, a number of them, most notably Robin Wadley, decided to make notes of all relevant meetings and conversations with Mr Perry during the relevant period; indeed, a large proportion of the evidence bundle was made up of these notes, which were said by each of the authors to have been made contemporaneously. By contrast, Mr Perry simply relied upon his recollection of such meetings and conversations, which of course occurred several years ago. By way of example, Mr Wadley produced a note of a meeting with Mr Perry that took place across two days, 11th and 13th June 2018; it is dated 14th June 2018 at the bottom [115]. According to the note, several issues were discussed and, in cross-examination, Mr Perry agreed that such discussions did indeed take place. Amongst other things, the note recorded that their relationship was discussed, that Mr Wadley felt that his role was often seen by Mr Perry as "interference" and that Mr Perry had said that he did not feel valued for the extra work that he did and that he had been doing his job satisfactorily for 5 years so saw no need to make changes and concentrate on administrative details. When asked if he agreed with the note, Mr Perry responded "no, not entirely". When I asked him to say which elements he accepted and which he did not, he replied that it was difficult to say as it was 4 years ago and he was unable to recall what was said word-for-word. He agreed that he had been given the opportunity to consider the note as part of the disclosure but agreed that he was unable to confirm if it was an accurate record or not.
12. When making findings of fact in relation to contentious issues in this matter, I was often faced with a scenario whereby Mr Perry clearly did not accept what was being asserted

(and what was often recorded in a contemporaneous note) but was equally unable to articulate what he did or did not dispute and was unable to provide a clear alternative factual basis. He was also, on at least one occasion, unable to recall what documentation he had seen during the disclosure process. Specifically, when being cross-examined in relation to the appraisal process, Mr Perry insisted that he had only seen this document [75-83] for the first time about 6 months ago but, when I pointed out to him that it was referred to in his witness statement dated April 2020, he became rather confused and said that he had been experiencing health problems. This of course does not apply to the entirety of Mr Perry's evidence but was a very important point to have in mind throughout in relation to its overall cogency on many issues.

13. Returning to the appraisal system that was introduced in early 2015, it was clear, even from his own evidence, that Mr Perry did not see this as a positive development. Mrs Gault's note of the appraisal, which took place on 2nd March 2016 [75-83] records Mr Perry as saying that he felt the appraisal process was "ridiculous" for a small part-time role and was a waste of his time. In cross-examination, Mr Perry denied that the first 3 sentences of the meeting record [79] were accurate, saying that he did not recall it. However, when asked if he did think that it was a ridiculous process, he said that he was desperate to have training and had never had an appraisal in his working life and did not say that it was ridiculous but might have said that it was a little unnecessary for this role, although he "might be wrong about that". When asked if he accepted that he said that it was a waste of time, he replied that, for the same reasons, he would have thought that it was but cannot remember if he said that or not. He then did accept that he said that an appraisal was unnecessary.
14. Mr Perry's feelings in relation to how he was being managed are made clear at paragraph 3 of his witness statement:

When the Trustees changed in Autumn 2014, I felt that I continued to be supportive although I began to feel that I was no longer part of a team but more like a them and me situation. It is submitted by the respondent that I did not like to be managed and did not respect their authority however, I was constantly under the impression that I did not fit into the mould they wished. I often had conflicting instructions from different trustees.

15. At paragraph 4 of his statement, Mr Perry says that, in his opinion, the trustees "set the tone for the working relationship" when the issue of his appraisal came about in February 2016 and that he was given the impression that this was simply an off-the-record discussion and that he never received a copy of the report. He says that "it is

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not a credible report, it is not reflective of my recollection of the meeting and I was never asked to record my views of the meeting or asked to sign that it was a true record". When cross-examining Mrs Gault, the author of the record, Mr Perry asked her if there had been a form provided for him to agree or disagree with what was said during the appraisal and she said there was and that it was given to him; his response was that "that simply isn't true" and no further questions were asked on this point. In those circumstances, I find that the record of the appraisal meeting is an accurate reflection of what was said. Mrs Gault notes at paragraph 17 of her witness statement that a copy of the report was sent to the trustees but not to Mr Perry as the ratings were not agreed with him and were simply her views of his performance.

16. The outcome of the appraisal process is important for two reasons. First, it highlights the tenor of the trustees' view at that juncture that, whilst Mr Perry was clearly good at the more practical day-to-day aspects of his role and "has the members' interests at heart", his organisation, management skills and teamwork were somewhat lacking as his role of manager "is more than a tick-list of tasks" and there "needs to be a better paper trail and not so much information carried in [his] head", with one example being the rotas for drivers and other volunteers. His management of the volunteers and of the cook (the only other paid employee) was seen as being below the required standard, for example with his "casual approach to annual leave" for the cook and a lack of proper induction and regular monitoring of volunteers. There is a notable comment in the "initiative" section which observes that Mr Perry "can be inflexible when the committee requests change" and the "flexibility" section notes that, when asked to do something, he could take a moment to "absorb the request... and not putting up immediate barriers as to why he thinks it won't work". It is also noted that Mr Perry sometimes took short periods of time off work without authorisation (resulting in there being no manager or first-aider on-site) and also that he "currently doesn't work well with the Committee". One comment observes that it "would be good to see a more positive approach from David to committee requests and less resistance to necessary change".
17. The above is, with hindsight, something of an indication of what was to follow and it will be seen that several of the issues raised in March 2016 featured in the lead-up to Mr Perry's dismissal.
18. The second aspect of the appraisal's importance is what happened after it was discussed at a committee meeting. At paragraph 18 of her witness statement dated 30th June 2020, Mrs Gault says as follows:

On 12th April 2016, during an Operations Committee meeting, I was asked

by a committee member how the appraisal had gone. I said that the Claimant had persisted with his view (common knowledge) that it was a waste of time, that no boxes had been ticked, and it was a shame as it was really just his admin that let him down. I did not reveal anything that he and I had discussed and certainly nothing of a confidential nature.

19. There was a meeting between two of the trustees (Mr Powell and Mr Wadley), Mr Perry and Mrs Griffiths (presumably present to assist Mr Perry) on 25th May 2016. A report of this meeting was drawn up [91]; it begins by noting that “[t]he purpose of the meeting was to discuss the issues raised following the disagreement over the confidentiality of appraisal information with David and his line manager, Geraldine Gault involving him raising his voice in a public area at the day Centre”. It goes on to note that this “was not a formal verbal warning as written notification had not been given prior to the meeting” and says that a “wide ranging discussion took place in respect of several issues concerning the appraisal it’s [sic] conduct and the release of information and the inappropriate raising of his voice in a public area at the Centre and Centre administration”. The conclusion of the discussion regarding the appraisal was that the “differing accounts of events” from Mrs Gault and Mr Perry “could not be reconciled”. It was also emphasised that “an overview of the appraisal, not confidential detailed conversations needed to be made known to the trustees in order that the management team are aware of general strengths and any shortcomings”. However, given that Mr Perry had complained that such discussions had taken place in his absence at a meeting normally attended by him, “it was agreed that these notes should be struck from the record”.
20. This incident is highlighted for three reasons. First, it is yet another example of the clear tensions that were building between Mr Perry and the trustees. Second, a significant part of Mr Perry’s cross-examination of Mrs Gault focussed on this issue and Mrs Gault’s position remained that she did not believe that she had said anything that broke confidentiality and had simply noted that she was disappointed with Mr Perry’s response to the appraisal. Third, this incident was one of the matters referred to in the formal grievance raised by Mr Perry in December 2018, over 2 years later [207], which coincided with the disciplinary process which ultimately led to Mr Perry’s summary dismissal.
21. In the period that followed, Mrs Gault describes at paragraph 23 of her witness statement a deterioration in her relationship with Mr Perry such that she “kept [her] dealings with him for the remainder of 2016 and much of 2017 at a minimal but professional level” and “never knew what to expect when meeting him” as “he could be flippant, downright rude, or fly off the handle with the least provocation”. She

continues at paragraph 24 that:

In all my years as a manager, I had never dealt with such an intransigent and unpredictable employee. Every request put to him for simple, small changes or improvements was met with total resistance and argument. All attempts to help him, such as how to send attachments by email or create email folders to make his life easier, were dismissed out of hand. Anything that was not spelled out in his job description was challenged, which is why his most recent job description [p. 133-134] is quite so comprehensive.

22. None of Mrs Gault's comments above were challenged by Mr Perry and, as such, I must find that they are an accurate account of the parties' relationship during that period. Mrs Gault and Mr Wadley told me in evidence that it is for this reason that they both started to keep notes of all meetings they had with Mr Perry, the purpose of such meetings being both to attempt to provide support for him in the difficulties he was clearly facing in fulfilling his job description and to ensure that, following advice that they had received, they had a clear record of the discussions that had taken place in that regard.
23. In March 2018, Mr Perry returned to work after a period away for medical reasons and the minutes of the back-to-work meeting on 16th March 2018 were provided [104], the contents of which did not appear to be contested by Mr Perry during the course of the hearing. During that meeting, it was made clear that there were 3 areas of Mr Perry's job performance that would be "monitored" which were: communication (including regarding the rotas and a weekly email), rotas and drivers (including organising and planning ahead and keeping notes in the day book). Also in March 2018, at Mr Perry's request, he was issued with a detailed job description [102-103], which set out his specific responsibilities in relation to members, staff and volunteers, administration, finance, centre hire and premises. Interestingly, when Mr Perry was being cross-examined in relation to this document, he specifically asked if he could emphasise that ensuring the welfare of members whilst on the premises was "number one in the list"; this reflected a fundamental theme of Mr Perry's position, namely that he felt that his primary role was to look after members and, as an experienced volunteer, he was well-placed to decide how to go about doing that.
24. There then followed a series of meetings with Mr Perry in March, April, May, June, July and August of 2018 [107-126]; these will not be set out in detail but the notes show that several issues in relation to Mr Perry's performance were discussed repeatedly, such including the planning of drivers' and volunteers' rotas, the making of the relevant

diary entries and the provision of a weekly email summarising relevant events and issues. It is clear from these notes that Mr Perry was offered assistance with how to go about improving his performance in relation to the use of computers and the drawing-up of rotas. It is also clear from the notes of the meeting on 11th and 13th June 2018 [115] that Mr Wadley had the impression that Mr Perry found his involvement to be more like “interference” and that Mr Perry’s position was that he did not feel valued for the extra things that he does, has been doing things satisfactorily for 5 years and sees no need to make changes and concentrate on details of administration. Similarly, during the meeting with Mr Wadley on 18th June 2018 [116], Mr Perry “expressed concern that his job was to interact with the members not to be “stuck” in the office doing lots of admin”.

25. In a letter from Mr Wadley to Mr Perry dated 13th August 2018 [127], Mr Wadley says that, following advice from HR support, he is “drawing a line under the past” and taking “informal action” as they have been meeting “for some time and this has had virtually no impact on your behaviour, you have made little sustained attempt in several key areas where improvement is required”. Mr Wadley continues: “If you do not act in the best interests of the charity then I will proceed with the disciplinary process. Also your behaviour is not acceptable and if it continues gives me no choice but to start down the formal disciplinary route”. Mr Wadley says that he is “giving [Mr Perry] reasonable management instructions” in relation to planning the volunteers’ rotas a month in advance, planning the drivers’ a week in advance and his responsibility for the cleanliness of the day centre. When cross-examined about this letter, Mr Perry confirmed that he had received it, that he was aware that this was his last chance before formal action was taken and that he understood the seriousness that Mr Wadley was trying to convey to him. In his oral evidence, Mr Perry said that he did not have the time to plan the volunteers’ rota a month in advance and “probably did say that” to Mr Wadley but was unable to say when, which he said was frustrating and he should have recorded it. In response to the suggestion that his line manager was simply giving him instructions, Mr Perry said that he was “prioritising people’s safety over what [he] was being told to do”, which he asserted, when asked if that was a deliberate decision, was “the decision of any normal person”.

26. Most telling perhaps was Mr Perry’s response to cross-examination in relation to the meeting on 18th June 2018 [116], when he was told by Mr Wadley what he should be prioritising. Mr Perry simply replied that his view was that it was not a reasonable management request. Mr Perry was asked a number of times in cross-examination whether he had actually told the trustees that he felt that he was being given too much work to do and, in response, he said variously that he thought it was “fairly evident”

and “common sense” that he was overworked but he did not raise the issue because he felt that it would have been “more inflammatory to say that”.

27. Although Mr Perry had been provided with a detailed job description in March 2018 [102], he said at a meeting with the trustees on 31st August 2018 [129] that he was still unclear which responsibilities lay with him and which with the trustees. He also requested a review of his pay as he believed that there was an inappropriate differential between his pay and that of the cook. Perhaps most relevant, Mr Perry also said that he was unhappy with his current level of supervision by Mr Wadley, who comes in twice a week, which is too often. By way of a letter dated 11th September 2018 to Mr Perry [131], Mrs Gault responded to these concerns on behalf of the trustees, agreeing to an adjustment in his salary and noting that he has a job description [133] that lists “but not exhaustively” his roles and responsibilities and that the level of supervision is in line with his line manager’s confidence in his ability to carry out basic tasks effectively and may be reduced when this is demonstrated satisfactorily. It was also noted that the trustees are entitled to visit the centre whenever they wish and that this should “not be confused with supervision”.
28. By way of a letter dated 22nd October 2018 to Mr Perry [145], Mr Wadley notified him that he was initiating formal disciplinary action and a formal investigation would take place. The issues were set out as being “insubordination” and a failure to comply with reasonable management instructions in respect of planning drivers and the volunteers’ rota and related diary entries.
29. Mr Perry’s letter in response, dated 24th October [146] simply states: “This is just to inform you that from now on and only when we are alone together, I will be recording our conversations. If you chose not for this to happen then I will not take part in any conversation”. When asked in cross-examination why he had responded in this way, Mr Perry said that it was because of the way that Mr Wadley was talking to him and the “huge amount of stress” that he was putting him under but did not provide any cogent evidence in relation to either of these assertions. I note that it is not until he made his formal grievance on 9th December 2018 [207] that Mr Perry appears to have raised any of these issues with the trustees. In this letter, he refers to Mr Wadley’s “harassment” of him by “insisting on time wasting weekly supervision meetings”.
30. The grievance process initiated by Mr Perry took its course and I have considered the various stages documented by the Respondent including the invitation to a grievance hearing dated 12th December 2018 [225]; Mr Wadley’s response to the grievance dated 13th December [226-233]; the dismissal of the grievance by Mr Duncan communicated by a letter dated 3rd January 2019 [234]; Mr Perry’s appeal against this

decision [235]; the Croner report into the grievance appeal [244]; and the outcome letter dated 12th February 2019 [262] which upheld only two elements. The first grievance that was upheld related to the placing of Mr Perry's personal belongings in the staff toilet (although it was noted that employees should not be leaving personal items at work as there is nowhere for them to be stored). The second grievance that was upheld related to Mr Perry's complaint that he was being given too much work to do since his return to work and the difficulty created by his dyslexia in this regard. In response to this, the grievance was partially upheld on the grounds that the trustees will take steps to reduce the impact of Mr Perry's dyslexia (which had not been reported prior to the grievance as impacting on his ability to do his job) but there was deemed to be no evidence that the tasks required are unreasonable or excessive. I have not provided more detail of the grievance process because, aside from being relevant background to the context of the disciplinary process, I do not find that it has any relevance to Mr Perry's claim against the Respondent. First, I note that Mr Perry made his formal grievance 2 months after the disciplinary process against him was commenced and refers to matters that took place several months (and in some instances years) previously. Second, I note that Mr Perry has not set out, either in his ET1 claim form and the attached particulars of complaint or during the course of the hearing, what relevance this process has to his claim. Third, I note that the Respondent did in fact pause the disciplinary process so that the grievance process could be dealt with separately and the two did not overlap. As such, I do not intend to consider this element of the background any further.

31. Returning to the disciplinary process, a disciplinary investigation meeting was held across 4 dates in November and December 2018 and February 2019. Mr Duncan's notes of this meeting [149] make clear that they should be read alongside the Claimant's report and the diary provided by Mr Wadley, both of which I have considered. Alongside this part of the process, Mr Perry was suspended (with pay) by way of a letter from Mr Wadley dated 29th November 2018 [206]. The reason for this suspension was said to be that, at the meeting with Mr Duncan on 28th November, Mr Perry had produced letters and a petition of support from centre members, which was deemed by the trustees to be a breach of confidentiality by discussing information relating to the running of the centre with members, staff and volunteers. When cross-examined on this point, Mr Perry accepted that he did initiate the letters and petition, asserting that, at this point, he had not been told that the procedure required him not to do this and that he simply wanted to show the trustees that he was doing a good job. However, the letter of 28th November itself states that, while suspended, Mr Perry "shall not enter Company premises nor should you make contact with any member of [centre] staff, members or volunteers" without Mr Wadley's permission. It continues:

“Failure to comply with this instruction will be regarded as an act of Gross Misconduct and may result in disciplinary action”. Mr Perry accepted under cross-examination that he had received this letter and, as such, I find that he was aware that he had been instructed not to contact the people named and that doing so could be considered an act of gross misconduct.

32. The report by Mr Duncan following his investigation is dated 18th February 2019 [265] and I consider it to have been a reasonable and proportionate investigation which not only allowed Mr Perry to respond in writing to each allegation against him but gave him a 2-week extension to do so when he requested one. When making this finding, I note that Mr Perry does not appear to have challenged the reasonableness of the investigation process in any cogent manner. Mr Duncan concludes in his report that Mr Perry “appears to show an unwillingness to engage with the way that the Centre is now being administered and appears to have difficulty in understanding how to deal with being managed as this is a situation that he has not been particularly used to in the past”. He then cites several extracts from Mr Perry’s own response to the investigation process that support this finding. As such, he provides the opinion that Mr Perry “does appear to have difficulty in dealing with reasonable Management requests and his attitude to management would appear to be insubordinate. I therefore find both issues to be valid.” Formal action is recommended by Mr Duncan.
33. By way of a letter to Mr Perry dated 8th March 2019 [271], he was notified that a formal disciplinary hearing would take place on 15th March which would deal with the following allegations:
- a. That, between mid-August 2018 and November 2018, he refused to carry out reasonable management instructions, causing his line manager to start disciplinary action for subordination;
 - b. That, following notification of the disciplinary action, in November 2018, he divulged sensitive and confidential information to members regarding that disciplinary action, causing a great deal of unnecessary concern among members and their families;
 - c. That, on 29th November 2018, he failed to follow a reasonable management instruction set out in the suspension letter when he made contact with staff, members or volunteers without permission from his line manager; and
 - d. That, on 29th November 2018, he took part in activities that caused the charity to lose faith in his integrity in that he encouraged a member to retrieve an envelope marked “confidential” from the filing cabinet in the centre office which contained his contract and job description.
34. The disciplinary hearing took place on 15th March 2019 and was chaired by an external

consultant from Croner. The resulting report is dated 2nd April 2019 and runs to some 24 pages [275]; I have considered it carefully and will not repeat the contents in detail. A considerable quantity of paperwork was taken as part of the disciplinary procedure and Mr Perry was given appropriate opportunity to respond. In relation to each of the allegations, the consultant made the following findings:

- a. Although there was “substantial unsupported evidence” in terms of Mr Wadley’s diary and photographs of incomplete rotas, this issue should have been managed by way of a performance management or PIP (performance improvement plan) process; had it been managed in this way, it would have been open to the Respondent to find gross misconduct on the basis that Mr Perry’s persistent failure to comply with Mr Wadley’s instructions affected the operations of the centre and therefore could bring the service to members into disrepute. However, as this process had not been followed, this allegation was partially upheld as serious misconduct and not as gross misconduct.
- b. Although Mr Perry was not informed prior to his suspension letter of 29th November 2018 that all matters relating to his disciplinary process were confidential, such issues were covered by the “confidentiality” section of the employee handbook which had been delivered to Mr Perry on 14th September 2018 along with his new statement of employment and job description. As such, it was reasonable to expect Mr Perry to know, as the only paid manager, that he was bound by such a requirement and he did not deny having such discussions with staff, volunteers and members. The allegation was upheld as gross misconduct.
- c. The sole evidence regarding comments made by Mr Perry to a third party regarding his disciplinary process (to the effect that Mr Wadley had presented him with a 36-page document of criticism and thinks that he is the manager but is not as I am the manager and we need to get rid of him at a public meeting) came from Estelle Cross, who was Mr Wadley’s daughter. Mr Perry denied that this conversation ever took place. The consultant found that, due to the relationship between Estelle Cross and Mr Wadley, “it would not be recommend [sic] to pursue this allegation as it could be deemed biased”. This allegation was therefore not upheld.
- d. As part of the investigation into this allegation, Julia Minnal (now deceased) had been spoken to and she confirmed that she had discussed Mr Perry’s disciplinary process with him after he received the suspension letter of 29th November 2018. She also confirmed that she took the file from the centre office after speaking to Mr Perry, with Mr Perry admitting that he had told her that he needed a copy of his employment contract from the office. On

the basis that having such a discussion with Ms Minnal and either intentionally or implicitly suggesting that she should take the file for him would cause the Respondent to lose faith in Mr Perry's integrity, this allegation was upheld as gross misconduct.

35. The consultant noted that the company handbook states that any fundamental breach of contract that "irrevocably destroys the trust and confidence in the employee will result in a gross misconduct allegation being made against them". He also noted that the handbook goes on to state that "gross misconduct offences *will* result in dismissal without notice" (my emphasis). Mr Perry made a well-founded argument that this was incorrect as the correct version of the handbook states that gross misconduct "may" result in dismissal without notice. It was accepted on behalf of the Respondent during the hearing that the wrong handbook had been provided to the Croner consultant. However, I asked Mrs Gault several questions about this and her clear evidence, which I accept, was that there had been a meeting of the trustees to discuss the consultant's report and, although he had referred to the wrong version of the handbook, that had not impacted their decision to dismiss as they had a lengthy discussion about whether to dismiss Mr Perry without notice or not. She also made it clear that the trustees viewed the consultant's report as a collation of evidence together with recommendations which they did not have to follow and they were well aware that the final decision was theirs. On that basis, whilst I do find that there was an error in the consultant's application of the handbook in his recommendations, I also accept Mrs Gault's evidence that the trustees did not feel bound by this error and that it therefore did not in any way detract from the independence of their ultimate decision to dismiss Mr Perry summarily. This finding is consistent with the notes of the meeting that took place on 4th April 2019 [300], which were not challenged by Mr Perry, who also did not challenge Mrs Gault's evidence on this point in cross-examination when given the opportunity to do so.
36. Having decided to dismiss Mr Perry, a letter dated 16th April 2019 was sent to him [315]. This letter set out the consultant's conclusions as summarised above and recorded the trustees' unanimous acceptance of the findings and the recommendation to dismiss Mr Perry summarily for gross misconduct. It added that Mr Perry's actions had "caused distress to members, volunteers and Trustees, brought the Centre into disrepute, and caused Trustees to lose faith in your integrity".
37. As he was entitled to do, Mr Perry appealed against his dismissal by way of a letter dated 26th April 2019 [321]. His grounds of appeal [322] can be summarised as follows:
- a. The employer failed to follow continuously and reasonably all of its

published principles in respect of the disciplinary procedure;

- b. The consultant failed to consider the line manager's "history of menacing behaviour" prior to initiating formal disciplinary proceedings and "his motivation for doing so";
- c. There is no credible evidence in respect of allegation 4 (encouraging a centre member to take a confidential file from the office);
- d. The findings of fact are incomplete and it is not possible to identify the process which the consultant followed; and
- e. The trustees have relied entirely upon the consultant's recommendations and the process is therefore flawed.

38. An appeal hearing was held on 13th May 2019 and I have considered the notes of that meeting [332]. It seems clear from those notes, the accuracy of which were not challenged by Mr Perry, that he had ample opportunity to outline his criticisms of the disciplinary process as per his notice of appeal. The resulting report from the Croner consultant (a second independent individual) is dated 21st May 2019 [345] and all 5 allegations are dismissed, resulting in the appeal as a whole being dismissed. I will not deal with this in any further detail herein as it was not clear to me from his claim form or any submissions made by him during the hearing that Mr Perry was in fact making any specific criticisms of the appeal process save for emphasising that he was not satisfied with its outcome. In the usual way, Mr Perry was informed by way of a letter dated 4th June 2019 [357] that his appeal had been dismissed for the reasons set out in the Croner report.

Relevant Law and Conclusions: Unfair Dismissal

39. I referred at paragraph 4 above to the issues that I must determine in deciding whether the claim for unfair dismissal succeeds. A short summary of the applicable legal principles which I have kept in mind when considering these issues is appropriate at this point.

40. Section 94 of the Employment Rights Act 1996 ("ERA") confers on the Claimant the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The Claimant must show that he was dismissed by the Respondent under section 95, but, as outlined above, in this case the Respondent does not dispute that it dismissed the Claimant within the framework of section 95(1)(a) of the ERA.

41. Section 98 of the ERA deals with the fairness of dismissals. There are two stages within Section 98. First, the Respondent must show that it had a potentially fair reason for the dismissal within Section 98(2). Second, if the Respondent shows that it had a

potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason. In this case it is not in dispute that the Respondent dismissed the Claimant because it believed he was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The Respondent has therefore satisfied the requirements of section 98(2).

42. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the Respondent, shall depend on whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant; and shall be determined in accordance with equity and the substantial merits of the case.
43. In misconduct dismissals, there is well-established guidance for the Tribunal on fairness pursuant to Section 98(4) in the decisions in *Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827*. The Tribunal must decide whether the Respondent had a genuine belief in the Claimant's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the Claimant acted reasonably or unreasonably pursuant to Section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23 and London Ambulance Service NHS Trust v Small 2009 IRLR 563*).
44. I have set out in the chronology / findings of fact section above a detailed summary of the dismissal process and I will not repeat it here. On the basis of the evidence I heard, the documentation I considered and the submissions that were made at the conclusion of the hearing, I have little difficulty in finding that the Respondent acted reasonably in characterising Mr Perry's misconduct as gross misconduct. They were aware for several years that the relationship between Mr Perry and the trustees was becoming increasingly strained and, as such, they made the decision to take advice from an external agency and implement a system of recorded discussions during which Mr Perry's shortcomings in carrying out his tasks were set out and warnings given. There could have been no reasonable doubt on Mr Perry's part that his employer was making

it clear that he needed to comply with reasonable instructions in relation to his basic tasks and, if he did not, the inevitable outcome was a disciplinary procedure. I reject Mr Perry's argument that this was, in effect, a cynical attempt or a sham to force him into a corner and to provide putative grounds for dismissal as there is simply no evidence that I have been shown which points to this. To the contrary, I find, as asserted by Mrs Gault and Mr Wadley in particular, that they were trying to repair the relationship with their employee and to provide the help he required in order to improve his performance in the relevant areas but also to protect their own position should this not be successful. I remind myself that a finding of gross misconduct does not automatically render summary dismissal an appropriate punishment but, given the findings I have made, I find that the trustees acted reasonably in exercising their discretion to reach that decision.

45. Considering the same factual matrix, I also find that there were reasonable grounds for the trustees' conclusion that Mr Perry was guilty of misconduct and, there having been a proportionately detailed investigation that took place with no material errors, I find that the investigation and subsequent disciplinary procedure were reasonable in all the circumstances.

46. I must then go on to consider whether the Respondent's decision to dismiss the Claimant summarily on the grounds of gross misconduct was within the band or range of reasonable responses open to an employer in the circumstances. Summary dismissal is of course the harshest penalty that can be imposed by an employer on an employee found to be guilty of gross misconduct and it does not necessarily follow from a finding of gross misconduct. The Respondent expressed the view that the misconduct committed by the Claimant had fundamentally broken the relationship between employer and employee and that they had lost trust in his integrity. I recognise Mr Perry's apparent inability to accept this position and his dismay at being, as he sees it, punished for simply doing what he thought was in the best interests of the members of a centre where had worked as a volunteer for decades. However, I also accept the Respondent's position that they were unable to continue employing Mr Perry and that the relationship of trust had simply disappeared as a result of his unwillingness to follow reasonable management instructions and his intentional acts in breaching his duty of confidentiality in more than one way. I remind myself that I must not substitute my own view of Mr Perry's conduct when assessing the fairness of the dismissal and can only consider whether it was within the range of reasonable responses open to the Respondent. It was arguably a harsh response to dismiss summarily but, even given Mr Perry's lengthy and previously creditable service, I do not find that it was outside that band of responses.

47. The claim for unfair dismissal must therefore fail and is dismissed.

Relevant Law and Conclusions: Breach of Contract / Wrongful Dismissal

48. The Claimant was dismissed without notice. He brings a breach of contract claim in respect of his entitlement to 5 weeks' notice. The Respondent says that it was entitled to dismiss him without notice as a result of his gross misconduct. In contrast to the position where unfair dismissal is being considered, here I must decide on the evidence before me if the Claimant was in fact guilty of gross misconduct serious enough to justify summary dismissal.

49. The evidence underpinning the 4 allegations of gross misconduct has been summarised in some detail above and will not be repeated here. I remind myself that the Respondent must establish each allegation on the balance of probabilities for it to be accepted. Taking each allegation in turn:

- a. Refusing to carry out reasonable management instructions: There can, on the basis of the evidence I have considered, be little doubt that Mr Perry consistently failed to do what he was asked, most often by Mr Wadley, in carrying out his day-to-day tasks. Whilst I do accept that Mr Perry held a genuine belief that it was unreasonable for him to be asked to do these things, I find that it was entirely reasonable for his employer to ask him to complete rotas and communicate important issues in a satisfactory manner. Mr Perry took the view, on his own account, that he knew better how to run the centre and that he did not need to follow instructions which he did not consider would fulfil that goal. He also had the clear view that he was part of a team of equals and did not really see himself as an employee; for example, in his letter of 20th November 2018 [194], he described Mr Wadley at paragraph 5 as having a "very dictatorial manner and sees me not as a colleague but as his subordinate" and commented that "he undermines me at every opportunity and criticises virtually everything I do". That Mr Perry was frustrated with his employment position is clear; however, whatever his feelings and purported justification, I find that it was his own reluctance to swallow his pride and simply comply with his employer's repeated requests that caused matters to reach the stage where their relationship broke down irretrievably. Each individual failure to follow instructions could not be seen as gross misconduct but I find that the totality of his conduct in this regard over such a prolonged period was indeed sufficient to be regarded as such.
- b. Divulging sensitive information regarding the disciplinary process: The very fact that, within 2 weeks of the first meeting of the disciplinary investigation, Mr

Perry had produced letters of support and a petition from various individuals connected with the centre is arguably proof in itself that he must have somehow informed these people of what was happening. Mr Perry's response under cross-examination leaves me in no doubt: when asked if he initiated them, his response was simply that he had not been told not to do so. I accept that he had not yet received the suspension letter of 29th November 2018 [206] which specifically prohibits Mr Perry from contacting members without permission but I agree with the approach taken by the consultant following the disciplinary hearing, namely that the handbook given to Mr Perry only weeks before made it clear that he should not divulge such information to anyone. Once again, whilst Mr Perry's frustration is well understood, on an objective basis I find that this behaviour was, in the circumstances of the commencement of a disciplinary process, sufficiently serious as to constitute gross misconduct.

- c. Contacting members or volunteers without permission: Mr Perry admitted in cross-examination that he had contact with Ms Minnal but insists that she contacted him and not vice-versa. In any event, I find on the basis of Mr Perry's own account under cross-examination that he continued to tell her about the disciplinary process when he could simply have ended the call or said that he should not discuss it. In all the circumstances, given that this conversation took place after Mr Perry received the letter of suspension which made it clear that he was not to make contact with centre members or volunteers without permission and that this will be regarded as gross misconduct, I find that this was indeed serious misconduct. However, on the basis that I have not been referred to any direct evidence other than Mr Perry's, I find that Mr Perry was indeed contacted by Ms Minnal and, as such, this was not a sufficiently serious incident in isolation to constitute gross misconduct.
- d. Encouraging a centre member to remove a confidential file from the office: Mr Perry accepted in cross-examination that he had spoken to Ms Minnal, who said that she had heard that "there was a problem" and wanted to know if there was anything she could do to help. He said that his response was no but that he just needed his contract from the filing cabinet; she then said that she would go and get it and the next thing he knew he got a call from her saying that she had it. When pressed as to why he said at the investigation meeting on 28th November 2018 that he had asked a member to remove his personal file from the office, Mr Perry responded that she asked him where it was and he told her, he agreed that this would have had the impression that he was asking her to get it but he did not put it directly to her that he was asking her to do so. I reject the tenor of Mr Perry's position that, in the absence of not asking Ms Minnal directly to take his file he could not be guilty of gross misconduct; the

very fact that he had told her that he wanted a copy of it and that it was in the office when he should not have been discussing that with her at all supports the clear implication that he was all but asking her directly and intended for her to take the hint that this would be helpful to him. In the circumstances, I find that this did constitute gross misconduct.

50. Having found that 3 of the 4 allegations against Mr Perry which were relied upon to justify his summary dismissal did constitute gross misconduct and that one of them did not but did constitute serious misconduct, I must consider if the overall tenor of Mr Perry's established misconduct constituted gross misconduct. I do so find for the reasons that I have set out in relation to each individual finding.

51. For these reasons, I find that Mr Perry was guilty of gross misconduct and the claim for breach of contract must therefore fail and is dismissed.

Holiday Pay

52. Mr Perry's ET1 claim form purports to make a claim for unpaid holiday pay. The particulars of complaint suggest at paragraphs 31 to 34 inclusive [21] that he is owed 14.24 hours of holiday pay. The Respondent's response asserts at paragraph 34 [37] that "the Claimant has been paid all monies owing to him". The Claimant's witness statement does not touch on the issue of holiday pay at all. I asked Mr Perry to clarify the basis of this claim on at least two occasions during the course of the hearing and he was unable to do so, saying that he had not yet had the chance to look into it and that the calculation had been dealt with by his former solicitors. The Respondent's position is that all outstanding sums have been paid to Mr Perry and, as such, it was only if he should not have been dismissed without notice that any further sums may fall due. Given the absence of any cogent argument or evidence on this issue from Mr Perry and given my dismissal of the substantive claims, I have little choice but to dismiss the claim for unlawful deduction of wages (if indeed one was in fact being made at all).

Employment Judge **Cline**

Date: 6 October 2022

JUDGMENT SENT TO THE PARTIES ON

11 October 2022

FOR THE TRIBUNAL OFFICE

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