



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101527/2022

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Held in Glasgow on 12, 13, 14, 15, 16 and 21 December 2022

Employment Judge W A Meiklejohn

10 Ms Emma Iller

Claimant
In Person

15 The Urban Roots Initiative

Respondent
Represented by:
Ms C Greig -
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Employment Tribunal is that the claimant was unfairly dismissed by the respondent and the respondent is ordered to pay to the claimant the sum of **SEVEN HUNDRED AND EIGHTY-FOUR POUNDS AND FORTY PENCE (£784.40)**.

REASONS

25 1. This case came before me for a final hearing to deal with both liability and remedy. The claimant appeared in person and was supported (but not represented) by Mr J Monaghan. The respondent was represented by Ms Greig.

30 2. The sole complaint brought by the claimant was that she had been unfairly dismissed. The respondent admitted dismissal. Their primary position was that the claimant had been dismissed for some other substantial reason, being the irrevocable breakdown of trust and relationship justifying the dismissal of an employee holding the position which the claimant held. Their secondary position was that the claimant had been fairly dismissed for conduct, or
35 alternatively for capability.

Procedural history

- 3' The case had originally been listed for a final hearing between 22 and 26 August 2022. At that time the claimant was represented by Mr M Ballantyne of Thompsons, Solicitors. On 22 August 2022 Mr Thompson advised the
5 Tribunal that he had been informed by the claimant that morning that she was too unwell to attend the hearing. Employment Judge Strain postponed the hearing and the case was subsequently relisted for 12 - 16 December 2022.
4. Standard Orders had been issued including provision by the claimant of a schedule of loss to which the respondent was to respond. Both parties
10 complied and an updated schedule of loss (163-166) was provided by the claimant in July 2022.
5. EJ Strain required the claimant to produce, by 12 September 2022, medical evidence of her inability to attend the hearing on 22 August 2022. The claimant's solicitor withdrew from acting in these proceedings on 13
15 September 2022 (S4). Also on 13 September 2022, the claimant emailed the Tribunal (S5) seeking an extension of time "*to provide relevant documentation*".
6. On 14 September 2022, the respondent's solicitor asked for an Order relating to the production by the claimant of medical evidence (S6). The Order was
20 granted by EJ McManus on 15 September 2022 (S8-9) with 7 days for compliance. A strike out warning letter was sent to the claimant on 26 October 2022 (S12-13) on the basis that the claim was not being actively pursued. The claimant subsequently sent emails to the Tribunal on 9 November 2022 (S14), 17 November 2022 (S17) and 23 November 2022
25 (S23-24).
7. The respondent's solicitor emailed the Tribunal on 24 November 2022 (S25-26) seeking (a) that the rescheduled hearing on 12-16 December 2022 be discharged and replaced by a preliminary hearing on 12 December 2022 to deal with various matters including non-compliance with the Tribunal's order
30 of 15 September 2022 and (b) strike out of the claim on the grounds of (i) Rule 37(1)(b) of the Tribunal Rules 2013 - that the claimant had conducted the

proceedings in an unreasonable way by failing to attend on 22 August 2022 in the absence of any evidence of medical reasons, and (ii) Rule 37(1)(c) - that the claimant had failed to comply with a Tribunal Order.

8. The parties were advised by the Tribunal's letter of 6 December 2022 (S29-30) that these applications had been refused by EJ Robison and that the case remained listed for 12-16 December 2022.

Preliminary matters

9. Three matters were addressed at the start of the hearing -

a. The claimant's intention to call her 14 year old daughter as a witness.

The claimant set out the areas which her daughter's evidence would cover. Ms Greig questioned the relevancy of that proposed evidence.

I explained that taking evidence from a young person raised a number of issues which would normally be considered at a ground rules hearing. I decided that it was not necessary to deal with this

immediately as evidence from the claimant's daughter might not actually be required. In the event, as detailed below, the issue did not arise.

b. Witness timetable - the identities of the intended witnesses and the proposed running order was discussed.

c. Additional documents - the claimant wished to add a number of emails to the supplementary bundle. No objection was taken and the documents (S31-38) were duly added.

Evidence - oral

10. For the respondent I heard evidence from -

a. Ms C Bird

b. Ms M Evans Ewing

c. Ms E Wadsworth

All of these witnesses were either current or former trustee directors of the respondent. Ms Bird was chair of the respondent's Board at the relevant time Ms Evans Ewing (along with Ms D Cooper, another trustee director) dealt with the meeting following which termination of the claimant's employment was intimated. Ms Wadsworth dealt with the claimant's appeal

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11. In addition to her own evidence, the claimant indicated that she intended to call two witnesses as well as (possibly) her daughter. The first 4 days of the hearing were taken up with the evidence of the respondent's witnesses. The claimant was due to give her evidence on 16 December 2022. It was agreed that as her appeal document (142-157) set out much of the evidence she would wish to give, the claimant should adopt this as part of her evidence in chief.

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12. The claimant did not attend the hearing on 16 December 2022. She emailed the Tribunal that morning stating that she was unable to attend for a number of reasons which she would explain to me in due course. The hearing convened briefly in the claimant's absence and it was agreed that the case would continue on 20 December 2022. Ms Greig reserved the respondent's position on expenses.

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13. A notice of continued hearing was sent to the parties listing the case for 2 additional days on 20-21 December 2022. Unfortunately by reason of (a) a national rail strike and (b) a mechanical problem while driving to Glasgow, I was unable to reach the Tribunal on 20 December 2022. An amended notice of continued hearing was sent out listing the case for 21-22 December 2022.

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14. On 21 December 2022 the claimant emailed the Tribunal attaching her written submissions (responding to written submissions previously provided by Ms Greig). She stated that her health remained poor and that she would struggle to attend the hearing. She indicated that she would no longer be calling witnesses and requested that a decision be made in her absence. She asked

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- that she should be contacted by telephone if her presence was required to conclude the case.

15. I decided that it would be preferable if the claimant did attend if she was able to do so. I wanted to give her the opportunity to explain her reasons for non-attendance on 16 December 2022, I also wanted to clarify the claimant's statement that she would no longer be calling witnesses, ie whether that included her own evidence. I asked the clerk to contact the claimant and the outcome was that the claimant did attend, supported as previously by Mr Monaghan.

16. The claimant told me that she had not attended the hearing on 16 December 2022 because of her own poor health and also family matters. The latter related to her daughter's wellbeing. Ms Greig said that it would be normal to expect medical evidence for non-attendance on health grounds. I noted that a Statement of Fitness to Work obtained by the claimant from her GP on 15 November 2022 (S18) had expired on 15 December 2022 and I suggested it might be appropriate for the claimant to consult her GP and request a further Certificate running from 16 December 2022.

17. I then raised with the claimant the question of her own evidence. I explained briefly what I would have expected this to cover and referred again to her adopting her appeal document as part of her evidence in chief. To allow the claimant to consider her position I adjourned the hearing so that she could confer with Mr Monaghan. When the hearing resumed the claimant told me that she had decided in the best interests of her health that she did not have anything further to say at this stage. I asked the claimant to clarify if this meant that she did not propose to lead any evidence nor to make oral submissions. The claimant confirmed that was her position.

Evidence - documents

18. I had two bundles of documents. The first was a joint bundle extending to 170 pages prepared in advance of the hearing scheduled for 22-26 August 2022. The second was a supplementary bundle extending (after the addition of the claimant's additional emails) to 38 pages. I refer to both bundles above and below by page number, prefixed by "S" in the case of the supplementary bundle.

Findings in fact

19. The respondent is a private company limited by guarantee (SC362134) It is a Scottish charity registered with the Office of the Scottish Charity Regulator (OSCR) (SC040647) According to the OSCR website, the respondent's purposes are *"the advancement of education "the advancement of health", "the advancement of citizenship or community development" and "the advancement of environmental protection or improvement*
20. The respondent describes itself on its website as *"a community led environmental charity working across the Southside of Glasgow"* which empowers *"local people to make choices and lifestyle changes that are beneficial for them, their communities and the environment"*. The website describes projects undertaken by the respondents teams such as transforming derelict or unused green spaces into community gardens, changing Malls Mire woods from a fly-tipping site into a community run nature reserve and running after school clubs, holiday programmes and cookery courses/clubs.
21. The respondent has a board of directors who are also referred to as trustees or trustee directors. At the time of the events described below, the trustee directors (to whom I will hereafter refer as "trustees" or "Board members") were Ms Bird, Ms Evans Ewing, Ms Wadsworth, Ms Cooper and Ms F Njie. Ms Bird was chair of the Board.
22. Prior to the events described below, the Board would typically meet on a quarterly basis. The expectation of the trustees was that they would attend Board meetings and might involve themselves in activities of the respondent in which they had an interest. The trustees had oversight of the operation of the respondent.

Claimant's employment

23. The claimant's employment with the respondent began on 23 October 2011. Initially she was a Project Coordinator and became Project Manager in 2017. Contained in the bundle was her Contract of Employment dated 1 October

2021 (32-37). Ms Evans Ewing described the claimant's duties in the role of Project Manager as coordinating and managing the day-to-day running of the organisation, ensuring that funding was planned and in place, managing the rest of the staff, implementing policies and procedures (and reviewing and updating these as necessary), liaising with external partners and funders and engaging in appropriate networks.

24. At the time of the claimant's appointment as Project Manager, the respondent was not in a good position financially. The claimant was successful in restoring stability to the respondent. Income increased and reserves were built up. The claimant introduced financial management procedures and structured reporting to the Board. She developed Board induction packs. She wrote a 5 year strategic plan which, according to Ms Evans Ewing, "*was well implemented and gave the respondent a sustainable future*". Ms Evans Ewing described the claimant as "*very capable in her role*".

25. Ms Evans Ewing said that, prior to the chain of events described below, the Board was engaged in discussion about future strategy for the organisation. There was a recognition that the Project Manager role had become a lot for one person and the discussion included splitting it in two - one to focus on the operational side (referred to as an Operations Manager) and the other to focus on fundraising and managing the relationships with funders. The claimant's role had, according to Ms Bird, "*become too much for one person to do*".

26. Ms Bird described the claimant's response to the proposal to appoint an Operations Manager as "mixed". Sometimes she would be in favour. At other times she expressed concern about whether the Operations Manager post would be "parallel" with her own.

Concerns raised

27. By October/November 2020 Ms Bird was becoming concerned for the claimant. She perceived the claimant as being under a lot of stress. Ms Bird, Ms S Boyack (the respondent's Office Manager) and the claimant (and their respective daughters) were personal friends. Ms Boyack shared Ms Bird's

concern about the claimant. That concern was shared with the other Board members.

28 The respondent was a member of Glasgow Council for the Voluntary Sector (GCVS) Through that membership the respondent had access to a range of services including HR advice. On 4 December 2020 Ms Cooper contacted GCVS and spoke to Ms N Gordon about how the respondent should deal with the trustees' concerns for the claimant. Ms Cooper then reported to Ms Bird and Ms Evans Ewing by email (53-54) including these paragraphs -

io *7 said that we had concerns both for Emma personally and for the organisation (because she seems not to be looking after herself or able to follow up on agreed plans designed to help her). Natasha suggested that we tackle it in that order, i.e. we go into it from a supportive perspective, then we can begin to tackle the effects on the organisation later if Emma doesn't take up our suggestions.*

15 *The board needs to agree on a clear plan of action with her and evidence it (both what has been agreed and how it is adhered to). We can actually direct Emma to do things including directing her to take annual leave (there's a specific notice protocol to follow). There is a GCVS winter wellbeing seminar on the 17th February that we can sign her up for and insist she attend.*
20 *Natasha was very clear about the language we should use if we want her to do these things. We are not suggesting or encouraging her but telling her what we expect her to do. In the first instance we should direct her to speak to Natasha to get some supervision and advice."*

25 29. Ms Bird then emailed the claimant on 7 December 2020, referring to "you feeling burnt out" and "the amount of stress you're describing". In relation to the forthcoming December Board meeting Ms Bird said "I want to make sure you have space to speak openly about how you are and how the board can help". Ms Bird then emailed Ms Cooper and Ms Evans Ewing on 10 December 2020 (56) stating "I have spoken with Emma, who is happy for
30 board involvement".

30. In the meantime Ms Bird emailed Ms Cooper and Ms Evans Ewing on 8 December 2020 (58-59) to report on a conversation with Ms Boyack. After referring to the claimant not having produced board papers, Ms Bird included the following -

5 a. Slina named two hard deadlines that have been missed. This was the Scottish Government last Monday and the Agnes Trust - unsure when. Without these interim funding reports, those bodies will ordinarily not release funding. This strikes me as urgent!

b. Emma is not replying to Selina's emails/phone calls at the moment

10 31. Ms Cooper responded to Ms Bird's email on 10 December 2020 (56-57). She reported, having spoken to three members of the respondent's staff, in these terms -

15 *"There isn't enough communication re projects. They feel that they are only brought in at the point of delivery (which is mostly the appropriate time) then told some vague outcomes and plans, but they want/need more strategic information. They want to be clearer about what they are being asked to do, what resources they have and what the timescales are, especially if they are to be involved in the report writing.*

20 *There isn't enough delegation. I checked to see whether having more responsibility for some things would affect them and they said they'd welcome it and have capacity.*

25 *They also said that Emma is the only one who knows how all the bits of money, projects and resources relate to each other. Lyndsey suggested that having something like a spreadsheet or GANTT chart would help with all this. Gemma would be prepared to make one up, if someone else can enter the information. This needs to be accessible to everyone in case Emma should go off ill.*

There were a few comments about working at weekends and in the early hours of the morning (such as emails around 4am).

Board meeting on 14 December 2020

32 The minutes of the Board meeting held via Zoom on 14 December 2020 (60-62) dealt with routine business matters then what was described as a "confidential discussion with Manager". This was recorded in these terms -

5 "Sensitive information not recorded, however the following points were agreed:

1) Emma will have 2 weeks off starting Friday, no work whatsoever must be done in that time

10 2) Today: Emma will progress getting Dragon Software (to address macular degeneration and migraine); have a conversation with Natalie McColl re line managing Toryglen gardeners Ethan, Linda and Paul (please update Board), get up to date financial info from Karen Caillaud (accountant); and Emma is in touch with her GP about an appointment

15 2) Tomorrow and Wednesday: Emma and Fatou will go through report deadlines in the following order 1) Annual Board Report 2) Tudor Trust 3) Scottish gov't ICF and then in whichever order seems best Scottish gov't second report, SMH, Agnes Hunter reports. All reports will include a paragraph by Mandy on behalf of the Board

20 3) Thursday: attend GCVS wellbeing seminar, speak to Natalie Gordon and arrange support and supervision on a 2-3 weekly basis to be reviewed end Feb

4) Friday: Mandy to pick up on any loose ends prior to our break"

25 The references to "Natalie McColl" and "Natalie Gordon" should have read "Natasha Gordon". The Board's intention was to list the things the claimant had to do before the Christmas break. The need for the Dragon software was understood to relate to the claimant having excessive screen time during the coronavirus pandemic. Ms Evans Ewing's evidence was that despite agreeing to do so, the claimant did not attend the wellbeing seminar.

33. When the claimant returned to work in January 2021 she told Ms Bird that she , "had had a good break and felt better". Ms Bird hoped this was true but was sceptical. She felt the situation needed watching.

Board meeting on 18 January 2021

5 34. The minutes of the Board meeting held on Zoom on 18 January 2021 (63-65) included a "*Health and wellbeing update*"- ,

Emma is making really good progress. Selina has started to look at Dragon Software to help with screen work, and Emma has made contact with Natasha Gordon @ GOVS. Emma also now working in Toryglen as often as home schooling allows."

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35. Under "*Finance/treasurer update*" the minutes recorded as follows -

"Funding reporting backlog slowly being worked through. Some dispersed to staff, Emma still working on 5 but struggling to progress. Hope the week ahead in the office will help with this, but Mandy to check in again with Emma when she contacts for the above:

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- *MacRobert Trust*
 - *Agnes Hunter Trust*
 - *Scottish Government Supporting Communities*
 - *SCV Foundation Scotland*
 - *Heritage Lottery Fund*
- 20

36. The minutes also contained this paragraph -

"Other IT issue was around collating project info, budgets etc in spreadsheets, and in a master doc so that staff can keep on top of what's going on across the organisation. El said things are close, and just need a last nudge. Could be done via Coordinators meetings, perhaps by Kerry."

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The related action point was "*El to look at with Kerry*".

37. Ms Bird was disappointed that the Dragon software had not yet been purchased. The claimant had been tasked with this, and Ms Bird did not know how it had become a task for Ms Boyack -

38 Ms Evans Ewing emailed the claimant on 10 February 2021 (66-67) to ask if she had made contact with Ms Gordon at GVCS and to request an update on the five funding reporting items. The claimant replied on 15 February 2021 (66) -

‘7 spoke to Natasha a couple of times. I had to take some sick leave, am having some test done, which has set me back a bit again.’

10 The claimant provided an update on the funding reporting items by inserting comments in Ms Evans Ewing's email. She disclosed that, of the five items, two had been done but three had not. Ms Evans Ewing said that her *“concerns were increasing”* at this time.

Board meeting on 9 March 2021

15 39. This was held via Zoom. Once again the minutes (69-70) included a *“Health and Wellbeing update”*. This included the following paragraphs -

“Emma has progressed well and reports feeling more on top of the Work load. She has been able to work well using Toryglen office space and also mixed with WFH....”

20 *Consultation with Natasha at GCVS has been positive and she has seen her GP and made a Lifelink appointment.*

A monthly welfare check-in with Natasha was suggested and everyone felt like this would be a helpful structure for the next 6 months....”

40. The minutes also included the following

25 *“Funding Reporting backlog has lessened but still Agnes Hunter, Heritage Lottery and few messy bits with SNH and SG”*

41. Ms Evans Ewing felt cautious about the claimant's wellbeing. She said *“I felt it was quite a lot for her to become completely well when she had been*

suffering burnout". She said that she remained supportive of the claimant. She (Ms Evans Ewing) "felt things were heading in a more positive direction at this point" and that the claimant "was getting help and support with things", but she (Ms Evans Ewing) was "still a bit concerned with how the workload was being managed".

Coordinators' concerns

42. On 16 April 2021 Dr Gemma Jennings and Ms Lindsey Duncan, who both worked as coordinators and reported to the claimant, emailed Ms Cooper (72) raising concerns in these terms -

io "Emma's proposed return to work - Selina has indicated that Emma intends to return to work as of Monday, for 5 days per week 10am-2pm. We are concerned that this is too much too soon and we would have expected a more gradual phased return to work. We are worried that she may not have had enough time for a proper break and to resolve her ongoing health issues. It has been difficult for us to discuss this with her directly, partly for issues of confidentiality and partly because she is resistant to suggestions that she needs to take the time off for her own wellbeing and the effective function of the organization.

20 Over the past few weeks it has become clear that we need to make changes in the way we operate, for example to ensure greater transparency in our funding development, set clear work plans and make sure there is not so much responsibility placed on one person. We have made good progress in working on some outstanding reports and funding applications in Emma's absence and realize more than ever that we need (need?) a more robust structure for the future resilience of Urban Roots. We worry that things may continue the way they were and that the underlying issues may not be addressed.

25 We would like the Board to take a proactive approach to set an agreed return , to work plan and support an ongoing review of this. We think it may be useful 30 to clearly define Emma's role and that will help to identify both what

responsibilities can be delegated or shared, and what role(s) we may need to develop/fundraise for

More generally we think a clear HR structure should be put into place to help deal with any future issues.”

- ? 43 Ms Cooper forwarded the email from Dr Jennings.'Ms Duncan to the rest of the trustees on 18 April 2021 (71) On 19 April 2021 Ms Evans Ewing set up a WhatsApp chat group amongst the trustees She forwarded a message she and Ms Boyack had received from the claimant on 16 April 2021 (74) -

io *My request for the next two weeks is to return from furlough to work 21 hours per week....I can self certify as sick for up to five days, so I will take two days per week as sick leave on the grounds of ongoing undiagnosed medical conditions. In terms of work burnout I feel comfortable returning part time. In terms of my ongoing health issues and possible longer term impact on work, I will update next week after further medical appts.”*

- i? .44. The background to the claimants message was that she thought she was pregnant. Ms Bird understood this was what the claimant was meaning (ie pregnancy and maternity leave) when she referred to “ongoing health issues” and “possible longer term impact on work”. Ms Evans Ewing and Ms Wadsworth did not know at this point what the claimant meant when she referred to “undiagnosed medical conditions”.
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45. The trustees exchanged WhatsApp messages on 19 April 2021 (74-76) and agreed that the claimant should be instructed to take two weeks off. The trustees intended to consult Ms Gordon and to establish a return to work plan for the claimant. They then discovered that the claimant had returned to work on 19 April 2021 and it was agreed that Ms Evans Ewing and Ms Cooper would speak to her to pass on the trustees’ instruction.
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46. Ms Evans Ewing and Ms Cooper then held a meeting with the claimant over Zoom. They told the claimant that she should take two weeks off but the claimant was resistant to this. Ms Evans Ewing reported to the other trustees by WhatsApp (76) in these terms -
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So, we had a chat and Emma was pretty determined that she should be back at work on the basis that she is feeling good (burnout no longer an issue) and that there are no grounds for furlough.

5 She will do 3 days from 10-2 and take 2 days off sick to deal with her physical health. That would be for this week and next. That was her choice/suggestion.

It doesn't feel as though we can/should direct her to stay at home. I think we have to accept her word for being fit and we now have 2 weeks to sort out how we go from here.

io If no one objects, I can let her know that we agree to the phased return and can let Gemma and Lyndsey know that we're content for now, but will be monitoring and have some other things we will be doing as a matter of urgency."

47. Ms Bird was by this time concerned about the claimant's mental health.
15 However the claimant indicated that it was only her physical symptoms which were causing her to be absent.

Board meeting on 6 May 2021

48. Ms P Candea and (separately) Ms Gordon attended this meeting which was once again held via Zoom. Ms Qandea gave an overview of strategic planning
20 work she intended to carry out for the respondent. When Ms Gordon joined the meeting, the claimant and Ms Boyack (who was taking the minutes) were asked to leave. Ms Wadsworth's evidence was that it was Ms Gordon who asked them to do so, and that she (Ms Wadsworth) was 'taken aback' by this.

49. The minutes (87-89) recorded that Ms Gordon had provided advice on
25 "restructuring". This related to the proposed new post of Operations Manager and the impact on the claimant's role. According to Ms Bird, the claimant had produced a job description which showed the new role below her own, and the trustees wanted to discuss the options with Ms Gordon. It was agreed that Ms Wadsworth should continue to work on the job descriptions.

50. The claimant expressed her concern at being asked to leave the Board meeting *'without phot information'*. according to the minutes. However the minutes recorded that the claimant -

5 *acknowledged the extra work they had all recently put into their roles as board members in supporting her wellbeing and thanked them."*

The minutes also recorded that the Board asked the claimant to resume her check-in sessions with Ms Gordon "to continue the ongoing wellbeing support offered".

10 51. As chair of the Board, Ms Bird had been the claimant's main point of contact in line management terms. This became difficult for Ms Bird due to her mother's ill health and Ms Evans Ewing stepped in. The minutes of the 6 May 2021 meeting recorded that the claimant *"asked that her line management be clarified and strengthened again"* and that it was agreed that Ms Evans Edgar *"would continue to be the point of contact for personal matters and day to day task management would continue with the coordinators team and office manager"*.

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Ms Bird attends GP appointment with claimant

20 52. Around the middle of May 2021 Ms Bird attended with the claimant at an appointment with her (ie the claimant's) GP. She did so as a friend, as she was concerned that the claimant was not getting the medical care she needed. Ms Bird knew that the claimant believed she had become pregnant around the end of December 2020, but her tests had proved negative. Ms Bird said that the claimant did not look pregnant.

25 53. Ms Bird described the claimant's GP as *"thorough"* at this appointment. She said that the claimant *"had had scans and was linked in with various specialists including a psychiatrist"*. Ms Bird said that the GP had made mention of the claimant *"experiencing psychosis"* and she (Ms Bird) was concerned that this might be the case.

Claimant's attendance

54. Ms Bird described the claimant's attendance at work by May 2021 as "erratic". She said that the claimant "came in when she could". Staff were uncertain when the claimant would be in and were "finding it difficult".

5 55. On 24 May 2021 the claimant emailed Ms Bird and Ms Boyack (92) attaching a medical self-certificate form (94) covering absences on 6, 9, 14, 16, 23 and 26 April 2021 and 6, 13, 17, 18, 20 and 21 May 2021. The reason for absence was stated as "Abdominal issues". Also on 24 May 2021 the claimant emailed Ms Bird (90) attaching a medical certificate dated 6 May 2021 (91) covering a
10 period of 3 weeks from that date and stating the reason for absence as "abdominal symptoms under investigation".

56. In the first of her emails sent on 24 May 2021 (92) the claimant included the following -

15 *"Had a quick scan through the Sickness and Absence Policy document which (is long and) does have a process for managing frequent short term absence which is where I would say I am at the moment..."*

20 *"In the absence of being able to provide any further clarity to staff, my line is that I am still experiencing health problems, which are resulting in the need to take the frequent short term sick days/ but that this is being reviewed and supported by the board on a weekly basis."*

25 57. The claimant's decision not to give evidence meant that I was unable to resolve the inconsistency between (a) the medical certificate covering the period of 3 weeks from 6 May 2021 and (b) the claimant having self-certified for 6 individual days within that period. However, I was satisfied that Ms Bird's description of the claimant's attendance as "erratic" was justified, and that this did create uncertainty for staff. I also accepted Ms Bird's evidence that the claimant was not undertaking the structured and phased return to work which the trustees had anticipated.

More concerns raised

58. On 5 July 2021 Ms Cooper sent an email to Ms Duncan (96-97) referring to a conversation they had on 2 July 2021. This started as follows -

5 *'It was good to catch up with you on Friday, but not good to hear that things still don't seem to be going-as well as they ought to be '*

Ms Cooper shared this email with the other trustees on 13 July 2021 (96).

59. On 20 July 2021 Ms Wadsworth sent a WhatsApp message to the other trustees (78) in which she referred to a conversation with Dr Jennings who
10 *"said very similar things to what we've heard from Kerri and Lindsay, but provided a few more examples of the communication issues as she experiences them".* Dr Jennings followed this up with an email to Ms Wadsworth on 26 July 2021 (98) which included the following -

"It feels like the working relationship with Emma has broken down significantly over the last year."

15 *"With this poor communication it feels like we never know what is going on in the background and information that should be openly shared sometimes is not."*

20 *there have been a number of....meetings....that both Emma and I are invited to attend. It's normally the case that I don't know if Emma is going to attend or not. This would be fine if she gave apologies but there have been times over this last year when it feels like I'm making excuses and trying to "save face" for the organisation."*

"Unwillingness to deal with issues or to hold to account poor staff behaviour."

25 *"I got a call from our Youth Worker Robbie today - he voiced similar concerns...."*

60. On 28 July.2021 Ms Cooper sent an email to the other trustees (103-104) in which she said she had been *"approached by Robbie Forde, who has some issues with supervision that he wanted to talk about....He has been feeling*

stressed at work because he's been dealing with a lot of responsibility and hasn't been getting the support he needs. " Ms Cooper's email continued -

"/ asked him if he had communicated this clearly to Emma and he said that he had stopped asking, for a number of reasons. He would sometimes get a bit of quick attention that then wasn't followed up, or he might get a prickly response...."

Phone call on 28 July 2021

61. Ms Bird spoke with Ms Gordon on 28 July 2021. They discussed some options which included requesting an occupational health assessment and
10 GP report, then deciding whether the claimant's employment was sustainable, medical suspension, possibly medical ill health incapacity dismissal or settlement, and requiring the claimant to take annual leave.

62. After this conversation the claimant called Ms Gordon. Ms Gordon reported to Ms Bird that this call was *"really positive, with Emma being receptive and agreeable"*. Ms Gordon told Ms Bird that the claimant was amenable to a
15 number of suggestions -

- She would like an OH referral
- She would like to return to work for one week (after her current week's leave) then accept two weeks' paid leave personal time.
- 20 • She was agreeable to a transfer in her job role to Business Development (or other title) to focus on strategic funding.
- She was agreeable to the recruitment of a new post to take over the operational line management responsibilities.
- Upon her return from the two weeks' leave, she would request a Board
25 member (other than Ms Bird) attend a team meeting to present and discuss the changes to the structure and her position.
- She would possibly consider a financial package if one were offered.

Ms Bird sent an email to the other trustees on 28 July 2021 (107-108) ■ reporting on her conversations with Ms Gordon

63 On 29 July 2021 Ms Candea emailed the trustees (107) in terms which referenced the issues between the coordinators and the claimant -

5 *7 have now had coaching sessions with 2 of the coordinators. From those
conversations..J think the best support Emma could give to the organisation
when she returns for one week would be to fill in as much as she can of the
Funding Tracker the coordinators have set up to try to understand what
id funding exists: the amounts, deliverables, timeframe etc. My observation is
that they do not seem keen to have meetings with her to discuss this, but
would really value the information. I wonder if it would be possible to ask
Emma to focus on this activity when she returns for the one week, prior to the
other 2 weeks off?"*

64. Ms Evans Ewing sent an email to the other trustees (plus Ms Gordon and Ms
15 Candea) on 29 July 2021 which included the following -

*"It feels like everything that has been bubbling under is finally coming fully to
light which, to me, feels like a relief so we can genuinely address and resolve
the issues and do what is best for all staff and for the organisation to move
forward positively and constructively. Emma has dedicated so much to Urban
io Roots and the causes we as an organisation promote, value and hold dear
that I really hope we can help her find a plan of action/settlement that works
for her, supports and rejuvenates all the staff and strengthens the
organisation.*

*If I am correct, the summary of what you, Natasha, are offering to relay to
25 Emma in terms of immediate action is:*

- 1) *To focus on filling in as much as she can of the Funding Tracker when she returns for the one week, prior to the following 2 weeks off.*
- 2) *Make OH referral - Natasha, can Emma do this? Particularly as she has to make an appointment time that suits her. Or do one of us have to do it? I can do it, I have time. "*

65. Ms Gordon then emailed the claimant on 29 July 2021 (111) broadly confirming the Board's agreement to the points discussed during their telephone call on 28 July 2021 (see paragraph 62 above). The claimant replied to Ms Gordon by email on 2 August 2021 (110-111) setting out her work plan for the following week. The claimant's email included the following paragraph -

"I am in a very strange position to do with my health and I hope that the two weeks off will help me get some answers from health professionals, which will effect some of the decisions with regards to my employment."

io Coordinators write to Board on 3 August 2021

66. On 3 August 2021 the three coordinators (Dr Jennings, Ms Park and Ms Duncan) submitted a joint letter to the Board (113-120). The flavour of this was captured in the following introductory paragraph -

"Having Emma working on an unpredictable, on-off basis is actively unhelpful. It creates an ongoing atmosphere of uncertainty as we do not know what work is being covered, and what responsibilities may or may not need to be delegated. This cycle of stress and poor communication has a negative impact on staff and, it seems likely, on Emma herself. As a team, we are in agreement that we cannot continue working in this way."

67. Within their letter each of the coordinators expressed their concerns about the difficulties they were having in working with the claimant. Most of these reflected the concerns they had already raised individually. Within Ms Duncan's section of the letter appeared these paragraphs -

"As a staff group we have all recognised for some time (since early 2020) that Emma is experiencing mental health issues due to stress, burnout and personal issues. These are manifested in irrational, inconsistent and unprofessional behaviours in work contexts, and a failure to manage her workload (not reading emails and leaving important reports undone for example). We have been attempting to offer support & strongly advising her to take an extended period of time off for her mental health. However she has

5 *been resistant to this, sometimes becoming angry at the suggestion there is a mental health issue. She has refused to take an extended period of sick leave, while simultaneously expecting to be able to take days off work for health reasons whenever it suits her, without informing the staff team, so we often don't know if she is actually working on that day or not, and are reluctant to contact her in case it's a 'bad day'.*

10 *I feel that when these points are raised with Emma, she will ask why we did not raise them directly with her. The answer is that we did attempt to, on various occasions, over quite a long period of time, but due to the way they were received, it became clear there was little point in expecting a productive discussion, recognition/acknowledgement of problematic behaviours or situations, or willingness/ability to implement change.*

15 *Emma receives valid and non-aggressive queries and challenges to her opinions and decisions as personal criticisms, and becomes extremely prickly and defensive, so that it is exceptionally difficult to have an open and reasonable discussion with her. I feel she totally lacks insight into the extent of the negative effect her conduct has had and continues to have on her staff team."*

20 68. Each of the respondent's witnesses recognised the seriousness of the situation facing the organisation. Ms Bird referred to staff morale being the "biggest threat" to the respondent. People were stressed, so not at their best. Ms Bird recognised that the staff perception was that the Board had been indulging the claimant with her time off, and not supporting them.

Claimant goes off sick

25 69. The claimant messaged Ms Bird during the evening of 3 August 2021, as follows -

30 *"Sorry friend to do this, but I am calling on your chair role one last time. I have a-migraine now and I know I won't be fit for work tomorrow. I have a site meeting with Julia at 11.30 which I will need cancelled. I am meant to call Natasha if I am sick, could you do this for me please? It is untenable for me*

to continue working for my health and the good of Urban Roots. I could see if I am OK on Thurs Fri, I was trying to hand over more, but I probably need to start the 2 weeks garden leave immediately and do now need to be told effectively to do so. I have been trying so hard to fight to maintain my long and short term income, employment rights etc, and am aggrieved that I have not been able to manage this process in a more planned way, but thus (this?) uncertainty has gone on so long that I have to fold, and just look to my wellbeing.”

70. Ms Bird shared this with the other trustees via WhatsApp on 4 August 2021 (81). The trustees agreed that the claimant's two weeks' leave should start immediately, and Ms Bird advised the claimant of this. In one of the WhatsApp messages on 4 August 2021 (83) Ms Evans Ewing referred to the claimant having had “this moment of clarity”. In her evidence Ms Wadsworth described this as “a lightbulb moment”.

15 **Board meeting on 4 August 2021**

71. Ms Gordon attended along with all but one of the trustees. The minutes of the meeting (121-122) confirmed that the discussion focussed solely on the claimant's situation. Ms Gordon told the trustees that they had two options - continuing the claimant's employment and not continuing her employment. She (Ms Gordon) recommended the latter. She reminded the Board that the claimant had indicated she would consider taking a settlement.

72. Ms Gordon also referred to other options, described in the minutes as “*medical ill health incapability dismissal*” and “*unpaid sabbatical*”. Ms Gordon said that she did not favour either of these.

73. The Board agreed to pursue the option of offering the claimant a settlement. The claimant would be invited to a “*protected meeting*”- this was a reference to pre-termination negotiations under section 111A of the Employment Rights Act 1996 (“ERA”). The Board noted that the respondent would need to meet the cost of the claimant taking independent legal advice. The Board discussed the need for staff to know what was happening and agreed to work

with the coordinators *“to draft up an organisation structure and look at job descriptions to help decide what is actually needed”*.

74. The outcomes were recorded (at 122) in these terms -

“The board decided:

- 5 • *to work on the new staff posts/responsibilities*
- *look at the finances (financial settlement, therapeutic bills, costs for drawing up the agreement, El s independent legal advice, plus a c. £500 goodwill payment to the coordinators, a massage (or similar), and the Board to arrange a day in the woods/cook for them.*
- io • *Offer El a settlement whilst also preparing for a potential medical dismissal (NG to help)”*

Funding application missed

75. In a WhatsApp message on 26 August 2021 (84) Ms Bird reported to the other trustees that *“a significant funding application (£18000)”* had been missed.
15 Ms Bird said that this was because no-one else had access to the claimant’s emails. Ms Evans Ewing_ blamed the claimant for there not being *“some mechanism for someone else to pick up her emails”*.

76. The evidence did not cover expressly whether the claimant had returned to work following her two weeks’ leave earlier in August 2021, but it seemed
20 probable from the comments made by Ms Bird and Ms Evans Ewing (and from what the claimant herself said in the message reproduced in the next paragraph) that she had done so.

WhatsApp messages on 30 August 2021

77. On 30 August 2021 the claimant sent a text message to Ms Wadsworth which
25 she shared with the other trustees via WhatsApp -

—“Just to update you that I continue to be in a very challenging position, which is still difficult to talk about. I would like to request two weeks unpaid compassionate/family leave. I have been trying to protect my income and

employment rights, but my situation has just got bigger than my job, I will in this time work on some focussed handover questions where needed. I still say I'm 8 months pregnant with the tummy and all other signs to match, but unbelievably my GP has last week again sent me to a queue to wait for further tests and investigations, but no "diagnosis". It is mind bending what is happening to me and anything I say to discuss it sounds so unbelievable that I just have to sit and wait for things to unfold. I would accept the settlement offer now if trustees and colleagues thought this best for a clean break, but it is not-my favoured option. I had found the energy earlier in the year to carry on with the work to the next stage, so leaving in this way would be circumstance rather than choice, but I could go with it on good terms if needed. If the unpaid leave request is granted, I would ask for a weekly check in. I am happy to discuss these options any time, please let me know when suits."

15 78. Ms Bird responded as follows -

"Oh dear :(this isn't good. Yeah, we'll need to wait for Natasha to get back from -AL on Wed to advise. I think we should get on with recruitment regardless in all honesty,

If Emma is going on Mat leave, she needs a MatB1 I think.

20 It's a difficult feature of psychosis that the person often doesn't recognise they are ill There have been at least 2 blood tests, 2 scans, numerous manual exams and the doctor asserts Emma's belly is the same as when she first presented round new year. None of this evidence has convinced her.

25 We'll still need to proceed with the package or absence management if not, because of the impact on the organisation of not having a functioning leadership, as Emily indicates in her email. I do disagree with Emma saying she managed to get back to work at the start of the year - as far as I can see, she hasn't functioned properly at any point in 2021, and it's now nearly autumn.. It's very sad. As for the handover questions... I'm not sure what to do about those, again, one to talk through with HR"

30

OH referral

79. Ms Bird and Ms Wadsworth were involved in preparation and submission of an online application to Integral Occupational Health (130-131). This was sent to Integral on 6 September 2021. The submission contained a description of the claimant's duties and narrated the trustees' perception of events over the preceding 12 months. It included the following sentence -

10 *'We are....requesting a medical report from yourselves and her GP with a view to instigating absence management dismissal proceedings on grounds of medical health incapability, having exhausted all other avenues of support within her employment. '*

80. The Integral report' was dated 22 September 2021 (135-136). It was received by Ms Wadsworth (to whom it was addressed) and shared with the trustees a few days later as the claimant had asked to see it first. The report included the following paragraphs -

15 *"In terms of Emma's health, she has described some periods of stress and workload issues in relation to the role. Some of these were manifest before the pandemic and obviously there have been additional challenges since the pandemic. I understand that [there] had been some health concern in terms of Emma's mental health. Emma states she has not had any previous*
20 *treatment for mental ill-health and on speaking with her today I could not detect any mental ill-health e.g., in the form of mood disorder, lability etc. She does have feelings of stress because she is not at work and also that some concerns have been raised that she needs further discussion for. I think she has an appropriate response to that situation.*

25 *In relation to the potential pregnancy symptoms that have been mentioned in the referral, Emma was able to discuss these with me today and she is under hospital investigation. I will understand more about the background to this when I receive the GP report with sight of specialist reports. However on speaking to Emma today, she demonstrated good insight into not only her*
33 *health issues but also the work challenges that she has stated.*

5 /understand that there were multiple periods of short-term sickness absence in the earlier part of 2021 mainly attributed to migraine headache. Emma feels that she had been spending much more of her time on computer-based activities including Zoom meetings and this may have been a factor. She is also quite short-sighted and is due to have a further eye test carried out shortly. She thinks that whilst she has been off work over recent weeks, her headaches have improved.

10 She does discuss some stressors due to being away from work at present in the sense that she is concerned about tasks not being properly executed in her current absence.

15 On speaking with her today, I could not detect any health issue that I would regard as a clinical barrier to work. I think Emma does describe some work stressors historically and currently in relation to the situation of her suspension. I think the way forward is for me to get a background report from her GP and have a further consultation with Emma once that has been received, for me to issue final advice. Meanwhile I would recommend there is open discussion about the performance concerns that have been raised with Emma and I believe she is medically fit to have such conversations.

20 If you require further guidance or clarification on the above advice, please let me know. Otherwise I will be in touch when I hear from her GP to arrange a further appointment. ”

81 . All of the respondent's witnesses regarded this as the final OH report. To their credit, they all accepted that this could not be right, given the language of the report. The claimant referred to it during her cross-examination of the respondent's witness as an "interim" report. That was an accurate description, with a final report to follow after the OH doctor received the GP report and conducted a further consultation with the claimant.

GP report

82. It was not clear from the evidence of the respondent's witness as to who had done what in relation to obtaining a report from the claimant's GP. Ms Bird

30

said that she thought a GP report had been sought at the same time as the OH referral. Given the reference to it in the OH online submission form, that was probably correct.

- 5 83. On 17 September 2021 the claimant sent an email to the trustees (132) stating that she had registered with a new GP and had a consultation that morning. She said that she had not been issued with a sick line, and had a number of investigations ongoing. She continued -

“You can request an update from the GP in writing. I will need to give consent for this report to be shared with you once I have seen it.”

- 10 84. Ms Wadsworth’s evidence was that a report had been requested from the claimant’s old GP. There was no evidence to indicate that the trustees had followed up with the claimant’s new GP, and I believed they had not done so.

- 15 85. The trustees perceived that they were getting contradictory messages from the claimant. She had said at the end of August 2021 that she believed she was eight months pregnant and had asked for unpaid leave, indicating that she felt unable to work. Little more than two weeks later, she was telling the trustees that she was not given a sick line from her new GP, indicating that she was fit for work.

Board meeting on 30 September 2021

- 20 86. The minutes of this meeting (137-138) indicated that the discussion focussed on what should be done regarding the claimant. Ms Gordon and Ms Candea were both present. In relation to the OH report, the minutes recorded -

25 *“The report did not provide any conclusive information on EI’s health, however the Doctor who interviewed her thought that there was no reason for her not to return to work. There has been no news regarding the GP report, though EI has requested sight of the report before it being sent to us and could refuse consent for it to be released.”*

87. The minutes then recorded advice from Ms Gordon -

“Dismissal on medical ill health incapability grounds needs both reports to agree that EI should not return to work or not fit to fulfil contractual obligations. Regardless of if we get the GP report, the OH report did not say she shouldn’t return to work, so we can no longer pursue that avenue. NG then detailed our other options:

5

- EI should be allowed to return to work
- I/ve follow a route of Dismissal due to Some other Substantial Reason (SOSR) - in this case irrevocable breakdown of trust.
- Another package could be offered prior to SOSR, and if it was rejected, then the SOSR dismissal route followed. ”

io

88. The trustees’ frustration with the claimant was clear from the next paragraph

“We have offered EI a generous package, which was rejected. We offered her an alternative post, which was also turned down. She has been offered support in the form of counselling, peer support, gardening leave, reduced duties, been given several chances, but has been not just unhelpful to other staff, but actively obstructive to people trying to cover her workload during a variety of her absences. ”

15

89. Ms Gordon described the process for a SOSR dismissal in these terms, according to the minutes -

20

- Decision made by the Board. EI invited to a formal meeting. EI can bring a union rep or colleague and must have at least 48 hours notice of the meeting.
- Two board representatives form a panel (NG can be there in an advisory capacity), and at the meeting inform EI that the board are considering dismissal on the grounds of SOSR. EI can provide additional info (the panel should consider new information that has not been presented before) to assist the panel in making their decision.

25 .

- *Following the meeting, the panel make the decision. If dismissal is agreed and letter is issued with immediate effect.*

90. The minutes recorded the trustees' decision as follows -

“Vote;

5 *All five board members present voted. The result is as follows:*

- *Offer EI another settlement before going down dismissal on grounds of SOSR - 1*
- *Dismissal on grounds of SOSR immediately - 4”*

Meeting with claimant on 15 October 2021

10 91. Ms Evans Ewing and Ms Cooper agreed to form the panel. Ms Cooper wrote to the claimant on 5 October 2021 (139) inviting her to a meeting on 7 October 2021. The letter was headed *“Continuation of Employment Review Meeting”*. Ms Evans Ewing accepted that this was not completely accurate as a description of the purposed of the meeting. There was no doubt as to what
15 the outcome of the meeting would be - the Board had already decided that the claimant should be dismissed.

92. The meeting with the claimant actually took place on 15 October 2021. The claimant was accompanied by Mr Monaghan. Ms Gordon was in attendance. The minutes (140) recorded Ms Evans Ewing in these terms -

20 *“Unanimous vote by board to terminate employment. This has taken nearly a year to decide, a lot of effort has been made to avoid this. [The next sentence was redacted - 1 was told this had been agreed with the claimant’s previous legal representative] Board feel relationship with staff team broken down and with board. No longer trust and relationship. ”*

25 93. The claimant complained in her subsequent appeal document that she was not provided with any explanation of her SOSR dismissal. However, the minutes of the meeting recorded Ms Evans Ewing stating as follows -

5 *"List of examples have been compiled - staff supervised, own absence not recorded, funding applications not done, when information requested, wasn't forthcoming, refused to liaise with board or HR, confidential discussions with staff, team and board not clear about progress of work, performance, funding, applications, relationships, inappropriate comments with staff about others. None of this is gross misconduct, the employment is no longer sustainable."*

94. The outcome of the meeting was confirmed to the claimant in Ms Evans Ewing's letter of 18 October 2021 (141). This stated -

'Dismissal by way of Some Other Substantial Reason

10 *Further to our meeting on 15th October 2021, I confirm the organisation has taken the ,decision to terminate your contract by way of Some Other Substantial Reason being based on:-*

- *Irrevocable breakdown of trust and relationship "*

The claimant was offered the right to appeal to Ms Wadsworth.

15 **Claimant appeals**

95. Ms Wadsworth's evidence was that the claimant sent her an email stating her intention to appeal. Ms Wadsworth could not recall whether the claimant provided grounds for her appeal when she emailed. A date for the appeal was set, then put back at the claimant's request. The claimant was to provide her appeal statement five days prior to the appeal hearing.

20

96. The appeal was to take place on 11 November 2021. In the event, the claimant provided her appeal document (142-158) on 10 November 2021. It was a comprehensive narrative, as seen from the claimant's perspective, of events over the period January 2020 to October 2021. Ms Wadsworth had been able to look only briefly at the document prior to the appeal hearing.

25

97. At the appeal hearing the claimant was accompanied by her trade union representative, Mr S Fullerton. Ms Gordon was in attendance. Ms Wadsworth stated the purpose of the hearing in these terms -

- To allow the claimant to provide additional evidence not included in her appeal statement.
- To ask the claimant what outcome she wanted.
- To provide the claimant with a timeline of when things were going to happen.

5

98. The minutes of the appeal hearing (159-161) recorded the claimant expressing concern about (a) Ms Wadsworth being on the appeal panel as she was involved in the decision to dismiss the claimant and (b) M's Gordon being present *"who El states has acted and communicated unprofessionally"* Ms Wadsworth confirmed that Ms Gordon was attending in an advisory capacity only and would *"not involved in the decision making process"*.

10

99. Ms Wadsworth asked the claimant what outcome she was seeking. The claimant said that she wanted to be reinstated. Ms Wadsworth said that she would review the information submitted by the claimant and would follow up if any further information was required from the claimant. She indicated a timescale of five days to provide an outcome.

15

100. Ms Wadsworth said that the appeal hearing lasted about half an hour. When asked by me what the claimant's grounds of appeal were, Ms Wadsworth said that she followed Ms Gordon's advice. She had not been advised to go through the claimant's appeal document and identify the grounds of appeal.

20

101. Ms Wadsworth wrote to the claimant on 19 November 2021 (162) with the appeal outcome. She set out her decision in these terms -

"Having considered your appeal very carefully and taken into account your representations, it has been decided to uphold the decision of the Board with regards to your dismissal. This decision has been taken because all information available to the appeal panel including all the information provided by yourself clearly evidences a complete breakdown of trust and relationship between yourself and the organisation making any reinstatement unsustainable. "

25

Mitigation

102. The claimant's decision not to give evidence meant that I did not hear from her in relation to her efforts to secure fresh employment. I did however have the updated version of the schedule of loss she had been ordered to provide (163-166). Ms Greig had responded to the original version of the claimant's schedule of loss by email on 16 May 2022 (167). In this she contended that the claimant had failed to minimise her loss.
103. It was not in dispute that the claimant's weekly pay with the respondent amounted to £636.65 gross and £486.92 net. It was agreed that the respondent made pension contributions for the claimant at the rate of 5% of pensionable pay, equal to £31.83 per week.
104. The claimant's updated schedule of loss disclosed income since dismissal as follows -
- a. Earnings from self-employment at the rate of £105.81 per week between 1 November 2021 and 1 May 2022.
 - b. Earnings from selfemployment at the rate of £230.00 per week from and after 1 May 2022.
 - c. Working Tax Credit at the rate of £105.00 per month between 1 November 2021 and 31 March 2022.
 - d. Working Tax Credit at the rate of £248.00 per month from and after 1 April 2022.

Comments on evidence

105. It is not part of the function of the Tribunal to record every piece of evidence presented to it, and I have not attempted to do so. I have sought to focus on the evidence which I considered to have the closest bearing on the issues I had to decide.
106. The respondent's witnesses gave the impression that they were Somewhat reluctant participants in these proceedings. That was understandable as they

had all accepted office as trustee directors of the respondent on a voluntary basis because they believed in the objectives behind the organisation. It might be said that being required to give evidence at an Employment Tribunal was not what they signed up for.

5 107. That is not to say that they were in any way evasive when answering questions. On the contrary, each witness gave her evidence in a straightforward manner to the best of her recollection. To their credit, each was prepared to concede points which might be adverse to the respondent when it was appropriate to do so. They were all credible witnesses.

10 108. The impression of reluctance related more to their discomfort in being required to give evidence against someone with whom they had enjoyed a good relationship prior to the events described above. That was particularly so in the case of Ms Bird with whom the claimant had a long-standing friendship.

15 **Submissions**

109. Ms Greig provided skeleton submissions upon which she expanded orally at the hearing. She stressed the language of section 98(1)(b) ERA - *“some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held”*. It was relevant to
20 look at the claimant’s role and the nature of the respondent’s organisation. Ms Greig argued that the respondent had been particularly dependent on the claimant, and her functioning well. This made it easier to justify a SOSR dismissal.

110. Ms Greig also stressed the language of section 98(4) ERA where the Tribunal
25 has to take account of *“the size and administrative resources of the employer’s undertaking”*. The respondent was a small organisation and had had limited administrative resources, with no internal HR function (although Ms Greig acknowledged that they had secured HR support).

111. Ms Greig reminded me that it was not for me to decide whether I would have
30 dismissed the claimant, ie I should not substitute my own view for that of the

- respondent. The question was whether dismissal of the claimant by the respondent fell within the range of reasonable responses open to a reasonable employer (a reference to the decision of the Employment Appeal Tribunal in *Iceland Frozen Foods Ltd v Jones* 1982 IRLR 439 where the
- 5 EAT held that the correct test was whether the decision to dismiss was “*within the band of reasonable responses to [the employee’s] conduct that a reasonable employer would use*”).
112. The respondent relied on an irrevocable breakdown of trust and relationship as the SOSR for dismissal. The facts here were unusual. Normally a health
- io issue would rely heavily on medical advice/evidence but in this case, up to October 2021, there was no defined medical reason for the claimant’s absences - “*ongoing undiagnosed medical conditions*”. The respondent was in what Ms Greig described as an “unending rolling situation” with no end date they could work with.
- 15 113. Ms Greig recognised the argument that the respondent should have waited longer before dismissing the claimant. However, she submitted, there was no evidence of a short-term solution. There was no indication of what the responses would have been if they had waited for a GP report and a final OH report.
- 20 114. Ms Greig sensibly accepted that Ms Evans Ewing and Ms Wadsworth (in their roles as dismissing and appeal officer respectively) had treated the OH report as a statement that the claimant was fit for work. Neither had taken account of the full content of the OH report in the sense of the need for further
- 25 information. However, both had said that the respondent’s original intention was to go down the route of an ill health dismissal but had changed tack when the OH report came in. Ms Greig reminded me of some of the language Ms Evans Ewing had used, such as “*Something fundamentally different had happened*”.
115. Ms Greig referred to *Ezsias v North Glamorgan NHS Trust* 2011 IRLR 550
- 30 where the EAT (per Keith J at paragraph 58) counselled against allowing SOSR to become too easy an escape route for employers -

'We understand that concern, but the fact is that the Whitley Council terms only apply when it is the employee's conduct or competence which is the real reason for why the action was taken against him. Although as a matter of history Mr Ezsias' conduct was blamed for the breakdown, the Tribunal's finding in the present case was that his contribution to that breakdown was not the reason for his dismissal. We do not suppose that those who were responsible for negotiating the Whitley Council terms had this in mind, but the fact is that the Whitley Council terms do not apply to cases where, even though the employee's conduct caused the breakdown of their relationship, the employee's role in the events which led up to that breakdown was not the reason why action was taken against him. We have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of "some other substantial reason" as a pretext to conceal the real reason for the employee's dismissal.'

15 116. Ms Greig argued that the evidence in this case showed that the trustees were concerned about the viability of the respondent's organisation as a whole. There had been a breakdown in the relationships between the Board and the claimant and between the claimant and the staff. This could have been catastrophic for the respondent. The trustees were concerned that the staff would not tolerate the situation much longer. The result was that the point where there could be a fair SOSR dismissal had been reached.

117. There had been staff complaints about the claimant over a long period from December 2020. These had been put in writing in April, July and August 2021. It was reasonable for the respondent to treat these as credible. Should they have been put to the claimant? Ms Greig's response to her own question was yes - in normal circumstances. But the circumstances in this case were not normal. The claimant had appeared to be exhibiting mental health problems. Despite medical opinion to the contrary, the claimant believed she was pregnant. Ms Bird and Ms Evans Ewing had been concerned that "pushing back" on that might have had a serious impact on the claimant's health.

118. The respondent had to deal with the strange circumstance of a continuing pattern of the claimant saying she was unwell, then saying she was fit. There

had been some acceptance of her situation by the claimant at the end of July 2021 when she agreed to the OH referral, two weeks' leave and a change in her role. However, within a few days, at the start of August 2021, the claimant was telling Ms Bird that it was "*untenable for me to continue working for my health and the good of urban roots*". At the end of August 2021, the claimant was describing her situation as "*mind bending*" and "*unbelievable*". The respondent had to try to grasp what was happening.

119. The respondent had moved in the direction of an ill health capability process, only for the claimant to state in mid-September 2021 - between the OH referral and receipt of the OH report - that she had seen her new GP and had not been signed off as unfit for work. Then the OH report advised that there was no health issue which amounted to a "clinical barrier to work". That left the trustees with no option but to address the breakdown in the organisation.

120. Ms Greig argued that there was nothing the respondent could have done to maintain the relationship between the claimant and the staff, due to the length of time involved and the nature of the claimant's health issues. In effect they could do no more than ask staff to bear with them. That might have been manageable for a short period but it had gone on for a long time and there was no information the respondent could have given to the staff.

121. Ms Greig accepted that as there had been a performance/conduct element at the start of the process, the ACAS Code was engaged. She accepted that the Code had not been followed. The hearing on 15 October 2021 was convened to convey the decision to dismiss which the Board had already taken. Ms Greig acknowledged the criticism that Ms Wadsworth as appeal officer had been involved in the decision to dismiss. However, the respondent was run by a small board made up of volunteers and it was reasonable for that board to be unanimous when deciding on the dismissal of a key executive. That was the reality of running a small charity.

122. That there could be circumstances in which a dismissal without following any procedure was fair was illustrated by the decision of the EAT in **Gallacher v Abellio Scotrail Ltd UKEATS/0027/19**. The EAT said this -

5 43. *The fact that no procedure is followed prior to dismissal would in many cases give rise to the conclusion that the dismissal was outside the band of reasonable responses and unfair. Such procedures, including giving the employee an opportunity to make representations before dismissal and to appeal against any dismissal, are fundamental to notions of natural justice and fairness and it would be an unusual and*
10 *rare case where an employee [sic - this should read "employer"] would be acting within the band of reasonable responses in dispensing with such procedures altogether.*

15 44. *The Tribunal was well aware of this when it stated at [250] that, "Often this failure [to adopt any formal procedure before dismissing] would lead the Tribunal to conclude that the dismissal was unfair." The Tribunal was correct to state that this would "often" be the case rather than to conclude that it would invariably be so. It is well-established but (that?) there may be cases, albeit rare, where the procedures may be dispensed with because they are reasonably considered by the*
20 *employer to be futile in the circumstances. Such a situation is contemplated in Polkey v Dayton, where Lord Bridge stated as follows:*

25 *"It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.98(4) may be satisfied. "*

30 Such cases, Ms Greig accepted, were fact-specific. Ms Greig observed that there were several points within her appeal document where the claimant

referred to losing trust in the respondent. However, it was not essential for the respondent to establish that in order to rely on Gallacher.

123. In relation to the alternative reasons for dismissal advanced by the respondent, Ms Greig submitted that if the reason for dismissal was not SOSR, it could on the same facts be found to be conduct or capability under section 98(2) ERA. The focus would then be on the causes of the breakdown in relationships rather than the fact of the breakdown.

124. Turning to remedy, Ms Greig pointed to the fact that the claimant had chosen not to give evidence. She directed my attention to documents S9 and S16 in the supplementary bundle in which the claimant has stated that she was not seeking financial compensation. However, she accepted that section 112(4) ERA came into play here - *“the tribunal shall make an award of compensation....”*.

125. Ms Greig argued that if compensation were to be awarded to the claimant, account should be taken of her contributory conduct. She acknowledged the difficulty where the relevant conduct was linked to health but submitted that there should be some reduction.

126. Ms Greig referred to *Polkey vAE Dayton Services Ltd [1987] UKHL 8*. If there was to be an award of compensation, account should be taken of the likelihood of a fair dismissal if a different procedure had been followed.

127. Finally, Ms Greig submitted that the claimant had failed to mitigate her loss. She had not, according to her schedule of loss, returned to full time work. She had also not given credit within that schedule for the payment in lieu of notice which she had received.

128. Notwithstanding her earlier indication that she did not wish to make an oral submission, I invited the claimant to respond. She said that for her the case was an issue of principle rather than financial gain. It was a lose/lose situation in that she regarded damage to the respondent as damage to her. She said that she intended to donate any sum awarded to her back to the respondent.

Applicable law

129. The right not to be unfairly dismissed is found in section 94 ERA -

(1) *An employee has the right not to be unfairly dismissed by his employer....*

5 130. Section 98 ERA deals with the reason for and fairness of a dismissal -

(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -*

(a) *the reason (or, if more than one, the principal reason) for the dismissal, and*

10 (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) *A reason falls within this subsection if it -*

15 (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

(b) *relates to the conduct of the employee,*

(c) *is that the employee was redundant, or*

20 (d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

(3) *In subsection (2)(a) -*

25 (a) *“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

5 (4) Where the employer has fulfilled the requirements of subsection(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

io (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case....

131. Section 112 ERA deals with remedies -

15 (1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.

(2) The tribunal shall -

(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and

20 (b) ask him whether he wishes the tribunal to make such an order.

(3) if the complainant expresses such a wish, the tribunal may make an order under section 113.

25 (4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee.

132.. Section 113 deals with orders for reinstatement or re-engagement.. The claimant was originally seeking reinstatement but by the time of the hearing she had confirmed that this was no longer the case.'

133. Sections 118, 119, 122 and 123 ERA deal with compensation and provide, so far as relevant, as follows -

118 General

(1) *Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—*

(a) *a basic award (calculated in accordance with sections 119 to 122 and 126), and*

(b) *a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).*

119 Basic award

(1) *Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by -*

(a) *determining the period, ending with the effective date of termination, during which the employee had been continuously employed,*

(b) *reckoning backwards from the end of that period the number of years of employment falling within that period, and*

(c) *allowing the appropriate amount for each of those years of employment.*

(2) *In subsection (1)(c) “the appropriate amount” means -*

(a) *one and a half weeks’ pay for a year of employment in which the employee was not below the age of forty-one,*

(b) *one week’s pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and*

(c) *half a week’s pay for a year of employment not within paragraph (a) or (b)....*

122 Basic award: reductions

(V)

(2) *Where the tribunal considers that any conduct of the complainant before the dismissal. ...was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly...*

5

123 Compensatory award

(1) *Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers Just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

10

(2)

15

(3)

(4) *In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.*

20

(5)

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

25

134. In **Polkey** Lord Bridge adopted language used by Browne-Wilkinson J (as he then was) in the earlier case of **Sillifant v Powell Duffryn Timber Ltd 1983 IRLR91-**

5 *“There is no need for an “ail or nothing” decision. If the industrial tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment. ”*

Discussion and disposal

135. The issues I had to decide in this case were quite straightforward -

(a) Had the respondent shown a potentially fair reason for dismissal?

10 (b) If so, had the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant?

Reason for dismissal

15 136. The decision to dismiss the claimant was taken at the respondent’s Board meeting on 30 September 2021 . They had been moving towards dismissal since the Board meeting on 4 August 2021. The position at the August meeting was that, while a negotiated settlement with the claimant was the preferred outcome, the board were preparing for the claimant’s *“potential medical dismissal”*.

20 137. When a negotiated settlement was not achieved, the respondent took steps consistent with possible termination of the claimant’s employment on the grounds of what was described in the Board minutes of 4 August 2021 as *“medical ill health incapability”*. They sought an OH report and a GP report. Those were steps that would normally be expected when an employer was contemplating a dismissal on grounds relating to an employee’s capability in terms of the employee's health.

25 138. The OH report did not provide support for terminating the claimant’s employment by reason of lack of capability. Ms Gordon’s advice was that the respondent *“could no longer pursue that avenue”* Ms Gordon also advised that the options open to the respondent included pursuing the claimant’s dismissal for SOSR, based on *“irrevocable breakdown of trust”*. What I have

referred to above as “the trustees’ frustration with the claimant” (see paragraph 88) was in essence the set of beliefs upon which the decision to dismiss was based.

139. In ***Abernethy v Mott Hay and Anderson 1974 IRLR 213*** Lord Cairns said -

5 “A reason for the dismissal of the employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee”.

140. I found that it was the breakdown in the relationships between the trustees and the claimant, and between the claimant and the respondent’s staff (in particular the coordinators), which underpinned the decision to dismiss the claimant. That breakdown was capable of being a SOSR for dismissal, and I found that it was the reason for dismissal in this case.

141. I considered whether it could be said that the respondent has used this SOSR as a “pretext to conceal the real reason” for the claimant’s dismissal (see the reference above to *Elzsias*). I decided that they had not done so. There was clearly a capability aspect as confirmed by the trustees’ intention to move towards dismissal for that reason, prior to receiving the OH report. However, the trustees had then been advised that they could no longer pursue this and had not done so.

20 142. There was also a conduct aspect, reflected in “the trustees’ frustrations” as recorded in the minutes of the Board meeting on 30 September 2021 . There was perceived by the trustees to have been conduct of the claimant which contributed to the relationship breakdown. It was however that breakdown, and not any conduct of the claimant which contributed to it, which was the reason for dismissal.

25

Did the respondent act reasonably or unreasonably?

143. I considered the circumstances which subsisted at the time of the claimant’s dismissal. I believed the following were relevant-

- s
- (a) The seniority of the claimant's position within the organisation. It was clearly important that a relationship of trust should exist between the Board and the respondent's senior manager. Absences and erratic attendance on the part of that manager would be very likely to impact adversely on the operation of the organisation and put added pressure on other staff. I believed that was what had occurred in this case.
- io
- (b) The respondent's size and administrative resources. The respondent was a small charity whose board comprised unpaid volunteers. However, through membership of GCVS the respondent had access to a range of services including HR advice. In the period of time leading up to and immediately following the claimant's dismissal, the respondent had the benefit of HR input from Ms Gordon. Accordingly they were not materially disadvantaged (in the context of dealing with that dismissal) by reason of their small size and lack of administrative resources.
- is
- (c) The trustees were dealing with a difficult and unusual situation. They were getting mixed, and at times conflicting, messages from the claimant about her state of health. The claimant had given very good service over a period of 8/9 years and was entitled to take credit for the relatively sound financial position of the respondent. There was goodwill towards her on the part of the trustees. That, combined with an understandable (given the absence of a clear diagnosis) lack of clarity from the claimant about her health, presented a challenging set of circumstances for the trustees.
- 20
- (d) The issues with which the trustees had to deal included a variety of complaints about the claimant from staff, including the coordinators who were next in seniority to the claimant. There was ample evidence (such as the joint letter of 3 August 2021) for the trustees' perception that the relationship between the claimant and the coordinators had broken down.
- .30

144. In terms of assessing whether the respondent acted reasonably or unreasonably, I considered that things went wrong at the Board meeting on 30 September 2021. The advice from Ms Gordon about how to proceed towards a SOSR dismissal was basically sound (see paragraph 89 above).
5 When she referred to "*Decision made by the board*" I believed that she must have meant a decision to start the process potentially leading to the claimant's dismissal for the SOSR reason of irrevocable breakdown of trust. That was consistent with the next step in that process as outlined by her - holding a meeting at which the claimant would be told that the Board was "*considering dismissal on the grounds of SOSR*". It was also consistent with the final step
10 in that process - "*Following the meeting, the panel make the decision*" and "*If dismissal is agreed*."

145. However, the actual decision taken by the Board following their vote was "*Dismissal on grounds of SOSR immediately*". I found that some unfortunate
15 consequences flowed from this -

(i) Firstly the letter sent to the claimant (139) inviting her to the meeting was misleading. The heading of "*Continuation of Employment Review Meeting*" and the narrative of "*The purpose of the meeting is to review your current circumstances and sustainability of employment*" and
20 "*one of the possible options will be to consider terminating your employment*" did not reflect the true position which was that a decision to dismiss the claimant had already been taken by the Board. The claimant was not given fair notice of what issues were to be discussed at the meeting.

(ii) At the meeting on 15 October 2021, what was presented to the
25 claimant was the *fait accompli* that the decision to terminate her employment had been taken by the Board. She was not given either in advance of, or at, the meeting any details of the information upon the basis of which the Board believed that her relationship with the
30 staff team and the Board had broken down. This deprived her of any opportunity to provide her own input and answer allegations against her. That she might well have done so, had she been given such an

opportunity, was demonstrated by the content of her subsequent appeal document.

146. As the case of **Gallacher** illustrates, there can be circumstances where a failure to take procedural steps such as giving the employee an opportunity to make representations before dismissal will not render the dismissal unfair. However, such cases are likely to be infrequent and fact-specific. In contrast to what happened in **Gallacher** where no procedure was followed, in the present case there was a procedure but unfortunately it was one which offended against the principles of natural justice. The claimant should have been, but was not, (i) given fair notice of the issues to be discussed at the meeting on 15 October 2021 and (ii) afforded a chance to provide her own input and to answer allegations against her.

147. It is convenient here to deal with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "Code"). Ms Greig accepted in her submissions that the Code could apply even where the dismissal was ultimately for SOSR. She referred to **Lund v St Edmunds School, Canterbury [2013] All ER (D) 365**. In that case the EAT (per Keith J) said that the Code -

"...is intended to apply to those occasions when an employee faces a complaint which may lead to disciplinary action or where the employee raises a grievance. If the employee faces a complaint which may lead to disciplinary action (whether because of his misconduct or poor performance), the Code applies to the disciplinary procedure under which the complaint is to be investigated and adjudicated upon. Of course, the outcome of the disciplinary procedure may not result in the employee's dismissal at all. Or it may result in his dismissal which on analysis turns out not to be a dismissal for his misconduct but for something else. The important thing is that it is not the ultimate outcome of the process which determines whether the Code applies. It is the initiation of the process which matters. The Code applies where disciplinary proceedings are, or ought to be, invoked against an employee."

148. Section 207A (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides as follows -

If, in the case of proceedings to which this section applies, it appears to the employment tribunal that -

- 5 (a) *the claim to which the proceedings relate concerns a matter to which a relevant Code Of Practice applies,*
- (b) *the employer has failed to comply with that Code in relation to that matter, and*
- (c) *that failure was unreasonable,*

io *the employment tribunal may, if it considers it Just and equitable in all the circumstances to do so, increase any award it make to the employee by no more than 25%.*

149. The Code itself contains the following paragraphs -

- 15 1. *This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.*
- *Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.*
 - *Grievances are concerns, problems or complaints that employees raise with their employers.*

25 *The Code does not apply to redundancy dismissals or the non-renewal of fixed term contracts on their expiry.*

2. *Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear.*

5 *Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used.*

iO 3. *Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment Tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.*

4. *That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:*

15 • *Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.*

• *Employers and employees should act consistently.*

20 • *Employers should carry out any necessary investigations, to establish the facts of the case.*

• *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*

25 • *Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.*

• *Employers should allow an employee to appeal against any formal decision made.*

150. It was clear from **Lund** that the Code could apply in circumstances where an employer initiates a process which relates to an employee's conduct or

performance, and which leads to a dismissal for another reason, such as SOSR. However, I considered it less clear that the Code could apply where, as here, (a) the process initiated by the employer related to the claimant's capability in relation to her health and (b) at no point was it a disciplinary process.

5
151. While I could see the argument that it had been aspects of the claimant's conduct which had led to the relationship breakdown, I did not consider that the process followed by the respondent could at any stage, from initiation to conclusion, fairly be described as "*disciplinary proceedings*". I therefore
10 decided that the Code had not been engaged in the particular circumstances of this case.

152. I could also see the argument that the respondent should have waited for a report from the claimant's GP. I was in no doubt that the respondent's witnesses had been wrong to treat the OH report as being a final report, and
15 that the claimant's reference to it as an "interim report" was an accurate description (see paragraph 81 above). Did the failure to await the GP report and thereafter obtain a final OH report make the claimant's dismissal unfair?

153. I believed that the right way to look at this was that it was one of the "*circumstances*" which I required to consider in terms of section 98(4)(a) ERA.
20 I considered that to treat this as sufficient on its own to render the claimant's dismissal unfair would not be the correct approach (and might risk the criticism that, if I did so, I would be impermissibly substituting my own view rather than looking at the fairness or otherwise of what the respondent did). I found that the respondent's failure to wait for a GP report, and then to obtain a final OH
25 report, counted against them in my assessment of whether they had acted reasonably or unreasonably.

154. Approaching matters on the basis of the range of reasonable responses, I believed that no reasonable employer would have failed (i) to give the claimant fair notice of the issues to be discussed at the meeting on 15 October
30 2021_and (ii) to afford the claimant a chance to provide her own input and

answer the allegations against her. These were fundamental matters of natural justice.

155. In contrast, I did not believe it could be said that no reasonable employer would have failed to wait for a GP report and then obtained a final OH report.
5 It would have been preferable if the respondent had done so. However it was not such a fundamental breach of what was fair as to take it outwith the band (or range) of reasonable responses.

156. The claimant's appeal gave the respondent an opportunity to put things right in the sense of addressing the failures referred to in paragraph 154. For that
10 to happen, the appeal would have required effectively to be a rehearing of the case at the dismissal stage. That did not occur, which was not surprising since the failures were not recognised as such.

157. However, the respondent could and should have done more at the appeal stage. The grounds of appeal should have been identified and the respondent
15 should have been able to explain why each ground of appeal was rejected. These matters also counted against the respondent in my assessment of whether they had acted reasonably or unreasonably.

158. I therefore decided that the respondent had acted unreasonably in treating the SOSR of breakdown of relationship as a sufficient reason for dismissing
20 the claimant. Accordingly, the dismissal was unfair.

Remedy

159. The claimant having confirmed that she did not wish to return to the respondent's employment, I proceeded to consider the matter of compensation.

25 160. I considered first the basic award. The claimant's employment commenced on 23 October 2011 and ended on 19 October 2021. That meant she had completed 9 years' continuous employment at the date of dismissal. However, by virtue of section 97(2) and (3) ERA, the claimant's effective date of termination ("EDT") for the purpose of calculating the basic award was the
30 date upon which her statutory minimum period of notice (calculated in terms

of section 86 ERA) would have expired. That period was 9 weeks which meant her EDT was 19 December 2021 .

161. As at 19 December 2021, the claimant would have completed “10 years’ continuous employment. Her date of birth was 7 March 1974, so Z of those years were after the age of 41 and the appropriate multiplier was 1.5. The remaining 3 years were below the age of 41 and the appropriate multiplier was 1. The aggregate multiplier was 13.5.
162. The claimant’s gross weekly pay was £636.65. However the applicable statutory cap on a week’s pay at the relevant time was £544.00. Applying to this the aggregate multiplier of 13.5 produced a basic award of £7344.00.
163. I noted that section 112(4) ERA provided that, where no order for reinstatement or re-engagement was made under section 113, “*the tribunal shall make an award of compensation....*”. The use of “*shall*” meant that such an award required to be made. Accordingly, subject to what I say below, I decided that the claimant was entitled to a basic award of £7344.00 .
164. I next considered the compensatory award. Here I was in some difficulty as a result of the claimant’s decision not to give evidence. In particular -
- a. I had no information about the claimant’s qualifications and past work experience to take into account when assessing whether the claimant had taken reasonable steps to mitigate her loss.
 - b. I had no information about the self-employment undertaken by the claimant since 1 November 2021 according to her schedule of loss, and so no information about her current or future prospective earnings from which I might be able to assess when and if her earnings might equal or exceed her earnings with the respondent.
 - c. I had no information about the steps, if any taken by the claimant to secure employment at a rate of pay comparable or better than her earnings with the respondent, and hence I had little to go on in terms of assessing whether the claimant had taken reasonable steps to mitigate her loss.

d. I had no information about any other factors which might have affected the claimant's earning capacity since her dismissal, such as her state of health or childcare responsibilities.

e. I did not have the opportunity to consider the claimant's responses to questions under cross-examination about mitigation of loss.

5

165. For the reasons set out in the preceding paragraph, I came to the view that I was not satisfied that the claimant had taken reasonable steps to mitigate her loss following her unfair dismissal. Accordingly I decided (a) it would not be appropriate to make an award in respect of loss of earnings and (b) it would be just and equitable to compensate the claimant only for the loss of her statutory employment protection rights. I assessed that loss in the sum of £500.00. The aggregate of the basic award and the compensatory award was therefore £7844.00.

10

166. I then considered the likelihood that the claimant would have been dismissed had the respondent followed a fair procedure. I refer to the passage quoted from *Polkey* at paragraph 134 above. I believed that if the respondent had given the claimant (a) fair notice of the issues which were to be discussed at the meeting on 15 October 2021 and (b) an opportunity to provide her own input and answer allegations against her, it was highly probable that the outcome would have been her dismissal.

15

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167. I did not have to speculate about what the claimant might have said if the respondent had taken these steps because the claimant had produced a lengthy and comprehensive appeal document. The respondent's witnesses all presented as being fair-minded and not ill-disposed towards the claimant. I did not believe it could be said with complete certainty that the claimant would inevitably have been dismissed had a fair procedure been followed. However, the likelihood of dismissal was very high, and I assessed that likelihood at 90% (the "*Polkey* reduction"). Applying the *Polkey* reduction to the aggregate of the basic award and the compensatory award resulted in the reduced sum of £784.40.

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168. Had it been appropriate to do so I would then have considered whether this sum should be adjusted by reason of an unreasonable failure to follow the Code. However, in view of my finding that the Code had not been engaged in the particular circumstances of this case, no such adjustment was required.

5 169. I then turned to the question of whether there should be any adjustment to compensation by reason of conduct on the part of the claimant. I reminded myself that the statutory language was different as between the basic award (per section 122(2) ERA) and the compensatory award (per section 123(6) ERA). I decided that there should be no such adjustment. I came to that view
10 because I considered it would be too speculative to try and assess the extent to which the breakdown in relationships between the claimant and the respondent's staff, and between the claimant and the trustees, was attributable to conduct/action of the claimant.

15 170. Accordingly, I found that the amount of compensation to which the claimant was entitled by reason of her unfair dismissal was £784.40.

Employment Judge: S Meiklejohn
Date of Judgment: 9 January 2023
Entered in register: 11 January 2023
and copied to parties

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