



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Garner

Respondent: Cheshire Autism Practical Support Limited

HELD AT: Liverpool (by CVP)

ON: 29, 30 April, 1, 2 & 3
May 2024

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Unrepresented

Respondent: Mr David Flood (counsel)

JUDGMENT

The judgment of the Tribunal is that:

- (1) The complaint of unfair dismissal brought under Part X Employment Rights Act 1996 is unsuccessful which means that the claimant was fairly dismissed.
- (2) The complaint of breach of contract/wrongful dismissal is not well founded which means that this complaint is unsuccessful.
- (3) The complaint of unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 is not well founded which means that complaint is unsuccessful.
- (4) The complaint seeking payments in respect of untaken accrued annual leave entitlement at the date of termination contrary to regulations 13 and 13A Working Time Regulations 1998 is not well founded which means it is unsuccessful.

REASONS

Introduction

1. These proceedings arose from the claimant's (Mrs Garner's) employment as a managing director with the respondent charity (known as CHAPS) and her dismissal for reasons of conduct by the Trustees of CHAPS on 19 April 2022.
2. Mrs Garner was the founder of the charity in 2010. It was incorporated in 2012 and from this point she was employed by CHAPS as its Managing Director. In 2018, she was diagnosed with autism which she believes explained several ongoing difficulties that she had been experiencing with work previously.
3. Several issues arose concerning Mrs Garner's relationship with colleagues and trustees in 2021. However, it was an investigation into allegations regarding various financial irregularities in 2022 while employed as Managing Director, which resulted in her dismissal.
4. Mrs Garner presented a claim form to the Tribunal on 3 August 2022 following a period of early conciliation from 15 June to 4 July 2022. She indicated that her complaints were unfair dismissal, disability discrimination, notice pay, holiday pay, arrears of pay and other payments. The asserted disability condition was autism.
5. The grounds of claim which accompanied that claim form focused primarily upon the background to Mrs Garner's disability discrimination complaint. It did however, to a lesser extent, also address the other complaints that Mrs Garner was bringing in these proceedings and which have survived to the final hearing.
6. The response was prepared by Mr Flood and presented to the Tribunal by CHAPS's instructing solicitors on 16 September 2022. It resisted the claim arguing that Mrs Garner had been fairly dismissed by reason of her conduct, that they disputed she was disabled and, in any event, she had not been subject to discrimination because of her alleged disability.
7. There has been considerable case management in this case and a Preliminary Hearing Case Management (PHCM), took place before Judge Leach on 10 November 2022. Following clarification of Mrs Garner's claim, an amended grounds of resistance was permitted and this was presented on 12 January 2023.
8. Following consideration being given to ground rules at a PHCM before Judge Howard on 28 June 2023, a preliminary hearing (PH), took place before Judge Aspinall on 2 October 2023. She determined that Mrs Garner did not have a disability within the meaning of section 6 Equality Act 2010 (EQA) at the material time and accordingly the disability discrimination complaint was dismissed. The other complaints however, remained and would proceed to the final hearing. Importantly, Judge Aspinall had an opportunity to consider

Mrs Garner's capacity to manage her claim and adjustments were discussed at the beginning of the PH and identified within the Note of PH produced, (pp108-9 of the bundle).

Issues

9. The parties were informed of the list of issues which was attached to the Note of Preliminary Hearing of Judge Aspinall, (pp115-7 of the bundle). It is repeated in this section below.

Unfair dismissal

10. It is accepted that the Claimant was dismissed.
11. Has the respondent shown the reason or principal reason for dismissal?
12. Was it a potentially fair reason under section 98 Employment Rights Act 1996? The respondent says that the claimant was dismissed for misconduct.
13. If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reasons as sufficient to dismiss the claimant?
14. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
- a) The respondent genuinely believed the claimant had committed misconduct.
 - b) There were reasonable grounds for that belief.
 - c) At the time the belief was formed the respondent had carried out a reasonable investigation.
 - d) The respondent followed a reasonably fair procedure.
 - e) The dismissal was within the band of reasonable responses.

Remedy for unfair dismissal

15. Does the claimant wish to be reinstated to their previous employment?
16. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
17. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

18. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
19. What should the terms of the re-engagement order be?
20. If there is a compensatory award, how much should it be? The Tribunal will decide:
- a) What financial losses has the dismissal caused the claimant?
 - b) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - c) If not, for what period of loss should the claimant be compensated?
 - d) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
 - e) If so, should the claimant's compensation be reduced? By how much?
 - f) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - g) Did the respondent or the claimant unreasonably fail to comply with it?
 - h) If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
21. What basic award is payable to the claimant, if any?

Wrongful dismissal / Notice pay

22. What was the claimant's notice period?
23. Was the Claimant paid for that notice period?
24. If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

Unauthorised deductions

25. Did the respondent make unauthorised deductions from the claimant's wages and if so, how much was deducted?

Evidence used

26. Mrs Garner gave witness evidence and relied upon the following witnesses:
- a) Michelle Collard (CEO of CHAPS from January to September 2023).

- b) Jane Harris (director of grants for Steve Morgan Foundation).
- c) Anne-Marie Hoekstra (service user/supporter of CHAPS).
- d) Jennie Deus (service user/supporter of CHAPS).
- e) Marie McLaughlin (service user/supporter of CHAPS).
- f) Dr Kate Sillitoe (service user and former trustee of CHAPS).
- g) Jo Morlidge (service user and former CHAPS).

Mrs Garner produced a lengthy statement which dealt with a range of matters relating to her employment, including grievances and relationships with the trustees and other employees working for CHAPS. There was little reference made to the actual dismissal and the fairness or otherwise of the Tribunal proceedings. Mr Flood not surprisingly, felt that his cross examination did not need to be extensive given the limited evidence relating to the dismissal and other complaints involving notice pay, wages and holiday pay.

27. CHAPS called the following witnesses:

- a) John Fielding (investigating officer)
- b) Joanne Thomas (disciplinary hearing officer/Chair of Trustees)
- c) Leona Sasse (one of two trustees hearing appeal/trustee)

I accepted Mr Flood's application following the conclusion of the claimant's witness evidence that Ms Thomas be recalled in order that she could answer a specific question. This arose from evidence given by Ms Harris when asked a supplemental question by Mrs Garner, regarding an absence of a spreadsheet when she attended several months following the dismissal of the claimant and which had not been addressed in her witness statement.

28. On Day 2 of this hearing, Ms Thomas gave evidence in the morning and Ms Sasse gave evidence in the afternoon. The claim existing at the final hearing primarily involved unfair dismissal hearing. This meant the respondent's witnesses gave evidence first. Day 2 ended early at 3:30pm, because Mrs Garner began to feel overwhelmed.

29. On Day 3, Mr Fielding gave evidence which concluded the respondent's case. Ms McLoughlin then gave evidence because she had limited time available followed by Mrs Garner. The remaining claimant witnesses were heard in the following order during the afternoon: Jane Harris, Jennie Deus, Anne-Marie Hoekstra, Michelle Collard, Joanne Morlidge and Dr Kate Sillitoe.

30. Concerns raised by Mr Flood at the beginning of Day 3 that Ms Collard had ended her short period of employment as Chief Executive of the respondent during 2023 with an agreement which included a confidentiality clause. As

this matter related to a witness rather than Mrs Garner as claimant, I simply made sure that Ms Collard was warned that this issue had been raised earlier by Mr Flood. However, she confirmed that she wished to give her evidence, which was completed very quickly with no cross examination from Mr Flood.

31. While Mr Flood conducted limited cross examination of the claimant's witnesses, he asserted that this was on the basis that the respondent did not accept the contents of those statements which had been provided.
32. Documents were contained in a main hearing bundle of 2745 pages and consisting of the proceedings, numerous emails, investigatory and process related matters and policies and procedures as well as the schedule of loss and counter schedule of loss. There was some duplication of documents and a significant proportion of its contents were not relevant to the determination of the claim.
33. It is unfortunate that the parties were unable to reduce the scale of the bundle before the final hearing took place as it added unnecessarily to the reading required on the first day. I acknowledge however, that Mrs Garner was unrepresented and was also concerned that the full history of events during the latter part of her employment were included. Indeed, Mrs Garner also provided an additional bundle of documents 76 pages and consisting of emails and messages, which were not significant in terms of my deliberation in this final hearing.
34. Not surprisingly this substantial bundle combined with the numerous witness evidence meant that following an initial discussion with the parties, I needed to devote the remainder of Day 1 dealing with reading.

Adjustments provided to the claimant concerning her participation as an unrepresented party with neurodiversity during the final hearing

35. Consideration was given to Mrs Garner's neurodiversity and previous adjustments discussed at the preliminary hearings before Judges Howard, Aspinall and Shotter. Primarily this provided for additional breaks as necessary and allowing additional time so that Mrs Garner could organise her thoughts in relation to evidence and cross examination.
36. As it happened, Mrs Garner was able participate in the proceedings relatively easily. I often had to encourage her to take breaks every hour or so. There were some challenges required concerning the nature of her cross examination, the extent to which it remained focused upon the dismissal and matters under consideration in the list of issues. Like many unrepresented parties, Mrs Garner had an ongoing unhappiness concerning the way in which she was managed and which went beyond the complaints under consideration in these proceeding.
37. I applied the overriding objective and the relevant principles explored in the Equal Treatment Bench Book concerning unrepresented and neurodiverse parties.

38. While at times my interruptions of Mrs Garner's cross examination of the respondent witnesses may have been frustrating for her, she did display a desire to question her witnesses beyond what was already provided within their statements. Nonetheless, I did allow her some latitude insofar as was proportionate and in the interests of justice. In particular, this involved time being allowed so that each of her witnesses could give evidence and to apply some flexibility so that she could ask limited supplemental questions. She explained that as some of the witnesses were also autistic, they may give lengthy answers which went beyond the closed question and answer that would normally be encountered. I was willing to allow some flexibility in this regard but on the basis that Mr Flood could object as appropriate and in relation to one matter, he could recall Ms Thomas as described above.
39. There were occasions when I needed to encourage some progress within this final hearing. Moreover, occasional interventions were required to avoid the risk of disproportionate prejudice to the respondent and to ensure overall fairness. Accordingly, I insisted that the usual format take place concerning the examination of witnesses and at least on one occasion, I needed to explain to Mrs Garner that she could not return to cross examine Mr Fielding following the completion of cross examination, judicial examination and re-examination of the witness concerned.
40. I was satisfied however, that Mrs Garner was provided with every opportunity to cross examine the respondent's witnesses. I allowed a break between each of the main witnesses being called. I did ask Mrs Garner to reflect when she said that she had concluded her cross examination of each witness so that she could assess whether she had asked everything that she needed in relation to the list of issues.

Findings of fact

The parties and their relationship

41. The respondent CHAPS began as a small, unincorporated charity and was founded by the Mrs Garner in April 2010. It became an incorporated and registered charity with the Charity Commission from 6 November 2012 and from this point she became the charity's Managing Director. This was the senior employed, leadership role and placed Mrs Garner in a position of significant responsibility.
42. Mrs Garner had a background of working in jobs which involved accountancy skills and was familiar with using systems provided by the company Sage, (SAGE).
43. Following her son's diagnosis with Aspergers (which is an ASC), she established CHAPS with other parents in her locality who had children with ASC. She was heavily involved in running of CHAPS and the charity's income increased significantly from 2014 until 2022.
44. As a registered charity, governance was understandably of paramount importance and CHAPS was supervised by a number of Trustees whose

numbers and names varied from 2012 until the 2022. Many of the people who served as Trustees became involved with CHAPS because of their experience of having autism or having children or other family members who had been diagnosed with ASC. Despite being a voluntary role, it placed the holder under significant responsibility. Inevitably, it could be very time consuming as CHAPS was a growing charity with increasing resources, expanding its service provision with a need to recruit employees and more volunteers. In 2022, the relevant Trustees were Joanne Thomas as Chair, Leona Sasse and James Eager.

45. I understood that there had been a greater number of Trustees in office during previous years, but several had resigned during 2021. This would undoubtedly have placed significant workload pressures upon the 3 remaining Trustees in 2022.
46. Mrs Garner was Managing Director of CHAPS from 2012 until 19 April 2022 when she was dismissed following a disciplinary process. I accepted that she was Managing Director of a relatively small organisation with fewer support staff available than might exist with say, one of the larger regional or national charities. Accordingly, her remuneration was not comparable with that received by Managing Directors or CEOs at these larger organisations. Nonetheless, it was a responsible job, being a leadership role and one which required good supervision and management of organisational and financial matters.
47. There appeared to be a challenge faced by Mrs Garner as CHAPS grew in that she needed to devote herself to the more mundane but essential administrative tasks which ensured good governance of this charity. A tension appeared to exist between these activities which would normally be carried out by a Managing Director and the therapeutic and supportive activities of service users which were understandably the reasons for Mrs Garner creating CHAPS in the first place. This seemed to result in her being 'spread thinly', when some of the more frontline services such as running an on site café, should have been delegated to more junior colleagues.
48. There was no doubt during this hearing that many people who had been involved with CHAPS, retained a great deal of respect for Mrs Garner and were dismayed about what had happened in relation to her dismissal. It is certainly the case that Mrs Garner's has demonstrated a commitment to supporting people with autism in the part of Cheshire where she lives and farther afield. This is commendable and with a public sector which has suffered funding restrictions for many years, UK society relies hugely upon the third sector and the determination and passion of people like those involved with CHAPS including Mrs Garner.
49. While I acknowledge the considerable support given from the character witnesses who were called to support Mrs Garner in this case, the list of issues related to decisions made by the Trustees to subject her to a disciplinary process resulting in her dismissal by reason of conduct and related wages type complaints. Accordingly, Mrs Garner's witnesses did not contribute materially to the evidence that I needed to consider in these finding

of fact in relation to unfair dismissal, breach of contract, wages and holiday pay. Nonetheless, it is to Mrs Garner's credit that the witnesses who provided witness evidence in support of her case, were not only willing to provide signed statements, but were also willing to attend the hearing and give evidence under oath. This is something that happens rarely in an Employment Tribunal hearing of this nature.

The dismissal of the claimant

50. The decision to dismiss was made by Ms Thomas who is the Chair of Trustees. She explained in a letter dated 19 April 2022, (p1341-8), the grounds of the dismissal and that the reason for reaching this decision was that she believed Mrs Garner had committed acts of gross misconduct relating to:

- a) *'Potential Fraud – Avoiding VAT on laptops'*. The making of a declaration to an IT company in January 2021 that CHAPS did not have to pay VAT when four laptop computers were purchased.
- b) *'Potential Fraud – Use of a SAGE licence that is not registered to CHAPS'*. The use of licences for SAGE business accounts and payroll systems for a number of years, which actually belonged to another company not related to CHAPS.
- c) *'Poor financial governance of the charity'*. General financial mismanagement over a number of years involving access to company bank accounts, not invoicing to service providers sufficiently quickly and poor management involving access to SAGE.

The investigation process and the evidence which resulted in the decision to dismiss

51. CHAPS has a disciplinary procedure which applies to all of its employees, (pp1555-8). When Ms Taylor became aware of allegations involving Mrs Garner, she raised the matter with Claire Bentley who is CHAPS' HR consultant. She knew Mr Fielding had knowledge to carry out disciplinary investigations and he convincingly explained that his familiarity with SAGE IT systems made him an obvious candidate to act as investigating officer. He was instructed by her on 25 February 2022, (p1571).

52. Mrs Garner was already suspended when the investigation which led to her dismissal began. She was already subject to a suspension concerning allegations which had been made against her involving another member of staff and which ultimately was not resolved by the time her dismissal took place.

53. The issue relating to the laptops and the question of whether VAT was payable arose from an order made by Mrs Garner for 4 laptops for CHAPS from a company called Ballicom. The invoice produced by Ballicom under invoice 304325440 charged the net figure of £2,160.00 with VAT being recorded as £0.00, (p225).

54. The second page included a VAT Reliefs for Disabled People – Eligibility declaration by a charity, which was signed by Mrs Garner on 7 January 2021 and ticked the box entitled '*Goods which are being supplied for a disabled person's personal or domestic use*', with the handwritten details, '*4 LAPTOPS FOR ADULTS WITH AUTISM*', (p226-7). On the following page there is a clear warning called '*Note to customer*', and which says, '*If you are in any doubt as to whether you are eligible to receive goods or services zero-rated for VAT you should consult the HMRC website or telephone the VAT Disabled Reliefs Helpline on 0300 123 1073.*'
55. I did not hear any evidence from Mrs Garner that she made an enquiry with HMRC at time of the order with Ballicom. She appeared adamant that because the laptops were ordered for people with autism, they were zero rated for the purposes of VAT. Indeed, the messages which were sent between management on 7 January 2021, clearly confirmed that the intended primary purpose for the laptops was for CHAPS staff and not service users or as a consequence of Access to Work arrangements, (pp230-1).
56. Mrs Garner asserted during her disciplinary investigation with Mr Fielding that the laptops were for employees with autism, (p1253). However, when questioned by Ms Thomas during the disciplinary hearing, she revised this position, conceding that only two of the intended recipients of the laptops had autism, but arguing that the others while without a formal diagnosis, '*...were on the spectrum.*' (pp1335). She also argued that by ordering laptops for working from home, this could constitute personal use.
57. During the disciplinary hearing, Mrs Garner sought to attribute responsibility for determining whether VAT is payable with Ballicom as supplier rather than on herself as the Managing Director of CHAPS ordering the equipment. Ultimately, she said that there was '*No intention to defraud – no gains for me*', which appeared to relate to her belief that she was saving CHAPS money rather than making the declaration for her own personal, financial advantage., (p1326). Ms Thomas made enquiries with Ballicom on 12 April 2022 which confirmed that Mrs Garner had made the declaration stating the order was VAT exempt, (p1338).
58. While in her evidence, there was an assertion made by Mrs Garner that the original Ballicom invoice would have been signed off by the Trustees, this was an argument that was only advanced during these proceedings in preparation for the final hearing and it was not an argument raised during the disciplinary process, where she claimed that as CHAPS is a '*...health institution...which provides health care, outpatient care centre or specialist care centre*', the laptops could be zero rated. Ms Sasse disputed that the allegations were correct when she gave her evidence to the Tribunal. On balance this appears to be correct. From the available documents which consider this particular issue, there does appear to be failure to take responsibility on the part of Mrs Garner and she was searching for arguments which would avoid her accepting the blame for what was a clear declaration made as Managing Director on behalf of CHAPS.

59. The issue relating to SAGE arose from an email that Mrs Garner sent on 21 February 2022 to the Trustees where she claimed expenses for the purchase of a new SAGE subscription. She explained that *'We haven't historically paid for the accounting software as I have provided it'*, (p1045). Both Ms Taylor and Mr Eager sought further clarification and Mrs Garner that the subscription originally derived from her own business *Abacus Bookkeeping* which existed before CHAPS had been established. The subscription was in her own name and its provision avoided the need for CHAPS to contract directly with SAGE, (pp:1041-6).
60. During the investigation meeting, Mrs Garner gave conflicting information to Mr Fielding concerning the provenance of the SAGE account. She initially said the licence related to her name, but this explanation evolved as the discussion progressed and she stated that it belonged to her former employer, Anne Allen Associates. When Ms Allen retired, Mrs Garner said that she inherited the access to the licence, but it was not changed into her name, (pp1253-4).
61. At the disciplinary hearing, it was explained that Mr Fielding had been able to discover that the SAGE account which Mrs Garner had used for CHAPS was registered to a company called 'Global Material Handling Limited' and which was a third party business. It had not connection to either Mrs Garner or CHAPS, (p1327). Mrs Garner did not dispute this explanation and attributed this licence holder to a mistake and suggested that the blame rested with her former employer, Ms Allen, (p1330).
62. Consequently, the concern for Ms Thomas was that Mrs Garner had used a licence belonging to another registered owner and despite not changing the licence details with SAGE and provided a series of different explanations which she blamed upon others rather than herself.
63. The poor financial governance allegations related to distinct charges and were identified by Mr Fielding as being:
- a) The SAGE log in procedures were installed so that instead of the 5 separate user accounts to be logged in, which identified who was logged on what activities they were responsible for, anyone logging on would be recorded as using a single 'MANAGER' log in. This would make auditing more difficult as it would not be easy to identify who had accessed SAGE and what they had done due to same generic log in being used.
 - b) Two trustees had not been removed as signatories from CHAPS' bank account sufficiently quickly following their resignation from this role. While the initial instructions to the bank had been given by Mrs Garner, these had not been followed up to check they had been complied with.
 - c) Invoices had not been presented in good time meaning that the financial year end was short of funds which should have been billed and paid by that date. Mrs Garner believed her suspension may have impeded this matter being progressed but that other staff could have dealt with invoices. Mr Fielding believed that responsibility rested with the CEO.

64. Mr Fielding produced an investigation report on 6 April 2022, which confirmed that Mrs Garner had been accompanied during her interview and that he had also interviewed the three Trustees, Ms Thomas, Ms Sass, and Mr Eager, on 3 March 2022. He noted that Mrs Garner confirmed she was experienced and knowledgeable in relation to bookkeeping. He *'filtered the concerns and allegations'* and in relation to the three allegations, determined that there was a case to answer. He noted in terms of capability, there was an absence of *'self reflection'* on her part and no indication that she was aware that she might require support. Relevant documents were enclosed as appendices, (1570-1575).
65. There had been some suggestion by Mrs Garner that Mr Fielding was not impartial in his role as investigator and suggested that his familiarity with Ms Bentley and his appointment as a Trustee in 2023 indicated that he would be biased against her. I could not accept that this was the case and not surprisingly, Ms Bentley wanted to instruct an external investigator whom she knew about and whom she had confidence in their background knowledge. Mr Fielding was only appointed as a Trustee in 2023 following the dismissal and I heard no convincing evidence that suggested this appointment was connected with him carrying out the investigation in a way which was favourable to CHAPS.
66. I concluded that he behaved in a way which was consistent with an investigating officer during a disciplinary process, had no prior involvement with the matters under investigation and he gave credible and reliable evidence.

The disciplinary hearing

67. An invitation was then sent to Mrs Garner on 1 April 2022 by Ms Bentley and which provided details of the allegations made against her following the conclusion of the investigation. She was invited to a disciplinary hearing on 5 April 2022 at the St John's Church Centre and it was explained that Ms Thomas would conduct the hearing and Krystyna Peterson would attend as witness and note taker. The relevant documents were enclosed that would be used at the hearing, Mrs Garner was advised that she could be accompanied and that if the allegations were proven, her employment might be terminated without notice, (p1297-8).
68. Mrs Garner wanted to bring a companion to the disciplinary hearing and as they were not available until 8 April 2022, the hearing was postponed until that date and confirmed in an email sent to her on 4 April 2022, (p 1314). She was cautioned however, that if she failed to attend, the hearing might take place in her absence.
69. The hearing took place on the rearranged date of 8 April 2022 and in addition to Mrs Garner, her companion Helen Bright was present along with the hearing decision maker, Ms Thomas and note taker, Ms Petersen, who produced a typed note which was included within the bundle. The hearing began at 1:40pm and ended with 15 pages of notes having been recorded,

(pp1323-7). Mrs Garner was recorded as being able to answer the allegations. It concluded with Mrs Garner arguing that she felt she was being treated differently from other members of staff. Ms Thomas confirmed she would reflect and provide her decision following Mrs Garner's week's holiday which was to begin the next week.

70. The dismissal letter as described above, was sent to Mrs Garner on 19 April 2022. Each of the allegations was found to have been proven and an explanation was provided for each decision, (pp1341-8).
71. In relation to the laptops and VAT allegation, she found that Mrs Garner knew the intended use for the laptops were not purchased as being with assistive technology to support disabled members of staff and were not for domestic or personal use. As such, she believed that Mrs Garner:

'...knowingly deceived the supplier in order to gain goods without paying the requisite VAT. Your defence that this was an honest mistake is not acceptable due to the clear wording of both the relevant guidance and the VAT declaration you completed clearly stating the usage was for the personal use of disabled adults with autism.'

'The fact that you did not personally gain from this transaction does not make the act any less serious – particularly considering your position as MD [presumably meaning Managing Director] in public office.'

She concluded by stating that she had made reference to the disciplinary policy and was satisfied that these actions amounted to gross misconduct, *'...specifically "theft, fraud, falsification of Company records or any dishonesty involving the Company, its employees, customers or suppliers."'*

72. In relation to the SAGE allegation Ms Thomas recorded that Mrs Garner had admitted using a licence that applied to a third party and her concern was that SAGE licences were not transferrable or shareable and can only be used by the organisation that purchased them. The result was that CHAPS had been using a licence which it did not own and without any authority to do so, for a period of more than 8 years. While she noted that Mrs Garner was of the belief that CHAPS could not afford to pay for a licence itself, Ms Thomas concluded that her actions were fraud as services had been obtained by deception. She referenced the same section of the disciplinary policy as before and also added that it could also amount to gross negligence meaning that her actions amounted to gross misconduct.
73. The final allegation was also considered proven with particular concerns being that a bank account containing substantial sums of money remained open for access by two former Trustees for a period of more than two years and yet Mrs Garner had failed to check to see that her instructions to the bank had been followed up. She noted Mrs Garner's experience of bookkeeping her leadership role and while she acknowledged that other members of staff might be involved in the relevant processes, it was Mrs Garner who was *'ultimately responsible'*. Ms Thomas also regarded the management of SAGE to be very poor and that Mrs Garner had left CHAPS vulnerable to misuse and fraud.

She also said that these actions amounted to gross misconduct and made reference to the part of the disciplinary policy relating to gross negligence.

74. Ms Thomas concluded by observing Mrs Garner's '*...strong background in bookkeeping...that you have knowingly put the charity and its reputation at risk, through negligent and underhand practices. That you stated you were doing this to save money for the charity is not a valid defence.*' Consideration was given to the possibility of imposing a lesser sanction than dismissal, but the reasons given in the above conclusion, she found that dismissal was the appropriate sanction. Dismissal was with immediate effect as being attributed to Mrs Garner's conduct and took place on 19 April 2022 when the decision was communicated to her. She was notified of her right to appeal within 5 working days and that notice should she decide to appeal, should be in writing and sent to either Ms Sasse or Mr Eager. It was confirmed that an independent person would then be appointed to hear the appeal.
75. Mrs Garner expressed concern that Ms Thomas was not impartial or unbiased and based her decision upon the wrong evidence. Moreover, she argued that Ms Thomas '*...failed to consider the range of options available and I believe gross misconduct was overly punitive given the circumstances.*'
76. Considering Mrs Garner's senior role with CHAPS, I considered it appropriate that Ms Thomas as Chair of Trustees was the appropriate person to hear the disciplinary hearing. Ms Thomas confirmed that consideration was given by the Trustees and Ms Bentley to the recent grievance brought by Mrs Garner against the trustees. However, they concluded that as an independent HR consultant had carried out the investigation and the decision on 14 March 2022 had been not to uphold any of the allegations, it was appropriate for Ms Thomas to be the Chair.
77. I accepted that Ms Thomas had gone to some length to check that she was able to assume this role and she confirmed she took account of the respondent's disciplinary procedure when reaching her decision. She also allowed Mrs Garner to fully participate in the disciplinary hearing and did not rush her decision upon its conclusion. Ms Thomas explained in her evidence that she considered Mrs Garner's role as the founder of CHAPS and her length of service. But she also balanced this against her role as Managing Director and her considerable experience. Moreover, she felt that the way Mrs Garner had behaved during the disciplinary process was lacking in honesty and her experience meant that she should have known what was being done was wrong. She acknowledged that Mrs Garner believed that her goal was to save CHAPS money, but this could not justify the actions, especially as these could cause reputational harm to the charity.
78. Ms Thomas also asserted that Mrs Garner's neurodiversity was also considered but concluded that she had a history of being able to establish and build up CHAPS and was not persuaded that this might have impaired her judgment.
79. Ms Thomas' evidence concerning the disciplinary process and the reasons for her decision to dismiss were not subject to significant challenge by Mrs

Garner during her cross examination. I found her to be a credible witness. On balance, I accepted that she reached her decision to dismiss as she described in her witness evidence.

The appeal against dismissal

80. Mrs Garner decided to appeal Ms Thomas' decision and her letter was dated 26 April 2022, (p1354-7). Her appeal letter was lengthy and identified the following grounds:

- a) Potential fraud – avoiding VAT on laptops: arguing that the sanction too severe or disproportionate.
- b) New evidence has come to light that should be investigated: arguing that the sanction too severe or disproportionate to the misconduct.
- c) The sanction was inconsistent with one imposed for similar misconduct committed by another employee: comparing her treatment with Natalie Cotterall.
- d) There was unfairness or bias amongst the original decision makers: in particular Ms Thomas was tainted by a poor personal relationship with Mrs Garner.
- e) The employer has not taken into account a previously exemplary disciplinary record.

81. Ms Thomas instructed Sharon Griffiths who is an independent Human Resources Consultant to produce an investigation report. Ms Thomas informed her that as she had determined the disciplinary hearing which resulted in Mrs Garner's dismissal, she could not take any further part in the disciplinary process. The report that Ms Griffiths produced was to be provided to the two other Trustees, Ms Sasse and Mr Eager who would review her findings from the appeal investigation and determine the outcome of the appeal. However, Ms Griffiths was to carry out an investigation which could make recommendations within her report. What appeared to actually happen was that Ms Griffiths conducted both an investigation and appeal hearing with Mrs Garner and then reported to the Trustees so that they could reach a decision.

82. Mr Eager notified Mrs Garner of Ms Griffiths' appointment on 4 May 2022 which was followed by a formal introduction from Ms Griffiths the next day. A meeting was then arranged with Mrs Garner at a neutral venue and which took place on 11 May 2022. It was 2 ½ hours in length and Mrs Garner was accompanied by her friend Helen Bright, who was allowed to contribute and support her. The procedure and the grounds of appeal were discussed and this appeared to be the actual hearing of the appeal that she had brought.

83. The appeal report was produced in an initial draft and the final version was concluded once Mrs Garner had been able to review her interview notes. A range of additional documents were also referred to within the report which

Ms Griffiths had considered. Ms Griffiths was not available to give evidence during the final hearing due to ill health, but her investigation was not subject to criticism by Mrs Garner and indeed she was concerned that Ms Sasse and Mr Eager did not accept all of her recommendations, (pp1488).

84. In terms of the first ground of appeal, Mrs Garner was recorded as remaining of the view that the laptops qualified for a VAT exemption, the responsibility for clarifying this rested with Ballicom, that the Trustees signed off the purchase, that Ms Catterall was responsible and that there was no intention to defraud HMRC. A detailed consideration was included within the report of Mrs Garner's arguments as well as HMRC guidance on the matter. Ms Griffiths acknowledged that Mrs Garner believed she was acting in a good cause to save CHAPS money, but that her behaviour was not excusable and could cause a risk to the reputation of CHAPS. She did not accept that others bore responsibility for the declaration that the laptops were VAT exempt and Ms Griffiths believed that the original decision of Ms Thomas correctly identified gross misconduct for which dismissal could be a reasonable response.

85. Consideration in the appeal report then moved on to the matter of the SAGE usage by CHAPS. It was noted that Mrs Garner referred to new evidence that she had submitted to Ms Thomas an hour before the dismissal letter was sent to her on 19 April 2022 and which she believed was not relevant to the decision that she had reached. Ms Griffiths considered all of the available but importantly, she felt the explanation of a prior agreement between Mrs Garner and Ms Allen concerning permission to use SAGE lacked credibility and she should have been aware that such an arrangement would breach SAGE's terms and conditions of use. Additionally, she did not accept that the Trustees were aware of the arrangement and had tacitly agreed to the use of SAGE in this way. The additional evidence which was submitted late was found to have been considered by Ms Thomas and correctly deemed it to be irrelevant to the decision reached.

86. Ms Griffiths acknowledged that Mrs Garner was *'acting in a good cause, viewed the use of unlicensed software as a harmless and excusable means of saving the charity money.'* But she concluded that this raised *'serious questions about Jo's [Mrs Garner's] judgment and decision making.'* Once again, reference was made to the risk of reputational harm to CHAPS.

87. Other matters were also considered including the suspension, the original disciplinary proceedings for bullying, the offer of assistance from former Trustees to the current Trustees and the actions of the current Trustees following the dismissal, (p1520). Ms Griffiths did not accept that the suspension excluded Mrs Garner from CHAPS and limit the investigation. She considered it unfortunate that the earlier disciplinary process had not been formally concluded but balanced this against the Trustees being volunteers with many demands on their time and noted that complexity of multiple grievances which had been brought by Mrs Garner. She noted that the former Trustees had offered to be informal mediators and that this predated the disciplinary process related to the matters which led to the dismissal. She noted that there were communications by Ms Thomas on

Facebook which Mrs Garner and Ms Bright but could not conclude that they were aimed at Mrs Garner.

88. She also concluded that there was no inconsistent treatment between Mrs Garner and Ms Cotterall and that even if allegations which had been made by Mrs Garner to the Trustees had taken place as alleged, they *'...would not be in any way comparable in seriousness with Jo's own actions and would not therefore warrant a finding of gross negligence/gross misconduct'* or that she acted vindictively, (pp1515-9).
89. In terms of the ground of appeal that there was unfairness or bias on the part of Ms Thomas as dismissing officer, Ms Griffiths recorded the efforts made by her to ensure fairness and concluded that *'faced with an inevitably difficult situation, Joanne [Ms Thomas] acted professionally and impartially'*, [p1517].
90. Ms Griffiths briefly dealt with the ground of the appeal that Ms Thomas had failed to take account of an exemplary record she noted that *'...it would be misleading to describe Jo's record as exemplary'*. She accepted that there were no written warnings on her record, however, but that while this was the case, *'given the seriousness of the disciplinary findings, which include at least one count of gross misconduct, I believe that Jo's existing disciplinary record was irrelevant'*, (p1519).
91. I did notice that Ms Griffiths found the report difficult and acknowledged she was *'not necessarily comfortable with viewing this as a straightforward gross misconduct scenario.'* She felt that while Mrs Garner's actions relating to VAT and SAGE met the definition of fraud, she felt the use of this term to be *'a highly emotive word...that describing Jo's actions as fraudulent has perhaps been unhelpful in that it presumes a deliberate, cynical form of criminal activity. The inference has agitated Jo [Thomas] greatly and perhaps allowed her to dismiss Joanne's [Mrs Garner's] conclusions without any real reflection about why the concerns Joanne had with her conduct were, in fact, legitimate'*, (1527).
92. This was a lengthy report with a detailed consideration of the grounds of appeal. There was a summary and conclusions and there was no criticism of the way in which the disciplinary procedure had taken place. Ms Griffiths paid particular attention to the failure on the part of Mrs Garner to accept responsibility for her actions and *'sought to deflect blame onto others, including a direct report (Natalie Cotterall), the Trustees, the charity's accountant Mark Greave, and supplier Ballicom. Given that she held a senior and high profile position within the organisation, I find this concerning'*, (p1526).
93. She emphasised that *'As the organisation's Managing Director, Jo was however employed in a position of trust, with an additional burden of responsibility to lead by example. I think it also important to note that, as founder, Jo was the charity's figurehead and ambassador; I suspect that for many of the charity's financial dealings should be completely transparent and above board'*.

94. It was important to consider the appeal report from Ms Griffiths in detail as this was the document that was provided to Ms Sasse and Mr Eager. However, Ms Sasse gave credible and reliable evidence regarding the Trustees' role in the appeal and the time spent considering and deliberating upon the evidence that was before them. This was not an appeal where they chaired a hearing and instead this was carried out by Ms Griffiths with her detailed report being provided to them so that they could reach a decision. This was contained within their joint letter which was sent to Mrs Garner on 13 June 2022. The letter summarises the outcome of the disciplinary hearing and recorded what had been considered at the appeal hearing before Ms Griffiths, (pp1529-1535).

95. In relation to each of the grounds of appeal considered, the Trustees concluded as follows:

- a) VAT on laptops – They were satisfied that Mrs Garner's actions were deliberate and that she knew the declaration made to Ballicom concerning VAT was misleading and for the gain of the charity, but which would cause a financial loss to HMRC. This amounted to gross misconduct justifying dismissal.
- b) New evidence concerning SAGE licence – This did not change the conclusions reached by Ms Griffiths, the behaviour amounted to gross misconduct.
- c) Sanctions Inconsistent with actions towards other Employees – The Trustees concluded that this was irrelevant as Ms Catterall was not the Managing Director and was accused of matters relating to dishonesty or fraud.
- d) Unfairness or bias amongst the decision makers – They agreed with Ms Griffiths' conclusion and that it was appropriate for Ms Thomas to act as disciplinary hearing officer. It was noted that four trustees had resigned and three of them had referred to issues with Mrs Garner's conduct, leaving a limited cohort of Trustees.
- e) Previously exemplary disciplinary record – The Trustees acknowledged the record but were satisfied that Ms Thomas had taken this into account.
- f) Disciplinary action for victimisation and bullying allegations has not concluded - The Trustees did not consider this allegation to be relevant as it did not relate to the matters under investigation in this disciplinary process. They noted that CHAPS was a small charity with limited resources.

They also noted that the third ground of poor financial management determined by Ms Thomas at the disciplinary hearing was not part of the appeal allegations and was therefore not considered. They concluded that the appeal was therefore concluded and the decision was final.

96. I did consider that the procedure adopted by the Trustees concerning the management of the appeal was slightly unusual in that the investigation and the hearing were outsourced to a third party independent HR advisor, namely Ms Griffiths. However, it is important to note that CHAPS as has already been explained above was a small charity with a depleted number of Trustees. Being volunteers, the demands of this role would usually have to be balanced against other professional and income generating activities. Mr Fielding gave credible evidence concerning his brief experience of being a Trustee of CHAPS during 2023 and that he could simply not deal with the demands it placed upon him when balancing them against his other commitments.
97. The remaining Trustees did the best they could under very difficult circumstances and nonetheless were at pains to ensure that due process took place in relation to Mrs Garner. As is often the case, an employee under investigation can bring numerous grievances and there was the unresolved bullying disciplinary process. However, Ms Thomas clearly took into account the need to be impartial, Mr Fielding was instructed as an independent investigator and then for the appeal, Ms Griffiths conducted a commendable piece of work.
98. Taking into account the numerous pressures that they faced, it could have been very easy for the appeal panel of Ms Sasse and Mr Eager when faced with the notes of the appeal hearing and report produced by Ms Griffiths to simply 'rubber stamp' her conclusions. However, I accept that they took a great deal of time to review the grounds of appeal and the outcome of the investigation and reached a decision based upon their own conclusions and they managed the appeal appropriately.

Other complaints

99. It is also necessary to briefly consider findings in relation to the other secondary complaints which have been brought by Mrs Garner.
100. The complaint of wrongful dismissal involves a different legal test to that which is applied in relation to unfair dismissal and that will be described below in the section of this reserved judgment and reasons which considers the relevant law. Mrs Garner asserts that she was entitled to 12 weeks pay in respect of notice which amounts to $(£587 \times 12) = £7,413$.
101. Mrs Garner was dismissed without notice on 19 April 2022 following the decision of Ms Thomas at the disciplinary hearing. In principle, she was therefore entitled to argue that CHAPS did not meet its obligation to give her paid notice before her employment came to an end.
102. For the purposes of this complaint however, I would refer to the findings of fact made above in relation to the decision to dismiss. I accept that based upon the available evidence, Mrs Garner did act in a way which amounted to gross misconduct and which justified her summary dismissal by CHAPS.

103. I accepted Mr Flood's submission that the complaint in respect of wages was unclear although it has been a complaint which had been identified since the commencement of her Tribunal claim. Limited further particulars have been provided by Mrs Garner in relation to this complaint. However, considering the schedule of losses and the information provided within Mrs Garner's witness statement, I will deal with each item in turn.
104. Final wages – incorrect calculation, (pp1440-2). Ms Thomas is alleged to have used the incorrect form of calculation for Mrs Garner's final payslip, resulting in an underpayment of £937.81 gross. Ms Thomas provided an explanation in her email to Mrs Garner dated 6 May 2022 which noted her monthly average pay was £3062.50. To take account of the variation in calendar days and working days each month was to achieve an hourly rate which was rounded up to £18.85. Her employment ended on 19 April 2022 and her final salary was calculated over the period of 26 March to 19 April 2022 which amounted to 17 working days. As she had 6 leave days booked, only 11 working days remained making £1555.13, which was calculated based upon an hourly rate of £18.85 hours over 82.5 hours, (p1443). This was what was paid by CHAPS and Mrs Garner did not challenge Ms Thomas' evidence during the final hearing. On balance, I accept that Mrs Garner was paid correctly.
105. Time off in lieu – 70 hours not paid amounting to £1,319.50 gross, (p408 and p143). The identified documents referred to a noted of what appeared to be time spent on tasks on 26 to 30 July 2021 and a chronology of events relating to that period. Mrs Garner gave no meaningful evidence in relation to this item. Ms Thomas asserted that TOIL did not form part of Mrs Garner's contract and in the absence of evidence from her and challenge of Ms Thomas in cross examination, this complaint is not proven.
106. That CHAPS did not reimburse Mrs Garner for £115.20 for the purchase of SAGE software in October 2021 which she believes she was miss sold as it was unsuitable for the charity. There was little evidence advanced concerning this matter but any monies owed for this item do not fall within the ambit of an unlawful deduction from wages complaint. As submitted by Mr Flood, is a claim for expenses which would have to be pursued as a civil claim.
107. In her updated schedule of loss provided later than her final submissions on the morning of 3 May 2024, she acknowledged that the '*Otter deduction*' was removed as well as the payments lost relating to birthday gifts and Christmas bonus. It also makes reference to other complaints not included within the February 2024 schedule of loss, which were not raised during the hearing and which the respondent was unable to consider before the evidence was concluded. This was in respect of two unpaid bank holidays which remained outstanding following the termination of employment in the sum of £235.00 and an illegal deduction of salary since September 2021 making a gross sum of £2031.22. The holiday pay complaint is considered below, but the illegal deduction of wages has been submitted too late during these proceedings and it would not be in the interests of justice to consider

this matter as it should have been identified at the beginning of the final hearing.

108. There is also a complaint brought in respect of holiday pay and there is no dispute that Mrs Garner had taken 6 days annual leave between the period of 26 March 2022 and 19 April 2022 when her employment ended. The CHAPS holiday year period ran from April to March which is typical of many organisations as it reflects the financial year that they operate under. Little evidence was provided by Mrs Garner concerning this matter, but Ms Thomas had included relevant evidence in her statement and this was not challenged by Mrs Garner during her cross examination of her.

109. In Ms Thomas' email dated 6 May 2022, she confirmed that having checked both SAGE and the Gov.uk website, Mrs Garner had used all of her annual leave entitlement during the 2021/22 leave year and had no leave entitlement remaining by 31 March 2022. As she was only employed for a short period during the 2022/23 leave year from 1 April to 19 April 2022, her accrued annual leave entitlement amounted to 1.5 days. This was included within her final payslip and nothing further is payable to her in respect of annual leave entitlement that was untaken at the effective date of dismissal.

Law

110. I agreed with Flood in his closing arguments that the law concerning unfair dismissal relating to the potentially fair reason of conduct is well established and straightforward. Nonetheless, it is important that the law is set out below as well as that relating to the other complaints of wrongful dismissal/notice pay, wages and holiday pay.

Unfair dismissal

111. Part X of the Employment Rights Act 1996 ('ERA') deals with complaints of unfair dismissal. Section 94 of the ERA confirms that an employee has a right not to be unfairly dismissed.

112. Under section 98(1) of the ERA, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

113. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see *W Devis and Sons Ltd v Atkins* 1977 ICR 662.

114. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair

or unfair 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 must be determined in accordance with equity and substantial merits of the case.

115. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in *British Home Stores v Burchell* 1980 ICR 303, the Tribunal must consider a threefold test:
- a. The employer must show that he believed the employee was guilty of misconduct;
 - b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
 - c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.
116. However, it is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In *Sainsburys Supermarkets v Hitt* [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.
117. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.
118. In *Taylor v OCS Group Ltd* [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

119. Indeed, defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. It is not necessary for the appeal to be by way of a re-hearing rather than a review but the Tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision maker; see Taylor v OCS Group Ltd [2006] IRLR 613 CA.
120. In respect of certain claims, such as unfair dismissal and breach of contract, Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer or employee has unreasonably failed to comply with the Code of Practice, it may, if it considers it just and equitable in all the circumstances to do so, increase or reduce compensation awards by up to 25% (this does not apply to any Basic Award for Unfair Dismissal).
121. The Polkey principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects, then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Guidance as to the enquiry the Tribunal must undertake was provided in Ms M Whitehead v Robertson Partnership UKEAT 0331/01 as follows:
- (a) what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?
 - (b) depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?
 - (c) even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?
122. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.
123. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.
124. The Tribunal must award compensation that is just and equitable. Even if the loss arising from the dismissal is substantial, the Tribunal can still award

no compensation if it would be unjust or in equitable for the employee to receive it. This might be the case where acts of misconduct discovered after the dismissal means that it would not be just and equitable to award compensation; see W Devis & Sons Ltd v Atkins [1977] IRLR 314.

Wrongful dismissal

125. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

126. A claim for notice pay is a claim for breach of contract; Delaney v Staples 1992 ICR 483 HL.

127. In Neary v Dean of Westminster [1999] IRLR 288, it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.

128. In cases of wrongful dismissal, it is necessary for the Respondent to prove that the Claimant had actually committed a repudiatory breach of contract. See: Shaw v B & W Group Ltd UKEAT/0583/11.

Unlawful deduction from wages

129. Section 13 of the Employment Rights Act 1996 ('ERA') provides that a worker has the right not to have their employer make an unauthorised deduction from their wages.

130. The exceptions are where a deduction is required or authorised by a statutory provision or a relevant provision of the worker's contract or where the worker has previously given in writing their agreement to the making of the deduction.

131. Section 14 ERA provides that section 13 does not apply where the deduction is made by the employer to reimburse an overpayment of wages.

Holiday pay

132. Regulations 13 and 13A of the Working Time Regulations 1998 ('WTR') provide that a worker is entitled to annual leave in each leave year, (4 weeks and 1.6 weeks respectively).

133. Regulation 13(2) WTR, provides that a worker's leave year begins on

- a) On such date during the calendar year as may be provided for in a relevant agreement: or

- b) Where there are no provisions of a relevant agreement which apply, the date will be (for all employment beginning after 1 October 1998), on the date which that employment begins and each subsequent anniversary of that date.
134. The word 'calendar year' is interpreted by regulation 2 WTR as meaning '*...the period of twelve months beginning with 1st January in any year*'.
135. Leave may not normally be carried over into a subsequent leave year, unless there is agreement between the parties or where it was not reasonably practicable to take the leave as a result of the effects of the coronavirus in accordance with regulation 13(10) WTR as amended.
136. Regulation 30 WTR, provides workers with the right to bring a complaint to the Tribunal regarding (amongst other things), breaches of rights under regulation 13 and 13A.

Discussion

Unfair dismissal

137. There was no dispute that in her role as Managing Director of CHAPS, Mrs Garner was an employee and having commenced her employment with the charity in 2012, she had accrued more than 2 years continuous employment at the effective date of her dismissal on 19 April 2022.
138. There was also no dispute that Mrs Garner was dismissed following the decision made by Ms Thomas as dismissing officer on 19 April 2022, in a letter which was sent to her and it is understood she was aware of the decision from that date. The decision was made summarily which means that it was made without notice.
139. The respondent CHAPS has maintained that Mrs Garner was dismissed by reason of her conduct, which is a potentially fair reason under section 98(1) ERA 1996.
140. The basis of the disciplinary investigation carried out by Mr Fielding, the decision of Ms Thomas and ultimately the decision of the appeal panel, maintained that the reason for the decision to dismiss was one of gross misconduct. Indeed, Ms Thomas confirmed that she had referred to the CHAPS disciplinary procedure when considering the nature of allegations made against Mrs Garner and which she considered proven. She identified relevant examples of conduct which could constitute gross misconduct and was satisfied that the 3 allegations were proven and that they fell within the relevant categories.
141. During the appeal process, Mrs Garner only raised grounds of appeal in relation to the laptop VAT and SAGE licence issues and not the more

general allegation of poor financial governance. However, Ms Griffiths during the investigation and hearing and the Trustees supported by the convincing evidence of Ms Sasse, confirmed that it was reasonable to conclude that gross misconduct had taken place.

142. I did consider the question raised by Ms Griffiths during the appeal about Mr Fielding's reference to the Fraud Act 2006 and the criminal definition of fraud perhaps distracting Ms Thomas' consideration of whether or not gross misconduct had taken place. I did consider whether there was evidence available which suggested that Ms Thomas had in mind other reasons for Mrs Garner being taken through an employment process and whether perhaps the real reason behind the decision to dismiss was something other than conduct such as capability.
143. However, I noted that Ms Thomas had identified the concerns initially with HR and had concerns that conduct was in issue. The attitude of Mrs Garner throughout this disciplinary process was one of unwillingness to accept personal responsibility despite being the Managing Director and corporate leader in relation to her failures. Moreover, her evidence was confused and contradictory and appeared to be evasive. The way in which she sought to blame others and Ms Thomas was explicit in considering her actions appearing to be *'deceitful and dishonest'*. Moreover, while there was a lack of responsibility being taken in relation to VAT, Ms Thomas identified an underlying belief on the part of Mrs Garner that seeking to avoid payment of VAT and using a third party's SAGE licence was in the best interests of CHAPS as it saved them money. These were quite reasonably considered as actions which were *'wholly wrong'* and they served not only to cause reputational harm to Mrs Garner, but also to CHAPS.
144. Ms Thomas reached her decision following a proper investigation by an independent HR investigator Mr Fielding. While his report was criticised by Mrs Garner for being concise, I was satisfied that it properly considered the allegations identified and made reasonable recommendations resulting in a case to answer. Ms Thomas nonetheless properly considered the issues having heard from Mrs Garner at the disciplinary hearing and her decision that there was gross misconduct was reasonable.
145. Ms Griffiths did acknowledge that there were a few difficulties with the disciplinary investigation in her appeal investigation report but noted that they were faced with a number of grievances being brought by Mrs Garner and a limited number of Trustees being available. Nonetheless, the disciplinary process and the decision to dismiss were not considered fundamentally flawed.
146. I would agree that this is the case and considering the limited resources of CHAPS as a charity, that it was the Managing Director who was the subject of the investigation and their use of external HR advisors as appropriate, the Trustees behaved appropriately and managed their limited resources as reasonably as they could. Overall, the procedure used was a fair one with Mrs Garner being notified of the action in writing, an investigation taking place to establish the facts and which Mrs Garner could attend, a

formal disciplinary hearing where she could be accompanied and an opportunity to appeal being allowed. Additionally, the appeal process itself although slightly unusual in format, was extremely thorough and was far from a perfunctory exercise. Indeed, in many ways although it was an appeal based on grounds of appeal rather than a rehearing, it afforded Mrs Garner ample opportunity to correct any shortcomings in her participation at the disciplinary hearing before Ms Thomas.

147. The decision to dismiss was based upon 3 related allegations involving financial irregularities and which could all be considered gross misconduct. Ms Thomas clearly considered whether she should stop short of dismissal and explore other possible lesser sanctions. She considered Mrs Garner's good record and her role in founding CHAPS. She also took into account the impact of her neurodiversity. However, she noted the extent of the misconduct, Mrs Garner's senior, leadership role, her previous experience of management of financial matters and her failure to accept responsibility for her actions and the potential damage to the reputation of CHAPS concerning good governance, the proper payment of tax and the use of properly licensed software.
148. I therefore find that dismissal was a sanction within the range of reasonable responses to an employer. It may well have seemed a harsh decision to Mrs Garner, especially considering her history with CHAPS. However, it is not my role to substitute my view for that of the dismissing officer and I must conclude the dismissal was fair.
149. I did consider the question of *Polkey* and the possibility that the dismissal was procedurally unfair. I have already explained that the decision to dismiss the claimant was fair by reason of her conduct. The process was fair and while Mrs Garner was already subject to a suspension for the unresolved bullying complaint, she was informed of the new process relating to financial irregularities and the specific allegations. Suspension was reasonable considering the financial management issues. Although there were difficulties concerning who should hear the disciplinary hearing and the appeal hearing, the decision was carefully considered and the risk of unfairness was properly managed using external advisors. Indeed, there was clear evidence of recognition on the part of the Trustees who were confronted by a Managing Director who was causing concern, that they needed to ensure the disciplinary process remained fair and impartial. On balance, this was something that they achieved and they followed their disciplinary process.
150. For the avoidance of doubt, had the disciplinary process suffered from unfairness (which is not the case), the background of this case would have meant that had a fair process been followed, the nature of the matters under investigation and that they were clearly attributable to Mrs Garner, means that a fair dismissal would have been achieved within a short period following the effective date of termination and by no later than 19 June 2024.
151. It is not necessary to consider contributory fault given my finding regarding the fairness of the dismissal. Had there been a problem with fairness however (which is not the case), I would have been compelled to

conclude that Mrs Garner's conduct was objectively culpable and blameworthy and caused (or at least contributed) to her dismissal. In these circumstances, it would have been just and equitable to reduce the awards for unfair dismissal by 75%. For the avoidance of doubt however, this is a hypothetical consideration and my remains conclusion that the dismissal was fair.

Breach of contract

152. Mr Flood correctly explained that I must apply a different legal test when determining whether the complaint of wrongful dismissal/breach of contract succeeds.

153. In my findings of fact above, I did deal with this complaint separately and concluded that considering the information contained within the decision letter of Ms Thomas which gave notice of the dismissal and accepted that Mrs Garner acted in a way which amounted to gross misconduct and justified her summary dismissal.

154. Accordingly, this complaint must fail.

Unlawful deduction from wages

155. I would refer to the findings of fact concerning the items asserted by Mrs Garner in her schedule of loss which had been identified at the beginning of this final hearing. It is not necessary to repeat those findings of fact, other than to say that Mrs Garner failed to provide evidence which persuaded me that she had suffered an unlawful deduction from wages contrary to section 13 ERA 1996.

Holiday pay

156. I would refer to the findings of fact concerning this matter and my consideration of Ms Thomas' evidence. I must conclude that Mrs Garner received the holiday pay for untaken annual leave entitlement when her employment ended and this complaint must fail.

Conclusion

157. Accordingly, I must make the following judgment in relation to the complaints brought by Mrs Garner:

- a) The complaint of unfair dismissal brought under Part X Employment Rights Act 1996 is unsuccessful which means that the claimant was fairly dismissed.
- b) The complaint of breach of contract/wrongful dismissal is not well founded which means that this complaint is unsuccessful.

- c) The complaint of unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 is not well founded which means that complaint is unsuccessful.
- d) The complaint seeking payments in respect of untaken accrued annual leave entitlement at the date of termination contrary to regulations 13 and 13A Working Time Regulations 1998 is not well founded which means it is unsuccessful.

158. I recognise that Mrs Garner will be unhappy with the outcome of this final hearing and this is understandable for the reasons discussed in the findings of fact and identified within the appeal.

159. However, I would add that my decision is focused upon the issues relating to the fairness of the dismissal and the related complaints contained within the list of issues above.

160. While it is unfortunate that her employment ended in the way that it did, the Trustees of CHAPS behaved appropriately in reaching the decision that they did, they did recognise Mrs Garner's significance as the founder of CHAPS and her previous good record. Nonetheless, it is essential that the duty of organisations and people to pay taxes is followed and that the correct licensing procedures for IT products are followed. Charities can only remain viable when their finances are not only well managed *but are also seen to be well managed* with good governance.

161. Although it is not directly relevant to my consideration of the issues in this case, there was clear evidence of Mrs Garner's of devotion to supporting people with autism and their family and increasing awareness of this disorder which is finally being better understood by society following a long history where support and empathy was significantly lacking. It is to her credit that she not only worked to support her family and friends, but also established the charity which became the respondent CHAPS.

162. It is unusual for so many witnesses to attend to give evidence in support of Mrs Garner as a claimant in an unfair dismissal claim. While I could not accept that their evidence was relevant to the issues I had to consider, it is nonetheless to Mrs Garner's credit that those witnesses spent the time giving evidence to support her.

Employment Judge Johnson

Date 3 May 2024

JUDGMENT SENT TO THE PARTIES ON
7 May 2024

FOR THE TRIBUNAL OFFICE

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