EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr Dennis Kay	Tideswell Male Voice Choir

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Manchester on 23, 24, 25, 26 and 27 April 2018

EMPLOYMENT JUDGE Warren

Representation
Claimant: in person
Respondent: Mr Stanyer and Mrs Currie -Jones

JUDGMENT

1. The claimant was an employee of the respondent from January 2011.

2. The claim of unfair constructive dismissal is well founded and succeeds.

3. The claimant resigned in response to a fundamental breach of his contract.

4. The claimant contributed to his own dismissal by 25 percent

5. In breach of contract the respondent failed give the claimant 5 weeks' notice.

6. There was an unlawful deduction from the claimant's wages in the sum of two thousand pounds.
7. The compensatory award is uplifted by 25 percent to reflect the respondent's failure to comply with any step in the ACAS Code of Practice.

8. The respondent is ordered to pay the claimant compensation in the sum of eight thousand and seventy four pounds and twenty seven pence (£8674.27) calculated in accordance with the Reasons set out below**.**

Reasons were requested by the respondent.

REASONS

1. Background and Issues

1.1 By an ET1 (claim form) presented on 8th of March 2017 the claimant brought complaints of unfair dismissal, breach of contract (including unpaid notice pay) and unlawful deductions from wages. The respondent, a registered charity, disputed that the claimant was an employee or a worker as defined in the relevant legislation and defended the claims generally.

1.2 In a preliminary hearing (case management) held in Manchester on 21 June 2017 Employment Judge Ryan identified the issues in the case.
1.2.1 For the purpose of the complaints of unfair dismissal and breach of contract was the claimant an employee as defined in section 230 of the Employment Rights Act 1986 (" the ERA")?

1.2.2 For the purposes of the complaint of unlawful deductions from wages was the claimant a worker as defined in section 230 of the Employment Rights Act 1986 ("the ERA")?

1.2.3 Was the claimant dismissed? In order to decide this issue the tribunal must decide either that the contract under which the claimant was employed was terminated by the employer (whether with or without notice) or that the respondent committed a repudiatory breach of the claimant's contract of employment and that the claimant resigned in response to that breach and did not delay in resigning such that it can be held that the breach was waived and the contract affirmed.

1.2.4 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason under section 98 (2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for the dismissal. If the tribunal finds that the dismissal was a constructive dismissal it will have to consider what the reason of the breach of the contract was, since that is normally the reason for dismissal in these circumstances.

1.2.5 Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?

1.2.6 Was the decision to dismiss a fair sanction that is was it within the range of responses for a reasonable employer?

1.2.7 If the dismissal was unfair did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

1.2.7 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

1.2.8 Breach of contract - additional payments. Did the respondent agreed to pay the claimant the additional sum of £500 per show producing four performances of the Les Miserables show?

1.2.9 Was the respondent in breach of contract in failing to make the payments?

1.2.10 Notice pay.To how much notice was the claimant entitled? If the claimant was entitled to notice or pay in lieu does the respondent prove that it was entitled to dismiss the claimant without notice because the claimant had committed gross misconduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct?

1.2.11 If the claimant was a worker of the respondent, on what date was the engagement terminated?

1.2.12 Was the claimant paid for all his work up to the date of termination? This claim depends upon a finding of constructive dismissal. If the engagement was terminated as the respondent alleges then the claimant was paid until the end of November 2016 and no deduction was made.

1.2.13. Remedy. If the claimant succeeds, in whole or part, the tribunal will consider remedy. This may include reinstatement, re-engagement or compensation for unfair dismissal and compensation for unpaid wages or breach of contract.

2.The Evidence

2.1 Mr Kay gave evidence in his own regard and called Peter Sinclair, former member and chairman of Tideswell Male Voice Choir.

2.2 The respondent called Mr P Stanyer, Mrs E Currie-Jones, Mr P Grimshaw, Mrs Johns, Mr D Torrington, Prof Plank, Mr Eccles and Mr Lawson to give evidence.

2.3 There was an agreed bundle of evidence extending to 297 pages

2.4 By the direction of Employment Judge Ryan, the respondent had been limited to calling eight witnesses. The respondent, without leave of the Judge, provided further 19 witness statements under rule 42 Employment Tribunal Rules of Procedure. Those witnesses did not give evidence, and the claimant did not have the opportunity to challenge the evidence in cross examination, and little weight was therefore given to them.

2.5 Their evidence is summarised here, with limited conclusions drawn from them
2.5.1 Brian Atherton. Dealt with the claimant in his time working for another choir. Malcolm Bennison. Did not like the direction taken by the choir from 2013. However he had moved away in 2012 and did not attend rehearsals and concerts regularly.

2.5.2 Scott Dawson. Confirmed the claimant's account of being asked to prepare promotional footage. The choir have not yet paid his account. It had been sent to the claimant in December 2016 (after the claimant had left the choir).

2.5.3 Michael Donaldson. His evidence that the choir were unhappy about the lack of a managing committee, is discredited by the live evidence given, that the claimant constantly sought membership from the choir, none of whom would volunteer.

2.5.4 Paul Dinsdale, was unable to provide direct evidence of the terms under which the claimant was employed, and provided no evidence of the incidents which led to the claimant leaving the choir.

2.5.5 Emma Hanlon Penny, was a member of the military wives choir under Gareth Malone. The claimant worked with the choir, and an events coordinator suggested to the claimant that he invoice a venue for his expenses. There is no evidence that he did so.

2.5.6 Frank Holland. Could give no direct evidence on the terms under which the claimant worked. Described the incident on the 15 November, and subsequent meetings and votes, but did not add anything to the 'live' evidence adduced. (Page 4 of his statement was missing, but the respondent were unable to provide a copy, and indicated I should proceed without).

2.5.7. Stuart Gordon left the choir in January 2016 when he realized that the programme consisted of Les Miserables. He noted that the claimant preferred to work with a small committee rather than a large one, which he described as lots of talking and limited action.

2.5.8. Sean Jennings left the choir in 2015. He left because he perceived a lack of organisation at rehearsals, he disliked the repertoire, he felt there should be more local concerts, and heard 'rumblings about finances', and disliked comments made to individual choir members by the claimant.

2.5.9. John Jones described the claimant as outspoken in his criticism, there being ill feeling within the choir about their role in the 4 large concerts. He described the claimant's meeting with the choir on 15 November as a tirade of insults and when interrupted the claimant swore, and called a choir member a useless drunk.

2.5.10. Eva Lawson makes no mention of the terms of employment or otherwise, was upset that a large donation made to the choir had not been acknowledged, and alleges that the claimant was rude to her about catering when asking her to cater for 50 not 25 for an event.

2.5.11 Audrey Morton. The claimant asked for expenses to attend to direct the choir at her husband's funeral and refused to attend another charity event as it was too expensive to attend.

These 2 ladies appear to have conflated the role of the Music Director with that of a member of the choir. He was engaged to direct the choir and should not have been expected to attend any event beyond that at his own expense.

2.5.12 Francis Pearson. His evidence is not relevant to the issues.

2.5.13 John Riches. Described the claimant's behaviour as bullying tactics, but gives no example at all. He does refer to the claimant's distaste for committees.

2.5.14 Raymond Vaughan objected to the claimant opening an envelope with money in it at a wake, and without any apparent or stated evidential foundation, believed that money was missing from a donation to the choir.

2.5.15 Raymond Whiteley suggests that the claimant would not entertain a committee, when the live evidence made it clear that he was desperate for the choir to have a committee, but members would not volunteer. He also noted that there were rumours of cash being mishandled, which showed a complete lack of judgement on his part as there was absolutely no evidence to support this rumour. He appeared to believe that the claimant was paying money from buckets for charities into the respondent's bank account when the payments into the account was the job of the treasurer.
2.6 I had little difficulty in believing the evidence of the witnesses I heard live. Everyone did their best, but some had better memories than others. The situation moved swiftly in November 2016, with several meetings, and it would be surprising if everyone had a perfect memory of the events of those few weeks The case has been decided on the evidential test, the 'balance of probabilities' References to page numbers relate to the agreed bundle.

3.The Facts

3.1 These are the facts found from the evidence heard. The judgement will only deal with those facts which are necessary to decide the issues.

3.2 The respondent is a male voice choir, formed in 1956. The claimant joined the choir as musical director ("MD") in April 2005. At the time he was paid expenses and a fee.

3.3 In March 2008 the choir became a registered charity. Each year thereafter at the AGM, the claimant was confirmed as MD. His wife assisted (unpaid) with administration, and a committee of the choir oversaw the administration. There was a treasurer responsible for banking and accounts, and the accounts were audited and approved each year at the AGM. The membership of the choir each had a vote. They paid an annual subscription, which at the material time was £100.00. The MD worked for the choir.

3.4 It is a common agreement that most choirs engage their MDs as selfemployed fee earning individuals. Most will have a portfolio of other employment or self-employed activities. It would seem at the start of his

engagement the claimant was similarly engaged. He would submit invoices for expenses, and fees.

3.5 On 23 January 2011, the committee met to discuss the MD and how he was paid (p.135). Bill Preece posed the question in which he .referred to salary several times, explaining that for the claimant's level of activity on a pro rata basis when compared with another MD of whom he was aware, the claimant then should be paid more than £20,000 a year. Reference in the minutes is made to considering alternative ways of remunerating the MD, and to paying at least £15,000 in salary and expenses. It was agreed that there would be a business plan to take this into account for adoption at the AGM

3.6 The claimant was told that the choir would aspire to a salary level, with expenses, of £15,000 per annum by 2013, and that the claimant was key to this by arranging concerts which would increase income to meet such additional costs. At a point after this the treasurer advised the claimant that he need no longer present invoices.

3.7 In September 2011, it was agreed that the claimant would receive £12,000 per annum gross paid in equal monthly installments of £1,000.

3.8 By January 2012, that had been increased to £15,000 gross. It was agreed by the committee and included in the accounts which were both audited and approved by the members at each AGM.

3.9 At each AGM the members had the opportunity to vote on the continued position of the MD and the assistant MD.

3.10 Mrs Edwina Curry – Jones was appointed as president in 2012. Her role was by her own description at that time largely 'posh frock and presence'. Her husband is a member of the choir.

3.11 Throughout this time and later, the claimant had various other work – he had companies of which he was a director, he owned a sandwich shop with his wife, he offered singing lessons, and he worked with other choirs, albeit with a much smaller remit than the respondent.

3.12 By March 2015, Peter Sinclair was appointed as chairman of the committee. Paul Dinsdale produced 'A Way Forward' a strategic plan for the choir for the following 5 years. Part of this was a requirement on the part of the Music Team to drive up event income to at least £40,000, at a rate of £5,000 a year. Another part was that accounts should be produced and agreed before events and approved by the committee.

3.13 In January 2016 the secretary retired because of ill health. No one replaced him.

3.14 In April 2016 the treasurer retired through ill health and was replaced with Peter Grimshaw.

3.15 Peter Sinclair, at a point in April when he was the only committee member, agreed with the claimant that after each of the planned 4 big shows, £500 would be paid to both the MD and assistant MD to recognise the increase in their workload. This was not however minuted, nor relayed to the new Treasurer when he was appointed.

3.16 The choir's plan was to put on 4 large shows as income generators, based on the music of Les Miserables. It was the claimant's idea. He had been tasked to increase the choir's income. However he failed to obtain permission from Cameron Mackintosh (who holds the copyright). He accepts that this was his mistake. With assistance from the President the situation was rectified. No action was taken against the claimant at the time although the choir lost money on CDs which had been produced and could not then be sold. The 4 large shows subsequently took place in 2016 and made a profit.
3.17 At some point between July and October 2016 Mike Donaldson became the secretary on the committee. It is unclear when, as there is no note of his appointment in the choir's paperwork supplied to the Tribunal, and if he was in place he does not appear to have been particularly active until October.

3.18 In October the claimant produced draft accounts for that summer's programme showing the £500 payments to the music team.

3.19 It is fair to say that the choir were fed up with singing the music from Les Miserables. It may have been a crowd pleaser, but their role was relatively small, fronted by several paid soloists, and that was just about all they had done that year. They wanted change. Nobody complained directly to the Music team.

3.20 There is evidence that the claimant became more short tempered with the choir, nerves appear to have been frayed on all sides. He made remarks which were hurtful, telling a disabled member to stand up, when he could not, amongst others. No one complained about these comments

3.21 At nearly every meeting the choir were asked to volunteer as committee members, none would. This left the claimant having to manage without the support of a committee, and being left with roles which were not his to fill, including collecting money after concerts, paying accounts and counting the

contents of the charity buckets. I accepted his evidence in relation to cash handling without reservation. It seems however that he has never before had the chance to explain this to the choir.

3.22 Rumours spread about cash mishandling by the MD. There appears to have been no foundation to these rumours, they were not investigated at all. No one asked him at the time about any of them. He was unaware of the rumours.

3.23 At this time Peter Sinclair described the running of the choir as like running a small business, of which the MD was having to play the part of the Chief Executive.

3.24 Paul Dinsdale had been living in France, and acting as concert secretary. He came over to England and had a committee meeting with Phil Holland and Mike Donaldson. Peter Sinclair did not attend although invited.

3.25 Emails began to circulate which were hostile to the MD – Peter Sinclair expressed his concern at this 'witch hunt'. Paul Dinsdale sent an email to others accusing the music team (MD and assistant MD) of bleeding the choir dry, and the claimant's wife of deliberately denying access to crucial financial information. He suggested that the claimant had awarded himself the £4,000 (£500 per concert for the MD and assistant MD). These emails were not sent to the claimant, assistant MD or the claimant's wife.
3.26 On 14 November Paul Dinsdale wrote to choir members:- 'the music team must be very grateful that the choir is without a secretary again, the less people to question them the better'. Similar derogatory statements were sent over the following days by Mr Holland – some of really unpleasant character. For example ' his brutish, dictatorial and insulting outburst sank to depths which are not only appalling and reprehensible but highlight the arrogance, self-delusion and bullying bluster'

3.27 Most of the extraordinarily rude and derogatory emails reached the claimant through other sources. He was very worried that no one had given him an opportunity to deal with these allegations. He asked on 13 November 2016 for an urgent meeting with the committee. This was refused.

3.28 On 15 November 2016 he decided to speak to the choir to counter the emails. He was interrupted and not allowed to finish. He lost his temper and was rude to 2 members of the choir. The incident was recorded.

3.29 Mr. Donaldson, who had resigned on 12 November as secretary sent an email to all members describing the claimant as an 'employee of the members'.

An SGM for the members was set up for 22 November 2016. The claimant was not invited and did not attend.

3.30 The meeting was chaired, with the consent of the chairman, by the President, who drafted 5 proposed motions. In her notice of the SGM she urged members to attend as there was no provision for a proxy vote. The list she used to send out the notice did not include all members and did include a member who had resigned. It was clearly the secretary's task to ensure that all members were notified directly, and that only those entitled, voted. He failed in this regard as it is clear that one ex member who had resigned did vote, and another was not given notice and the opportunity to vote. Those who did not attend, but had been invited by the president, would believe that they could not have submitted a proxy vote.

3.31 In the event some members were acting as proxies for others, and voted to allow a proxy vote. No check was made as to whether any missing member may, had they realised, have wished to enter a proxy vote.
3.32 In the event one of the motions proposed by the president and adopted by the choir was in the following terms 'should the claimant be invited to continue as the choir's musical director'. It was defeated by one vote with one abstention.

3.33 Mr Sinclair was in shock. He spoke to the claimant to relay the words of the motion and the vote. He had no idea what it meant, nor did the claimant. Several days passed and still the claimant received nothing in writing from the choir's committee. He did not know whether it meant he was voted out immediately, or at the next AGM, whether he would be given notice and if so for how long.
3.34 The president 'assumed' that it was clear he should go immediately. No one from the choir communicated with the claimant at all. In the days that followed the claimant learned that the president was looking for a new MD.

3.35. The day after the vote Thomas Eccles and 3 others changed the locks at the choir's stores. A planned committee meeting did not occur.

3.35 By 8 December the claimant had still not been told what was happening, he felt that all trust and confidence had gone and he resigned.

3.36 By 13 December, Peter Sinclair, Philip Holland and Mike Donaldson had all resigned and at an SGM interim officers were appointed and the president indicated formally that there should be a search for a new MD.

4. The Law

4.1 Employment Status

4.11 The Employment Rights Act 1996 ("ERA") section 230 (1) describes an employee as 'an individual who has entered into or works under a contract of employment.'
Section 230 (2) describes a contract of employment as ' a contract of service or apprenticeship, whether express or implied and whether oral or in writing'

4.22 Current case law on establishing employment status makes it clear that no one factor determines status. There are however a number of features which should be considered – in particular the following 3 are seen as an irreducible minimum: - control; integration, and payment.
4.1.2.1 Control – is the claimant under a duty to obey orders, does the employer control hours of work, and what the claimant does and is the claimant supervised as to the mode of working?

4.1.2.2 Integration - *(Stevenson, Jordan and Harrison Ltd v MacDonald and Evans 1952 ITLR 101 (CA)*.
Was the claimant in business on his own account? – does he provide his own equipment, hire his own helpers and take financial risk *(Market Investigations Ltd v Minister of Social Security 1969 2QB 173 QBD)*

4.1.2.3 Payment - *Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace 2008 ICR 1423 (CA)*:-
Whether the claimant pays his tax and national insurance as self-employed or otherwise is not conclusive of his employment status.

4.1.3 *O'Kelly & Others v Trusthouse Forte plc 1983 ICR 728* requires that 'the Tribunal should consider all aspects of the relationship, no single factor being in itself decisive, each of which may vary in weight and direction,& having given such balance to the factors as seems appropriate, to determine whether a person is carrying on business on his own account'.

4.2 Constructive dismissal

4.2.1 Section 95 Employment Rights Act 1996 provides:

> "(i) For the purposes of this Part an employee is dismissed by his employer if
>
> > (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

4.2.2 That situation has been referred to in numerous decisions as "constructive dismissal". The authorities demonstrate that for an employee to be able to claim constructive dismissal, four conditions must be met, namely:

(i) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;

(ii) The breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify him leaving;

(iii) The employee must leave in response to the breach and not for some other unconnected reason;

(iv) The employee must not delay too long in terminating the contract in response to the employer's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract.

4.2.3 The breach relied upon by the employee may be a breach of either an express or an implied term. The implied term relied upon most frequently by an employee is the implied term of trust and confidence. There is a helpful review of the law relating to the breach of this implied term contained in the decision of the Employment Appeal Tribunal in the case of Safeway Stores Plc –v Morrow 2002 IRLR 9. That decision traces the progress of the implied term from the decision in Western Excavating Ltd –v- Sharp [1978] IRLR 27 to Mahmud –v- BCCI [1997 ICR 606. In the latter decision the House of Lords expressed the term as an obligation that:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

4.2.4 The term was revisited by The House of Lords in Johnson –v- Unisys [2001] IRLR 279, where Lord Millett referred to the obligation thus: "This is usually expressed as an obligation binding on both parties not to do anything which would damage or destroy the relationship of trust and confidence which should exist between them".

4.2.5 Further, Safeway Stores Plc –v- Morrow 2002 IRLR 9 is authority for the contention that in general terms a finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean,

inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract.

4.2.6 The question in every case is whether, objectively speaking, the employer has conducted himself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. Furthermore, an employer can breach the implied term of trust and confidence by one act alone or by a series of acts which cumulatively amount to a repudiatory breach of contract, even if the last event in that series is not actually a breach of contract at all. The question to be asked is whether the cumulative series of acts taken together amount to a breach of the implied term.

4.2.7 The application of the law has been summarised by the Court of Appeal in London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493 in the judgment of Dyson LJ:

> "14. The following basic propositions of law can be derived from the authorities:
>
> 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.
>
> 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Mahmud v Bank of Credit and Commerce
> International SA [1997 ICR 606 I shall refer to this as "the implied term of trust and confidence".
>
> 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.
>
> 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on

as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer"

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

"Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

4.3 Unfair dismissal

4.3.1 Section 98 Employment Rights Act 1996 provides:-

(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
   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 –
   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."

(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) –

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."

4.3.2 It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the misconduct alleged. British Home Stores v Burchell 1978 IRLR 379. The tribunal must consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.

4.3.3 In the words of the guidance offered in Iceland Frozen Foods v Jones 1982 IRLR 439:-

a) the starting point should always be the words of section 98(4) themselves

b) applying the section the tribunal must consider the reasonableness of the employers conduct, not simply whether they consider the dismissal to be fair

c) in judging the reasonableness of the dismissal the tribunal must not substitute its decision as to what is the right course to adopt for that of the employer

d) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another

e) the function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

f) The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

4.3.3 The Court Of Appeal in Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 3 concluded that the band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to

dismiss. In A V B 2003 IRLR 405 the EAT concluded that when considering the reasonableness of an investigation it is relevant to consider the gravity of the charges and the consequences to the employee if proved. Serious allegations of criminal misbehaviour must always be the subject of the most careful and conscientious investigation.

4.3.5 The tribunal has considered the provisions of the ACAS code of practice to disciplinary and grievance procedures.

4.4 Unfair Dismissal Remedy

Section 118 Employment Rights Act 1996 provides:

> "Where a tribunal makes an award of compensation for unfair dismissal, the award shall consist of –
>
> (a) a basic award; and
> (b) a compensatory award."

Section 123(1) Employment Rights Act 1996 provides that:

> "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."

Section 123(6) provides:

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

Section 122(2) provides:

> "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."

The latest version of the ACAS Code of Practice on Disciplinary and Grievance Procedures

('the ACAS Code'), issued under S.199 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), came into effect on 11 March 2015. The Code contains a section on handling disciplinary issues and sets out six steps employers should normally follow, namely:

- establish the facts of each case (paras 5–8)
- inform the employee of the problem (paras 9–10)
- hold a meeting with the employee to discuss the problem (paras 11–12)
- allow the employee to be accompanied at the meeting (paras 13–16)
- decide on appropriate action (paras 17–24)
- provide employees with an opportunity to appeal (paras 25–28).

Section 207A TULRCA sets out a provision whereby an award of compensation may be uplifted or reduced by 25% for a failure to comply with any or all of the ACAS code by either the respondent or the claimant respectively

4.4.1 *Norton Tool Co v Tewson [1972] IRLR* 86

An award of unfair dismissal compensation should include the following heads of damage:

- Immediate loss of wages
- Future loss of wages
- Loss arising from the manner of dismissal
- Loss of protection in respect of unfair dismissal

The general principles for calculating unfair dismissal compensation ate twofold:-

Firstly to compensate fully but not award a bonus.
Secondly the amount awarded is what is just and equitable in all the circumstances having regard to the loss sustained buy the complainant.
The burden of proving loss lies with the claimant
The employment tribunal has a duty to set out its reasoning in sufficient detail to show the principles on which it proceeded.

4.4.2 *Polkey v A E Dayton Services Ltd 1987 IRLR 503 HL*

In considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the employment tribunal thinks there is a doubt whether 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

4.4.3 *Software 200 Ltd v Andrews [2007] IRLR 568 EAT*

The s.98A(2) ERA exercise of determining whether the employer has shown that the employee would have been dismissed if a fair procedure had been followed, and the assessment of whether, instead, the dismissal is unfair but subject to a *Polkey* reduction, are exercises which run in parallel. There are five possible outcomes:-

- The evidence from the employer may be so unreliable that the exercise of seeking to reconstruct what might have been is too uncertain to make any prediction, though the mere fact that an element of speculation is involved is not a reason for refusing to have regard to that evidence.
- The employer may show that if fair procedures had been complied with, the dismissal would have occurred when it did in any event. The dismissal will then be fair in accordance with s.98A(2)
- The tribunal may decide that there was a chance of dismissal but it was less than 50%, in which case the compensation should be reduced
- The tribunal may decide that employment would have continued, but only for a limited period.
- The tribunal may decide that employment would have continued indefinitely because the evidence that it might have terminated earlier is so scant that it can be effectively ignored.

4.4.4. Simrad Ltd v Scott [1997] IRLR 147 EAT

The assessment of a compensatory award in accordance with s.123 (1) involves a three stage process requiring firstly, factual quantification of losses claimed. Secondly. The tribunal must consider the extent to which any or all of those losses are attributable to dismissal or action taken by the employer. Thirdly the phrase “just and equitable” requires the tribunal to look at the conclusions it draws from the first two questions and determine whether, in all the circumstances, it remains reasonable to make the relevant award

4.4.5*. Tele-Trading Ltd v Jenkins [1990] IRLR 430 CA*

The provision in s.123 (6) for the reduction in compensation on grounds of contributory fault applies where for example an employee was guilty of conduct of which the employer became aware and as a result dismissed him. The dismissal may be unfair, perhaps because the employer failed to give any prior warning or failed to carry out a proper investigation but, nevertheless when assessing compensation the employment tribunal can consider how far the misconduct caused or contributed to the dismissal.

4.4.4 *Maris v Rotherham County Borough Council [1974] IRLR 147 NIRC*
In determining whether compensation should be reduced on grounds of contributory fault, the employment tribunal should ignore the technical reason why the dismissal was unfair and look at the realities of the situation to see to what extent, if any, the employee contributed to his ultimate dismissal.

4.5 Breach of contract

4.5.1 At common law every employee is entitled to notice of the termination of the contract of employment, unless there has been a breach of a fundamental term such as to enable the other party to terminate immediately
The amount of notice due to an employee will usually be found in the terms and conditions of the employee's contract of employment.

4.5.2 In addition there are statutory notice rights which lay down minimum periods of notice for employees who have been employed continuously for a month or more. These apply if the contractual rights are less favourable – (Section 86 Employment Rights Act 1996), and amount to not less than one weeks' notice for each year of continuous employment if his/her period of continuous employment is two years or more but less than twelve years.

4.5 Unlawful deductions from wages

4.6.1 s.23(1) Employment Rights Act 1996 gives workers a right to complain about deductions from wages that are unauthorised by that Act and to seek reimbursement of the sums involved**.** A worker may present a complaint that the employer has made a deduction from wages in contravention of s.13(1) ERA
s13(1) ERA states that an employer must not make a deduction from wages of a worker employed by him unless:-

i.the deduction is required or authorised to be made by virtue of a statutory provision or relevant provision of the workers contract or

ii.the worker has previously signified in writing his agreement to the deduction.

Section 27(1) ERA In this Part *"wages"*, in relation to a worker, means any sums payable to the worker in connection with his employment, including— (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.

5. Representations of the claimant

I summarise 6 pages of detailed skeleton argument (and oral representations) as follows:-

The committee believed the claimant was an employee referring to salary and expenses, and the claimant as an employee. The recently resigned secretary of the choir on 18.11.16 referred to the very fact that the MD, an 'employee of the members', along with the claimant's own evidence.

There was evidence of a repudiatory breach of contract on 22 November 2016. The claimant was unaware of the derogatory emails until told by a 3rd party. The committee refused to meet the claimant before the SGM despite his request. His attempt to speak to the choir was thwarted by two members. The president chose to issue a motion which stated that the MD should be invited to stay on, and a vote was taken, without every member receiving an email, deciding on the night to accept proxy votes when members were advised in advance that proxy votes would not be accepted, and a vote being accepted from an ex member. The claimant heard the result from a third party, but was not told what it meant for him. He learned that the resident was looking for an MD, but there was no contact with him at all. He resigned because the situation was intolerable. There was no formal allegation of misconduct ever made against him, and the choir had no grounds to dismiss for misconduct. The choir did not adopt a fair procedure. The dismissal was unfair.

In breach of contract the choir failed to pay the agreed £500 bonus for each of 4 concerts.

6. Representations of the respondent

Again I summarise the key relevant points from 18 pages of written representations supplemented with oral submissions.

There is no evidence of a written contract of employment. Normal practice is for MDs to be self-employed (per the evidence of Mrs Celia Johns.) The claimant was paid gross of tax and national insurance. He could undertake work for others without reference to the choir and he had full control of his activities, particularly when there was no functioning committee.

The claimant was dismissed without notice, as he was not an employee. The procedure was correct and fair.

The respondent was asked to chair the meeting on 22 November by the chair of the committee. There is no prohibition to proxy votes in the constitution. Although

a member was not included on the list for the SGM notice, he must have been aware of it from other emails.

The SGM was conducted fairly, and the president believed the relationship between the choir and the MD ended immediately, and that the members who changed the locks the following day understood that to be the case.

The respondent believed the reason for dismissal to be misconduct, and held that belief on reasonable grounds. It believed that the claimant had prevented people from airing grievances, there were no meetings in 2015 and only 2 in 2016. The claimant could have persuaded members to serve on the committee. Further that he was distracted by other work, and allowed revenues to drop, allowing costs to grow. The choir was losing members, the claimant was rude to choir members. There were issues over cash handling.

The respondent was thus justified in ending the relationship.

The respondent admits not making payments to the claimant in the total sum of £2000. The respondent denies that there was an agreement to make this payment.

The claimant is not entitled to notice because he had an implied contract of service. The claimant resigned without notice, indicating that he knew he was party to a contract that did not require notice.

If the claimant was dismissed the respondent argues that the claimant was guilty of gross misconduct: falling revenues, falling surpluses and rising costs, along with willful rudeness to the choir members.

7. Conclusions

7.1 Was the claimant an employee or self-employed?

7.1.1 The claimant was self-employed up to 2011, and thereafter he was employed.

7.1.2 In 2011 he was offered and accepted a salary and expenses, paid monthly, such terms were subsequently adopted by the choir at their AGM. From 2011 he stopped providing invoices, he received pay rises, was offered and accepted bonuses. He was paid the same sum regularly every month, along with his expenses.

This is in direct contrast to his previous way of working, when he invoiced the choir and was paid on each invoice.
He was not given a written set of conditions of employment, but the nature of his relationship with the choir changed.

7.1.3 Mr Donaldson, who was the last secretary of the committee before the SGM described the claimant in an email to members dated 18 November as an 'employee'. There is no record of anyone challenging his description.

7.1.4 The choir provided the majority of the claimant's earnings, dictated his place of work and provided his equipment.

7.1.5 He has been described as being like the chief executive of a small business. Such a chief executive would be an employee.

7.1.6 The claimant was enmeshed within the management and business of the choir and expected to perform to a different level to a 'normal' MD. In particular, when the members refused to form a committee, the claimant was expected to undertake some of their roles as well to ensure the choir survived.

7.1.7 Whilst at times there was no one to tell him what to do, there was plenty of evidence that he pleaded with the choir to form effective committees and they failed to step up to the plate. When there was a committee, they guided his work and set him performance objectives based on increasing the choir's income.

7.1.8 The claimant did not have to employ a deputy himself. There was an assistant MD, paid in the same way as the claimant. If the claimant were not able to work, the choir would turn to their assistant MD

7.1.9 The fact that he had other sources of income, in some of which he may have been self-employed, is irrelevant. It is not uncommon to have more than one part time job.

7.1.10 The choir were well aware of his other sources of income and did not object. Many of them contributed to it by paying him for singing lessons.

7.1.11 He started his career with the choir as self-employed, invoicing for fees and expenses, he was then responsible for paying his own tax and national insurance and simply continued to do so when his status changed.

7.1.12 Looking at all the evidence in the round, I conclude that there was sufficient control, integration and evidence of the way he was paid and the particular circumstances of the changes made in 2011, and the way the

respondent and claimant conducted themselves from 2011, to be satisfied that on the balance of probabilities the claimant was an employee

7.2 Was the claimant dismissed?

7.2.1 The claimant did not receive any clear notification that he had been dismissed. All he had was second hand information about a vote, from an individual who freely admitted he did not know what it meant. He received no formal notification of the vote, or of what it meant to him. This is hardly surprising as the president did not believe he was being dismissed, but rather that his contract for services was being immediately terminated. Even then it would not have been clear that was the case. He was not therefore dismissed.

7.2.2 The claimant resigned on 8 December 2018, in response to the vote about which he had been told verbally, and which was inconsistent with any long term future as an employee.

7.2.3 To conduct a vote in the somewhat less than democratic way described in the evidence, and not to undertake to advise the claimant properly of what the outcome was, is a clear breach of trust and confidence, as was the failure to explain what the vote would mean in advance, and to give him the chance to answer any allegations.

7.2.4 Before the claimant had been formally advised, the locks were changed and the claimant had learned that the President was seeking a new MD. This is another example of a breach of the term of trust and confidence. These were repudiatory breaches.

7.2.5 I am therefore satisfied that the claimant was entitled to resign in direct response to a series of fundamental breaches of the implied term of trust and confidence which had occurred between the beginning of November and 8 December 2016.

7.3 Was this a fair dismissal?

7.3.1 The dismissal was procedurally unfair. The claimant was not advised formally of any complaint at all. There was no investigation into any allegation, he was not asked to account for any allegation. There was no disciplinary hearing, and no appeal procedure. The claimant was not even notified of the outcome of the vote, and the choir appear to have been unclear as to what they had achieved in the vote to remove him.

7.3.2 The reason for the dismissal has not been established by the respondent as misconduct, as it asserted, a potentially fair reason under section 98 Employment Rights Act 1996.

7.3.3 There are various allegations of misconduct now being asserted. However, at the time no action was taken with regard to the Cameron Mackintosh allegation. Things may have been different had there been a proper investigation then. As it was there was no finding against the claimant, who admits that he made a mistake.

7.3.4 Allegations of financial misconduct based so far as could be seen on pure rumour, were never looked into. Had the claimant been given the opportunity to answer the rumours, he would have given the explanations given to the Tribunal, which made it very clear, on the balance of probabilities that he was innocent of the allegations, and that the rumours were just that.

7.3.5 There were no formal investigations into the claimant's conduct with the choir, nobody complained at the time to anyone. The claimant was never given the chance answer any allegation of bullying or rudeness or to change his behaviour.

7.3.6 A reasonable belief in misconduct requires a reasonable investigation. There was no investigation, no disciplinary hearing and no outcome. There was no finding of gross misconduct and no right therefore to summarily dismiss.

7.4 Breach of contract – notice pay

7.4.1 The claimant was entitled to 5 weeks' notice, based on 5 completed years of continuous service as an employee, calculated at the statutory rate of 1 week per year.

7.5 Contributory fault.

7.5.1 I do find culpable conduct. There is plenty of evidence that the claimant lost his temper with the choir on the 15 November 2016. I consider that he contributed to his own downfall by 25%, by swearing and being rude to members of the choir he was paid to serve. His conduct undoubtedly impacted on the vote to remove him. I do not take account of the unfounded rumours of financial irregularities, I heard no credible evidence at all to support these rumours.

7.6 But for the unfair dismissal would the claimant have been dismissed in any event (Polkey v AE Dayton Services Ltd 1988 ICR 142)

7.6.1 Whilst it is difficult to assess the percentage difference, I have taken account of the fact that some members may have voted based on the rumours of financial mismanagement, about which there was no evidence at all, others may not have been given a proxy vote, it is possible that the ex member voted to remove the claimant, and that the member who did not receive notice may have voted to keep him. Had the choir voted for the claimant to remain he would not have resigned. It is noted that had there been a fair democratic vote, it would have been obvious. However, where the outcome was actually to remove the claimant by one vote, when others did not have the opportunity to vote, and the claimant as not given a fair chance to address the choir members to deal with the speculative rumours before the vote, so that they only really had one side of the story, on the balance of probabilities, I consider it more likely than not that te claimant would have been retained by the choir. The president, even in the face of such unfairness, claimed to be shocked by the outcome of the vote, assuming that the claimant would be retained.

7.6.2 I do therefore consider, on the balance of probabilities, that but for the unfair procedure undertaken, the claimant would have remained in the employ of the choir.

7.7 Breach of contract, unlawful deduction from wages

7.7.1 There was a binding contract between the chairman of the choir's committee and the claimant to pay him £500 for each of 4 concerts in 2016. The concerts took place and made an overall profit and the choir is thus in breach of contract by failing to pay the £500.00 per concert for 4 concerts, and this amounts to an unlawful deduction from wages.

REMEDY

8. The claimant gave evidence in support of his claim for compensation, and was cross examined.

9. Neither party considered reinstatement or reengagement appropriate.

10. The claimant was born on 18 December 1947.

11. He has throughout the latter part of his employment with the respondent and to date, been paid £50.00 per week expenses conducting another choir 1 night a week.

He has a state pension (£683.67), guaranteed pension credit (£71.76), a small private pension (£41.40) and income from a role as a property manager (£220.00), all of which predate his dismissal from the respondent.

12. Since his dismissal he has not found any other work. He no longer teaches singing as he no longer has the facilities having moved to a smaller home. He has made no effort to find more work.

The respondent had been his main source of income. The way he lost his job left both him and his wife severely affected. Both were taking medication. They had to rely on friends and family, sold their property at a loss and moved to a rented cottage.

The claimant explained that other choirs had heard and his reputation had been damaged. He was now 70 years old and felt unable to take on any work whilst the allegations were hanging over him.

13. He agreed that had he received the £2000 unpaid wages, he would have paid 20% of it in tax.

14. It had always been agreed that his £15,000 was split – £4,500 in expenses and £10,500 as salary. He agreed it was reasonable to infer that had continued to the date of dismissal.

15. He agreed that he had undertaken one concert since his dismissal at Gawsworth Hall, it was a concert he was contracted to undertake before he had been dismissed, for expenses. He hoped to undertake another for expenses and a potential share of the ticket sales. He would not be conducting, just pulling the concert together.

Respondent's representations

16. Whilst having sympathy for the claimant's age and health, it is still appropriate to suggest he could continue to take private pupils. He is still able to conduct a choir once a week. Gawsworth Hall will provide something.

17. The respondent does accept there were no systems in place, and inadvertently the choir created an employment situation. The claimant had rights and they should have been recognised. The choir wished to express its greatest regret that it had no employment procedures and policies in place.

18. It acknowledged that the lack of a committee was no excuse, and accepts that they should have sought help from ACAS. Steps have been taken to ensure that there are systems and policies in place in future.

19. The choir acted in the genuine belief that the claimant was self- employed, and did not act with malice.
The respondent reminded the tribunal that it is a charity, whose expenses are now close to its annual turnover.

20. I reminded the respondent that I had no jurisdiction to offer time to pay as requested, and that the calculation of the award could take no account of the respondent's means.

Conclusions on remedy

21. The claimant had gross annual earnings of £10,500. He earned £201.92 per week gross, which amounted to £161.54 net (having deducted 20% for tax. (The claimant's age precludes the payment of national insurance). Unlawful deductions from wages.

22. For this purpose the claimant earned £15,000 per annum gross - £288.46 gross and 248.08 net per week.

23. The breach of contract claim (unlawful deduction from wages) requires compensation to be net – £2,000 less 20% tax - £1600.

24. Notice pay amounts to 5 weeks payable at £248.08 net = £1240.35.

25. The claimant is entitled to a payment for loss of statutory rights in the sum of £250.00 (to reflect his income level before dismissal).

26. The claimant is entitled to a basic award in the sum of:-
£201.92 x 7 = £1514.40, less 25% for contributory conduct = £1135.80

Compensatory award

27. I consider it reasonable to allow the claimant compensation from the end of his notice period to the 19 July 2017, after which he could have been making active attempts to seek other employment. Prior to that he was unwell and shocked. He was well enough to conduct a choir every week, and to discuss further matters with Gawthorp Hall with a view to a summer concert. He admits he made no attempt to seek work, and has not done so to date.

26 weeks@ £161.54 = £4200.04 less 25% contributory conduct = =£3150.03

28. I consider it appropriate to uplift the compensatory award by 25 % in accordance with the provisions of section 207A of the TUCLR for the

complete failure of the respondent to undertake any form of investigation, disciplinary procedure or appeal. I appreciate that this was a small charity, with limited resources, but note that no effort at all was made to undertake any research, seek advice, or even reflect on the situation, prior to the actions taken, even though at times the choir were warned that the claimant may be an employee.

29. The total compensatory award is thus £4200.04.

30. The total award to the claimant to be paid by the respondent is thus £8674.27.

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Employment Judge Warren

Signed on 23 June 2018

Judgment sent to Parties on
18 July 2018

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For the Tribunal Office

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2401614/2017

Name of Mr D Kay v Tideswell Male Voice Choir case(s):

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 18 July 2018

"the calculation day" is: **19 July 2018**

"the stipulated rate of interest" is: 8%

MISS L HUNTER
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.justice.gov.uk/tribunals/employment/claims/booklets

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.