Case Number: 2303749/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**

BETWEEN:

Mr K Drugan **Claimant**

AND

Carers Lewisham **Respondent**

ON: **30 and 31 May and 1 June 2022**

Appearances:

For the Claimant: **In person**

For the Respondent: **Ms G Roberts, Counsel**

Judgment

1. The Claimant's claim of unfair dismissal succeeds.
2. The Claimant's claim of breach of contract succeeds.
3. Any compensation to the Claimant for unfair dismissal (both the basic award and the compensatory awards) should be reduced by 80% to reflect conduct that in my judgment contributed to his dismissal and shall be subject to the adjustments for mitigation of loss and failure by the Respondent to comply with the ACAS Code of Practice.

Reasons

Introduction

1. By a claim form presented on 15 October 2018 the Claimant presented claims of unfair dismissal, wrongful dismissal, unlawful deduction from wages in respect of holiday pay and disability discrimination. The disability discrimination was subsequently dismissed on withdrawal by the Claimant. The Claimant did not pursue any pay related claims (unlawful deduction from wages or holiday pay) at the hearing before me, but that may have been because the hearing dealt only with matters of liability.

2. Following a case management hearing on 18 March 2019 the case was listed to be heard in April 2020 as a three-day hearing in person. There were then several postponements, the first of which followed the onset of the Covid-19 pandemic. Accordingly, by the time I heard the evidence, the facts of the case had arisen almost four years previously.

3. The Claimant indicated at the start of the hearing that he had a hearing impairment and a back condition that made sitting for long periods uncomfortable. Ms Roberts also has a hearing impairment. Accordingly, arrangements were made to ensure that all parties could properly hear and participate in the proceedings and breaks were taken at intervals or when the Claimant indicated that he needed a break.

4. I spent the first part of the hearing reading the witness statements and the documents referred to in them. The Claimant gave evidence on his own behalf and the Respondent had two witnesses – Dr Hervey, currently at trustee of the Respondent and Mr Beswick, a former trustee. The bundle of documents comprised 1381 pages and any references to page numbers in these reasons are references to page numbers in that bundle.

The issues

5. There were two separate claims in the proceedings in relation to the termination of the Claimant's employment. The Claimant claims constructive unfair dismissal on the basis that he resigned in response to conduct by the Respondent that he says was a fundamental breach of his contract of employment. However, during his notice period his employment was terminated by the Respondent without notice or payment in lieu of notice on the grounds that it had discovered that the Claimant had committed acts that the Respondent considered to be acts of gross misconduct. This had the consequence that his employment was terminated before the end of his notice period.

6. The first set of issues that arose were therefore those that arise in a constructive dismissal claim:

    a. was there a fundamental breach or breaches of the employment contract by the Respondent;

b. did the Claimant resign a least in part as a result; and
c. did the Claimant do so without too long a delay?

7. The second set of issues are those arising in a claim based on the Respondent's decision to dismiss:
    a. was there a potentially fair reason to dismiss (the Respondent relied on the Claimant's misconduct);
    b. did the Respondent act reasonably in treating the reason relied on as a reason to dismiss, taking into account all the circumstances including the Respondent's size and administrative resources, equity and the substantial merits of the case. Part of this assessment involves considering whether the Respondent adopted a reasonable procedure in respect of both its investigation and its decision to dismiss.
    c. Did the Respondent comply with the minimum standards set out in the ACAS Code of Practice?

8. As regards remedy, the Claimant seeks compensation for unfair dismissal and for wrongful dismissal in relation to his notice period. By the time of the final hearing no other claim was being pursued or remedy sought. The Claimant had set out his losses in a detailed schedule of loss (pages 56-61). In determining remedy I would also need to consider:
    a. whether any procedural unfairness by the Respondent had made a difference to the outcome (and by what percentage chance would the dismissal still have happened if a fair procedure had been followed);
    b. whether there had been a breach of the ACAS Code of Practice that warranted an uplift in compensation; and
    c. whether the Claimant had contributed to his own dismissal by his conduct and if so by what percentage?

The law

9. The statutory provisions are contained in ss 95 and 98 Employment Rights Act 1996 ("ERA"). Section 95 (1) (c) ERA provides for an employee to treat themselves as "constructively dismissed" in certain circumstances. The section states:

> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only 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.**

10. Lord Denning in Western Excavating (ECC) Ltd v Sharp [1978] Q.B. 761 set out the relevant test as follows:

> **"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."**

11. Also relevant is the implied term of trust and confidence. Under this term, the employer must not, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the mutual trust and confidence between employer and employee. The distinction between a breach of trust and confidence and unreasonable conduct on the part of an employer, while real, is often a narrow one.

12. The following elements are needed to establish constructive dismissal:

    a. Repudiatory breach on the part of the employer. This may be an actual breach or anticipatory breach, and can also arise from a series of acts rather than a single one, but must be sufficiently serious to justify the employee resigning;
    b. An election by the employee to accept the breach and treat the contract as at an end. The employee must resign in response to the breach;
    c. The employee must not delay too long in accepting the breach, as it is always open to an innocent party to "waive" the breach and treat the contract as continuing (affirmation) (subject to any damages claim that they may have).

13. In an unfair dismissal case the burden of proof is on the Respondent to show that it had a potentially fair reason to dismiss the Claimant. The Respondent's case is that it dismissed the Claimant for what it regarded as gross misconduct on his part. Misconduct is a potentially fair reason to dismiss under section 98(2)(b) ERA The question of whether the Respondent is entitled to rely on the alleged misconduct as a reason to dismiss the Claimant fairly involves applying the test in **British Home Stores v Burchell [1980] ICR 303** namely whether the Respondent at the time of the dismissal had a reasonable belief in the employee's guilt based on reasonable grounds after conducting such investigation as was reasonable in the circumstances. The standard to be applied to the investigation carried out by the Respondent in a misconduct case is also a standard based on what a reasonable employer might have done (**Sainsbury's Supermarkets v Hitt [2003] IRLR 23**).

14. The case of **Iceland Frozen Foods v Jones [1982] IRLR 439** confirms that the Tribunal must not, in reaching a decision on the reasonableness of the Respondent's decision to dismiss, substitute its own view as to what it would have done in the circumstances. Instead, it must consider whether the Respondent's response fell within a band of responses which a reasonable employer could adopt in such a case.

15. Further issues then arise under section 98(4) ERA which provides that the question of whether the dismissal was fair or unfair involves considering whether, having regard to the reasons shown by the Respondent, in all the circumstances of the case, including the size and administrative resources of the Respondent's undertaking, the Respondent acted reasonably or unreasonably in treating the reason relied on as a sufficient reason for dismissing the Claimant. The question must be determined in accordance with equity and the substantial merits of the case.

16. In order to meet the test in section 98(4) the Respondent must also follow a procedure that is fair in all the circumstances. That will ordinarily involve compliance with the provisions of the ACAS code of practice on grievances and discipline and with the Respondent's own written procedures.

17. In a case in which a dismissal is found to be procedurally unfair consideration must also be given to the principles in the case of **Polkey v A E Dayton Services [1988] ICR 142** and if it appears that there is a chance that the Claimant would have been fairly dismissed in any event had a fair procedure been followed then any compensation awarded must be reduced to reflect the percentage chance of that being the case.

18. In a case in which the Claimant is found by the Tribunal to have been unfairly dismissed for misconduct the Tribunal must, if it has found that the Claimant has to any extent caused or contributed to her own dismissal reduce any compensation by such amount as the Tribunal considers just and equitable having regard to that finding (section 123(6) ERA). A finding of contributory fault can only be made if the Tribunal forms the conclusion that the Claimant has on the balance of probabilities been guilty of misconduct.

Findings of fact

19. I make the following findings of fact on a balance of probabilities based on the oral and written evidence presented to me. I have not made findings on every matter of dispute between the parties, but only on those that are relevant to the issues I needed to decide.

20. The Respondent is an organisation that provides support for carers in the Lewisham area of London. It is a charity and a company limited by guarantee with a turnover (at the relevant time) of around £600,000. I find that the size and administrative resources of the Respondent were therefore limited. The charity is dependent on local authority and grant funding and at the time of the matters giving rise to the dispute its finances were in a somewhat precarious state. Responsibility for the governance and proper running of the charity ultimately lay with its volunteer trustees, of which there were six at the time of the Claimant's employment. The day to day running of the charity was delegated to its 13 paid employees, led by the Claimant as chief executive. However, the evidence I heard suggested to me that the trustees were also significantly involved in the charity's day to day management and oversight of its staff and activities.

21. The Claimant was employed as the organisation's Chief Executive from 1 June 2015 until his summary dismissal on 25 July 2018. He commenced employment on a salary of £40,000 and this increased to £50,000 when his hours of work increased. At page 97 there was a further contract under which the Claimant was paid £60,000 and his notice period was increased to three months. The Respondent did not dispute that that document set out the terms of the Claimant's employment at the time of his dismissal.

22. The Claimant suffered a cycling accident during the course of his employment (the

evidence was not consistent as to whether this had been in 2015 or 2017) and he suffered significant injuries that left him with mobility difficulties. As a result, he negotiated with the trustees at the time various arrangements concerning travel to and from work and what were in effect financial subsidies from Respondent pending the outcome of his personal injury claim following the accident. It was common ground that the intention of the arrangement had been that the Claimant would repay the Respondent once he received the compensation from a personal injury claim.

23. There was some contemporaneous evidence that the relationship between the Claimant and the board of trustees had been difficult for some time before his resignation. I do not make detailed findings about these matters because the Respondent did not rely on them as reasons for terminating the Claimant's contract, although they had some importance in setting the background to the dispute. The Respondent's position was that a number of female members of the board had resigned because they had had difficulty working with the Claimant. There was also some evidence that there had been difficulties with volunteers and other members of staff. The Claimant's position was that these matters were not formally raised with him and that they did not happen in the way described in the Respondent's evidence. I find as a fact that the trustees did have concerns about the Claimant's working relationships but that these were not formally raised with him and that the concerns were in effect overtaken by the events that unfolded in the period March to July 2018.

24. The Claimant resigned from his employment on 8 June 2018. His resignation letter was at page 409/411 and was sent at 11.32 am. It stated:

> **"I have just had a conversation with Denise in which I feel she has harangued me unfairly and made desultory, defamatory and inaccurate statements. Further to the failure to act upon the grievance which I submitted on 31st May 2018 and my request for an urgent board meeting to discuss the redundancy situation, I have no option but to consider this a fundamental breach of my contract of employment with the charity. Accordingly, I hereby offer my resignation.**
>
> **As you can see from the attached timesheet, I am owed 289 hours in annual leave and a further 190 hours in TOIL. This equates to 63.86 days or 12 weeks and four days. I am required to give three months' notice as per the terms and conditions of my contract. If you accept my resignation, I would like to request that I take the time owing to me now. This means I will not return to carers Lewisham but I will remain an employee for three months until 8 September 2018.**
>
> **I will be leaving the office immediately and taking the rest of today off but I can be contacted on my mobile. For the avoidance of doubt, I do not wish to resign and I would be happy to continue as Chief Executive. I am happy to discuss the situation with you further to agree a suitable way forward".**

25. The Claimant therefore resigned in response to three matters. The first was a conversation with the then Chair, Denise D'Elia, in which he said that she had "harangued me unfairly and made desultory, defamatory and inaccurate statements". The Respondent advanced no direct oral evidence on this. Mr Beswick said that he was aware that the claimant and Ms D'Elia had had a heated conversation and that whilst none of the other trustees had been party to it, he did not doubt that it might have been heated - he thought probably on both sides. Given

the lack of direct evidence from the Respondent I accepted the Claimant's evidence that he was spoken to in an inappropriate way by Ms D'Elia on 8 June 2018. I return to this matter in my conclusions.

26. The second matter was a disagreement with the board of trustees about the Claimant's management of and decision to make redundant, one of his colleagues ("PG"). The redundancy proposal was put forward by the Claimant in March 2018 (pages 206, 252 and 281) as a response to the financial difficulties the Respondent was facing at the time (as mentioned in paragraph 20). The Claimant was very clear in his view that this was the correct response to the situation. However, PG appealed against the decision in accordance with the Respondent's written procedure (page 65) which provided for decisions on appeals to the taken by the trustees. Having considered his appeal the trustees revoked the decision on 31 May 2018 (page 387) and offered to reemploy PG on a part tie basis in order to continue to deliver services effectively at the same time as making some of the needed cost savings. It was the Claimant's position that this decision and the way that it had been implemented had made his role as CEO untenable as it cut across his own strategy for bringing the organisation's finances into a better position.

27. The third matter the Claimant relied on was that he had raised a grievance about the revocation decision which had not been responded to and had been not specifically addressed as a grievance. The grievance itself was at page 393 – the Claimant sent an angry email response to the decision to revoke the redundancy at 11.13 and at 23.11 the same day an email confirming that he would like that response to be treated as a grievance. The grievance procedure (page 90) provided that:

> **"The grievance should be submitted in writing without unreasonable delay to the chief executive who shall formally acknowledge receipt within five working days.**
>
> **The chief executive will... meet with both parties … Ideally, any such meetings should be held within 15 working days of the submission of the written grievance …"**

28. I find as a fact that there was a delay in acknowledging the grievance. The Claimant resigned on the sixth working day after submitting the grievance – the time limit for acknowledging it had expired the day before. Dr Hervey said in his evidence that the trustees had not responded to the grievance because of the almost immediate emergence of concerns about the Claimant's management of the organisation's finances. In my judgment this was partially true, but I also find that the size of the organisation, its limited resources, and the fact that the trustees were all volunteers who were unable to deal with operational matters in the same way as the paid staff of an organisation also contributed to the delay. The Claimant's actual complaint was that the trustees had "failed to act upon the grievance". I return to this point and its relevance to the issues, in my conclusions.

29. The Respondent accepted the Claimant's resignation by letter of 12 June 2018 (page 423), agreeing to the proposed termination date of 1 September. The Claimant was asked to remain away from the Respondent's offices and office systems and to assist with an orderly handover.

30. On 15 June Mr Beswick began an investigation into the Claimant's conduct after the trustees had been alerted by PG and other members of staff that there were some suspicious transactions involving the Respondent's funds. In fact, the concerns appear to have arisen some weeks earlier - at page 275-6 there was an account of a conversation between Dr Hervey and a staff member in which he was told that the staff member had "noticed some strange cash withdrawals of sums around £300-£400, also petty cash hadn't been reconciled". PG had emailed the former Chair of the organisation (page 279) on 2 May 2018 and had said: "I've mentioned please find attached scans of last year's bank statements. There may be an innocent explanation for the regular cash withdrawals, but other staff cannot think of one. This also shows how the money in the account has diminished in the last year from being in credit £78,524 to an overdraft of £60,403.

31. I find as a fact that as a result of these matters having been raised with them the trustees legitimately became concerned about financial impropriety. Mr Beswick took responsibility for looking into the concerns. He produced his first report (page 447A-C) on 17 June 2018. This identified several issues:

    a. A £36,311.99 discrepancy between the current account balance on the Respondent's bank statement and the balance on the accounting system;
    b. £17,000 worth of ATM withdrawals made by the Claimant (who was at the time the only holder of the Respondent's debit card) without entry onto the accounting system or evidence of their purpose. Many appeared to have been made at times when the Claimant was on leave or off sick, or were made in the neighbourhood where he lived;
    c. A number of other unexplained payments such as a direct debit to Virgin Gym;
    d. £5000 in taxi usage by the Claimant. Although a limited amount of taxi usage had been agreed following the Claimant's bicycle accident (see paragraph 22) it appeared to the trustees that the amount concerned was excessive and that claims had been made for times and dates that fell outside what they understood the arrangement agreed with the Claimant to have been.

32. Mr Beswick produced a further report on 4 July 2018 (page 488-491) that set out further details of payments that the trustees regarded as having been unexplained or unauthorised. They included cash advances of £2000 on 3 August 2017 and £300 on 1 September 2017 made by the Claimant to himself, the purchase of a Microsoft computer for the Claimant coasting £2249.10, a payment to the Premier Inn M5 J17 Bristol for the Claimant, his wife and children, made on 11 August 201 and a cash withdrawal of £400 made at Edinburgh Waverley Station on 27 October 2017 when the Claimant was on leave. Mr Beswick wrote: "This report is written to help us determine if there is a case for dismissal of KD. It includes several examples, verified and checked, where it is believed that KD has been in breach of CL's standard financial procedures. Note that there are very many more similar examples to be found".

33. Following the report Mr Beswick found evidence of two cash advances the Claimant made to himself that were not mentioned in the reports he had produced so far. He emailed the former Chair of trustees, Rachel Maloney, on 4 and 6 July (the email chain was at pages 495A-C) seeking confirmation of certain details

regarding the Claimant's insurance claim and specifically asking whether the Claimant had sought authorisation for four cash advances against salary amounting to £1450, on 21 August 2017, 24 August 2017, 27 October 2017 and 14 February 2018, which appeared not have been repaid or deducted against his salary. Ms Maloney replied confirming that a season ticket loan to the Claimant which he had taken out in addition to the agreed taxi usage, was to be repaid as soon as the insurance claim paid out. She also confirmed that:

> "**The taxi usage was a short-term measure when Kevin needed to attend meetings especially at rush hour times when the bus or train journey would be more difficult to navigate, and where justified yes both ways as Kevin also explored the additional pressures of his caring responsibilities for his wife.**
>
> **I did not specify an explicit end time, as the workplace assessment e-mail describes we talked about not needing to be in office every day and avoiding rush hour travel where possible, and the expectation would be that at other times he would who could use public transport. The conversation was around responsible stewardship balancing out with his changeable health needs, and that these would be recoverable costs".**

34. As regards the salary advances, she said "I did not authorise any advance payments on his salary and he did not request this". Mr Beswick pointed out to his fellow trustees in his e-mail that in light of the responses from Ms Maloney, there was a possibility that the insurance policy would not in fact be making any payment to the Claimant, thus leaving him with an uninsured loss and exposing the Respondent to the risk of not being repaid for the advances made against the insurance claim.

35. The report was then set out in an email from Ms D'Elia to the Claimant dated 5 July 2018, which also attached the "Notice of Disciplinary Meeting" at page 495. The meeting was to take place on 17th July and the Claimant was informed that he could be accompanied by a colleague or trade union representative. The email made it clear that the trustees were contemplating dismissing the Claimant.

36. The email to the Claimant therefore preceded the confirmation from Ms Maloney about the salary advances. Nevertheless, in my judgment the trustees were amply justified in considering that the payments described in the report required explanation and that they potentially provided evidence of conduct that would merit summary dismissal. The notice and the report, read together, made it clear what the trustees' concerns were and the Claimant cannot have been in any doubt what was on their mind.

37. The Claimant's initial response, describing the allegations in the report as "baseless and ridiculous" was sent on 6 July (page 492). He said that he would not be able to confirm attendance at any disciplinary hearing until he had spoken to his solicitor. He also referred to the Respondent's disciplinary procedure for the process to be followed.

38. On 9 July Ms D'Elia wrote to him again (page 500) setting out the additional concern regarding salary advances and again warning of the possibility of dismissal. The Claimant responded on 10 July, saying that he wanted the disciplinary hearing to be delayed pending his solicitor's availability and the

outcome of a subject access request which he had made in the meantime. He made a request for various documents and again referred to the disciplinary policy noting that he had not at that point being invited to any investigation meeting or had sight of any evidence supporting the allegations made against him. He asked for details of who had undertaken the investigation and who would be conducting the disciplinary hearing. He gave details of the individuals he would like to call as witnesses at any disciplinary hearing and suggested that as that list included two of the trustees, they ought to be precluded from acting as members of the disciplinary panel.

39. The investigation did not in fact at any stage include a meeting with the Claimant himself. That was an omission which greatly troubled the Claimant because, as he rightly said, the Respondent's disciplinary procedure (page 70) clearly stated that in all circumstances an investigation meeting with the employee should take place. I note that this is a particularly rigorous requirement and goes above and beyond the requirements of the ACAS Code, which acknowledges that in some cases an investigatory meeting with the employee will be necessary but implicitly acknowledges that this will not be true in all cases. Nevertheless the Respondent's own policy could not have been clearer on this point. The trustees appear to have proceeded on the basis that the Claimant would be given the opportunity to explain himself at the disciplinary hearing itself.

40. On 16th July Ms D'Elia wrote to the Claimant again, enclosing the evidence that the Respondent would be relying on at the disciplinary hearing, informing the Claimant that the individuals he had asked to attend the hearing had invited to attend and informing him that the hearing panel would be made up of three trustees who had had no prior involvement with the investigation. He was asked to confirm his availability for 19th or 20th July. The Claimant replied on 19th July making it clear that he would not be attending a hearing on either day and would not be attending any hearing until certain conditions were met. These were: that his subject access request had been responded to, that he had had 10 days in which to consider any evidence with his solicitor and that he had been informed of who would be sitting on the disciplinary panel, who had conducted the investigation and who had raised the allegations against him. In my judgment some of the points the Claimant raised were legitimate such as his request for information about who would be on the panel and who had conducted the investigation, but others, such as a stipulation that he needed 10 clear days to consider any evidence with his solicitor and that he would not be proceeding until after his subject access request had been dealt with, were designed to delay the process.

41. The trustees met the following day and took the decision that a letter should be sent to the Claimant confirming his dismissal, once Ms D'Elia had taken legal advice. That letter (page 520) followed on 25 July. It said:

> **"I contacted you on 5th July 2018 requesting your attendance at a disciplinary hearing on 17th July 2018. You declined to attend the hearing on this date. I subsequently requested your attendance on alternative dates, offering you the choice of 19th or 20th July 2018, which you again declined to attend. You have now stated that the earliest you can be available for the hearing is 14th August 2018.**
>
> **In light of your continued refusal to attend a disciplinary hearing, Carers Lewisham has**

been forced to make a disciplinary decision on the evidence available. In view of the seriousness of these matters, it has been decided that your employment with the Charity should be terminated for gross misconduct without notice.

The allegations against you of serious financial impropriety have been upheld. You have made a series of cash withdrawals from charity funds that cannot be reconciled against legitimate expenditure. These totals several thousand pounds. You have also made a number of unauthorised purchases using charity funds which appear to be for personal benefit and clearly do not represent legitimate expenditure.

You have the right to appeal against your dismissal."

42. The claimant appealed by e-mail of 26 July 2018 (page 523). The Respondent contacted the Claimant with a view to arranging an appeal against his dismissal on 7th August (page 531), 15 September (page 555), 20th October (page 576) and 3rd December (page 590). However, no appeal hearing ever took place. The Claimant in fact took up employment with another organisation (St Christopher's Hospice) on 13 August 2018, meaning that with a short space of time, following his dismissal, he had mitigated the losses arising from the dismissal.

Submissions

43. Both parties provided me with written submissions at the end of the evidence. I was assisted by both of sets of submissions in reaching my conclusions and refer to them as necessary in what follows.

Conclusions on the issues

Constructive dismissal

44. Dealing first with the Claimant's claim of constructive dismissal, the first matter the Claimant relies on is the trustees' decision not to terminate PG's employment, but to uphold his appeal against redundancy. In my judgment, the trustees were not breaching any term of the Claimant's contract by taking a different view from the Claimant of the right course of action for the charity and thus upholding PG's appeal. A chief executive whose strategy and vision does not align with that of the board of an organisation may decide that the situation is untenable because he will not be able to work productively with a board whose vision differs radically from his own. But that does not by itself mean that there has been a repudiatory breach of the chief executive's contract – far from it. A charity chief executive does not have a contractual right to agreement from the board of trustees about measures he chooses to adopt. A board of trustees is entitled to reach its own view of the course of action that will best serve the interests of the charity – and indeed they are under a duty as trustees to form that view independently of the wishes of the chief executive. I find on the facts of this case that there was no breach of the Claimant's contract by the trustees in their decision to uphold PG's appeal against his dismissal and instead adopt the view that the organisation should retain his services.

45. Dealing secondly with the Claimant's assertion that he resigned because of the Respondent's failure to act upon the grievance he submitted on 31 May, I have

made my findings of fact about the timing of the Claimant's grievance and resignation at paragraph 28. In my judgment there was no repudiatory breach of the Claimant's contract on the part of the trustees in failing to acknowledge his grievance by the time of his resignation. It is the case that the Respondent's grievance procedure stipulates that there must be an acknowledgement of a grievance within five working days, but even if that stipulation did have contractual effect, which is doubtful, failing to acknowledge a grievance within the time limit does not by itself represent a breach that goes to the root of the contract. Nor can it be reasonably construed as being a breach of the implied term, to fail to adhere to precise time limits in a written procedure that is designed to give management of the organisation guidance as to how grievances should be handled. As noted previously, the Claimant's actual complaint was that the trustees had failed to act on his grievance. I find that at the point of his resignation the Claimant had no grounds for concluding that they had failed to act – they had simply failed to acknowledge it in time and he then resigned before they could act on it any further. He had no grounds at the point of his resignation for concluding that the Respondent did not intend to be bound by the terms of his contract of employment in relation to his grievance and I conclude that as regards this aspect of his resignation letter he did not resign in response to a repudiatory breach of his contract.

46. That leaves only the matter of the conversation with Ms D'Elia. I have found as a fact that the Claimant has proved on a balance of probabilities that he was spoken to inappropriately. I am prepared to accept that words were used in a manner that were capable of amounting to a repudiatory breach of the Claimant's contract – it is a potential breach of the implied term to shout at or harangue an employee, however robust the individual. However, the problem for the Claimant is that the terms of his resignation letter clearly state that he himself did not regard the matters he referred to as terminal – he made it clear that he did not in fact want to resign. The letter ends with a clear expression of a desire not to leave and instead to engage in a discussion about the way forward. A claimant cannot have this both ways – he must unequivocally accept the conduct he complained of as having ruptured the employment relationship irretrievably. If he does not do this, but instead makes it clear that he was at the time prepared to engage in discussion in order to continue the employment relationship, in my judgement he waives the breach and undermines the basis of the claim for constructive dismissal. In this case the Claimant made it perfectly clear in the terms of his resignation letter that Ms D'Elia's conduct towards him was something he was prepared to overlook. He did not therefore resign in response to the conversation with Ms D'Elia – he indicated that he was prepared to move on from it in order to engage in discussion about his future working relationship with the trustees. The trustees regarded his threat to resign as a ploy designed to coerce them into bending to his view of matters over PG's resignation. I did not think that was necessarily an accurate assessment of his true intention, but I was satisfied that he did not regard Ms D'Elia's conduct towards him as having ruptured the working relationship irretrievably.

47. I therefore find on the basis of my findings of fact that that the Claimant did not resign in response to a repudiatory breach or breaches of his contract of employment and his constructive dismissal claim must therefore fail.

Summary dismissal

48. I must therefore consider the unfair dismissal claim under s 98 ERA. In dismissing the Claimant the Respondent relied on his misconduct in relation to a number of financial transactions that were unexplained and, it believed, unauthorised. Misconduct, as noted above is a potentially fair ground for dismissal under s 98. For the purposes assessing whether the dismissal was fair, my focus is whether the Respondent held a reasonable belief in that misconduct based on reasonable grounds after reasonable investigation (following *Burchell*).

49. In my judgment, at the point of the Claimant's dismissal Mr Beswick had conducted an investigation that was thorough as far as it went. The size and administrative resources of the Respondent are clearly a relevant factor when evaluating the standard on investigation undertaken but despite the limited resources available and the many difficulties facing the Respondent at the time, Mr Beswick had gone carefully through the books, consulted the accountants and checked the facts as regards authorisation of payments with Ms Maloney. Ms Maloney's emails were critical to the trustees' view that the Claimant was guilty of wrongdoing. Ms Maloney had accepted that arrangements had been made to enable the Claimant to claim some of the immediate costs he incurred following his accident from charity funds on the basis that he would repay the Respondent from his insurance claim. (This would not have been news to some of the other trustees who had also agreed to that arrangement). However she was quite clear that not only had the Claimant's £1450 in salary advances not been authorised, he had not even asked her for authorisation. On that basis the trustees formed the view that the Claimant had made unauthorised payments to himself. It was of course intending to put this to him at a disciplinary hearing alongside other matters such as an apparently excessive number of taxi fares and the payment of family hotel bills using the Respondent's funds.

50. The problem with the Respondent's case against the Claimant at both the investigation stage and the dismissal stage is that the allegations never were formally put to the Claimant. This fundamentally weakened the Respondent's case. It seems to me clear that when the honesty of an employee is in issue it is particularly important to investigate thoroughly and to ensure that the employee has the opportunity to explain himself. In this case an investigation meeting might well have made a difference to the precise nature of the allegations that were eventually put as disciplinary charges. I accept that the ACAS Code of Practice does not require an investigation meeting with an employee in every case, but in this case, I consider that fairness required it, the more so because the Respondent's own written procedure stipulated in the clearest terms that an investigation meeting must take place. The Claimant was justified in expecting this step to be taken prior to the disciplinary hearing and in my judgement, to omit this step was a procedural failing of sufficient seriousness to render the dismissal procedurally fair overall.

51. The problem might conceivably have been circumvented if the Claimant had been given adequate time at a disciplinary hearing to consider and respond to the evidence against him, but matters were compounded by the Respondent's

decision to move to a dismissal without a disciplinary hearing ever taking place. I accept that the Claimant was very uncooperative about attending a meeting, using a number of excuses that could potentially have been challenged in the circumstances, such as his absence on holiday. The fact is however his reasons were not challenged and instead the Respondent went ahead and dismissed without ever warning the Claimant that if he did not attend a meeting a decision would be made in his absence. On any analysis that was unfair to the Claimant.

52. Hence the lack of a meeting with the Claimant made his dismissal indisputably unfair on procedural grounds. I also find however that it undermined the Respondent's ability to establish that it had a fair reason to dismiss. By the end of the evidence and submissions in this case I was not satisfied that the Respondent had met the Burchell test in relation to the matters for which it dismissed the Claimant, primarily because it had never heard the Claimant's side of the story. Even in the matter of salary advances I consider that the Respondent could not have formed a reasonable belief in the Claimant's guilt without first asking the Claimant for his version of events, despite what Ms Maloney said. Instead, the Claimant did not have any chance to explain himself or refute the allegations and the trustees, as I have noted, acted peremptorily in deciding to dismiss at the point they did. Dismissing an employee summarily in their absence is an exceptional step and irrespective of the Respondent's limited administrative and financial resources, it should at the very least have been made clear to the Claimant that a decision would be made in his absence if he did not attend the hearing. Given the seriousness of the trustees' concerns and the fact that these involved dishonesty on the Claimant's part, the Claimant was entitled to a hearing and dismissal without one should have been a last resort. Instead, the trustees dismissed as soon as the Claimant had indicated that he could not make the revised hearing dates (which, he pointed out with some justification, were notified to him only three working days in advance).

53. It follows from this reasoning that the Respondent did not, on these facts, act reasonably in treating the reason relied on as a reason to dismiss.

54. However the Claimant was in my judgment a very significant contributor to his own dismissal, for reasons I will go on to explain (and despite the findings I make below concerning his wrongful dismissal claim). The Claimant in my judgment made use of the Respondent's finances in a way that was wholly inappropriate, effectively using his employer, a small and impecunious charity, as a banking facility. Although for the reasons set out above, I have fallen short of concluding that he was guilty of financial impropriety (see the next paragraph), it was in my view clearly improper for him to be, in effect, borrowing significant sums from his employer, without proper accountability and without a clear guarantee that he would eventually be in funds and able to pay it back. In a small charity such as the Respondent the chief executive is relied upon to act with the highest standards of integrity, without the need for daily oversight and with an exceptionally high degree of trust placed in the occupant of the role by trustees. Trustees are unpaid volunteers, responsible for strategy and oversight, but not the day to day running of the organisation. They rely heavily on the integrity, financial and otherwise, of their chief executive officer. In this relationship the normal inequality of bargaining position between employer and employee is disrupted, and in some instances reversed altogether. The

Claimant, in my judgment, exploited the management weaknesses of his employer to his own advantage and whether or not he was technically dishonest, this was nevertheless wholly inappropriate conduct. None of the investigation into his conduct as regards the Respondent's funds would have been necessary if he had not allowed this state of affairs to unfold. The fact that some of the trustees appeared to have condoned it was clearly regrettable in itself, but that is not a matter for me and does not excuse the Claimant's own conduct. In an unfair dismissal claim the Tribunal is bound to consider whether and to what extent a Claimant has contributed to the circumstances that led to the dismissal. In this case I find a very considerable contribution of 80 per cent – in other words, 80 per cent of the reason for the dismissal lay at the Claimant's own door as a result of his failure to observe proper boundaries between his personal finances and those of the Respondent. I fall short of saying 100 per cent because of the contribution made by the serious shortcomings in the procedure adopted by the trustees.

55. As regards the Claimant's wrongful dismissal claim, I cannot say with confidence that the Claimant did do the acts of misconduct for which he was dismissed. It was the Claimant's case that all of the transactions which were regarded as dubious were in fact authorised and properly recorded. He submitted that there was documentation at the office in coloured folders that would exonerate him and the Respondent said that it had not been able to find them. The Claimant was dismissed without notice, giving rise to a case of breach of contract unless the Respondent can show on a balance of probabilities that the Claimant actually did the acts which the Respondent relied on as acts of gross misconduct. To reiterate, the dismissal letter said this:

> **The allegations against you of serious financial impropriety have been upheld. You have made a series of cash withdrawals from charity funds that cannot be reconciled against legitimate expenditure. These totals several thousand pounds. You have also made a number of unauthorised purchases using charity funds which appear to be for personal benefit and clearly do not represent legitimate expenditure.**

56. Because these allegations were not formally put to the Claimant, I cannot conclude that the Claimant did not have explanations for them that would have undermined the allegation of serious financial impropriety, the basis of the Respondent's decision to dismiss summarily. I therefore uphold the wrongful dismissal claim.

Remedy

57. My judgment relates to liability only. However, I make the following remarks concerning remedy. Dealing first with the unfair dismissal claim, the following reductions and limitations will need to be applied:

    a. As the constructive dismissal claim has failed the Claimant can at most be compensated for the balance of the notice period he gave when he tendered his resignation - his employment was going to terminate on 1 September 2018 in any event, irrespective of the Respondent's actions.
    b. The Claimant then mitigated his losses by taking up employment with St Christopher's Hospice on 13 August 2018. The maximum period of

compensation for unfair dismissal is therefore the three-week period between the date of the dismissal (25 July) and the date on which the Claimant started new work. I make this observation on my understanding that the Claimant was paid the same, if not more in this new role, than he was paid at the Respondent.

c. I have found however that the Claimant has contributed to his own dismissal by 80 per cent and it would in my judgment be just and equitable to reduce both the basic and compensatory awards by this amount.
d. Any award to the Claimant ought to be increased to reflect the Respondent's very significant departures from the procedural standards set out in the ACAS Code. The departures are so significant that a full uplift of 25 per cent would be appropriate but for the limited size and administrative resources of the Respondent. In light of that factor I would limit the uplift to 20 per cent.

58. Dealing next with the wrongful dismissal claim, the Claimant is entitled to be paid compensation for the three-week period between the termination of his employment with the Respondent and the start of his employment with his new employer. That sum is not susceptible to any reduction for contributory conduct. However this sum must be set off against the remaining amount of the compensatory award after the reductions described in the previous paragraph, to avoid double compensation for that part of the notice period.

59. The parties may wish to bear these comments in mind in deciding whether there is the need for a remedy hearing in this case, but either party may apply for a remedy hearing to be listed if they cannot reach agreement.

Employment Judge Morton
Date: 28 June 2022