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THE EMPLOYMENT TRIBUNALS

Claimant: **Mr AM Fincham**

Respondent: **Alpha Grove Community Trust**

Heard at: **East London Hearing Centre**

On: **13, 14 and 20 September 2018**

Before: **Employment Judge Hallen**

Representation

Claimant: In person

Respondent: Mrs N Jameson (Solicitor)

JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for breach of contract is unfounded and is dismissed. The Claimant was procedurally unfairly dismissed and is awarded a basic award of £900. The Tribunal assesses that if a fair procedure was followed by the Respondent the Claimant would have been dismissed for gross misconduct at the end of a further period of one month. Accordingly he is awarded £1,300 gross in respect of this additional period of time.

REASONS

Background

1 Following a Preliminary Hearing before Employment Judge Goodrich on 14 August 2018, the case was listed for a two day hearing on 13 and 14 September at the East London Hearing Centre.

2 The issues were defined by Judge Goodrich in the Preliminary Case Management order which was at pages 31B through to 31D of the bundle of documents. These issues were as follows:-

Breach of Contract

3 The Claimant's case was that he started work with the Respondent having been appointed to a position on an advertised salary of £25,480 per annum and that in breach of contract, the Respondent failed to pay him at this rate throughout his employment. The Claimant estimated that a shortfall amounted to approximately £19,600.

4 Additionally, in forming part of this underpayment, the Claimant's case was that by a letter dated 29 March 2017 the Respondent stated that it would pay him £4,610.00 to address what the Respondent described as a historical error in payment. Prior to the commencement of this hearing, the Respondent conceded that it owed the Claimant £4,110.00 based on this historic underpayment plus £154 being the shortfall in pay for the period 26 January to 30 January 2018. The Respondent did not accept that the Claimant was entitled to £500 as this was an ex gratia payment and it was not legal obliged to pay him this sum. The Tribunal noted that the Claimant had prior to the hearing accepted this sum so the Tribunal had to determine if he was entitled to the payment of £500 as a matter of legal entitlement or whether the sum was ex gratia as the Respondent was saying and the Claimant was not entitled to it.

5 The Respondent's case in reply to the Claimant's claim for breach of contract was that the Claimant was not contractually entitled to the rate at which he said the position was advertised but at the rate of £8.50 per hour which formed part of the terms and conditions of his contract of employment. Furthermore, the Respondent said that the offer made to the Claimant in a letter dated 29 March 2017 of £4,610.00 was refused by him albeit the Respondent prior to this hearing paid the Claimant £4,110.00 being the historic shortfall outlined in the letter of 29 March 2019 plus £154 being the shortfall in pay for the period 26 January to 30 January 2018.

6 The Claimant's pay was increased from £8.50 to £10.00 an hour and then from 29 March 2017 until the Claimant was dismissed, his pay was increased from £10.00 to £12.00 per hour and this rate was accepted by the Claimant as wages during the course of his employment.

7 At page 31E of the Case Management Order, Judge Goodrich dealt with the shortfall of pay between 26 January and 30 January 2018 in respect of the Claimant's application to amend his claim to include this shortfall. The amendment was permitted by Judge Goodrich. The Respondent confirmed that it accepted the shortfall in pay between this period of time and in addition to paying the Claimant the contractual shortfall of £4110.00 it paid him an additional sum of £154.00 net as stated above.

8 With regard to the claim for unfair dismissal, Judge Goodrich noted that the Respondent accepted that the Claimant was entitled to bring a claim for unfair dismissal. The Respondent contended that the principal reason for dismissal was conduct namely:-

8.1 Refusal to carry out reasonable management instructions.

8.2 Gross insubordination towards Reverend Dix in January 2018; and

8.3 Speaking in a rude, insubordinate and intimidating manner towards

Davidson James (Chairman of the charity) on 9 January 2018.

9 At the Preliminary Hearing, the Claimant disputed that these reasons were the principal reason for dismissal and that Reverend Dix in particular had threatened to remove him from the Respondent's employment and would reference this threat at the Tribunal hearing. Judge Goodrich noted that the parties disputed whether the Claimant's dismissal was fair within the meaning of Section 98(4) of the Employment Rights Act 1996 (ERA) namely whether the dismissal was substantively and procedurally fair.

10 The Claimant also asserted that he was entitled to one month's notice pay as the Respondent was not entitled to summarily dismiss him for gross misconduct.

11 With regard to remedies, Judge Goodrich noted that the Claimant sought reinstatement and/or re-engagement and if this was not permitted, compensation.

12 During the course of the Tribunal hearing, the Claimant clarified his breach of contract claims as follows:-

12.1 He said he was entitled to a rate of pay which equated to £25,480.00 (the advertised rate) from the time that he was appointed to his role in July 2014 until the termination of his employment in January 2018;

12.2 If the Tribunal did not accept this, he confirmed that he accepted the sum of £4,110.00 in respect of the historic shortfall in pay and £154.00 in respect of the shortfall in pay for the period 26 January to 30 January 2018;

12.3 However, he said he was still entitled to a payment of £500 as offered to him by the Respondent on 29 March 2017 and did not accept it was an ex gratia payment (page 47);

12.4 He was entitled to notice pay on the basis that he was dismissed without notice.

13 At the hearing, the Tribunal had in front of it a trial bundle made up of some 513 pages. The Tribunal also heard from the Claimant in evidence who produced two witness statements which were at pages 6 – 9 and 30 – 33 of the witness statement bundle. He called a witness, Mr Keith Lay who attended in person and produced a witness statement at pages 1 – 4 of the witness statement bundle and he produced a witness statement from Andy Scar which was at page 5 of the witness statement bundle which dealt with the Claimant's efforts to mitigate his losses by starting a self-employed business selling vintage maps. The Respondent called two live witnesses, the dismissing officer, Mr Davidson James (Chairman of the Trust) and Reverend Ed Dix (Trustee). These witnesses produced witness statements which were at pages 17 – 29 in respect of Davidson James and 10 – 16 in respect of Reverend Ed Dix. The Claimant, Davidson James and Ed Dix gave live evidence to the Tribunal and were subject to cross-examination as well as questions from the Tribunal.

Facts

14 The Respondent is a multipurpose charitable centre offering social and recreational facilities and services to local communities in the Isle of Dogs and the London Borough of Tower Hamlets. The Respondent is governed by a board of trustees comprising Mr Davidson James (Chair of Trustees), Reverend Ed Dix, Ugo Ikokwu and Shirazul Islam (Trustees). The Respondent primarily relies on rental income to fund its premises, staffing, utilities and other overheads. The role of trustee of the Respondent involved having responsibility for all matters of governance in respect of the Respondent. It included helping to set the strategic direction of the centre, to bring about improvements in the fabric of the centre and its running, in order that the centre may further benefit the lives of the local community. At the relevant time during the Claimant's employment the centre was a small employer employing two employees, the Claimant and Amina Begum, office assistant who commenced employment on 14 July 2014. The Respondent as a small employer did not engage a separate human resources department.

15 The Claimant was employed by the Respondent as a Centre Coordinator. He commenced his role on 18 July 2014 and continued his role until his summary dismissal for gross misconduct on 26 January 2018. As an employee of the Respondent, the Claimant reported to the trustees and the trustees had to have trust and confidence in the Claimant at all times. The Claimant often worked unsupervised and was the first and sometimes the only point of contact on behalf of the centre for many users and suppliers. In such circumstances, it was imperative that the Claimant maintained good relations with users and suppliers of the centre but also very importantly with the trustees. A small employer in the Tribunals view could not run effectively without such trust and confidence in the Centre Coordinator.

16 The Respondent through its witnesses gave evidence to the Tribunal that the Claimant would frequently get frustrated and this frustration would then turn into long communications with the Respondent (usually by emails) which were not considered respectful in their tone and nature. Evidence was given that he was not easy to work with and that it was very difficult to resolve problems with him. The Tribunal took judicial note of the Claimant's conduct during the course of the two and a half day Tribunal hearing and although, the Claimant was a litigant in person, the Tribunal noted that it was difficult on numerous occasions to communicate with him and/or provide him with the necessary guidance to assist him in putting his case. In this regard the Tribunal got a flavour of the frustration that the Respondent had in working with the Claimant.

17 The Respondent gave evidence which the Tribunal accepted that the Claimant had been warned against using aggressive and rude language and tone with the trustees and others informally throughout his employment and before the disciplinary action which led to his summary dismissal for gross misconduct. The Tribunal was referred to pages 240 – 242 of the bundle of documents which was appendix 7 to the investigation report and consisted of email exchanges between the Claimant and Ugo Ikokwu, a trustee. This email exchange referenced complaints received from trustees about "a bombardment" and/or "a barrage of emails" which the Claimant had been warned against generating. Despite the warning, the Claimant wrote this email attaching further attachments relating to the Tower Project which Mr Ikokwu found to be offensive and intimidating.

18 The Claimant took on the role of Centre Coordinator with the Respondent having

responded to a job advertisement which advertised a rate of pay of £25,480.00. By the time the Claimant had applied and interviewed for the position, the duties initially associated with the role had been split up, so it was unclear whether the initial advert was ever actually referred to during the recruitment process. As it happened, the Claimant did not have the skill set to undertake the role as advertised but an amended role and hours were agreed with the Claimant and he was offered a contract to undertake those duties. The Respondents gave evidence and it was accepted that with respect to paragraph 2 of the job description at page 32 of the bundle of documents it recruited Amina Begum to undertake administrative and financial systems within the organisation and as referenced earlier, she commenced employment as an Office Assistant on 14 July 2014.

19 At the time of his appointment, the trustees had been clear with the Claimant as to the limited funds available to the centre. As a consequence it was agreed that the Respondent would pay the Claimant £8.50 per hour. In July, the Claimant began working as the new Centre Coordinator for £8.50 per hour. His agreed hours were 1.00pm to 5.00pm from Monday to Friday with a flexible additional five hours per week and no scope for overtime to be paid. A contract of employment was produced which reflected these terms but was not produced in the bundle of documents as neither party had a copy. However, the Claimant confirmed in his Claim Form at page 13 of the bundle of documents that he commenced work with the centre at £8.50 per hour in accordance with his contract of employment.

20 In September 2014, the trustees agreed to increase the Claimants pay to £10 per hour from 3 September 2014 onwards. A draft contract was prepared to reflect this (pages 33- 35 of the bundle) which was given to the Claimant and signed by both parties albeit the signed copy was not in the bundle of documents. However, this change in pay was not reflected by the Respondent erroneously and the Claimant continued to be paid £8.50 per hour which he did not complain about at the time. In August 2016, the Claimant's pay was raised to the London living wage (which at the time was £9.40 per hour) and this increase was effected.

21 In late 2016, the Claimant queried with the trustees why he was not being paid the salary of £25,480.00 referenced in the initial job advertisement. This was nearly two years after the Claimant's commencement of service. The Claimant sought to convince the Tribunal that he did not know what he was being paid and trusted the Respondent. However, the Tribunal did not accept this evidence. In the Tribunal's experience, the rate of pay is a fundamental term for most employees and it very unlikely that the Claimant was not aware of his rate of pay. Nevertheless, upon the Claimant raising his concerns, the trustees confirmed to the Claimant that it had been clear that the advertised did not accord with the Claimant's responsibilities and he was not entitled to the rate of pay advertised in the job advert. However, in March 2017, the Respondent recognised that the initial pay rise to £10 per hour had not been actioned as from September 2014 and having recognised this oversight the trustees wrote to the Claimant on 29 March 2017 (page 47) in an attempt to rectify the shortfall in pay over that period. The letter explained that the Claimant should be paid (i) £3525.00 in respect of the shortfall of £1.50 per hour from September 2014 to August 2016 and (ii) £585.00, in respect of the shortfall of £6.60 per hour from August 2016 to March 2017. This was on the basis that the Claimant worked 25 hours per week for (i) 94 weeks and (ii) 39 weeks respectively. The letter also stated that in recognition of additional hours worked in the corresponding period, the trustees had agreed to pay the Claimant an additional sum of £500. This made a total

payment on offer of £4610.00. The Claimant rejected this offer of £4610.00 on 12 June 2017 (page 80) of the bundle of documents as he did not consider it sufficient. As a consequence, Mr James wrote to the Claimant on 8 November 2017 (page 190) withdrawing the offer of £4610.00. The Tribunal noted that prior to the commencement of the Tribunal hearing, the Respondent accepted that the Claimant was entitled to the shortfall in pay as referenced in a letter at page 47 of the bundle of document sent to the Claimant on 29 March 2017 and sent him a cheque for £4110.00 being the difference in pay between 2014 to March 2017. The Respondent gave evidence to the Tribunal that the sum of £500.00 was offered in the letter was in fact an ex gratia payment and because the Claimant did not accept that payment prior to 8 November 2017, it was withdrawn. The Tribunal accepted the Respondent's evidence that in respect of the sum of £500.00, the Claimant was not contractually entitled to this sum as it was an ex gratia payment, not accepted by the Claimant at the relevant time and subsequently withdrawn by the Respondent on 8 November 2017.

22 In May 2017, the trustees met to review the centre's pay to its employees and decided that £12 per hour was a reasonable sum and could be sustained by the Respondent finances and accordingly the Claimant was informed on 24 May 2017 that his pay would be increased to this hourly rate. The Claimant was subsequently paid £12 per hour until he was dismissed summarily for gross misconduct in January 2018. Despite the increase, the Claimant confirmed to the Respondent that he was aggrieved that his hourly rate was not calculated in accordance with the advertised annual salary and that he considered the increase of £12 per hour to be a pay cut. As a consequence on 18 April 2017, the Claimant wrote an email to the Respondent (pages 39 – 41 of the bundle) which the Respondent treated as a grievance. Reverend Dix met with the Claimant on 11 September 2017 with regard to his grievance stating that his salary should be paid at the advertised rate of £25,480.00. The Claimant rejected the Respondent's offer of £4610.00 and made a counter offer of £16,879.75. The Reverend Dix considered the Claimant's grievance relating to his pay but did not uphold it and wrote to the Claimant on 19 September 2017 to confirm this. He explained that the Claimant was not entitled to the salary set out in the job advert as he had taken on a different role with different duties. Reverend Dix confirmed that the job advertisement did not carry any legal force and that the contract of employment signed by the Claimant did and that this confirmed the hourly rate of pay which the Claimant was paid at. As a consequence that part of his grievance was dismissed (pages 102 – 125).

23 The Claimant appealed against the grievance decision and his appeal was heard by Ugo Ikokwu. Mr Ikokwu did not uphold the Claimant's grievance and this was confirmed to the Claimant by a letter dated 7 November 2017 and this was at pages 186 – 187 of the bundle.

24 Towards the end of 2017 and early 2018, the Respondent had cause to be concerned about the Claimant's conduct. Firstly, there were issues relating to a contractor appointed by the trustees to clean the centre named "Cleaning Zoo". The Claimant was responsible for maintaining relationships and paying contractors who provided the services to the Respondent including the company which provided cleaning services namely Cleaning Zoo.

25 On 5 December 2017, Mr James received an email from Reverend Dix (page 195 of the bundle) which forwarded an email from Julia Nowak of Cleaning Zoo containing an

exchange between her and the Claimant which Mr James considered to be overly heated and unprofessional on the part of the Claimant. Reverend Dix also shared with the trustees that he had separately received an email from Ms Nowak (page 210 of the bundle) who had asked him to instruct the Claimant not to contact her anymore as she found his communications "out of order".

26 On behalf of the trustees, Mr Davidson James instructed the Claimant from refraining from contacting Ms Nowak moving forward as she found his communications distressing. He gave the Claimant instruction clearly and in writing, by email on 5 December 2017 (page 212 of the bundle).

27 On 5 December 2017 Mr James sent an email to the Claimant asking him to prepare a cheque to settle the now outstanding Cleaning Zoo bill (page 211). He considered that this was a reasonable and lawful instruction to the Claimant from the employer. The Tribunal reviewed the instruction at page 211 and the Claimant's response on the same page dated 5 December where he categorically confirmed that he would not be following the instruction from the chair of trustees and not issuing a cheque to pay the bill as instructed. He said he would not pay unless he was given an opportunity to explain his objections and that any further direction from the trustees would be considered to be harassment by him.

28 On 6 December 2017, the Claimant sent an email to the Reverend Dix and Julia Nowak (despite Mr James instructions not to contact Ms Nowak). In the email, the Claimant outlined his objections to the services of Cleaning Zoo referencing an incident of leaking sulphamic toilet cleaner found in the toilet in which the external contractor worked. The Tribunal noted that although the Claimant may have had objections as to how Cleaning Zoo undertook its duties, it was for the Respondent to consider its relationships with the Cleaning Zoo and if it felt that the invoice to the Cleaning Zoo should be discharged it was a duty of the Claimant to do so. As an employee of the Respondent he was required to carry out a legitimate management instruction and this was one.

29 On 5 December 2017, the Reverend Dix forwarded to Mr James an email that the Claimant had sent him (page 204) and explained that he thought that the Claimant was trying to intimidate him and isolate him from the other trustees. On 3 January 2018, the Claimant copied Mr James into an email chain between himself and the Reverend Dix (page 217 of the bundle) in which:-

29.1 The Reverend Dix made a request to the Claimant in relation to updating the trustees details for the charity's commission;

29.2 The Claimant accused the Reverend of causing him and Amina "considerable work related stress"

29.3 The Claimant told Reverend Dix that he was "an uninsurable risk" for the centre and demanded that he resigned immediately;

29.4 The Claimant told Reverend Dix his behaviour was "highly irresponsible and dangerous"

29.5 The Claimant seemed to threaten Reverend Dix with "career damaging publicity";

29.6 The Claimant refused to file the paperwork with the charity commission as per Reverend Dix's request;

29.7 The Claimant referred at length to what he considered to be an insurance risk to the Respondent (the leaking cleaner incident above).

30 The Tribunal reviewed these emails and noted that whilst the Claimant had cause to be concerned about the actions of Cleaning Zoo in respect of the sulphamic toilet cleaner being left in the toilets, the nature of his communications with the Reverend Dix was disrespectful and insubordinate.

31 As a result of the Claimant indicating in his email of 3 January 2018 that he was suffering from "considerable work related stress" the Respondent through Reverend Dix sent an email to the Claimant (page 215 D2 of the bundle) in which Reverend Dix encouraged the Claimant to seek medical attention if he was unwell. The Claimant confirmed to Reverend Dix that although his GP had recommended that he take time off due to work related stress the Claimant did not wish to do so. The Claimant did not wish to take time off work because he did not want to have too much work to do upon his return from sick leave. Despite the response from the Claimant, the Respondent understood it had a duty of care to the Claimant and if he was not well to attend work due to stress, he should consult with his doctor. The Respondent sought to convince the Claimant to do so but the Claimant refused. As a consequence, Mr James consulted with fellow trustees and given the Claimant's self professed "stress at work" the trustees insisted that the Claimant obtained medical evidence to show that he was fit for work. Mr James therefore wrote to the Claimant on 9 January 2018 (page 222) asking him to take advice from his GP and confirmed that he would be paid for the period it took him to obtain such medical advice. Mr James handed the Claimant the letter of 9 January 2018 personally with the instruction to seek medical advice. The Claimant followed Mr James down the corridor and acted in a rude, unprofessional and aggressive manner. The Claimant disputed doing so. The Tribunal preferred the evidence of Mr James in this regard. It seemed to the Tribunal that the actions described by Mr James were very likely to have happened and were consistent with the email exchange between the Claimant and the Respondent at this time which showed a level of aggression and insubordination.

32 As a consequence of the Claimant's aggressive and intimidating behaviour towards the Chairman, Reverend Dix and Ms Nowak, the trustees became increasingly concerned about the Claimant's conduct which appeared to be:-

32.1 Communication in a rude and unprofessional manner;

32.2 Attempting to threaten the trustees; and

32.3 Failing to follow reasonable instructions of the trustees.

On this basis, the trustees instructed Shirazul Islam to undertake an investigation of the Claimant's behaviour and conduct and Mr Islam produced an investigation report for

consideration of the trustees in relation to whether any formal action should be taken against the Claimant for his perceived and serious misconduct. The investigation report was at pages 230 – 234 of the bundle of documents and contained ten appendices which were relevant to the issues under consideration. The report recommended that it would be appropriate for the Claimant to be taken through a disciplinary process in respect of his recent misconduct and Mr James as chair of the trustees was to be the disciplinary officer nominated by the trustees. As a small charity, it was noted by the Tribunal that all of the trustees were volunteers. Mr Islam conducted the disciplinary investigation, Reverend Dix had been involved in the Claimant's grievance the previous year and this left the most appropriate person to deal with the disciplinary procedure as chair of the centre Mr James. The Tribunal noted a level of criticism made by the Claimant against Mr James as he was also a victim of the Claimant's alleged insubordination and disrespectful and rude conduct. However the Tribunal noted that the Respondent was a small employer, that there were a number of allegations against the Claimant and only one related specifically to allegations of insubordination towards Mr James. There were also allegations of insubordination and rudeness towards Reverend Dix as well as Ms Nowak. In the circumstances, the Tribunal was of the view that it was appropriate for Mr. James to conduct the disciplinary hearing.

33 Mr James therefore wrote to the Claimant on Wednesday 7 January 2018 inviting him to a disciplinary hearing on Monday 22 January 2018 at 4.00pm. The disciplinary hearing was to consider allegations that the Claimant:-

33.1 Sent Intimidating, rude and threatening emails to Reverend Dix on 3 and 15 January 2018 having been told not to;

33.2 Refused to undertake a reasonable lawful instruction given by Reverend Dix to update details of the charity commission website;

33.3 Emailed Julia Nowak of Cleaning Zoo twice after being specifically instructed not to by Mr James; and

33.4 Refused to pay Cleaning Zoo despite specific instructions from Mr James to do so.

Given the fact that the allegations related to the conduct of the Claimant acting in a disruptive insubordinate and rude manner, and that the Claimant's role meant that he was often unsupervised in the centre, the Respondent suspended the Claimant on full pay pending the disciplinary hearing to minimise disruption. The Claimant was sent the disciplinary investigation report along with the appendices to that report which included all of the evidence that the Respondent would be considering. The Claimant was also given an opportunity to be represented at the disciplinary hearing by a colleague or trade union representative. Despite the suspension, the Claimant attended at the Claimant's premises on 18 January 2018 and was reminded by the Reverend Dix that he was not permitted to be there.

34 On 19 January, Reverend Dix informed Mr James that the Claimant had sent him a text saying that the investigation report did not comply with Acas guidelines as he had not been consulted about it. The Claimant said that the hearing date could not be agreed until he had been consulted on the report. This text was forwarded to Mr James and he replied on behalf of the Respondent to confirm that he did not consider that the

Respondent needed to consult with the Claimant under Acas guidelines and that the purpose of the disciplinary hearing was for the Claimant to respond to the allegations set out in the disciplinary invitation letter. Mr James confirmed that he would be going ahead with the disciplinary hearing on 22 January 2018 (page 282 of the bundle).

35 On 20 January 2018 the Claimant sent Mr James a text saying that he had not "agreed" to the time, date or venue of the disciplinary hearing and that "one working day" was insufficient notice. Mr James did not consider it appropriate nor necessary to obtain the Claimant's agreement to the time, date, or place of the meeting provided it took place within a reasonable time and a reasonable location even though the Claimant raised valid concerns including the fact that his trade union representative could not attend. It was Mr James's view that he would take all of these matters into consideration at the disciplinary hearing.

36 At the time of the Tribunal hearing, the Claimant accepted that his assertion of one day's notice was insufficient was incorrect as he received notification on Wednesday 17 January and knew about the disciplinary hearing at that stage and that it would take place on Monday 22 January 2018. Nevertheless, the Tribunal saw a text from the Claimant at page 283 of the bundle of documents in which he confirmed that the date, time and venue and the fact that Mr James was chairing the disciplinary hearing were not agreed, that the law was based on the concept of reasonableness and that the Claimant had insufficient time to liaise with his trade union representative. Given these clearly expressed concerns prior to the hearing and the fact that Mr James himself had on 9 January (page 222) expressed concerns about the Claimant's health and his stress at work, in conjunction with the fact that the Claimant had not been disciplined before in respect of any disciplinary issues, the Tribunal was not satisfied that proceeding with the disciplinary hearing in the absence of the Claimant was procedurally the actions of a reasonable employer. Given what was known to the Respondent at the time that this text was written, the Respondent should have been on notice that it was necessary to have the Claimant in attendance to put his defence to the allegations under consideration. This was inspite the fact that Mr James had informed the Claimant that if he did not attend the disciplinary hearing will go ahead in his absence.

37 On 22 January 2018 the date of the disciplinary hearing Mr James arrived at the venue at 3.50pm and stayed until 4.30pm during which time the Claimant did not attend. In the Claimant's absence he considered the report produced by Mr Islam and the allegations against the Claimant. He came to the conclusion that Mr Islam's report seemed to have been fully and properly investigated and concluded that the report showed three types of gross misconduct:-

37.1 Unreasonable refusal to carry out lawful management instructions;

37.2 The content of the Claimant's emails to Reverend Dix of 3 and 15 January 2018 were aggressive and inappropriate and that it was sent in contravention of a reasonable and lawful management instruction; and

37.3 His rude and aggressive manner when speaking to Mr James on 9 January 2018.

Mr James considered mitigating factors but did not consider that there were any and

moreover, the Claimant did not provide any written response to the allegations under consideration and did not attend the hearing. Mr James considered whether summary dismissal was fair and appropriate in the circumstances and whether dismissal could be avoided. He noted that the Claimant had showed no remorse for his actions nor had he accepted that they were inappropriate in any way. He therefore concluded that it was highly likely that such behaviour would be repeated. The trustees were volunteers with other jobs and the Claimant's position within the centre was pivotal. He decided that if the trustees could not rely on the Claimant to undertake lawful instructions and not to avoid rude and aggressive language even when he had been specifically instructed to do so, then the relationship could not continue. For this reason in particular he decided that the appropriate sanction would be summary dismissal for gross misconduct. The Tribunal noted the Claimant's actions during the Tribunal hearing and noted that he did not accept even at the Tribunal hearing that his actions were disrespectful, rude and/or insubordinate. He confirmed that he would act in the same manner again. He showed a negative attitude towards the Respondent and towards Mr James and Reverend Dix throughout the Tribunal hearing and the Tribunal got the impression that he believed that he acted reasonably at all stages. The Tribunal did not share this view.

38 During the course of the hearing, the Claimant alleged that the Respondent had already decided to dismiss the Claimant and referenced the centre's audited financial statement for the year ended 31 March 2017 which was finalised and dated 18 December 2017 (page 329 of the bundle). He referred to note 12 (contingent liability) to the March 2017 accounts as an indication that his dismissal was premeditated. Note 12 stated *"the charity's coordinator is in dispute with the charity. He argues for historical reason that his pay since his appointment in July 2014 has been too low, such that he is owed back pay as well as a higher salary. In addition, the coordinator has made allegations of harassment. Both of these issues are currently subject to the charity's dispute procedures, but if agreement cannot be reached then the case may come before an Employment Tribunal in which the trustees cannot be sure of the upper limit of any award that may be made to the coordinator."* The Tribunal noted that the Claimant had been in dispute in respect of his wages for some considerable period of time and that this particular note made no reference to any ongoing dismissal process. Therefore, the Tribunal came to the conclusion that the dismissal of the Claimant had not been premeditated. In addition, the Claimant asserted that a letter sent to him by Reverend Dix on 3 February 2016 referenced an intention to terminate the Claimant's employment. This letter was at page 36 and 37 of the bundle of documents and was sent to the Claimant almost a year before his actual dismissal. The Tribunal as a consequence did not feel that it was relevant to the Claimant's subsequent dismissal for separate allegations in January 2018 almost a year later.

39 The Claimant appealed against his dismissal by way of email dated 31 January 2018 sent to Mr James which was at page 277 of the bundle of documents. In the email of appeal, the Claimant stated *"I refute all of the allegations that led to my dismissal."* The Respondent retained an external contractor which was HR Inspire and the appeal was undertaken by Karen Borrett. Ms Borrett did not attend to give evidence to the Tribunal and Mr James confirmed that he as the dismissing officer was not interviewed or asked any questions by Ms Borrett in respect of the appeal that she undertook on behalf of the Respondent. The Tribunal noted that she took 10 pages of notes for the appeal which was at pages 294 – 304 of the bundle of documents. She limited her basis of consideration to of the appeal made by the Claimant to the ground that the disciplinary hearing took place in the Claimant's absence. She did not undertake a more substantive

consideration of all of the allegations under consideration nor did she ask any questions relating to the substantive allegations made by the Respondent against the Claimant. However despite this fact, it should also be noted that the Claimant did not present any substantive defence to the allegations that the Respondent was raising against him specifically in relation to his unreasonable refusal to carry out lawful instructions and his disrespectful and aggressive insubordinate attitude towards Reverend Dix/Mr Davidson James. The Tribunal reviewed the outcome letter in respect of the appeal which was at pages 308 – 310 in which Ms Borrett confirmed that the Claimant was not appealing against the actual outcome of the disciplinary hearing itself but the fact that the disciplinary hearing took place in his absence. Her conclusion was that it was right for Mr James to undertake the disciplinary hearing in the Claimant's absence. The Tribunal was critical of the approach taken by Mr James the dismissing officer given the fact that the Claimant had not been subject to disciplinary action before, was known to the Respondent to be suffering from stress and had asked for representation by his trade union prior to the disciplinary hearing going ahead in his absence. Ms Borrett was also aware of these facts yet dismissed the appeal on the limited basis that the hearing went ahead in the Claimants absence. Nevertheless, the Tribunal was of the view that had Ms Borrett considered the allegations against the Claimant in totality and the Claimant's failure to answer those allegations both in writing prior to the appeal hearing and at the appeal meeting, she would in all likelihood have dismissed the Claimant's appeal on substantive grounds as well. Nevertheless, the Tribunal was of the opinion that the failure to deal with the substantive grounds by Ms Borrett was a procedural failure on behalf of the Respondent.

The Law

40 In order for a contract to exist, all of the following criteria must be met:-

40.1 Offer and acceptance;

40.2 An intention to create legal relations;

40.3 Certainty of terms;

40.4 Consideration (*Foley v Classique Coaches Ltd [1934] 2KB1*).

The burden of proof is on the Claimant to demonstrate that the contract was formed and he has to do so on the balance of probability.

41 Under Section 98(1) ERA 1996 the Respondent has to show the reason (or principal reason) for dismissing the Claimant and the Respondent asserts in this case that it was conduct (Section 98(2)(b) ERA 1996).

42 The Respondent has to show that in the circumstances including the size and administrative resources of the Respondent it acted reasonably in treating the Claimant's gross misconduct as a sufficient reason for dismissing the Claimant under Section 98(4) ERA 1996.

43 In dismissing the Claimant for misconduct the Respondent has to show that it acted fairly and that:-

43.1 It believed that the Claimant was guilty of misconduct;

43.2 It had reasonable grounds for believing the Claimant was guilty of gross misconduct; and

43.3 At the time the Respondent held that belief, it had carried out a reasonable investigation as was necessary in the circumstances. *British Home Stores Ltd v Burchell [1978] IRLR 379.*

44 In addition a decision to dismiss the Claimant has to fall within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*).

45 With regard to Section 10(4) and (5) of the Employment Relations Act 1999 (The Act) the Claimant is required to give a good reason for his refusal to attend a disciplinary hearing. The Act reads:-

"(4) if –

(a) A worker has a right under the Section to be accompanied at a hearing,

(b) His chosen companion will not be available at the time proposed for the hearing by the employer; and

(c) The worker proposes an alternative time which satisfy subsection (5), the employer must postpone the hearing at the time proposed by the worker.

(5) an alternative time must –

(a) be reasonable and

(b) be for the end of the period of five working days beginning with the first working day after the day proposed by the employer'.

Tribunal's Conclusion

Claimant's Breach of Contract Claim

46 The Tribunal conclusion was of that the Claimant was never entitled to the advertised rate of £25,480.00 as he asserted at the hearing. This was because the job description at page 32 (the "Job Description") and the reference in it to £25,480.00, could not be construed as contractually binding. In order for a contract to exist, all of the following criteria must be in existence: offer and acceptance, an intention to create legal relations, certainty of terms and consideration (*Foley v Classique Coaches Ltd [1934] 2 KB 1)*. The burden of proof was on the Claimant to demonstrate that a contract was formed and he could not do so. In the Tribunals view there was no sensible and reasonable construction that a job advertisement was an offer open for the acceptance of the Claimant (or anyone else). A job advertisement was plainly an invitation to treat, akin

to a shop displaying goods for sale, as in *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd [1953] EWCA Civ 6.* On the evidence, the Claimant did not demonstrate to the Tribunal that the Respondent offered to pay the Claimant the advertised rate nor that he accepted it. The Tribunal heard in evidence from Mr James that there was no intention to make an offer to the Claimant for the advertised rate. The Claimant said in the appeal meeting against the outcome of his pay grievance that he did not sign the Job Description and that it '*doesn't form part of the contractual agreement as they* [the Job description and the Employment Contract] *were never married together'* page 166 and confirmed (same page reference) that *'there is no Job Description that was signed by either party'.* The Claimant confirmed in his evidence that he did not sign the Job Description.

47 There was insufficient clarity as the Tribunal heard in evidence from the Claimant around the terms of the Job Description (which could also be seen from the document on its face which contained three short paragraphs detailing the role.) The Tribunal also heard in the Claimant's evidence that there was another job description (which was not disclosed by the Claimant) which he said was two or three pages long and set out a more detailed job description of the role. It was therefore not possible for the Claimant to rely on the Job Description when his evidence was that it was superseded by another document, notwithstanding the Respondent's position that it was superseded by his contract of employment.

48 There was consideration passing between the parties, being the Claimant providing work and the Respondent paying an hourly rate for this. However the hourly rate paid was not the advertised rate, it was a lower rate. Even if the Job Description were contractually binding it was superseded by subsequent offer(s) that the Respondent made to the Claimant for employment, which were accepted. In particular, the Respondent offered the Claimant employment on the basis of £8.50 per hour as set out in an employment contract. The Claimant referred to the contract and the rate of pay of £8.50 per hour as set out in an employment contract. The Claimant referred to the contract and the rate of pay of £8.50 per hour in his pleadings at page 13. The Claimant accepted this offer by his conduct and worked for this amount. It was not disputed that he was paid £8.50 per hour from his appointment in July 2014 and the Claimant confirmed he earned £8.50 per hour in paragraph 6 of his witness statement (page 7 of the witness statement bundle). A second employment contract (at page 33 in the bundle) made a further offer to the Claimant in September 2014 to work at £10 per hour which he accepted and he worked on this basis. The contract did not set out any specific duties but clearly stated that the rate of pay was £10 per hour. At paragraph 5 (headed 'Pay') it confirmed that it "sets out the main particulars of the terms and conditions of your employment". It stated "your pay is £10.00 per hour". The Claimant accepted this offer [by signing the contract] (neither party had a signed copy) and his conduct, continuing in his role for nearly two years more before mentioning issues with his pay in 2016.

49 The Tribunal heard, the role of centre co-ordinator was split between the Claimant and another person (Ms. Begum) who was hired at the same time as an Office Assistant. The job accepted by the Claimant was for this reduced role which matched his skillset and abilities. In other words, the role the Respondent offered which the Claimant accepted was not the tole set envisaged in the job Description. For the above reasons, the Tribunal concluded that the Claimant was not entitled to pay at the rate of the job advertisement of £25,480.00 from the commencement of his employment to his termination.

50 At the hearing, the Claimant argued that he was entitled to the difference between his actual pay (either £8.50 per hour or £9.40 per hour) between July 2014 and 2017 and the increased rate of pay which the trustees had resolved to pay him which was £10 per hour (point 47.2) above. The Respondent conceded this point and prior to the Tribunal hearing he was paid £4,110.00 which extinguished the historical entitlement that the Respondent did not pay him pursuant to its letter dated 29 March 2017.

51 With regard to the Claimants claim that the Respondent was in breach of contract for failure to pay £500.00 which was originally offered to him by the Respondent on 29 March 2017 and labelled as a payment 'in recognition of additional hours worked in the corresponding period,' the Tribunal concluded that the Claimant was not entitled to this sum on the basis that there was no contractual entitlement to payment. By way of explanation, the Claimant had no legal entitlement to any pay for additional hours. The Respondent made the offer 'in recognition of' additional hours worked, not 'as payment in respect of X hours'. This distinction was key as it demonstrated that the Respondent was making a payment to acknowledge the Claimant's hard work rather than calculating and paying a sum due in respect of certain hours worked. He was not entitled to pay for overtime as per the employment contract at page 33. The Claimant's evidence was that he sometimes worked additional hours without receiving any additional pay in relation to these hours. He said he was never paid for work that he did at home out of hours. There was no evidence that the Claimant actually worked any additional hours for the period to which the letter related. There was no calculation or correlation between £500.00 (which was an arbitrary figure) and this should have been expressed as a goodwill or ex gratia payment by the Respondent and was intended to be considered in this way. Although the Respondent made an offer to the Claimant for this amount (amongst other sums which have been paid) on 29 March 2017 (page 47), the Claimant rejected this on 12 June 2017 (page 80) and then, for good measure, it was withdrawn by the Respondent on 8 November 2017 (page 190).

52 Prior to the hearing, the Claimant argued that he should have been entitled to a payment of four days' pay in respect of the delay between the date on which the letter terminating his employment was dated and the date on which he received such letter. The Respondent had prior to the hearing already made a payment to the Claimant of £144.00 in respect of two days' pay on 12 September 2018 so there was no finding to be made in favour of the Claimant on this point. On termination, the Claimant was paid up to and including Friday 26 January 2018. This payment was calculated on the basis that there were two working days between 26 January 2018 and Tuesday 30 January 2018. The Claimant was paid by the hour for the work that he did and it was the Respondent's position that the Claimant would not have been entitled to pay for any additional hours worked. In any event, the Claimant did not work during the weekend of 27/28 January 2018 so he would not be entitled to pay for these days.

53 Finally, the Claimant had no entitlement to a months contractual notice pay as he was summarily dismissed for gross misconduct. Although the Tribunal found that he was procedurally unfairly dismissed (see below), it was of the conclusion, that the allegations against the Claimant amounted to gross misconduct and that he was on the evidence adduced at the Tribunal guilty of such gross misconduct. Accordingly, he was not entitled to his contractual notice pay.

Claim for Unfair Dismissal

Reason for dismissal

54 The Tribunal noted that the Respondent dismissed the Claimant for gross misconduct for the following reasons:

54.1 Refusal to carry out reasonable management instructions ("Allegation 1");

54.2 Gross insubordination in relation to the content of emails the Claimant sent to Reverend Edward Dix on 3, 5 and 15 January 2018 (pages 217, 216 and 227 respectively) ("Allegation 2)"; and

54.3 Speaking to Davidson James (the Chair of Trustees of the Respondent) in a rude, insubordinate and intimidating manner ("Allegation 3").

The allegations were sufficiently serious and the evidence adduced to the Tribunal clearly pointed to gross misconduct being the genuine reason for dismissal. There was no credible evidence adduced by the Claimant to suggest that the Respondent had another reason for dismissal or that the decision was premeditated. The Tribunal did not find that Reverend Dix's letter to the Claimant on 3 February 2016 amounted to a pre conceived intention to dismiss the Claimant over a year later. The reference in the accounts which predated the Claimants dismissal indicated a dispute about pay and did not reference the Claimants subsequent dismissal for gross misconduct at all.

The procedure followed to dismiss the Claimant

55 The Tribunal accepted that the majority of the procedure that was followed by the Respondent was a reasonable process in relation to the Claimant's dismissal specifically it:

55.1 Carried out an investigation into the Claimant's conduct and provided the report to the Claimant before the disciplinary hearing (page 230 – 264);

55.2 Invited that Claimant to a disciplinary hearing by email on 17 January 2018 (page 265 – 269) which invitation set out the allegations against him and warned him that he may be dismissed for gross misconduct without notice. It also offered him the right to accompanied at the meeting by a trade union representative. The hearing was scheduled for 22 January 2018;

55.3 Communicated the outcome of the disciplinary hearing to the Claimant by letter dated 26 January 2018 (page 271 – 276);

55.4 Gave the Claimant the opportunity to appeal the decision;

55.5 Appointed an independent appeal hearer to hear the Claimant's appeal; and

55.6 The independent appeal hearer heard the Claimant's appeal. The

Claimant was given the opportunity to, and did, bring a companion to the appeal meeting (pages 294 – 304) and the appeal hearer reconsidered his appeal and gave him written reasons of the outcome (pages 308 – 310).

Claimant's non-attendance at disciplinary hearing

56 The Claimant did not attend the disciplinary hearing and gave legitimate reasons for not attending (page 283). The Respondent was aware at the time of going ahead in the Claimant's disciplinary hearing in his absence that he was suffering from stress and had indeed instructed him to see his GP to get signed off for such condition. Given this knowledge and the fact that the Claimant asked for a postponement of the hearing so that he could get his trade union representative to attend, the Tribunal was of the view that going ahead with the hearing in the Claimant's absence amounted to a procedural irregularity. This was especially so as the Claimant up to this point had a clean disciplinary record. The Claimant may not have complied with section 10(4) and (5) of the Employment Relations Act 1999 (the Act) but in the Tribunals view gave a good reason for his refusal to attend. Therefore there was a requirement on the Respondent to rearrange the hearing to an alternative date when the Claimant and his union representative could attend. In the Tribunals view the rearranging of such hearing was unlikely to have made a difference to the decision to dismiss the Claimant for gross misconduct as he did not raise a viable defence to the allegations either in writing or orally at the time or subsequently.

The Appeal

57 The Claimant did appeal the substantive decision to dismiss him in his email of appeal as referenced in the facts section of this judgment. The Tribunals view was that the appeal officer, Ms. Borrett being an experienced HR external consultant should have dealt with the substantive and procedural irregularities in the case especially as the Claimant had indicated in his appeal email that he appealed against the reasons for his dismissal and the hearing going ahead in his absence. Indeed the rules of natural justice which Ms. Borrett no doubt knew required her to review the decision to dismiss in its entirety both substantively and procedurally especially given the fact that the Claimant did not attend the disciplinary hearing. It appeared that she did not even interview the dismissing officer to ascertain why he took the decision he did and why he went ahead in the Claimant's absence. She did not do such a fundamental review, focusing only on the hearing going ahead in the Claimant's absence. It is the Tribunal's view, however, that even if she did deal with the substantive issues and the Claimants denial in respect of all of the substantive allegations that lead to his dismissal, she would still have dismissed his appeal. As stated above, the Claimant did not raise a substantive defence to the allegations either in writing or orally. Indeed at the Tribunal hearing, he said he would have acted the same way again. The Tribunal was not impressed with this admission as the evidence clearly showed that the allegations against him were serious and required an explanation. The Claimant did not provide such explanation to the Respondent and nor did he offer one to the Tribunal.

58 Accordingly, the Tribunals view was that the Claimant was procedurally unfairly dismissed for the reasons stated above. The Claimant would in all likelihood have been dismissed within the period of one month from the actual date of his dismissal if the Respondent did follow a fair procedure. The Claimant did not put forward a substantive defence to the allegations against him that had any real merit. As such he is award £900

in respect of a basic award and £1,300.00 for one month's gross pay being for the period of time it would have taken the Respondent to conduct a disciplinary hearing with him in attendance and conducting an appeal that considered the substantive grounds of appeal against the rationale for his dismissal as well as the procedure. Reinstatement requested by the Claimant was not practicable given the above findings of the Tribunal.

Employment Judge Hallen

1 October 2018