EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**

B Duffy -v- Age Concern Plymouth (t/a Age UK Plymouth)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 12-16 March 2018

EMPLOYMENT JUDGE PSL Housego

Representation

For the Claimant: Mr R Carey of Independent Trade Union
For the Respondent: Mr T Falcão, solicitor, of Stephens and Scown LLP

JUDGMENT

The judgment of the tribunal is that:

1. The claimant was not unfairly dismissed.
2. The claimant is due holiday pay of £1,061.94.
3. The claim for unlawful deduction from wages is dismissed.

REASONS

1. In this case the claimant claims that she has been unfairly dismissed, and brings other claims of breach of contract for notice pay, for unlawful deduction from wages, and for accrued holiday pay. The respondent contends that the reason for the dismissal was misconduct, or alternatively for *"some other substantial reason"*, that the dismissal was fair, and denies the remaining claims.

2. I have heard from the claimant, and for the respondent I heard from six witnesses. They were:

- Pam Creaven: of Age UK;

- Mary McClarey: chair of the board of trustees at most material times;

- Carolyn Giles: an independent human resources consultant who prepared a report once the board had decided on a disciplinary process;

- Benny Wright: a trustee from 30 August 2016 and a member of the disciplinary panel;

- Elizabeth Edwards-Smith: a trustee from 03 December 2015 and Chair from 03 November 2017 and who chaired the appeal panel;

- Susan Williams: a trustee since 2008, Chair prior to Ms McClarey, with 22 years experience in Adult Social Care Services, asked by Ms McClarey to support the claimant from mid April 2016, and not involved in disciplinary or appeal hearings;

3. It is clear to me that all involved, including the claimant and the witnesses from whom I heard for the respondent and from Age UK, are engaged in the work of the respondent because they have a desire to make life better for the elderly. While the matters covered in this decision may be considered critical of some aspects of some matters covered, I make it clear that the integrity and commitment of all of those engaged in this case is not in doubt (and neither party suggested that it was).

Preliminary and interlocutory matters

4. There was a lot of documentation to read, and 7 witness statements, some of which were lengthy. I decided the first day would be a reading day. In the morning of the first day, before so deciding, I discussed the issues with the parties. I enquired why the claimant's schedule of loss included injury to feelings when there was no claim of pre dismissal detriment. There were claims for unfair dismissal and for automatically unfair dismissal based on public interest disclosure, but not for pre dismissal detriment. At the commencement of the second day of the hearing the representative for the claimant asked for leave to amend the claim to include such detriment. I declined to permit such an amendment, which would have required pleading, and more fundamentally would have affected the way the case was approached by the respondent. There had been two telephone case management hearings at which the issues had been identified, and no such claim had been raised. If there was such an amendment the hearing would have to be adjourned and for a hearing of this length a re listing would not be until November or thereabouts.

5. A second matter arose towards the end of the evidence of the respondents witnesses. At the end of the evidence of Ms McClarey on Wednesday afternoon it emerged that the board had new members. One of them is a solicitor at my firm. I did not know of her involvement. I asked the representative of the claimant to consider this with the claimant overnight. At the commencement of the hearing on Thursday I indicated that I had considered carefully whether I should recuse myself in any event. I said that I could see no way the personal position of my colleague, who was appointed subsequent to all the events relevant the claim, could be affected, positively or negatively, whatever decision I made. I had decided not to do so, but if the claimant so requested I would recuse myself. The representative of the claimant said that they did not wish me to recuse myself. I advised the representative of the claimant that I attended the office ofd my firm perhaps once a month, being primarily involved in judicial work in Employment and Immigration Tribunals and in professional regulation tribunals. I said that I had not seen or

communicated in any way with that colleague since, at the latest, the firm's Christmas lunch, if she had attended it (which was likely but which I could not recall). The representative indicated that without that information he and the claimant were content that the hearing proceed, and this information confirmed them in that decision.

The hearing

6. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

7. Facts: first the events leading up to the situation:

   7.1. Plymouth Age Concern is a charity. It is the trading name of Age UK Plymouth. It is in a *"brand partnership"* with Age UK, which is a national charity, to which several hundred local charities have an affiliation such as does the respondent.

   7.2. The claimant was the chief executive of the respondent, a position she had held since 2008. She reported to the board of trustees, volunteers with a range of experience and expertise, much of it relevant to the work of the respondent.

   7.3. The respondent had an annual income of a little over £2m a year. The respondent ran a residential home, for about 24 people. The residents were elderly people with some vulnerability, which was why they were in a residential home. It was not a nursing home. It was subject to regulation by the Care Quality Commission ("CQC").

   7.4. The income of the home was about half the turnover of the respondent. It ran at about break even, but this is a not for profit organisation (though a surplus is necessary for good governance). Much of the revenue of the home was through residents whose care was paid for by Plymouth City Council ("PCC"), which also commissioned other services from the respondent. It no longer commissions any services from the respondent, but it was not suggested to me that this was a direct causal effect of the events described in this decision, because the overall financial position of PCC has changed greatly over recent years, so that they may not have been able to commission services for reasons of financial constraint.

   7.5. The home had an established manager when it achieved the *"good"* report in 2013. That manager, Rachel Whatmore, left in April 2015, not returning after a maternity leave. After a period a new manager, GS, was appointed, commencing in June 2015. In 2015 a CQC report grading was *"requires improvement"* and that was again the report outcome in 2016. There are 5 grades of report: outstanding, good, requires improvement, inadequate and special measures. There is an overall grade and there are subcategories each marked similarly. The 2016 report had more *"requires improvement"*

grades than the 2015 report which had graded the care *"good"*, reduced in the 2016 report to *"requires improvement"*.

7.6. Susan Williams had been chair for some time. She remained on the board of trustees when Mary McClarey became chair on 30 September 2015. The claimant had two assistant directors, Kevin Aish and Denise Gregson. The claimant was the *"nominated individual"* for the home for CQC purposes, a role to which she had succeeded when taking over as CEO in 2008. When there were gaps in the post of registered manager of the home, Denise Greyson would assume that responsibility, she having previously held such a role in other organisations.

7.7. At a board meeting on 02 December 2015 the board discussed the home's *"requires improvement"* grading as a specific agenda item, number 7. The claimant reported to the board that her aim was to get a *"good"* report next time, and that her deputy, Ms Gregson was now based in the home *"to get everything in order"* (148). In reply to a question from Ms Williams (a past chair and someone close to the claimant) the claimant also confirmed (7(j)) that the new home manager was still on probation and that *"this was something that may need looking into"*. There are hints that all was not well, *"In summary we cannot change the home so it may be the person that will need to be changed."* On 11 December 2015 the new manager was removed at the end of her probation period. There is no reason why this decision could not have been reported in the meeting as the minutes were not produced until January 2016: it was not that the manager might have read them before she left.

7.8. The employment of the manager was ended on 11 December 2015 as it was felt that she was not fulfilling the job function well enough, and so at the end of her probationary leave her employment was brought to an end. The claimant suggested enhancing the salary to attract a higher quality candidate. This was approved by the trustees on 10 December 2015 (145 & 375).

7.9. A new manager, Hilary Hanna commenced work on 11 March 2016 (claimant's witness statement paragraph 23). She had no experience of a home such as that run by the respondent, but had run a regulated business before and achieved a *"good"* report from CQC. It was intended by the claimant that Ms Gregson would remain in the home until 04 April 2016 and then return to her usual base, River View.

7.10. When the new manager had been in place less than 2 weeks CQC made an unannounced visit. This was not unlikely given the previous grading of *"requires improvement"*.

7.11. At the time there was an outbreak of diarrhoea and vomiting ("d and v") at the home, which escalated the demands on staff, and also laid some of them low, so that there was a higher than usual level of agency staff in the home at the time.

7.12. On 01 April 2016 the CQC inspector came to see the claimant, to voice concerns about the staff feedback which was most unhappy about

management at the home. This was so extreme that the inspector told the claimant that 9 of 12 she had spoken to were threatening to walk out, which would, if it occurred, be a safeguarding issue.

7.13. On 04 April 2016 the CQC inspector indicated the result of the inspection in a handwritten report before leaving, and a typed report was issued on 19 June 2016 (258 et seq.).

7.14. On 04 April 2016 the claimant told Denise Gregson that for the time being she was not to attend the home. She then met with PCC's Caroline Paterson, who expressed the wish to be supportive but who also said that there was a perception by them of a lack of impartiality because the claimant had met Denise Gregson before the rest of the staff (claimant's witness statement paragraphs 29 et seq.)

7.15. The claimant told the chair that this was the first she was aware of this staff dissatisfaction (182, email of 11 April 2016). This report to the chair was after some discussions between them. It records that the claimant had withdrawn Ms Gregson from the home in response to that feedback, and that she had taken advice from ACAS and from a human resources adviser. As she had spoken to Ms Gregson personally, to tell her not to go to the home, the staff had also told the CQC inspector that they now perceived her as not impartial in relation to Ms Gregson, and so she asked for trustee involvement.

7.16. The claimant tried to meet staff to discuss, but they refused to attend a meeting with her (recorded by the chair in an email of 11 April 2016 (183). The accusations made by staff were vague but included the word *"bullying"* and the claimant said that that there needed to be an independent investigation. The chair did not feel that trustees should be doing this, and suggested that the claimant contact Age UK to see if they could help.

7.17. The claimant did so immediately, but they were not able to help with an independent report. Heather Stephenson of Age UK emailed the claimant to say so on 12 April 2016 (183). She said they had a bank of consultants, and referred the claimant to it. It was through this that Richard Slinn prepared a report about the home (which has only tangential relevance for this case).

7.18. The claimant tried again to organise meetings, for 11, 12 and 14 April 2016, but the only person who would attend was the new manager, Hilary Hanna.

<u>Matters come to a head</u>

8. On 05 April 2016 the CQC inspector made a safeguarding referral to PCC (noted by the PCC notes (307) of their safeguarding meeting with trustees on 15 July 2016).

9. On 18 April 2016 staff at the home wrote a grievance letter to the Board of Trustees (568a) which was said to be written under the whistleblowing policy and was referred to by all as *"the whistleblowing letter"*. Whether it was in fact a public interest disclosure is not germane. They requested an investigation into: their loss of trust and confidence in the senior management team, failure to provide staff

training, breaches of working time regulations such as no 11 hour gap between shifts, annual leave requests being declined so that staff had to carry over significant leave, failure by senior management to address health and safety concerns which meant residents were at risk and their dignity disregarded, failure by management to pass on important information about client medication to district nurses, and shortage of staff some 40 members of staff having left in the last three years with five managers in the last five years, for these reasons. They declined to attend a staff meeting on 19 April 2016 because they feared intimidation. The letter was signed by nine people with a further six names written in the same hand, pp.

10. On 20 April 2016 there was an executive meeting of the trustees (193-197). It was decided that the claimant would not be permitted to attend at the home save in case of an emergency, and she was so told. This was not acceptable to the claimant, for two very good reasons. First she was legally responsible for the home as the nominated individual, and secondly the point was to prevent, not to respond to, emergencies. The home had no registered manager, as Ms Hanna was still new and that process had not concluded.

11. The claimant immediately said as much both to Ms McClarey and to Ms Williams. She describes these as public interest disclosures. They are not: they are to respond to actions taken by a board of which they were part. On 21 April 2016 the claimant also complained about this to Age UK, in a telephone call to Stephen Finlay-Stephenson. This was capable of being a public interest disclosure. He and Pam Creaven came to see the claimant and Ms Williams on 26 April 2016 at River View. This meeting was also capable of being a public interest disclosure, albeit with the usual feature that it included someone involved with the decision to which the claimant objected.

12. There was a further meeting on 27 April 2016. Ms Creaven was uncertain whether she attended or not: Mr Findley-Stephenson was there, and Ms McClarey asked to, and did, attend. It was clear that Age UK thought the claimant right. Ms McClarey agreed to take legal advice and did so. On 28 April 2016 the claimant emailed Ms McClarey (208) asking her to be specific about what was and what was not permitted by the board for her to do.

13. On 30 April 2016 Ms McClarey emailed the claimant (209) to say that following advice received, the claimant had unfettered access to the home. However, after several attempts to arrange this had been unsuccessful, on 10 May 2016 the claimant emailed Ms Hanna (239) to say that she would be coming at 2pm that day. Ms Hanna replied putting this off, on the basis that the staff were consulting with their union about the situation.

14. On 18 May 2018 the claimant went to the home unannounced. Ms Hanna was not pleased and said so in as many words, so that the claimant left,as the claimant said Ms Hanna was demanding. The claimant told Ms McClarey about this. No action was taken against Ms Hanna for what could only be regarded as an allegation of insubordination to a high degree. Ms McClarey sent Ms Hanna an email (241) that day to say that there had to be a CQC audit and only the claimant could undertake it, and she was to be allowed in to do it. Ms Hanna responded saying that she and the staff felt *"intimidated by her continued presence"*.

15. On 18 May 2016 at 17:30 there was an extraordinary meeting of the trustees (243a et seq.) The claimant was present, as was Mr Findley-Stephenson of Age UK. It was decided to commission an independent external audit.

16. This was plainly an intolerable and unsustainable situation. The claimant felt she could not line manage Ms Hanna given the events of 18 May 2016, and said so in an email to Ms McClarey of 19 May 2016 (248). There was a stalemate for a period, which ended when the claimant could no longer cope and on 31 May 2016 the claimant was signed off work by her doctor for work related stress. She remained away from work until 20 June 2016.

17. On 07 June 2016 the CQC wrote to the respondent (250 et seq.). It was a warning notice under S29 of the Health and Social Care Act 2008. The matters of concern were under the heading *"good governance"*. It set out a series of issues with lack of systems and process and problems with record keeping for residents, and for the good running of the home, such as infection control practices. The formal report was issued on 09 June 2016 (258 et seq.)

18. At some point soon after the meeting on 18 May 2016 the trustees had commissioned a report from their solicitors, prepared by a paralegal there, Kelly Mitchell. On 09 June 2016 the claimant was told that the report had been received. The essence of this report is that the staff felt there was a lack of communication from management, and the staff distrusted management. As a result they were uncooperative, which created management issues of some complexity and importance, which had not been addressed. The staff were not willing to conform to instructions given by management for reasons relating to regulatory obligation, and management were not listening to staff about the difficulties they had in doing all they were required to do. A series of recommendations were made at the end of the report, which was in effect a list of staff complaints, and to recommend mediation.

19. The claimant felt this report should be actioned at a senior level. However it was also forwarded to Ms Hanna, who the claimant felt (with reason) was very much an opponent and in the camp of the staff at the home.

20. On 20 June 2016 Age UK wrote to the respondent (279 et seq.) to threaten removal of the *"brand partnership"* by reason of asserted breach of the agreement between them. This would have been catastrophic for the respondent, which would have had to cease the use of the works *"Age Concern"* in its title and in all its activities (the public not generally being aware that Age UK is an umbrella organisation with independent charities linked to it). There was a less formal letter of the same date (281 et seq.) which set out how Age UK sought to resolve matters, with an action plan and a list of things that needed doing immediately. If they were not attended to by 31 July 2016 steps would be taken immediately to end the brand partnership.

21. The claimant asserts that this was entirely due to the failure of the trustees to let her lead the organisation through the crisis, and to marginalise her. She asserts that this letter was damaging to the respondent and arose because she had involved Age UK by her public interest disclosures to them, and that this caused the trustees to take disciplinary action against her and to dismiss her.

22. On 23 June 2016 Ms Williams met the claimant and they discussed how things might start to improve. The consultant, Richard Slimm, who was to audit the home was coming on 24 June 2016 and would meet the claimant (and did so then).

23. On 06 July 2016 there was a meeting of the claimant, Ms McClarey and the vice chair, Matthew Rose (a solicitor). The reports were said to be the outcome to the grievances raised by staff. All should revert to their existing roles. Mr Aish would cease being the person in effect in charge of the home. The claimant and Ms Gregson would resume their previous responsibilities for the home. Both the claimant and Ms Gregson expressed worry about this, as they felt very exposed (298).

24. On 15 July 2016 there was a safeguarding meeting at PCC, as a result of the report made to them by the CQC inspector. There were two individuals of PCC, Julian Mouland and Catherine Paterson, and trustees. The PCC felt that neither the claimant nor Ms Gregson should enter the home. They were very critical of the management style of the claimant and Ms Gregson in the dealings the PCC had with them. The claimant was not there: it was with members of the board of trustees.

Disciplinary action

25. On 20 July 2016 there was an executive meeting of the board of trustees (318-319). The claimant was not asked to attend, but she knew of what was discussed as she was included on the distribution list for the minutes, as was usual, but in this case in error. It was decided that in view of the letter of 18 April 2016 from staff, the CQC report, and now the complaints made about the claimant and Ms Gregson by the PCC at the safeguarding meeting of 15 July 2016 there should be disciplinary action taken. The prospect of the claimant leaving was plainly in mind, as there was reference to there being willingness to offer her a compromise agreement.

26. On 21 July 2016 the claimant was sent a letter stating that there would be an investigation into allegations of gross misconduct. That was commissioned from an independent human resources consultant, Carolyn Giles. Her 17 page report (338-352) was delivered in September 2016. It was thorough, although (as Ms Giles accepted in reply to questions from me) some of its conclusions were judgmental and expressed in a way that was emotive. *"This individual has created and perpetuated a culture whereby she has complete control over how she wants the organisation to be run. She has allowed her passion for the organisation to blinker her ability to lead and grow the staff within it."* It accepted that to be a CEO of such an organisation, particularly with the funding challenges is very difficult. The report indicated that the board must consider whether the claimant had fulfilled her obligations as CEO, or whether her actions had been detrimental to the organisation, and if so *"whether or not this is a role that Barbara can return to.".*

27. On 01 December 2016 the respondent wrote to the claimant to call her to a disciplinary hearing, to face allegations redrafted (of her own volition) by Ms Giles (whose report was sent to the claimant). The panel was Neil Stephens, Linda Wheeler and Benny Wright, all trustees.

28. The hearing was on 20 December 2016 and the decision letter (376-381) was sent on 22 December 2016. Its outcome was summary dismissal for gross misconduct.

This related to failure to manage the home to CQC standards, which was her responsibiity. That could not be laid at the door of the trustees. Julian Mouland and Catherine Paterson of PCC had raised concerns such that the responsibilities of the role had not been fulfilled. Employees had lost confidence in the management of the claimant. It was accepted that the claimant felt she was approachable, but plainly that was not how the staff perceived matters. Ultimately the ethos and morale was down to the CEO. Age UK had said that the respondent was bringing their name into disrepute. That was serious. There was a failure to manage and lead the organisation effectively, and the board had not been fully informed or adequately appraised of problems: this was not felt to be deliberate, but the board had not been aware of the seriousness of the matters or what was outstanding. The claimant had tried to avert responsibility by blaming others or circumstances. The claimant was conscientious and hard working and did what she thought was right for the charity, but the failings were such that they did not feel that they could do other than dismiss summarily for gross misconduct, or alternatively for breach of mutual trust and confidence.

29. On 05 January 2017 the claimant's union lodged an appeal (382 et seq.) setting out 11 reasons why this was said to be unfair. These are set out at some length but in essence:

    29.1. Only 2 documents were referred to and others seem not to have been read or understood.

    29.2. The panel thought the failure was a result of a failure by the claimant to appoint a manager of the home, but this was to blame her for something not her fault, and a 3 month period was reasonable.

    29.3. Ms Gregson could not be home manager as well as her other duties: this was an interim solution and the board was kept up to date. It was unreasonable to blame the claimant when the resources available were never going to be adequate.

    29.4. The trustees blamed the claimant for not seeking help, but it was the duty of the board to oversee the claimant and they had failed her. The claimant has asked Age UK for support as she felt she had not enough from the board.

    29.5. Throughout the process statements made by the claimant had been taken out of context.

    29.6. The panel did not understand the CQC report, focusing on the rating rather than the failing aspects. The lack of a manager was a large and intrinsic part of the report, and the positive comments in the report had not been taken into account.

    29.7. The claimant did not have any opportunity to address the concerns of PCC, and that opinion did not take into account the great difficulty in recruiting a manager, the responsibilities and duties of the trustees, the nature of the CQC report and other issues contributing to its outcome, and the fact that a previous CQ's rating, when a competent manager was in place, was *"good"*.

29.8. It was ridiculous to assert there was *"overwhelming"* evidence that the staff had lost confidence, because none was discussed or referenced by the decision-making panel, and no evidence was presented at the hearing. In the bundle of documents were statements that were not signed, some were not statements and were merely notes, and there was much hearsay. Most of the complaints were not linked to the claimant. There was no specificity to the complaints.

29.9. The communication from Age UK of bringing the brand into disrepute was misinterpreted and taken out of context. The letter had been contingent – *"if"* the brand was jeopardised then it would terminate the partnership. This was to state that there was a risk of doing so, but not to state that it had happened. This ignored the fact that the claimant had contacted Age UK precisely because she was not getting support from the trustees. These were either errors in the process made deliberately, through laziness or through an alternative agenda.

29.10. Conclusions were made which were not evidence-based, such as attacking leadership and ability to motivate staff, without reference to the problems experienced. There was no reasoning to the decision, which was not evidence-based, there was no statement of which evidence they had found most persuasive nor consideration of mitigation.

29.11. The panel which decided to dismiss had washed its hands of all responsibility for knowing anything about the organisation and the fact that she impressed on all the importance of matters such as the lack of the home manager and its seriousness. The panel had placed over reliance upon the job description, and the board shared responsibility as it had an obligation to manage the CEO. No one could cater for bad luck such as the d and v outbreak or the lack of competent applicants for the manager's job.

30. The appeal was held on 23 February 2017. It was heard by two people, Elizabeth Edwards-Smith, a trustee, and Sheelagh Keen, Chair and former CEO of Age UK Bromsgrove and District. The appeal was scheduled for 5 hours but the claimant had not finished her exposition of her appeal at the end of its allotted time and she left with them the written notes of her appeal to which she was speaking. A transcript of the hearing was sent to the claimant later.

31. By letter dated 13 March 2017 (404-412) the appeal against dismissal was dismissed, but a decision to dismiss on notice was made instead, on conduct grounds, with the alternative conclusion that the whole circumstances were *"some other substantial reason"* and dismissal fair. The appeal letter worked through the 11 reasons given by the claimant in her letter. They concluded that the conduct of the claimant fell below what *"could reasonably be expected of a Chief Executive Officer"*. They said also *"The charity is also a relatively small organisation, with a small number of staff, the vast majority of whom have lived through the CQC reports, the failings as set out above, and have stated their distrust in management as well as threatening to walk out. All of this was under your leadership. There is no doubt in our minds that having heard your evidence, that you do not acknowledge the extent of (and indeed any of) your failings, and therefore a return to your role would not be tenable following an irreconcilable breakdown of trust and*

confidence between the Board of Trustees and yourself in the role as Chief Executive."

32. The application leading to this hearing was then lodged.

Submissions

33. Both the representative of the claimant and of the respondent made clear and focussed submissions, of which I made a careful typed note which can be read if required. The solicitor for the respondent also provided a skeleton argument. As the submissions took in total over 3 hours an accurate summary would be impossible. The points raised find their way into my findings of fact and conclusions. If not specifically mentioned they have nevertheless been considered.

Relevant law

34. Having established the above facts and considered the submissions, I now apply the law.

35. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act"). It is not disputed that this was the ground put forward. The Claimant asserts that this is an automatically unfair dismissal by reason of a public interest disclosure made by her.

36. If this was a conduct dismissal and not a public interest disclosure dismissal, I must consider section 98 (4) of the Act which provides *"…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case"*.

37. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

38. The dismissal is claimed to be automatically unfair as it is asserted that a principal reason for the dismissal was a public interest disclosure contrary to S103A of the Employment Rights Act 1996, which provides:

"Protected disclosure.
An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

39. A public interest disclosure is defined in Part IVA of the Employment Rights Act 1996, sections 43A to 43L.

40. I was referred to Royal Mail Ltd v Jhuti [2017] EWCA Civ 1632, while the idea was contested, the point being made that even if chair was unfair she did not take decision so it mattered not as the decision makers did not know of public interest disclosure, or any desire in Ms McClarey to be unfair, so that did not taint the dismissal as the decision makers themselves were free of that taint (if it existed).

41. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."*

42. The compensatory award is dealt with in section 123. Under section 123(1) *"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"*.

43. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: *"where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

44. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sarkar v West London Mental Health NHS Trust [2010] IRLR 508 CA; , Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Sheffield Health and Social Care NHS Foundation Trust v Crabtree UKEAT/0331/09; Bowater v North West London Hospitals NHS Trust [2011] IRLR 331 CA; London Borough of Brent v Fuller [2011] ICR 806 CA; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The range of responses of the employer is not infinitely wide but is subject to S98(4): Newbound v Thames water Utilities [2015] EWCA Civ 677, paragraph 61.

45. For a misconduct dismissal to be fair, the procedure must be fair throughout (*Sainsbury's v Hitt*). The employer must have a genuine belief on reasonable grounds after proper investigation (*Burchell v BHS*), and the dismissal must be within the range of reasonable responses of the employer (*Iceland Frozen Foods v Jones*).

46. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell

within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

47. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

48. A tribunal is not fettered by the label attached by the respondent to a dismissal. A dismissal said to be conduct may be decided to be by reason of capability, or have been for *"some other substantial reason"* even if the respondent has not so identified it. That the tribunal finds the dismissal to be for a reason other than that stated by the employer will have relevance to the question of whether the dismissal was unfair or not.

Application of the law to the facts

49. Applying the law to the facts, the first issue is whether what the claimant did amounted to a public interest disclosure. Consideration of that question starts with whether what was said was capable of being a public interest disclosure. There was an oral and email request by the claimant to Age UK for assistance. The claimant was barred from entering the home for which she was the responsible person. Her deputy was also barred. The home was being run by someone who was a new employee, and who was not yet a registered manager. The home cares for elderly vulnerable people. The claimant was CEO of the respondent and not allowed into the part of the charity which generated half its income. She was concerned about the health and safety of the residents (I so find). This has to be capable of being a public interest disclosure.

50. The second issue is the reason for making the disclosure. It was not for personal gain and it was made in good faith (I so find).

51. The third issue is to whom it was made. It was made to Age UK. This is not the employer. Nor is it a prescribed person within the Employment Rights Act 1996 and regulations made about public interest disclosure.

52. The disclosure must be considered under S43G

S 43G
Disclosure in other cases.

(1) A qualifying disclosure is made in accordance with this section if—

(a) . . . . . .

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—
(i) to his employer, or
(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

53. The claimant believed the disclosure to be substantially true (and it was true). She made no personal gain from it. It was reasonable of her to make the disclosure to the persons to whom she made it. It was not a breach of confidentiality. It was

serious and it was continuing. One of the conditions of subsection 2 has also to be met. The third applies, in that the claimant had said to her employer that she did not think it right that she be excluded. Given the association between the respondent and Age UK, it would be remarkable indeed if the CEO employed by an Age Concern charity could not alert Age UK of a health and safety matter relating to residents in the care of the employer and it not be a public interest disclosure. I find the email to Age UK and the request to them for help to be public interest disclosures.

54. There was a meeting with 2 people from Age UK and a trustee, Susan Williams, on 26 or 27 April 2016 about this. This was a further public interest disclosure to the employer (although this is logically difficult as the discloser has first to have told her employer, or fear a detriment if she did so, in order to qualify under S43G). Where the employee is complaining about something done by the employer to her, the situation is different to one where an employee tells someone outside the organisation something of which management may be unaware. I am satisfied that through one route or another there were public interest disclosures both to the employer and to Age UK.

55. The next, and critical, question is whether the public interest disclosure was the reason (or, if more than one, the principal reason) for the dismissal.

56. The claimant points to several factors:

    56.1. The time line, and that the chair had to reverse her own instruction to bar the claimant from the home.

    56.2. She asserts that this was regarded as an act causing the respondent great concern, as by her involving Age UK the brand partnership was now in jeopardy, which would have been calamitous for the respondent, and asserts that that her dismissal was principally because she had caused the chair and board such problems.

57. The respondent's witnesses and solicitor point to a series of factors indicating that this was not so. These include:

    57.1. The oral evidence of the chair that she welcomed help from whatever quarter and was grateful to Age UK for their help.

    57.2. The concern expressed on 15 July 2016 by senior staff of PCC in a safeguarding meeting about the claimant, which was unconnected with any such public interest disclosure.

    57.3. The reports made to the board that gave them no idea that the situation at the home was not fully under control.

58. I decide that the dismissal was not primarily caused by reason of the public interest disclosure made to Age UK or to the respondent itself. The impact of the poor CQC report was seismic and totally unexpected by the board. It was this that was the primary reason for the dismissal, when compounded by the 15 July 2016 safeguarding meeting, which marked the point when the board ceased to try to

grapple with the issues with the home through the claimant and instead to take disciplinary action.

59. Accordingly the dismissal was not automatically unfair and calls for consideration under normal unfair dismissal principles.

60. The claimant asserts that the dismissal was unfair for various reasons, including:

60.1. The chair intended to be part of the dismissal panel and on the appeal panel until the claimant objected on the basis that she would be perceived as biased, and judge in her own cause;

60.2. She was the CEO, and there was a clear management structure in place. It was the deputy manager who was responsible for managing the home pending the appointment of a new manager, so that she had been let down every bit as much as the board by these events.

60.3. The CQC report had been adversely impacted by the newness of the manager in post, so that she had not time to find her feet in the home, and so was unable to point the inspector to various policies that in fact existed.

60.4. The claimant was not permitted to address various errors in the report which meant that the home was in reality not as the report stated.

60.5. The d and v outbreak had made life much more difficult for the staff at the time of the inspection, and the respondent had made no allowance for that.

60.6. The claimant had been CEO for 8 years, and a holistic view of the situation should have been taken such that even if a disciplinary sanction were felt necessary to mark the CQC report it should not have been a matter for dismissal.

60.7. The disciplinary policy of the respondent was that only gross misconduct led to dismissal for a first matter (which this was), and the appeal panel had decided that it was not gross misconduct.

60.8. The appeal panel found as an alternative that *"some other substantial reason"* justified the dismissal, and it was not fair to cite a reason in an appeal outcome letter which had not been raised before.

60.9. The claimant was given no opportunity to address the concerns of PCC safeguarding team.

60.10. The board left her unsupported as she was neither supervised nor appraised.

60.11. The respondent's disciplinary policy set dismissal for a first matter only in cases of gross misconduct, and the appeal panel decided that this was not such.

60.12. The decision on 18 April 2016 to exclude the claimant from the home was completely wrong, and was not reversed until the claimant sought help

from Age UK. Even then, the new manager frustrated the claimant's attempts to get into the home, and when she finally did so, the new manager was insubordinate and rude, and the board failed to back her up at all, or take disciplinary action against her.

60.13. The decision makers knew all about the disciplinary matter involving Ms Gregson (who had resigned and the process in her case never concluded) and that was not made available to her. That would have influenced their decision making process and tainted the process.

60.14. The Giles report was *"a second bite of the cherry"*, and was unfair in using evidence from Ms Gregson when Ms Gregson had not approved that use, which was in any event only part of what she had written.

60.15. She was not given the opportunity to discuss matters with PCC so as to be able to restore that relationship.

60.16. In the Giles report there were interviews with 2 relatives of residents, but these were not representative as they had been selected by the staff specifically as people who had complained, so they were never going to be complimentary, and one of them was in the Plymouth Chamber of Commerce as was Ms Giles

61. The respondent responds:

61.1. The dismissal and appeal decisions were taken by newer members of the board, and so as far from the claimant as possible, and the board acceded to the claimants' requests that the chair should not sit on either panel. The appeal panel also included an external member.

61.2. The major commissioner of services from the respondent had no confidence in the claimant, and that was irremediable, as it was their settled view (which was why they had called the meeting of 15 July 2016).

61.3. The Board had legal responsibility, but it was the CEO who actually managed the business and the home. The reports made to the board had been consistent in saying that matters were being addressed and that the board could have confidence that the next CQC report would be better. While the board might have been more inquisitorial, the reports made by the claimant had not reflected reality.

61.4. When there was no manager at the home, the claimant should have been fully engaged in ensuring that the matters relevant to the CQC report were being resolved.

61.5. If it was indeed the fault of the deputy manager, that was a failure of the CEO to get updates and to manage the work of her deputy in what was the single biggest issue facing the respondent.

61.6. If the claimant felt she needed support she needed only to ask, as the board was supportive of her.

61.7. The staff at the home were so frustrated at the management that they were threatening to walk out. While the claimant was not in day to day charge, she was based only 50 yards away, and should have had some idea that staff morale was so bad.

61.8. The combination of things meant that there was no way the board could have any confidence in the running of the charity under the guidance of the claimant.

61.9. It was misleading to say that the home would require 10-15% of the CEO's time if well run, and that the CEO was entitled to rely on those appointed to run it, for it was half the income of the trust, and CQC regulated, and it was an important part of the CEO's role to make sure that it was well run.

61.10. The disciplinary policy is relevant to but not determinative of fairness, and this was such an important matter that dismissal was inevitable.

61.11. Ms Gregson had the right to confidentiality and the decision makers put matters to do with her out of their minds.

62. Having assessed all the evidence my findings are these:

62.1. The procedure was not unfair. While it was inadvisable for the chair to consider sitting on either the dismissal panel or the appeal panel, she withdrew when requested. The trustees that sat on both panels were as independent of events as was possible, and in the case of the appeal the trustee was newly appointed and so not in post at any material time. While he had been a volunteer before he became a trustee one of his motivations for becoming a trustee was his perception that there was little contact between trustees and volunteers. He had no substantial connection with the trustees in post at all material times. The second member of the panel was external.

62.2. There was a lengthy appeal meeting. It took about 5 hours. The claimant said this was not long enough, and that she had to leave her notes to be read in her absence later. Five hours is long enough for the claimant to be able to marshal and present a coherent appeal, backed by documentation to be perused later if necessary.

62.3. The interaction with the matter to do with Ms Gregson was unfortunate. Ms Giles used part of a statement made by Ms Gregson (361) in the preparation of her report. There would be the perception of bias from the knowledge of what was in that procedure unknown to the claimant. There was use of an extract from an email from Ms Gregson, but not the entirety: context was removed. It would naturally seek to cast the best possible light on herself even if that meant an unfavourable light on the claimant. In the scale of the issues facing the respondent I do not find this made the process (or outcome) unfair.

62.4. There was also the fact (for it was such) that Ms Giles was asked by staff to interview 2 relations of residents who had complained, so that this was not a representative sample of residents. The CQC report does say that day to

day care was satisfactory so this is of less weight as a point. The claimant in effect describes the report as something of a *"hatchet job"*, but the difficulty with this is that there is considerable weight in the observation made in submissions by the solicitor for the respondent (and in final page of the dismissal letter 381) that only in the hearing during cross examination did the claimant first accept any responsibility for the difficulties the home faced. She had delegated to others, who had not performed properly. She was not supported by the board. It was the board's role to supervise her and they had failed. The absence of a manager caused the issues, and the new manager was not up to speed when there was an inspection, so that the CQC inspector did not get a true picture. There was a d and v outbreak so that it was a very difficult time when the inspection took place. It affected staff as well so there was a higher than usual level of agency staffing.

62.5. While there is a criticism to be made about the sample selection it is a small factor compared to the issues that were faced by the respondent and the claimant's approach to them. I do not find the Chamber of Commerce connection between Ms Giles and one of the relatives of a resident to be something leading to lack of objectivity. There are 400 or so members and there was nothing to suggest a close connection between them.

62.6. While Ms Giles was clearly signposting her own view as to the outcome of the disciplinary process, in reality all that she did was to come to the same view of the two panels. The danger is whether the two panels came to their view because Ms Giles pointed them in that direction. I conclude not. The biggest difficulty facing the claimant is not that the day to day care of the residents themselves was unsatisfactory: but the claimant cannot take any credit for that as she was not involved in its provision or supervision of those who provided it. The issues were very long standing management issues of lack of process, and this was very much the claimant's responsibility. For example the staff did not go on training courses as they should have done, even to the extent of not attending courses on which they had been booked, and the claimant knew this. It is a long term leadership failure not to have addressed these issues. They were apparent from the last CQC report, and were longstanding - at least a year, if not longer. When added to the collapse of any staff morale or relationship with management, the imminent threat of withdrawal of brand partnership from Age UK and the very negative view of PCC, it is inevitable that the decision makers would come to the same decision.

62.7. The claimant asserts that the Giles report was a *"second bite of the cherry"* for the disgruntled staff following them not getting things all their own way in the Mitchell report earlier. There is duplication, plainly. However the reports have a different focus - one is what could be done positively to retrieve the situation, the other about whether there is blame for the claimant about the situation. There could equally have been complaint if the Mitchell report was used out of its context. It was not unfair to have a new report, and Ms Giles witness statement records that she was specifically tasked with preparing an independent report, and there is no reason to think that she was anything other than impartial in her approach, even if some of her conclusions went beyond her remit.

62.8. The Board had failed to be as inquisitorial as it might have been. The issue of a CQC report might be thought to be such as for the board to *require* the CEO to report, in detail, to the board about exactly what progress had been made, what plan there was, and how it was to be implemented. However, it is also fair to say that there was no reason for the board to be concerned. Their CEO of 8 years standing told them there was an action plan and that her deputy was implementing it, and that she expected a *"good"* report next time. They took her word for it, and while they should have asked for evidence to back it up, that does not affect the fact that when there was another CQC inspection the reality did not match up to what they were assured would be the case.

62.9. The absence of a manager for a 3 month period before the inspection, and the manager being new in post only a few days are not really exculpatory. The issues identified in the 2015 report were systemic and documentary. That being the case, the CEO should have been closely supervising and checking what was done. If she delegated that to her trusted deputy, then she should have made sure that the deputy had actually done what was required. The claimant criticises the board for exactly that failing. The difference is that the claimant was the full time person whose sole role it was effectively to run the organisation, reporting to a board whose role is to set strategic goals and exercise oversight.

62.10. The claimant's complaint that she was not adequately supervised does not carry weight, as she was an autonomous senior person, the most senior person employed. If she wanted supervision or appraisal she should have asked. It was not that she was left to get on with it with no engagement by the board, as there were regular, and frequent, one to one meetings with the chair, and meetings with finance and other committees. Barely a month went by without the claimant engaging with the trustees in one way or another.

62.11. The view of PCC was a fact. Whether right or wrong, it was their perception of the claimant, and it was not incumbent on the respondent to let the claimant try to change that perception before coming to its conclusion. If this had been the sole factor, then it would have been an obvious step to consider whether to try to repair this important relationship. In these circumstances where this was only one of 3 factors (the others being the CQC report and the threatened staff walkout) it is unrealistic to think that the respondent could put the working relationship with the claimant back together again.

62.12. The view of the board that these were systemic deficiencies is correct. The documentary systems in place had not been corrected before the 2016 CQC inspection. If the manager whose employment was ended on 11 December 2015 had not dealt with matters (and the CEO should have made sure that she had, particularly as she was new) then that should have been dealt with urgently from that point, still over 3 months before the 2016 CQC inspection. That was a management failing, and the claimant's view that she was let down by others is not to recognise that this was a failure to manage others. That is what a CEO has to do. The buck stops with the CEO, and while she is not responsible for everything that everyone does wrongly, this was such an important matter that the disciplinary outcome of dismissal for

that failure was not outwith the reasonable range of responses of the employer.

62.13. The approach of the claimant was, as is said elsewhere in this decision, not to accept responsibility but to deflect it, and to blame others, or attribute problems to circumstances or matters beyond her control. This did not assist her cause, as it did not demonstrate any insight, or give confidence that the future would be any different or better.

62.14. The appeal panel decided that it was not gross misconduct, but that there should have been a dismissal on notice, or alternatively it was a dismissal for some other substantial reason, which was fair. The procedure indicates that there should be a warning for a first offence, and that dismissal for a first matter is limited to cases of gross misconduct.

62.15. The board had been tossed this way and that by events: the staff at the home were effectively in revolt. The new manager was very much with them. The CQC report was very critical of the systems and processes that were (or were not) in place. The major commissioner of services was not happy with the claimant: that relationship was at best problematic. On 15 July 2016 they had said that the claimant and Ms Gregson should be excluded from the home, but that was something Ms McClarey had tried and been told that she could not do. Age UK had, while supportive, also threatened to withdraw the brand partnership if decisive action was not taken by 31 July 2016. It was only 11 days before that, on 20 July 2016, that the board decided on disciplinary action. After the paralysis affecting the respondent since April 2016 this was inevitable, and the timeline is significant. I conclude that whether or not Ms McClarey or others were or were not annoyed by the involvement of Age UK, that would have paled into insignificance given the totality of factors they faced. The public interest disclosure was not a significant factor in the decision to bring disciplinary action. Nor was it a matter in the minds of the decision makers at all. (*Jhuti* would apply even if Ms McClarey had an animus against the claimant. Those who made the decision are independent trustees, and were not beholden to Ms McClarey in any way.)

62.16. The decisions were in fact taken by those as far removed from the matters under consideration as possible. I was impressed by the evidence of Mr Wright and of Ms Williams, who gave evidence about the dismissal and the generality of matters respectively. Ms Williams was not unsympathetic to the claimant before these events arose. There was no reason for her to be other than fair, and she was. Her account, given in cross examination, of the immense difficulty they faced and why it was to be laid at the door of the claimant was plainly from the heart, and entirely rational.

63. There were a variety of matters that could have been done better by the respondent: in particular preventing the claimant going into the home, effectively for a month after 18 April 2016 because the manager was permitted to frustrate the attempts of the claimant to enter the home, was misguided. While the staff complained about *"the senior management staff"*, it was clear that they thought the claimant pleasant when she visited, and there was no early attempt to identify precisely who was felt to be overbearing. The difficulty was that the claimant was

too hands off. The board should have scrutinised the claimant's work far more carefully and not accepted her assurances that all was in hand without some form of checking given the critical importance of the issue of a CQC report (which should have been regarded as likely given a *"requires improvement"* report in 2015. There was no "dip testing", for example. Perhaps this is the wisdom of hindsight, but in one to one meetings with the chair it would have been sensible to have included a tour of the home and inspect. However even if there was a failure of governance (and the representatives of Age UK certainly thought there were failings of governance, and Ms Creaven said so in her oral evidence) that is a matter of where ultimate responsibility for the consequences lies, but the responsibility for action always lay with the claimant as CEO.

64. By the time all this arose as problems it was all far too late to resolve it. Even had the claimant gone in to the home on 18 April 2016, it would have made no difference. The remedial work should have been done even before the previous manager left on 11 December 2016.

65. I conclude that while the respondent could have handled governance better, it is unrealistic to consider that the employment of the claimant could have continued given the combination of the three issues that arose at the same time. Whether this is described as conduct or capability or *"some other substantial reason"*, that is the essence of the matter. This is a case where the issues affecting the running of the home were of such magnitude that the CEO had to go. If required to attach a label to it I would regard it as a matter of competence. While a mistake of sufficient severity can be properly labelled misconduct, that conveys a criticism of the claimant that is unfortunate: it was in inadequate performance of her role, principally ensuring that others whom she had tasked to carry out important work had actually done it, in failing to notice a failing relationship between staff and managers in the biggest part of the respondent's activities (only 50m from her office), and in failing to build a workable relationship with PCC officers who were the biggest commissioners of work from the respondent. That is more correctly labelled capability.

66. Alternatively, it is some other substantial reason. The respondent made the decision to withdraw from CQC regulated activities, which was a very substantial adverse change, and in reality it had no alternative to do so. Given this severe outcome, dismissal for some other substantial reason was fair.

67. Had I found the dismissal procedurally unfair I would have found that a fair procedure would have resulted in a fair dismissal (a 100% *Polkey* reduction). It also means that even if it was an unfair dismissal, it would be hard to put the contribution of the claimant at less than 100%.

<u>The holiday pay claim</u>

68. The claimant claims 6.5 days of holiday pay for 2016, rolled into 2017. It is not disputed by the respondent that the claimant had not used 6.5 days of her holiday entitlement from 2016 by the time her employment with the respondent ended. The claimant says that she was entitled to carry it forward; the respondent responds that the holiday entitlement was lost at the end of each calendar year if unused. It is agreed that the holiday year was the calendar year, and that the sum in issue is £1,061.94.

69. The respondent points to the policy (584) which states that holiday is lost if not used in the holiday year.

70. The claimant refers to examples where individuals were allowed to carry forward a day or two into the next year (511). She points out that as CEO she would be expected to be able to permit people so to do if she thought appropriate. She asserts that she was not required to obtain permission to take leave from the board, and that on occasion she would interrupt her holiday in order to attend to the respondent's business. In the staff complaint letter of 18 April 2016 the 5th bullet point of complaint was that *"Annual leave requests being repeatedly declined meaning that some staff have had to carry over significant portions of their annual entitlement"* (568a). She asserts that this was custom and practice for her, and for others at management discretion and pointed out that the policy in question (584) was dated March 2003 and did not reflect what actually happened. The respondent is not able to gainsay any of these points.

71. I find that the claimant is entitled to be paid for the holiday untaken in 2016, for the reasons put forward by the claimant.

72. The claimant also claims holiday pay calculated to 12 June 2018, rather than to the date she was paid until, 31 March 2017. She asserts that there was no right to pay her in lieu of notice, and that had she served notice she would have accrued a further 14.5 days holiday pay. This argument is flawed, for if the claimant had served a notice period she could have been required to take her outstanding additional holiday in that time. That argument does not extend to the 6.5 days from 2016, as there was no time when the claimant could have been required to take it. The contract of employment was not produced to me, but I do not think it would take the matter further in these circumstances.

<u>Unlawful deduction from wages claim</u>

73. This relates to the notice period, but is framed as a claim under S13 rather than as a contractual claim. The claimant was paid in lieu of notice to 31 March 2017. The claimant asserts that her effective date of termination was 12 June 2017, leaving a period of 2.4 months unpaid, at £3,807.05 monthly, a total of £9136.92.

74. The letter of dismissal is dated 22 December 2016 (376). It was of summary dismissal. The appeal outcome letter is dated 13 March 2017 (404). It substituted dismissal on notice. The claimant's assertion that this extended her employment to 13 March 2017 is unsustainable. The effect of the appeal was not to reinstate the claimant and then to dismiss her with notice. Accordingly the effect of the appeal was to give the claimant the right to notice pay effective from 22 December 2016 (or more accurately from the date she received the letter of dismissal). She was paid to 31 March 2017, which was 3 months from the end of December, by which time she had received the letter. The claimant accepts that she had a contractual 3 month notice period (which exceeds the maximum statutory period of 12 weeks). She was paid for 3 months after being dismissed on 22 December 2016. Therefore she was paid correctly.

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Employment Judge PSL Housego

Dated 27 March 2018

Judgment sent to Parties on

6 April 2018

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