EMPLOYMENT TRIBUNALS

Claimant: Mrs C Elton

Respondent: The King David Primary School

HELD AT: Manchester **ON:** 31 October & 1 November 2017 & 16 November 2017 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: Ms L Santamera, Counsel
Respondent: Mr J Rowe, Governor

JUDGMENT

The judgment of the Tribunal is that:

1. The complaints of unlawful deduction from wages, failure to pay holiday pay and in respect of "other payments" are dismissed on withdrawal by the claimant.

2. The complaints of unfair dismissal, breach of contract and entitlement to a statutory redundancy payment are not well founded.

3. Unless any party makes an application for costs by 28 days from the date this judgment is sent to the parties and/or the claimant writes to the tribunal by this date to inform the tribunal that she still wishes to pursue the costs application previously made, the hearing provisionally arranged for 30 January 2018 will be cancelled.

REASONS

Claims and Issues

1. The claimant on her claim form claimed unfair dismissal, statutory redundancy payment, breach of contract in respect of failure to give notice, unlawful deductions from wages in respect of arrears of pay "other payments" and holiday pay. At the hearing, the claimant withdrew the complaints in respect of arrears of pay, "other payments" and holiday pay and agreed that these could be dismissed on withdrawal. The complaints to be determined by the tribunal were, therefore, unfair dismissal, whether the claimant was entitled to a statutory redundancy payment and breach of contract in respect of failure to give notice.

2. There was a dispute as to whether the claimant was an employee of the respondent.

3. In its response to the claim, the respondent had asserted that the claimant was an "independent contractor".

4. In a letter dated 16 May 2017 to the Tribunal, Ms Buchanan, Secretary to the respondent's Headteacher, by then Mrs Rosenberg, wrote that "everyone agrees that Mrs Elton is an employee. The issue is whether she was employed by King David Primary School or whether she was employed by the out of school club - an organisation providing services to the King David Primary School (which Mrs Elton managed)."

5. A Preliminary Hearing was held on 15 June 2017. This had been listed to determine the claimant's employment status and her role as Out of Hours Club Co-Ordinator. Determination of that issue was postponed for reasons given by the Judge. It appears from the notes of that Preliminary Hearing, which was converted into a hearing to deal with case management, that the Judge understood the respondent's case to be that the club was a separate entity which the claimant ran as a business on her own account rather than that she was an employee, but not of the respondent. Mr Rowe, who was representing the respondent at that preliminary hearing as he did at this final hearing, did not seek to correct the judge's understanding of the respondent's case. The judge made no reference in his extensive notes of the preliminary hearing to the respondent's letter of 16 May 2017, so it appears this was not drawn to his attention.

6. Following the Preliminary Hearing, the respondent presented an amended response. The respondent did not amend the part of the response which asserted that "Mrs Elton ran her own operation as an independent contractor, running an out of school club for parents and pupils of the primary school". The respondent asserted that it did not employ the claimant.

7. Because of the different positions put forward in the response and the respondent's letter of 16 May 2017 about the employment status of the claimant, I sought to clarify with Mr Rowe at the outset of the hearing whether the respondent

was arguing that the claimant was self-employed in her position with the out of school club or whether they argued that she was employed by someone else but not by them. Mr Rowe clarified that their argument was that the claimant was employed possibly by another entity although he did not know what it was. His written skeleton argument which he had prepared prior to the final hearing and handed in at the start of the hearing stated: "The issue is not whether Claimant was self-employed or employed. Issue is whether she was employed by the KDPS [the respondent] or by the OOSC [the Out of School Club]."

8. The respondent ran an alternative argument that, if the claimant was their employee, she was not dismissed. In relation to the complaint of unfair dismissal, they ran further alternative arguments that, if the claimant was their employee and was dismissed, the dismissal was fair for the reason of conduct. Alternatively, if the dismissal was unfair, compensation should be reduced in accordance with the *Polkey* principle, i.e. that they would have dismissed her fairly in any event because of incompetence and disregard for minimum standards of financial housekeeping.

9. The issues in relation to the complaint of unfair dismissal were agreed to be as follows.

(i) Was the claimant an employee of the respondent?

(ii) If so, was she dismissed?

(iii) If so, has the respondent shown a potentially fair reason for dismissal, being conduct, and did it act reasonably or unreasonably in all the circumstances in dismissing her for this reason?

(iv) If the claimant was unfairly dismissed, what were the chances she would have been fairly dismissed by the respondent (the *Polkey* argument)?

7. The issues of whether the claimant was an employee of the respondent and whether she was dismissed were also relevant to complaints of failure to pay a statutory redundancy payment and a complaint of breach of contract in relation to notice pay.

8. I informed the parties that I would deal with all these issues together, leaving to a later stage, if appropriate, matters to do with remedy, other than the *Polkey* issue of principle, and any costs application that may be pursued. The claimant had indicated at the Preliminary Hearing that she wished to make an application for costs relying on the respondent's conduct of the case. Employment Judge Holmes had considered it premature to consider the application further at that stage but did not dismiss the application. I informed the parties that I would deal with any costs application after a decision on liability.

9. The claimant put her case on the basis of there being an actual dismissal on 7 December 2017. There was no alternative argument that the claimant had been constructively dismissed. The claimant argued that she was dismissed at a meeting on 7 December 2017. In closing submissions, when I asked Ms Santamera whether she had any alternative argument to make about the ending of the claimant's

employment, if I found that there was no dismissal on 7 December, Ms Santamera submitted that, if the claimant was not dismissed on 7 December, she was dismissed on 13 December.

Facts

10. The claimant began employment with the respondent as a Teaching Assistant in November 1996. In about May 2005, she agreed to take on the role of Out of School Club Administrator in addition to her job as a Teaching Assistant. It is now not in dispute that the claimant was employed by someone to perform the role of Out of School Club Administrator. Although the respondent was arguing at an earlier stage of proceedings that the claimant was an independent contractor, or in business on her own account in this role, they no longer pursue this argument and agree she was an employee as administrator of the Out of School Club. There are no factors suggesting that the claimant was self-employed, or an independent contractor in this role, or that this was her business and that she was a sole trader. The claimant received pay for 24 hours per month as the Club Administrator, paid through PAYE.

11. The issue about employment status is the identity of her employer. The claimant says this was the respondent primary school. The respondent asserts that the Out of School Club ("the Club") was a separate legal entity from the school, although it was not able to tell me what sort of entity this was. Mrs Gruber frankly admitted she had had "no idea" what sort of organisation the Club was when she was Chairperson of this. Having done some research after the first day of the hearing, Mrs Gruber suggested to me that it may have been an unincorporated association. When I asked who the members were of the association, she suggested they were her and the claimant.

12. The claimant's payslips for her work for the Club were issued by King David Schools, a registered charity ("the Charity"). The claimant, who was professionally represented throughout these proceedings, had not named King David Schools as a respondent and did not make an application to amend her claim to add the charity as a further respondent. The respondent, in its amended response, stated that the claimant was not an employee of the Charity. The respondent did not suggest at any time prior to closing submissions that the claimant might have been employed by the Charity.

13. From her answers to questions at this hearing, it appears that the claimant did not understand that there was a distinction between "King David Schools", the charity, and the respondent school. She said she worked for "King David Schools" in two separate roles, whereas it is clear that the claimant was, and remains, employed as a Teaching Assistant by "the King David Primary School" rather than by the Charity.

14. Mr Rowe, who is Chair of the Trustees of the King David Schools, Chair of King David High School and a Governor of the respondent primary school, represented the respondent. He informed me that he was doing so, rather than the respondent instructing legal representatives, due to financial constraints. It did not appear that the respondent had taken any legal advice in responding to this claim or preparing for the hearing.

15. King David Schools is a registered charity (charity number 526631). The Charity's aims are set out in publicly available documents on the Charity Commission website. These state: "King David Schools (Manchester) exist to provide Jewish children with a meaningful Orthodox Jewish religion education coupled with an excellent secular education". Mr Rowe informed me that the trustees of this charity are the equivalent to the "Diocese" in church schools and have oversight of the schools and their finances. On the King David campus, there are two schools: the King David High School and the respondent primary school. The respondent primary school became an Academy in recent years (I was not told the exact date). It is a state school. Teachers and Teaching Assistants are paid through the local Manchester payroll system; the money for the salaries comes from state funds.

10. Mr Rowe's evidence to the Tribunal was that there were also three other separate and quite distinct entities on the campus, being the nursery, kitchen and the out of school club. This was the evidence in Mr Rowe's witness statement, which he confirmed in oral evidence. Mr Rowe gave evidence on the first day of the hearing. At the start of the second day of the hearing, Mr Rowe, in his role as representative, informed me that, having sought further information overnight, he had learnt that the nursery and kitchens are in fact run by King David Schools, a charity, as opposed to the out of school club, which is independent. I asked Ms Santamera if she wished me to recall Mr Rowe to give evidence so she could cross examine him on this new information, but she did not wish to do so.

11. Mr Rose, the bursar for the Charity, informed me in oral evidence that the Charity employs directly the nursery staff and kitchen staff. I accept his evidence that the income from the nursery, being fees paid by the parents, and income from the kitchen, being payments for food and drink, appear in the Charity's accounts as part of the charity's income and that the wages paid to the nursery staff and the kitchen staff appear in the Charity's accounts as expenditure of the charity. The notes to the Charity's financial statements for the year ended 31 August 2016, which appear on the Charity Commission website, show that, during 2016, the average number of persons employed by the Charity were:

Teaching	85
Administration	3.

12. Mr Rose informed me that the number given for teaching staff includes the kitchen staff as well as the nursery staff. The number of administrators is now 2, being himself and Mrs Whelan, Assistant Bursar. The third administrator has left. The staff numbers in the notes to the financial statements do not include staff employed at the Club. The amounts paid as salaries to the Club's staff through the Charity's payroll do not appear as expenditure of the Charity in its accounts and the amounts paid from the Club's bank account to reimburse the Charity for this expenditure do not appear in the Charity's accounts as income of the Charity.

13. There has been very limited information given to me which can assist me to determine whether there was a separate legal entity known as the Club. There was very little documentary evidence produced relating to the Club's structure and

organisation and the witnesses for the respondent had limited knowledge about the club's original structure and its development.

14. The following findings of fact are based on the limited information provided to me.

15. The Club appears to have started in around 1997. This was started by a group of volunteers, who were mothers of pupils in the primary school, to assist working parents. Those involved at the outset were volunteers and were not paid for their work. It is unclear, from the evidence I have heard, exactly when the club started to operate looking after children and charging fees and whether staff were paid to do the work from the start of its operations or from some later date. Mrs Gruber, who was Chairperson of the club from 2005 until she stepped down in December 2017, was friends with some of the people originally involved in the club. She understood from them that the process of registration as a child care provider took quite a long time. Mrs Rosenberg thought, from what she had been told, that the Club was initially run by volunteers, without paid staff and without charging fees.

16. The Club originally operated an after school club only but later, during the time the claimant was administrator, set up a breakfast club.

17. The Club obtained a certificate of registration for independent day care from Manchester City Council, Education and Social Services Department. The only certificate I was shown was dated 1 August 2000, naming a person no longer involved in the running of the club. I have not seen any certificates before or after this date. The club also had a unique reference number with OFSTED and had a separate inspection to OFSTED's inspection of the respondent primary school.

18. There is no evidence that the Club was a corporate entity. There is no evidence of the Club being a company limited by shares or guarantee or being a charitable incorporated organisation. It was not registered with the Charity Commission, although its income was at a level that, if it was a charity, it was obliged to register. There is no evidence of there being a governing instrument, or any sort of constitution, for the Club. There is no evidence that the Club was registered with HMRC as a business or an employer.

19. At some stage, the Club started to employ staff. I have been shown two contracts signed by play workers in 2014. The contracts are issued in the name of "King David Out of School Club" although, since there is no corporate entity by this name, this cannot be the correct legal title of the employer. One of the play workers who signed the contract in 2014 had been employed before the claimant took on her role as Administrator in May 2005. This might indicate that no written contracts had been given to staff before 2014 or it may indicate that contracts were updated in 2014; I have no evidence about why a contract was issued in 2014 to an employee who had already been employed for some years. The contracts I have been shown do not comply with the legal requirements for a written statement of employment particulars in a number of respects, including the requirement to give the name of the employer (since, as noted, “King David Out of School Club” cannot be the name of the employer). The section for date of commencement of employment is blank and the salary is blank.

20. By the time Mr Rose took up his appointment as Bursar in January 2003, the King David Schools charity was operating payroll for the staff of the Club. I do not have any information as to whether this was the arrangement from the time the Club first started having paid staff but Mr Rose inherited this arrangement. The Charity paid staff working at the Club through the Charity's payroll and were then reimbursed for the amount of the wages by the Club.

21. The Club had its own bank account with The Royal Bank of Scotland in the name of "King David Infants After School Business Current Account." The respondent school has its account with the Co-Operative Bank. Fees paid by parents, other than cash payments retained in the petty cash tin, were paid into the Club's account. Expenses not paid out of petty cash were paid out of the account. Cheques were drawn on the account to reimburse the Charity for staff wages paid by the Charity through its payroll to staff working at the Club. Reimbursement was also made to the Charity for the cost of food supplied for the Club. Payments were made from the Club's bank account to the respondent primary school for expenses such as CRB (latterly DBS) checks, training and stationery items. Money from the account or from the Club's petty cash (many payments for breakfast club being made in cash) would also be used to purchase snacks for children attending the Club.

22. The employer reference number on the pay slips issued by the Charity to staff at the Club was that of the Charity. The name of the employer on these payslips was given as "King David Schools" i.e. the name of the Charity. The claimant's pay slip for her pay as a Teaching Assistant, as previously mentioned, was issued by the local Manchester payroll system. This bore a different employer's reference number to that on the payslip issued by the Charity. Tax and national insurance contributions were deducted from pay by the Charity and paid over to HMRC. Given that the employer tax reference was that of the Charity, it appears that, as far as HMRC were concerned, the staff working at the Club were presented as being employees of the Charity.

23. Mrs Gruber informed me that she understood that the Club had been set up as a non profit making organisation. She gave evidence that it was set up charitably, as a charitable act, but she did not understand it to be a charity. If the Club made a profit, Mrs Gruber told me this would be ploughed back into the Club, e.g. buying equipment. Some equipment was bought for the sole use of the Club and was locked in a cupboard when not being used by the Club so it was not available for general use in the school. Sometimes, more permanent equipment would be bought and this would be used by the school as well as the Club. Together with the Parents Guild, the Club bought a mini bus in 2005, which indicates on the side of it that it was presented by the Out of Schools Club and the Parents Guild. This mini bus is available for use of the Club e.g. during holiday play schemes, but is also available for use of the respondent school.

24. The Club operates on the respondent's school premises, usually in the hall, although it may be asked to use a classroom if the hall is needed for other purposes. The Club does not pay anything to the school for use of the premises. Mrs Gruber said she understood at one time the then Head Teacher suggested that the Club

should pay for the use of the facilities but was persuaded against charging because of the benefit to parents of the school in having the Club.

25. Mrs Gruber is now a Teacher at the respondent's school. In 2005, when she was a Teaching Assistant and was a parent of pupils at the school, she became Chairperson of the Club. The title is something of a misnomer since there was nothing to chair; there was no board or management committee of the Club. Mrs Gruber replaced somebody who no longer had children at the school. Mrs Gruber saw herself as a figurehead for the Club. She signed cheques on the Club's account together with another signatory. The other signatory was the respondent School's Secretary. Mrs Gruber purchased snacks when required. Mrs Gruber was not paid for any of her work for the Club. At the time Mrs Gruber took on the role, she had time to do this role but increased professional demands, when she became a Teacher, and personal circumstances, made it more difficult later for her to find time for this voluntary work.

26. As recorded later in these reasons, in November 2016, Steven Wiseglass, an accountant and a governor of the respondent primary school was asked to do an audit of the Club's finances. He met with the claimant, Mrs Gruber and Mr Rose and examined paperwork relating to the Club. One of his suggestions, following this audit, was that Mr Rose should take over the accounting function. In making this recommendation, Mr Wiseglass wrote: "It has only been a historic matter that Mrs Gruber took over the running of the banking facility as someone used to operate the club on a private basis." This suggests that Mr Wiseglass formed the impression, from what he saw and was told, that the organisation of the Club had changed over time. He also suggested investigating third party providers to see whether they could take over the offering in its entirety if the Club could not be reinvigorated. This suggestion would be consistent with Mr Wiseglass having an understanding that the Club did not have an independent existence at the time he was carrying out his audit. Mr Wiseglass, as an accountant, could be expected to have a good understanding of different legal structures. Mr Wiseglass was not called to give evidence at this hearing.

27. The Club had its own rules which were separate from those applying to the respondent school. I have been shown a written behaviour policy. This is undated but the version I have seen refers by name to the claimant and Mrs Gruber so this version must have been issued at some point since 2005, whether or not there was a previous version of the policy. The behaviour policy allows for permanent exclusion in the case of serious misbehaviour as a last resort. The policy states that parents will be given the opportunity to discuss the exclusion with the claimant and Mrs Gruber. Mrs Gruber informed me of one incident when a child had attacked a play worker and Mrs Gruber had spoken to the parents. The child was given warnings and then excluded from the club. The child was not excluded from the school. Exclusions from the respondent's school were carried out under a different procedure involving the Head Teacher of the respondent school.

28. At the time when Mrs Gruber became Chairperson of the Club, the respondent's School Secretary, Mrs Cohen, was carrying out the role of administrator of the Club. I accept Mrs Gruber's evidence that Mrs Cohen received a separate payment for her work as Administrator; payment was made by the Charity and reimbursed from Club

funds. When Mrs Cohen was leaving the school, she asked the claimant whether she would like to take on the role of Administrator of the Club. The secretarial post at the respondent school was advertised; the role of Administrator of the Club was not included amongst the responsibilities in the advertised job.

29. The claimant discussed the Administrator role with Mrs Cohen and the then Head Teacher, Mrs Janice Rich. Mrs Cohen told the claimant about her duties. These were not set out in writing anywhere but the claimant has set out her recollection of what she was told about her duties at paragraph 7 of her witness statement and there is no dispute that this correctly records her duties. Her duties included keeping records of the children's attendance by means of a daily register, sending invoices out to parents of the children who attended, keeping a record of payments and banking cash and cheques monthly. Bank statements for the Club's account went to Mrs Gruber and were not seen by the claimant unless she asked to see them because of a query, for example about whether a parent had made a payment. I accept the claimant's evidence that, when the job was discussed with her, no one told the claimant who her employer for this role would be. The claimant was not given a written contract of employment for her role and there was no offer letter. The claimant's responsibilities included hiring staff and issuing contracts to them. She issued contracts in a form which she says was given to her when she started. As previously noted, these contracts are headed "King David Out of School Club" which is not the correct name of a legal entity.

30. When the claimant considered that the wages of those employed to work at the Club should be increased, she referred the matter to Mrs Gruber who made the decision.

31. In what the claimant recollected as being around 2010, the claimant set up a breakfast club. If a report on page 57 of the bundle is accurate, it appears this may have been in 2008. Payments to staff employed to work at the breakfast club were dealt with in the same way as payments to staff employed to work in the after-school club.

32. Included in the school information on the respondent's website, printed on 6 August 2017, are details of the breakfast club. Those interested in their children attending are asked to contact the school office. There is no reference to the Club being separate from the school. The claimant's name and photo appear in the list of Teaching Assistants, also describing her as "Out of School Club Organiser" (the website appears to have been out of date in this respect on 6 August 2017).

33. Until around early 2016, things operated smoothly. The Club remained solvent and, indeed, as previously noted, the Club was able to make some purchases with profits made.

34. In around Spring of 2016, Mrs Gruber realised that the Club was running into financial difficulties. She found that the bank account did not contain sufficient funds to be able to reimburse the Charity for the payments they had made to staff. Mrs Gruber had to start paying the trustees in arrears because there was not enough money in the account and the Club began to build up a debt to the Charity. Mrs Gruber discussed the problems with the claimant. The numbers attending the Club

seemed to be falling and they were not sure why. She considered reducing staff numbers but could not do so because of the legally required ratios of staff to children. Mrs Gruber organised promotions and sent letters out through the school about the facility. Mrs Gruber discovered that it appeared that some parents owed substantial sums to the Club; she understood one couple owed about £1,700. She sought advice from Mr Rose about taking legal action against the couple. Mrs Gruber had to chase up debts that were owed. She found that, on some occasions, the claimant did not know how much was owed. It appears that problems had arisen because invoices were not always sent out when they should have been and invoices were not always paid when they should have been paid.

35. On 21 September 2016, Mr Rose wrote to Mrs Gruber, copying Mrs Nelson. He wrote that he was becoming increasingly concerned that the trustees were arranging the Club's monthly salaries and providing food from the school kitchens but were not being paid in a timely manner. He wrote that he had shared these concerns with the Treasurer of the trustees who instructed him not to process any further salaries or allow the kitchens to provide any further food for the Club until the outstanding amount, then being £5,360.19, was paid in full.

36. Mrs Nelson wrote to Mr Rowe on 22 September 2016, referring to Mr Rose's email. She wrote:

> "The out of school club is a privately run business within with [sic] campus and we know that it has been losing money. I understand that the Trustees cannot continue to fund salaries in this way but if it is to close then we need a strategy and some lead in time so that we can give parents due warning but also because the members of staff who work for the club depend on these wages and at worst, if we tell them overnight that they can no longer be paid then we will be at fault from a legal perspective.
>
> I have discussed with Mandy Gruber who runs the club and she would like 6 months to try to invigorate the club. If it doesn't work then we can look to end contracts and give parents plenty of notice before we close it".

37. In October 2016, Mr Rose reported to the Charity trustees that the Club was falling behind with their payments to the tune of around £9,000. He subsequently corrected this figure and gave evidence that the amount outstanding at the end of October was £7,382.13.

38. Steven Wiseglass, an accountant and a governor of the respondent primary school, was asked to do an audit of the Club's finances. He sent an email on 14 November 2016 to Nicola Nelson, the then Head Teacher of the respondent school and Stephen Verber, another governor. He recorded that he had met with the claimant, Mrs Gruber and Mr Rose regarding the out of school club provision. He had looked at the records for both the breakfast club and the after school club. He noted that there had never been any reconciliation of the cash held in the breakfast club cash tin to the number of children attending so could not, therefore, say for certain whether all the money had been accounted for correctly. In relation to the after school club, he wrote that, from what he saw, it was very difficult to understand and keep tally of the financial account for each child. He made a number of

recommendations including moving the accounting function to Mr Rose. In making his suggestion that Mr Rose take over the accounting function, Mr Wiseglass wrote: "It has only been a historic matter that Mrs Gruber took over the running of the banking facility as someone used to operate the club on a private basis." Mr Wiseglass noted that there were other afterschool clubs (mentioning specifically swimming and gymnastics) that ran during the week free of charge and suggested that the provision of the after school club should be looked at as a whole with the various other after school activities as opposed to running each club as a separate entity. He suggested, as an option of last resort, if the club could not be reinvigorated, investigating third party providers to see whether they could take over the offering in its entirety.

39. On 14 November 2016, Mrs Gruber and the claimant had a conversation about the Club. Mrs Gruber had had a meeting with Mr Rowe and Mr Rose to discuss the finances, which she thought was in October. They had said to her that she had to do something to get money in and they were giving her until the end of December. I accept that Mrs Gruber was reassured by them that no one was going to lose their jobs before Christmas. I accept the evidence of Mrs Gruber that Mr Rowe did not give her instructions about what she should say to the claimant. Mrs Gruber recalled the date of the conversation, which accords with the claimant's diary entry, because her mother died that night. I accept Mrs Gruber's evidence that, prior to the conversation on 14 November, Mrs Gruber had had a number of conversations with the claimant about the difficulties the Club was encountering. I accept Mrs Gruber's evidence that the claimant said on a number of occasions that she would "walk" if that meant it would save the jobs of people before Christmas and that she was happy to go because she had had enough. I accept Mrs Gruber's evidence that the claimant appeared stressed about the situation.

40. I accept the evidence of Mrs Gruber that both the claimant and Mrs Gruber were upset at the meeting on 14 November. The claimant has shown me a diary entry for 14 November in which she has recorded "was told by Mandy that I have to hand my notice in". The claimant was not challenged on the authenticity of this note and I accept that this was the impression the claimant gained from the conversation. However, I accept Mrs Gruber's evidence that she did not say words to this effect. I accept Mrs Gruber's evidence that the claimant was again talking about walking away. Mrs Gruber did not want to assume further responsibility at a time when work and personal responsibilities would have made this very difficult. However, she did not feel she should persuade the claimant to stay if the claimant did not wish to do so. I accept that Mrs Gruber said words to the effect that the claimant should walk away if that was what she wanted. It is not unusual that people come away with different understandings of conversations, particularly when they are upset. I accept that both the claimant and Mrs Gruber were seeking to give me their honest recollections of the conversation on 14 November. Whatever the exact words used in the conversation, the claimant did not hand in her notice and continued to carry out her duties for the Club.

41. Mr Rose had a number of conversations with the claimant over a period of weeks or months. He told the claimant that the trustees could no longer be paying salaries for the Club staff if the Club was not reimbursing the money; the message was that staff had to be paid out of the money taken by the Club. It is common ground that Mr

Rose referred to the possibility of issuing P45s to staff. I accept Mr Rose's evidence that he said this, meaning that they might have to set up a separate payroll for the Club which would require the Charity to issue P45s since the staff would then be paid by a different payroll with a different employer reference. I accept it was Mr Rose's intention to explain that payments would come directly from the Club's account under new arrangement and the employer reference would change and for this change to take place, P45s needed to be issued from the old "employer". I find that the claimant did not fully understand this and believed, because of the mention of P45s, that Mr Rose was suggesting that people would lose their jobs.

42. I find that, in the context of these conversations, the claimant said that she wanted to "walk away" as long as the other ladies got paid. The claimant acknowledges in paragraph 23 of her witness statement that she said she would "walk away" although she suggests this was because she could not work under the conditions of only being able to pay for staff, food snacks etc with whatever money she had taken. Based on an email from Mrs Nelson dated 20 December 2016 which was written fairly close to relevant events, the claimant's witness statement and Mrs Gruber's evidence, I find that the claimant did say she wanted to “walk away” and Mrs Gruber and Mrs Nelson understood from this that the claimant was "willing to walk away" if this would save the jobs of the other staff.

43. Mr Rowe gave evidence that he had a meeting with the claimant in November 2016. The claimant said she did not meet with Mr Rowe until 13 December. In his witness statement signed in June 2017 before the Preliminary Hearing, Mr Rowe described a meeting on 7 December which he then corrected in his witness statement signed in September 2017 as taking place on 13 December. He explained that he had had entries in his diary for both 7 and 13 December but had realised subsequently that he had met the claimant on 13 December. I consider it is more likely than not that Mr Rowe has made an honest mistake with the passage of time and is confusing the meeting on 13 December with a meeting in November. There is no documentary evidence of a meeting having taken place in November with Mr Rowe. Indeed, evidence of a November meeting with Mr Rowe would appear inconsistent with the email from Mrs Nelson sent 20 December in which she wrote that, about three weeks prior to that, Mr Rowe had asked her to speak to the claimant. Mrs Nelson referred in that email to the claimant having previous conversations with Mrs Gruber and Mr Rose but not to any previous meeting with Mr Rowe.

44. On 7 December 2016, the claimant met with Nicola Nelson, the then Head Teacher, and Stacey Rosenberg, the then Deputy Head who has since become the Head Teacher. It is apparent from Nicola Nelson's email of 20 December that Mr Rowe had asked her to speak to the claimant. She wrote in that email that Mr Rowe had asked her to say that "if she was finding it so difficult and really did want to walk away then we would let Adele Whelan and David Rose's office take over the management of the club to see if they could turn it around and if not that the club may have to close". Mrs Nelson wrote in the email of 20 December "I met with her and with Stacey and said this to her. Her response was utter relief and she again said she would happily walk away, that it was a huge weight off her mind etc etc".

45. The claimant alleges that she was dismissed at the meeting on 7 December 2016. She writes in her witness statement that Mrs Nelson told her that Mr Rowe did not want to meet with her as he did not know her but that he "wanted Mrs Nelson to tell me to walk away from my position as the Out of School Club Administrator and to take any paperwork relating to the club to the Bursers Office, which I did". The claimant said that, when she asked why, Mrs Nelson told her that she had "mismanaged" the business. I asked the claimant whether she had made any note of the meeting on 7 December in her diary since she had made a note of the meeting on 14 November. The claimant said she had, although she had not disclosed this so it did not appear in the bundle. The claimant had her diary with her and showed me the entry which I then had copied for the parties and added to the bundle. This note records "called to a meeting this morning with Tess, Stacey and Nicola as JR doesn't want to meet with me as he doesn't know me as well as Nicola. Stacey never spoke but Nicola said JR wants me to walk away. When I asked why I was told that I had mismanaged the business". Mr Rowe did not challenge the authenticity of this note in cross examination of the claimant. However, he did raise questions about its authenticity in closing submissions. I find that it is more likely than not that this is an authentic contemporaneous record. If the claimant had created the document for the purposes of these proceedings, I would have expected her to have disclosed this but she only produced it in response to my questions.

46. I find that the claimant left the meeting on 7 December with the impression that Mr Rowe wanted her to stop doing her work with the Club because he thought she had mismanaged this. I accept that her note in her diary reflected her understanding at the time. However, there is a dispute about what was said and the claimant has not satisfied me that she was told that Mr Rowe wanted her to walk away rather than this being her impression from the conversation. I find that the claimant left the meeting confused about the position. She sought advice from ACAS and wrote to Mrs Nelson, copied to Mr Rowe and Mr Rose, on 8 December. She wrote

> "Further to our meeting yesterday morning with Stacey I am writing to you to ask for clarification as to whether I have been dismissed from my employment as the After School Club Administrator. If my employment has been terminated then I need to have it in writing stating the reasons why.
>
> “I have sought independent advice on this matter and as I have been in this job in excess of ten years I am entitled to ten weeks notice. If the business is closing down and not reopening than I am entitled to redundancy pay".

47. This letter supports my finding that the claimant did not have a clear belief that she had been dismissed by reason of what was said at the meeting on 7 December 2016.

48. If the claimant had had a clear understanding that she had been dismissed by the meeting of 7 December, I consider it more likely than not that she would have referred to this in subsequent meeting she attended on 9 and 13 December. She did not.

49. The claimant has given oral evidence, in answer to questions from me, that she did not attend the after-school club or breakfast club after 7 December and the respondent is unable to challenge this evidence.

50. There is a dispute as to when the claimant took all the paperwork relating to the club to David Rose. The claimant did not refer to this in her witness statement but said in oral evidence this was on 7 December. I note also that the claimant's diary entry for 7 December makes no mention of being told to take the paperwork to Mr Rose and that she did so that day. Mr Rose and Ms Whelan say that the claimant delivered the papers later in December. Mr Rose's statement did not refer to the claimant delivering the papers. Ms Whelan's statement said the claimant delivered the papers in December but did not give a date for this. On a balance of probabilities, I prefer the evidence of Ms Whelan and Mr Rose. I consider that the claimant or one of the other people present at the meeting on 13 December would have referred to the claimant having already passed over all the paperwork if this had been the case. It is unlikely that Mr Rose and Ms Whelan would have offered at the meeting on 13 December, as they did, to help the claimant set up systems if the claimant had already passed all the paperwork over to them.

51. None of those to whom the letter of 8 December was addressed replied in writing to that letter. However, Mrs Nelson held another meeting with the claimant on 9 December which was also attended by Mrs Rosenberg and Mrs Anderson, another Teaching Assistant, who attended as a companion for the claimant. No one made any notes of this meeting. The claimant has given an account of the meeting in her witness statement, Mrs Rosenberg agrees that this is an accurate summary of the meeting. Mrs Nelson told the claimant that she had called the meeting as a result of the letter she had sent the previous day. She told the claimant that the out of school club had nothing to do with the school. Mrs Nelson referred back to a previous conversation they had had in November when the claimant asked if the staff were going to get paid in December and Mrs Nelson had confirmed that the staff would be paid in December. Mrs Nelson said that, during the conversation in November, the claimant had said she would walk away from her role. As previously noted, the claimant accepts that she had said this, although at the tribunal hearing she gave an explanation as to why she said this. Mrs Nelson said there were several hundred pounds owing from parents that she had not chased up and that one parent had repeatedly asked for an invoice from the claimant which she had ignored. The claimant alleges that Mrs Nelson talked about the claimant "owning the business". Mrs Rosenberg did not recall Mrs Nelson using this phrase but recalled a conversation about the club being a separate entity and that it had not been for Mrs Nelson to sort out the problem because it was not part of her finances and her budget. The claimant did not say at this meeting that she considered she had been dismissed.

52. Mrs Rosenberg recalled a number of previous, less formal, conversations with the claimant where the claimant said she thought she should just walk away and was in turmoil as to how the situation with the Club was going to sort itself out. Mrs Rosenberg was teaching at this time and the claimant was sometimes in her classroom. Mrs Rosenberg said she was aware the claimant was worried how this was to be sorted out and did not want the ladies to lose their jobs.

53. On 13 December 2016, the claimant attended a meeting with Mr Rowe, Mrs Nelson, Mrs Rosenberg, David Rose, and Mrs Whelan, Assistant Bursar. Mrs Anderson accompanied the claimant to the meeting. There is some dispute about what was said at this meeting. However, it is common ground that no mention was made of dismissal. Mr Rose and others were saying that they would like the claimant to stay but she needed to run the club properly. Mr Rose and Mrs Whelan offered to help the claimant set up systems if she wanted help. They arranged to meet again the following week. The claimant says that no specific date was given. However, it appears from subsequent email correspondence, that the meeting was arranged for 21 December, whether at the meeting on 13th or shortly afterwards.

54. It is common ground that, immediately after the meeting, the claimant went with Mrs Whelan to go through a simplified spreadsheet which Mrs Whelan had prepared. Mrs Whelan had prepared a spreadsheet into which the claimant would just need to insert the relevant figures. I accept Mrs Whelan's evidence that, if the claimant had still had difficulty in doing this, Mrs Whelan would have prepared an alternative Word document for the claimant to use. However, Mrs Whelan never said this to the claimant because the discussion did not get that far. It is common ground that the claimant was summoned by Mrs Nelson to return to her class after she had been with Mrs Whelan for five minutes because the claimant had responsibilities to fulfil as a Teaching Assistant, looking after a particular pupil. The claimant asked if she could see Mrs Whelan after school finished that day but Mrs Whelan said that she could not do that because she could not make childcare arrangements for that day. I accept Mrs Whelan's evidence that Mrs Whelan offered to meet the claimant at another time and went to see the claimant a number of mornings before school started but the claimant said she could not meet with Mrs Whelan at those times. The claimant did not seek to make alternative arrangements with Mrs Whelan.

55. At some stage prior to 18 December 2016, the claimant consulted a solicitor. Her solicitor wrote a letter addressed to the Headmaster of the King David High School on 18 December 2016. This asserted that the claimant had been wrongfully dismissed as Manager of the After School Club on 6 December 2016. The letter asked for a copy of the claimant's contract of employment and asserted an entitlement to damages for wrongful dismissal.

56. It appears that Mr Rowe received or was shown the letter. He then engaged in email correspondence about this with Stephen Verber, an accountant and a School Governor, and Mrs Nelson. Mr Rowe referred to the situation in the correspondence as a "comedy".

57. In answer to a question from Mr Verber, Mr Rowe wrote on 20 December 2016 about the claimant: "I have no idea who employed her, she is managed by the PS [Primary School] no one ever dismissed her. We just told her to start doing simple things such as keeping proper books - she had no idea where/what".

58. Mrs Nelson wrote on 20 December 2016 to Mr Rowe and Mr Verber: "she doesn't have a contract but she has been doing the role for about twelve years. She wasn't dismissed either - just asked to start managing the books properly as Joshua says". Mrs Nelson wrote further to Mr Verber on the same day:

> "The out of school club has run as its own entity and I haven't had any involvement apart from dealing with perhaps two minor complaints over the course of the past four years. It pays itself and operates its own banking system, managed by Mandy. Carole is paid extra, separately from her TA role".

59. Mrs Nelson wrote that she did not know that the trustees had been acting as a conduit for paying the salaries of the employees of the Club until this was brought to her attention at the end of the summer holiday when Mr Rose told her that the Club was making a loss and the trustees were covering salaries. Mrs Nelson referred to conversations which David Rose had had with Mrs Gruber and the claimant and wrote that the claimant had been told she had to start paying the wages herself and would have to set up her own payroll. She wrote that the claimant became very stressed and asserted that the claimant had said that she just wanted to walk away as long as the other ladies got paid. She wrote "about three weeks ago, Joshua asked me to speak to Carole to say that if she was finding it so difficult and really did want to walk away then we would let Adele Whelan and David Rose's office take over the management of the club to see if they could turn it around and if not, that the club may have to close. I met with her and with Stacey and said this to her. Her response was utter relief and she again said that she would happily walk away, that it was a huge weight of her mind etc etc".

60. Mrs Nelson referred to the claimant's letter saying that she wanted redundancy and to the meeting which followed, where Mr Rowe "re-iterated that he would like her to run the club more effectively in order to recoup the money owed to the trustees. She agreed to put in some new systems and processes as suggested by Joshua and David and then we would meet again today". Mrs Nelson, who was due to leave the school, wrote that, if she was staying, she would recommend getting HR involved at this stage and offered to do this before she left if they liked. After Mrs Nelson left, Mrs Rosenberg became Acting Head Teacher and then was granted the permanent appointment as Head Teacher.

61. Mr Rowe wrote on 20 December to Mr Verber and Mrs Nelson:

> "As I see it, this is a comedy.
>
> “The out-of-school club is a self-sustaining unit.
>
> “The only thing is that the Bursar's office (or, Trustees) provide is the payroll service".

He wrote that the club passed to the bursar monthly amounts to pay on the Club's behalf and the bursar charged this back to the Club, any profit remaining with the Club. Mr Rowe wrote that Mrs Nelson had spoken to the claimant about getting her house "in order" and he had done the same the previous week. He wrote that they had emphasised that they were not asking for anything other than simple and good housekeeping and that no one had uttered the word dismissal. He wrote that the claimant was supposed to come back this week with an orderly (manual) spreadsheet listing the outgoings and expenses, billing and cash received. He wrote that they had said that, once she sorted her paperwork, everything would flow from

there. He wrote that Mrs Whelan had already done the analysis which indicated that, on paper, the club ought to be making money. He wrote:

> "If you have HR free of charge, by all means, use them. Otherwise, I would not waste a penny on it. I will deal with it. She has absolutely no case. The only ones who have a case are the trustees who would like to recover the £9,000 she owes them".

62. On 21 December 2016, Mr Rowe wrote by email to the claimant, referring to the meeting which had been arranged for 1pm that day to go through all the items discussed at the previous meeting "which was basically about how the manager of the out-of-hours club should be organised and have proper systems in place for invoicing, collections etc". He wrote that Mr Rose had just advised him that the claimant refused to attend the meeting scheduled for 21 December. Mr Rowe asked the claimant to confirm to him by return whether the claimant would be attending the meeting.

63. The claimant replied by email that afternoon, asking that all communications should go through her solicitor. She wrote "for the avoidance of any doubt I am not refusing to attend your meeting just that any meetings/communications should go through my solicitor".

64. Mr Rowe replied to the claimant on 22 December. He asserted that she had refused to attend the meeting and wrote: "You are the manager of the club which employs you. As the manager, your very basic duty is to ensure that the unit has proper and orderly books (expenses/invoicing/collections). This you have not done". He described the system as "shambolic" and asserted that it had cost the trustees some £9,000 since September 2016 since the club had not reimbursed the sums owing for that payroll. He wrote:

> "Your primary duty is to run your unit properly and that is what the meeting last week was about and, as was made clear then, that is what the follow on meeting this week, was about. We are not asking for anything complicated. Just simple orderliness. In fact Adele [Mrs Whelan] even offered to set the simple tabulation up for you (expenses, invoicing and collection).
>
> "I understand that you have told various people that you do not wish to do the job. If that is your wish (and, your non-attendance yesterday seems to corroborate that), we will of course respect your decision to leave - however sorry we will be to see you go - and we will have no choice but to get someone else to run the club.
>
> “If, on the other hand, you do wish to continue running the unit, we will respect that too but you will have to do the job properly which includes, inter alia, keeping proper systems (nothing terribly complicated) and attending meetings such as the one scheduled for yesterday. The club cannot live with a huge financial haemorrhage which flows from a lack of basic and simple management.

> Please let me know your preference or if you have any other workable suggestions. As noted above, the issues have been raised with you before so surely our discussions and this letter do not come as a surprise. I think it is reasonable therefore to ask that you let us have a reply by the end of the holidays. If I do not hear from you by then, I will, sadly, have to assume that you do not wish to continue running this unit (which is reportedly what you have been saying)".

65. Later on 22 December, Ms Whelan sent an email to Mr Rowe, informing him that Vicki, who she wrote ran the after school club, had told her that the claimant had given them all good bye/thank you cards that week.

66. On 22 December, Alison, who appears to have been assisting Mr Rowe, replied to the claimant's solicitor's letter of 18 December. She wrote that the letter had been addressed to the wrong person and suggested the correct addressee should be "Mrs Carole Elton, Manager Out of Hours Club c/o King David Primary School".

67. The claimant's solicitors wrote again on 3 January 2017. The claimant's solicitor, Mr Cohen, wrote that should they continue to harass the claimant by communicating directly, they would advise referring the matter to Greater Manchester Police pursuant to the Protection From Harassment Act 1977 [sic]. Mr Cohen asserted that the claimant had not refused to attend any meeting during her employment writing that, following her dismissal, she was asked to attend a meeting "with whom and for what reason she is unsure".

68. Mr Rowe responded by email to Mr Cohen's letter on 4 January 2017. He asserted that the addressee of Mr Cohen's letter should be "Mrs Carole Elton, Manager Out of Hours Club c/o King David Primary School." He wrote:

> "Regarding the contract of employment, as noted, my understanding is that the contract will likely be with Carole since this was her club and she ran it as a "stand alone" and an entirely separate operation from the rest of the school".

Mr Rowe wrote that dismissal had not been mentioned and wrote that, at the meeting,

> "what we were telling her was that henceforth, no one would be bailing out the club and that if she did not run it properly, there would be no funds to pay her staff. The bursar's office also offered to show her how to set up the appropriate simple management system (although, clearly, she knew how to do it because she had been doing it successfully for quite a number of years). As part of that process she was invited to attend a follow up meeting in the following week but she decided not to attend.
>
> "My understanding is that she then notified the staff at the primary school that she had decided to leave her post, which has left us with a serious predicament as she gave us no notice and we now urgently have to find someone to operate the "out of school" club".

69. There was further correspondence between Mr Cohen and Mr Rowe. In an email on 9 January 2017, Mr Rowe wrote "in her role of running the out of school club, Carole is not an employee of KD [I was only responding to you in, in Carole's absence and in an effort to assist you so that you have an understanding of the relationship]. She ran her own club (using the school premises) and if she signed a contract in that capacity, she will have it". He wrote that the school would not accept service for any action relating to the out of school club and that any further communication should be with the claimant herself. He wrote: "whilst talking to her, will you advise her that the primary school is expecting her to attend to the out of school club now that the Spring term has begun?".

70. Mr Cohen replied the same day. He wrote that he found the contents of Mr Rowe's email “rather bazaar [sic]”. He wrote: "Is it the case that you aver that Mrs Elton in effect employed herself and ran this operation on her own autonomy?".

71. Mr Rowe wrote again on 11 January, writing that the information from the primary school was that the claimant was not attending to the out of school club. He wrote "as a result, the primary school will have to look for another (sub contractor) to run this club".

72. Mr Cohen replied on 11 January that the claimant would say she was not a sub contractor but an employee and that anything else was just ridiculous.

73. Mr Rowe replied on 12 January, clarifying that his involvement was only because the trustees had laid out significant sums of money on the claimant's behalf which she had not repaid and that, other than that, his communication with Mr Cohen was “only as a favour and in order to try and assist". He asserted that the out of school club was an independent unit providing a service to the parents of the King David Primary School and that the claimant was never dismissed. He wrote that "it would seem that there are no grounds whatsoever to bring an action at an Employment Tribunal against the King David Primary School. If anything, the trustees ought to bring an action against Carole for the £9,000 which is owing".

74. There was further correspondence about wage slips. Mr Rowe informed Mr Cohen that he understood that there were primary school payslips for the Teaching Assistant role at the primary school and payslips for her work at the out of school club issued by the bursar's office, who did the payroll on behalf of the out of school club and immediately invoiced and was reimbursed by the club.

75. On 19 February 2017, the claimant's solicitors sent a letter before action to the King David Primary School, writing that they had received instructions to pursue a claim for unlawful/wrongful dismissal in the Employment tribunal.

76. On 21 February, Mr Rowe wrote to Mr Cohen writing that, if they decided to proceed with litigation, they should address the correspondence to the claimant at the out of school club. He asserted that the claimant was never dismissed, nor did anyone terminate the arrangements with her.

77. The claimant notified ACAS on 28 February under the early conciliation procedure. The ACAS certificate was issued on 23 March 2017. The claimant presented her claim on 24 March 2017.

78. As previously noted, the tribunal listed the case for a preliminary hearing on the issue of the claimant's employment status in her role as Out of Hours Club Co-ordinator. This came before Employment Judge Holmes on 15 June 2017. After reading witness statements and documents and discussion with the parties, he decided to postpone the hearing for reasons which he set out in detail in writing. At paragraph 7 of the reasons, he noted that, after reading witness statements and documents, he raised with Mr Rowe some issues as to documents that were not before the tribunal, had not been disclosed, but which seemed to him to have potential relevance to and significance for the issue to be determined. At paragraph 12 he recorded that Mr Rowe explained non-disclosure as follows:

> "by reference to the fact that none of this material is in the possession of the respondent, because the respondent is "the School", and not the Club, which on its case, is a separate entity. Alternatively he says that it is in the possession or control of the "Trustees", or their payroll department. Further, he suggests that the claimant could herself get it, saying that she had a "route" to it. By that, however, he was not suggesting that she actually had retained any copies of this material, merely that she could ask someone at the School, where she still works, for it."

Employment Judge Holmes commented that he considered that "this was a most unsatisfactory state of affairs." He considered the documentation to be "highly pertinent to the issue to be decided, namely whether the claimant's engagement as Club Administrator was with the respondent, or whether she was truly not an employee at all, but carrying on her own business." It appears from the written reasons that the judge made this comment in the hearing, since he records that Mr Cohen, the claimant's representative, agreed with this. It appears that Mr Rowe did not take this further opportunity to clarify, if it was the case, that the respondent was not arguing that the claimant was self employed rather than an employee, but was arguing that she was an employee of someone else, but not the respondent. At no time after receipt of the written reasons from the preliminary hearing did the respondent seek to correct the understanding of the judge that the respondent was arguing that the claimant was self employed rather than being an employee of the respondent.

79. As previously noted, the respondent's amended response, presented on 12 July 2017, did not amend the part of the response which asserted that Mrs Elton was an independent contractor, running an out of school club for parents and pupils of the primary school and that Mrs Elton was not employed by the King David Primary School. This was described as ground 1 of the respondent's defence. Other grounds related to the argument that the claimant, if an employee of the respondent, was not dismissed and the other alternative arguments. There were a few additions to the section dealing with ground 1 of the defence but no assertion that the claimant was employed by someone else.

80. I set out in full, ground 1 of the respondent's amended response, marking in italics the parts which were added in the amended response. There were no deletions. The respondent has not sought to amend the response further.

> "Ground 1 of our defence is that Mrs Elton ran her own operation as an independent contractor, running an Out of School Club for parents and pupils of the Primary School. Mrs Elton was not employed by The King David Primary School.
>
> "*The Out of School Club is a stand-alone unit.* Mrs Elton ran the whole operation; she decided *on the staffing levels, who to employ*, number of children, hours worked, amount to be charged, etc. Any funds accumulated remained in the Out of School Club account. *The Club operated its own bank accounts and banking* [Mrs Elton did utilise the 'payroll' facilities of the KD Trustees (an entirely separate body) whereby wages were paid through that payroll system and immediately reimbursed by the Out of School Club. The Trustees payroll system also handled some of the paperwork, e.g. producing P60s etc *even though the Trustees were not Mrs Elton's employers*]."

81. It is unsurprising, in the light of the discussion at the preliminary hearing and the amended response, that the claimant's representative came to this final hearing prepared to deal with an argument that the claimant was an independent contractor, or self-employed, rather than an employee.

82. I note that the respondent added to its response a statement that the Trustees i.e. of the King David Schools charity, were not the claimant's employers.

83. In a written skeleton argument which Mr Rowe handed in at the start of the final hearing, he stated: "The issue is not whether Claimant was self-employed or employed. Issue is whether she was employed by the KDPS [the respondent] or by the OOSC [the Out of School Club]."

84. It was only in closing submissions, that Mr Rowe raised the possibility that, "in the worst case" the claimant might have been employed by the Charity but, if that was the case, she had sued the wrong respondent. Mr Rowe, as previously noted, is chair of the Charity Trustees. He was in a position to become fully informed of all arrangements between the Charity and the Club. If the respondent had seriously thought that the claimant may have been employed by the Charity, I would not have expected the respondent to make the statement in the amended response that the Trustees were not Mrs Elton's employers. In Mr Rowe's written skeleton argument handed in at the start of the final hearing, there are only two possibilities put forward: that the claimant was employed by the respondent primary school or by the Club. If the respondent had raised the possibility that the claimant was employed by the Charity at any stage in the proceedings prior to closing submissions, I would have expected the claimant, who was professionally represented, to have applied to amend the claim to add the Charity as a second respondent.

85. No application was made for any further order as to disclosure following the preliminary hearing. At the start of the final hearing, Ms Santamera raised a number of concerns about the process and about Mr Rowe's position as a witness and

representative for the respondent. She made no application to the tribunal arising from her concerns so I do not consider it necessary to say anything further about this.

Submissions

86. Mr Rowe made oral submissions in addition to his written skeleton argument on behalf of the respondent school. He submitted that the out of school club was a separate entity from the respondent. The written submissions did not address what type of legal entity the respondent said the Club was. In his oral submissions, Mr Rowe submitted that, in the worst case, in the alternative, the employer was not the respondent primary school but the charity King David Schools and that the claimant had named the wrong respondent. This was the first time the respondent had suggested that the claimant might have been employed by the Charity.

87. Mr Rowe suggested that the Club was an unincorporated association. He said it was not registered with HMRC. He submitted it was a grouping of volunteers like a club, it was a loose arrangement and that that is what is seemed to be. He submitted that the claimant was not employed by the respondent primary school for the out of school club work.

88. In relation to the question of whether the claimant was dismissed, Mr Rowe submitted that she was not dismissed. He commented that the diary entry of 7 December looked highly suspicious, suggesting that the writing looked different, noting that it had never been disclosed and that there were no diary entries for the 9 and 13 December. He submitted that, at the 13 December meeting, everyone wanted the claimant to continue running the club and there was no mention of dismissal. He submitted that someone had lost control of the club and said the claimant was running the club. He said the Club began to lose a lot of money, the claimant just wanted to walk away but, for some reason, decided to lodge a claim.

89. Mr Rowe submitted that, even if the claimant was an employee of the respondent and was dismissed, compensation should be reduced because she would have been dismissed for mismanagement.

90. I asked Mr Rowe what he would argue if I found that the claimant was not dismissed, as she asserted, on 7 December? How and when would he say that her employment had come to an end? Mr Rowe said he would say that her employment ended when she left, some time around Christmas and that she resigned rather than being dismissed.

91. Ms Santamera for the claimant started her submissions saying that the Tribunal had to make a finding of fact whether the claimant was an employee or self employed. I commented that the respondent was not now saying that the claimant was self employed; this had been clarified at the outset of the hearing. I informed Ms Santamera that I did not need her to address me on whether the claimant was self employed in the role but said she should address me on whether the claimant was an employee of the respondent or some other entity. Ms Santamera admitted that the actual status of the club was very unclear. She noted that the wage slips said King David Schools and that we now know that is the charity. Ms Santamera

submitted that there was no distinction between the wage slips for the Teaching Assistant position and for the after school club. I commented that the wage slips for the job as Teaching Assistant came from the Manchester payroll system. Ms Santamera submitted that there was no evidence to prove that the claimant was not employed by the respondent; the claimant was appointed as an Administrator not the owner. Ms Santamera submitted that the club could not be a charitable unincorporated association. With an annual income of over £5,000, it was required to be registered with the Charity Commissioners and that had not been done. She submitted that it was clear that no one had ever addressed their mind to the claimant's status until there was a problem and the Club was never intended to make a profit. Miss Santamera submitted that, at best, they were either ignorant or naïve about the situation. Mr Rowe said he was not sure who employed the claimant; if he did not know then who did?

92. Ms Santamera submitted that the claimant had been receiving payments for eleven years from the school.

93. Ms Santamera submitted that the claimant was dismissed on 7 December. The claimant's evidence was that she was very upset about this; she felt she was being told to walk away and that was why she thought it necessary to seek legal advice. The letter of 8 December was written on the advice of ACAS. As far as the claimant was concerned, she had been dismissed; she had been told to resign.

94. In relation to the *Polkey* argument, Ms Santamera asked why they would want someone to stay if she was incompetent. Ms Santamera submitted that Mr Rowe was asking the claimant to stay; the evidence was contrary to the argument that the claimant would have been dismissed for incompetence.

95. Ms Santamera invited me to find that the claimant was an employee of the respondent school and that she was unfairly dismissed.

96. I asked Ms Santamera whether she had any alternative argument to make about the ending of the claimant's employment, if I found that there was no dismissal on 7 December. Ms Santamera submitted that, if the claimant was not dismissed on 7 December, she was dismissed on 13 December by being given an ultimatum that, if she did not put her house in order, P45s would be issued. Ms Santamera submitted that that would amount to a dismissal, together with what had been said from October onwards.

The Law

97. A claimant only has the right not to be unfairly dismissed if they are employed, within the meaning in the Employment Rights Act 1996. A claim for unfair dismissal, breach of contract or in respect of entitlement to a statutory redundancy payment can only be made against their employer.

98. Only a legal entity can enter into an employment contract (written or not) with an employee. A legal entity may take many forms. It may be an individual, a group of individuals e.g. members of a management committee of an unincorporated association or trustees of an unincorporated charitable trust, or some form of

corporate entity e.g. a company limited by shares or guarantee or a charitable incorporated organisation. Where a trading name has been used for the employer, it is necessary to go behind that name to identify the legal entity using that trading name e.g. a sole trader or a limited company.

99. To succeed in a complaint of unfair dismissal, failure to give notice of termination or to be entitled to a statutory redundancy payment, an employee must have been dismissed. The dismissal may be an actual dismissal or a constructive dismissal. The claimant in this case has relied on actual dismissal and not argued, in the alternative, that she resigned in circumstances which amount to a constructive dismissal, so I say no more about constructive dismissal.

100. If an employee was dismissed, the dismissal will be unfair if the respondent does not show a potentially fair reason for dismissal or the tribunal finds that the respondent did not act reasonably in all the circumstances in dismissing the claimant for that reason.

101. If a tribunal finds that a claimant was unfairly dismissed, it can reduce the compensatory award that would otherwise have been awarded if it assesses that there was a chance that the claimant would have been fairly dismissed either at the same time or at some time after the effective date of termination had the respondent acted in a fair manner (the *Polkey* principle).

102. If an employee with sufficient qualifying service (2 years) is dismissed, they will be entitled to a statutory redundancy payment if the employee is dismissed by reason of redundancy. This will include where the employer no longer needs employees or as many employees to carry out the type of work which was done by the employee.

103. An employee who is dismissed, other than for gross misconduct, is entitled to notice of dismissal in accordance with the terms of their contract, or statutory minimum notice if this is longer. Statutory minimum notice is one week for each completed year of service up to a maximum of 12 weeks. If they are dismissed without such notice, the employer is in breach of contract and the employee can claim damages for loss suffered due to the breach.

Conclusions

Was the claimant employed by the respondent?

104. The first issue I have to consider is whether the claimant was employed by the respondent. If she was not, all her claims must fail.

105. Whether the claimant was self-employed, rather than an employee, in her role as administrator of the Out of Schools Club is no longer a live issue. It is right that it is not. There are no indicators pointing to self-employment or the Club being the claimant's "business."

106. This has been a very confused situation. The respondent has contributed to this confusion by the way it asserted in pre-litigation correspondence and then in these proceedings, prior to the final hearing, that the claimant was an independent contractor i.e. self-employed, running the Club as her own business. Apart from in their letter of 16 May 2017 which set out a different argument i.e. that the claimant was an employee, but not of the respondent, the respondent ran the argument about the claimant being an independent contractor from January 2017 until the start of the final hearing. The judge at the preliminary hearing in June 2017 understood the respondent to be arguing that the claimant was self-employed and the respondent did not seek to correct this understanding. The respondent, when it amended its response following the preliminary hearing, did not amend the part arguing that the claimant was an independent contractor. This remained the respondent's formally pleaded primary ground of defence. Only at the start of the final hearing, in answer to my questions, and in Mr Rowe's written skeleton argument, did the respondent clarify that it was no longer arguing that the claimant was self-employed but it was arguing that she was employed by the Out of School Club, not the respondent. As noted previously, at no time prior to Mr Rowe's closing submissions, did the respondent suggest that the claimant might have been employed by the King David Schools Charity. Indeed, in an amendment to the response, the respondent added a statement that the claimant was not employed by the Charity.

107. The Charity was not a respondent to the claim. The case would, no doubt, have proceeded in a very different way had the suggestion been made at any time prior to closing submissions that the Charity may have been the claimant's employer. The Charity may have been joined as a respondent. There may have been further documents disclosed and further witness evidence and the parties would have had other arguments to make. Neither party, prior to the respondent's closing submissions, ever advanced a case that the Charity was the employer. The respondent has close links with the Charity, the Charity having a role overseeing the respondent school as well as the High School. Mr Rowe, who represented the respondent from the time legal proceedings were threatened, up to and including this final hearing, is chair of the Charity Trustees. If the respondent had thought the Charity might have been the claimant's employer, I would have expected the respondent to have raised this at a much earlier stage of proceedings. It may be that Mr Rowe would have considered that he was not able to represent both the respondent school and the Charity if they did not resist the claims on the same grounds.

108. The claimant's payslips for her work for the Club were issued by the Charity, using the Charity's employer reference. The Club had no independent existence as an employer as far as HMRC were concerned. HMRC would have understood the claimant to be an employee of the Charity. This could be a strong indicator that the claimant was an employee of the Charity, but it is not conclusive evidence and can be displaced by other evidence. I did not hear or see all the evidence I would have expected to see if the Charity had been a respondent to the claim. However, I heard evidence from Mr Rose, who is bursar to the Charity, and from Mrs Gruber, Chairperson of the Club at the time, that payments were made by the Charity on behalf of the Club and then reimbursed to the Charity by payments out of the bank account operated by the Club, at least until the Club got into financial difficulties and got into arrears in reimbursing the Charity. Mr Rose's evidence was that this was a

different arrangement to that for people directly employed by the Charity who included the kitchen staff, nursery staff and administrative staff (himself and Mrs Whelan). Staff regarded as employed by the Charity were paid by the Charity and no reimbursement was sought from elsewhere. The staff costs were expenses of the Charity and recorded as such in its financial statements. Fees paid by parents of children attending the nursery and payments for food from the kitchens were income of the Charity and recorded as such in its financial statements. Mr Rose inherited an arrangement which he understood as being the Charity operating payroll on behalf of the Club but the Charity not being the employer of the staff working for the Club.

109. In the circumstances, where the Charity is not a respondent, neither party had (prior to the respondent's closing submissions) suggested that the Charity might have been the claimant's employer and there is some evidence pointing against the Charity being the claimant's employer, I do not consider that I can make a finding that the Charity was the claimant's employer. Neither do I consider that it would be in the interests of justice at this very late stage of proceedings to invite the claimant to make an application to add the Charity as a second respondent and, if that application was successful, to re-open the case for further disclosure, witness evidence and submissions.

110. I, therefore, consider that the correct course of action is for me to consider the issue which the respondent's skeleton argument identified: whether the claimant was employed by the respondent school or by the Club. This requires me to consider whether the Club had a separate legal identity from the respondent school. If not, my finding must be that the claimant was employed by the respondent school.

111. There are some indicators of a separate identity from the school. The Club had its own bank account. Its finances were operated separately from the school budget. However, this could indicate a situation analogous to a trading division of a company, expected to operate within its own budget, and does not necessarily indicate a separate legal identity.

112. The club had a unique reference number with OFSTED and had a separate inspection to OFSTED's inspection of the respondent primary school. If the Club had not had a separate OFSTED number and had been inspected as part of the respondent school, this would have been a clear indicator that the Club was not a separate legal entity to the school. However, it does not appear to me that the existence of a separate reference number and the fact of separate inspections is conclusive evidence, or even a strong indicator, that the Club had a separate legal existence from the school. There has been no evidence to suggest that OFSTED will only issue a reference number to a separate legal entity.

113. Staff working in the Club had separate contracts from the contracts they had if employed, like the claimant, in another capacity at the respondent school. The contracts for work at the Club name "King David Out of School Club" as the employer. This is not the name of a legal entity, since there is no corporate entity by that name. The contracts do not assist, therefore, in identifying the separate legal entity known as the Club, if there was a separate entity. The fact of separate contracts does not strongly point to the Club being a separate legal entity. A person may well have a number of contracts with the same employer if employed in a

number of separate posts. Similarly, the fact that there were different terms in relation to posts at the Club as opposed to as a Teaching Assistant at the school e.g. as to sick pay, does not appear to me to be a strong indicator of a separate legal entity.

114. The claimant had a different payslip for her work in the Club from the payslip for work as a Teaching Assistant; the work for the Club was paid through the Charity's payroll and the Teaching Assistant work paid through the Manchester local payroll. I heard no evidence that the respondent school had its own payroll. I heard no evidence to suggest that, if the respondent school employed anyone to do work other than that of a teacher or teaching assistant, the payments would be made through the Manchester local payroll. Payments by the Charity could be made as agent for the respondent school in the same way as they could be made as agent for the Club, if the Club had a separate legal existence. The fact of separate payslips does not, therefore, assist me in deciding whether the Club was a separate legal entity from the respondent school.

115. The Club had its own policies which differed from those of the respondent school e.g. in relation to the procedure to be followed for exclusion. This does not appear to me to be a strong indicator of the Club being a separate legal entity.

116. The Club reinvested any profit into equipment for the Club. Some equipment was kept for the sole use of the Club but this was sometimes shared for more general use in the respondent school. The Club, together with the Parents Guild, purchased a minibus which was used by the Club and for general use by the respondent school. The use of profits does not indicate strongly a separate legal entity; it could equally well suggest an arrangement analogous to that of a trading division within a company.

117. There are indicators of a close link with the respondent school. The Club operated on school premises without charge to the Club. Details about the breakfast club appeared on the school website with enquiries directed to the school office. The claimant was identified on the school website as both a Teaching Assistant and Out of Schools Club Organiser. Mrs Nelson involved herself to a considerable extent in meetings with the claimant about the Club when the financial difficulties arose. Prior to the claimant taking on the role, the post of Administrator had been held by the respondent School Secretary.

118. It may be that the Club in its original form had a separate legal identity to the school. The question I have to consider is whether, by December 2016, the Club had a separate legal identity from the respondent school.

119. It may well be that the Headteacher at the time and some others regarded the Club as separate from the school. It appears to me from the email of Mr Wiseglass dated 14 November 2016, written at a time before any possibility of legal action by the claimant against the respondent had been raised, that he did not regard the Club as having a separate legal identity from the school. Mr Wiseglass is an accountant and a governor. As an accountant, I would expect him to have a good understanding of different legal structures of organisations. He made a number of recommendations including moving the accounting function to Mr Rose. In making his suggestion that

Mr Rose take over the accounting function, Mr Wiseglass wrote: "It has only been a historic matter that Mrs Gruber took over the running of the banking facility as someone used to operate the club on a private basis." Mr Wiseglass noted that there were other afterschool clubs (mentioning specifically swimming and gymnastics) that ran during the week free of charge and suggested that the provision of the after-school club should be looked at as a whole with the various other after school activities as opposed to running each club as a separate entity. He suggested, as an option of last resort, if the club could not be reinvigorated, investigating third party providers to see whether they could take over the offering in its entirety. It appears to me likely that Mr Wiseglass would have made such enquiries as he considered he needed to make to understand the situation before making his recommendations and that his recommendations would have been of a different nature had those enquiries led him to believe that the Club was already being operated by a third party i.e. an organisation separate in legal identity to the school. If he had insufficient information to be able to form a proper understanding of the situation, I would have expected his email to make this clear. Mr Wiseglass was not called to give evidence at this hearing. My findings, therefore, are based on what I consider to be a normal reading of his email.

120. Regardless of what anybody understood to be the case at the time, if the Club was a separate legal entity, what was it? There is no evidence that it was a corporate entity. If it has a separate legal existence from the school it must, therefore, be an individual or a group of individuals.

121. The respondent suggested prior to this final hearing that the claimant was an independent contractor and that this was her "business". That suggestion appears to me to have no basis in the evidence. The claimant was clearly a paid employee albeit with managerial responsibilities. The respondent did not pursue the argument that the claimant was an independent contractor at this final hearing.

122. Was this an unincorporated association as suggested by Mrs Gruber? I consider that, in the form it was in by the time Mrs Gruber became chairperson (of a non-existent board) and Mrs Elton became administrator, it is very unlikely that this was the case, even if, at some time in its history, the Club had been such an association. If it was an association, who were the members? Mrs Gruber suggested she and the claimant were the members. It seems unlikely to me that the claimant was a member; she was a paid employee rather than a member of an association. It is more possible, but also unlikely, that Mrs Gruber was a member. If she was, it appears to have been an unincorporated association with one member. That does not appear possible; there can be no association if there is no one to associate with.

123. If it was not an unincorporated association, was the Club, in fact, just Mrs Gruber trading in the name of the Club, with the personal liabilities that that would entail? Mrs Gruber certainly did not understand this to be the case. It seems to me unlikely that Mrs Gruber was a sole trader or sole trustee of a trust. Mrs Gruber took little part in the discussions with the claimant in December 2016. Mrs Gruber had suffered a recent bereavement and returned from a period of mourning just before 7 December, which she thought may have been why she was not asked to attend the meeting on 7 December. However, if Mrs Gruber was the Club, I would have expected her to have been either leading the discussions with the claimant or asking

others to act on her behalf in the matter. It appears she regarded herself as someone to be invited to meetings about the running of the Club, rather than being the Club and asking others to act on her behalf if she was not able to do so due to personal circumstances at the time.

124. What happened after the claimant and Mrs Gruber stopped being the administrator and chairperson respectively may also cast light on the likelihood of the Club having a separate legal identity. Mrs Whelan took on both roles. I consider it very unlikely that the Club is now Mrs Whelan trading in the name of the Club, with the personal liabilities that would entail.

125. The claimant's predecessor in the role of Club Administrator was the respondent school secretary. Whilst she was paid separately for this role to her role as the school secretary, I consider this an indicator that the Club had become an operation of the school, even if, in its foundation, it had been something separate.

126. The respondent has had ample opportunity to investigate the situation and put forward what it considers to have been the legal entity which employed the claimant prior to the final hearing. It has not suggested a legal structure for the Club which seems at all likely. Coupled with the unlikelihood of the Club having any of the legal structures I have considered as possibilities, this leads me to conclude that the Club was, in fact, part of the respondent school. The claimant was, therefore, employed by the respondent school in her capacity as administrator of the Club.

Was the claimant dismissed?

127. I turn next to the issue of whether the claimant was dismissed. The claimant's case is that she was dismissed at the meeting on 7 December 2016. There was some dispute as to what was said at that meeting. The claimant's account in her witness statement was that Mrs Nelson told her that Mr Rowe did not want to meet with her as he did not know her but that he "wanted Mrs Nelson to tell me to walk away from my position as the Out of School Club Administrator and to take any paperwork relating to the club to the Bursars Office, which I did". The claimant did not satisfy me on a balance of probabilities that she was told that Mr Rowe wanted her to walk away rather than this being her impression from the conversation. I conclude that nothing in the conversation on 7 December 2016 could reasonably have been understood as a dismissal of the claimant. Even if I had accepted the claimant's evidence as to what was said by Mrs Nelson, I would have concluded that Mrs Nelson's words were not words of dismissal. The claimant's actions following that meeting are consistent with, at the highest, a confusion about her position. She wrote to the respondent on 8 December 2016 seeking to clarify the position. She attended meetings on 9 and 13 December 2016 without asserting that she thought she had been dismissed. The discussions at those meetings must have clarified for her that she had not been dismissed, since they talked about how she was to carry out the role of administrator in the future. Help was offered to set up systems and she went with Mrs Whelan to start to look at the spreadsheet Mrs Whelan had prepared, although she got called away to attend to her Teaching Assistant duties shortly afterwards. I conclude that the claimant was not dismissed on 7 December 2016. Her complaint of unfair dismissal relating to an alleged dismissal on 7 December 2016 must, therefore, fail.

128. During closing submissions, I invited both parties to say when and how they thought the claimant's employment had ended, if I concluded she was employed by the respondent but not dismissed on 7 December 2016. Ms Santamera submitted that the claimant was dismissed at the meeting on 13 December 2016. No evidence I have heard about that meeting suggests that anything was said or done at that meeting which could reasonably be understood to be a dismissal.

129. I conclude that nothing said on 7 or 13 December, even if I had accepted the claimant's account of the meetings as completely accurate, resulted in an enforced resignation which would be regarded as a dismissal. The conversations included offers of help to enable the claimant to continue doing the role. This was not a situation where the claimant was faced with the options of resigning or being dismissed.

130. It seems apparent that the claimant is no longer employed by the respondent as administrator of the Club. Her employment, therefore, must have come to an end in some way after 13 December. I have considered whether I should and could make any finding about when the claimant's employment came to an end and whether this was as a result of dismissal or resignation and, if the claimant was dismissed, whether the dismissal was unfair. Since the claimant has not put her case on an alternative basis that she was dismissed unfairly at a later date, and the respondent has not had notice that it would have to respond to such a case, I have concluded that it would not be fair to do this. I have concluded that I should limit my consideration to whether the claimant's case, as put by her, is well founded. Since I have concluded that the claimant was not dismissed on 7 December 2016, I conclude that the complaint of unfair dismissal is not well founded.

131. I have concluded that the claimant was not dismissed on 7 or 13 December 2016 and the claimant has not put forward a case that she was dismissed at any other time. Since the claimant has not satisfied me that she was dismissed, I conclude that the complaints of breach of contract in relation to failure to give notice of termination and in respect of a statutory redundancy payment are not well founded.

132. If I had found that the claimant had been dismissed at any time, I would have concluded that this was not by reason of redundancy and the claimant would not, therefore, have been entitled to a statutory redundancy payment. The job of administrator of the Club still needed to be done and was taken over by Mrs Whelan. There was, therefore, no redundancy situation.

_____

Employment Judge Slater

Date: 29 November 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 November 2017
.....

.....
FOR THE TRIBUNAL OFFICE