EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104821/2017

Hearing Held in Dundee on 9, 10, 11 April; 10 May; 28, 29 June; 2, 3 July; 14, 22 August; 10, 11, 12, 17, 18 December 2018; 18, 28 February; 26 June and 30 July 2019

Employment Judge I McFatridge
Tribunal Member N Rowlands
Tribunal Member M Keenan

Ms W Swankie	**Claimant** **Represented by** **Mr Whelan,** **Solicitor**
Arbroath Town Mission (SCIO)	**Respondent** **Represented by** **Mr MacMillan,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that (1) the claimant was automatically unfairly dismissed by the respondent in terms of section 103A of the Employment Rights Act 1996; and (2) the respondent unlawfully subjected the claimant to a detriment in terms of section 47B of the Employment Rights Act 1996. The respondent shall pay to the claimant a monetary award of Nineteen Thousand, Two Hundred and Ninety Eight Pounds (£19,298). There is no prescribed element.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been automatically unfairly dismissed by the respondent in terms of section 103A of the Employment Rights Act 1996. She also claimed that she had been unfairly dismissed in terms of section 98 and that she had suffered a detriment as a result of making protected disclosures in terms of section 47B. The hearing was originally set down to take place over four days in April and May 2018. Unfortunately, for reasons which will be expanded upon below it was not possible to complete the evidence during this period. The hearing was then continued to various dates before the evidence was finally concluded on 26 June 2019. Thereafter the Tribunal heard submissions on 30 July. During the course of the hearing evidence was led on behalf of the respondent from Moira Milton a member of the respondent's Board, Derek Marshall a member of the respondent's Board and Mr Inglis another member of the respondent's Board. Mr Marshall's cross examination was interrupted so as to allow Mr Inglis to give evidence when he was available. As it happens Mr Inglis' evidence was also interrupted and his final examination was conducted out of sync. The claimant gave evidence on her own behalf. Evidence was also given on her behalf by Councillor David Fairweather the leader of Angus Council who had attended a meeting of the respondent, Isobel Woods and Valerie Walker both former members of the respondent's Board. A joint bundle of productions was lodged which was added to during the course of the hearing. There were various discussions and rulings as to what could be added and where relevant these are set out below. It should also be recorded that at a fairly late stage in proceedings the claimant's representative sought to lodge documentation which he had received from OSCR and which he indicated were the principal letters or emails which had been sent in by the claimant and by Thorntons and which were relied upon by the claimant as being protected disclosures. This request was made after all of the respondent's witnesses had given evidence and in the middle of the claimant's evidence in chief. The respondent vociferously objected and the Tribunal upheld this objection for reasons which are set out below. On the basis of the evidence and the

productions the Tribunal found the following factual matters relevant to the claim to be proved or agreed.

Findings in fact

2. The respondent is a Scottish charitable incorporated organisation with a Christian ethos. Prior to being incorporated as an SCIO the respondent was a charitable trust. The organisation ran church services and carried out community work in Arbroath. The organisation owned a building known as the Arbroath Mission. They ran Sunday Schools and Youth and Community Groups from this building. There were twice weekly church services. The organisation was led by a Pastor. From 1950 to 2010 the Pastor was a Mr Clapham. Isobel Woods, one of the claimant's witnesses is his daughter. Under his leadership the Mission expanded its role. From around the 1980s the Mission obtained assistance with staff from the Manpower Services Commission and also took on broader social work commitments with assistance from the local authority and other grant funding bodies.

3. The claimant grew up in Arbroath and attended the Mission as a child and as a young adult. She became heavily involved in its work. She taught Sunday School and organised an annual camp. She taught bible stories and volunteered at various events. The claimant saw herself as a committed Christian. Whilst a child the family had attended the local Church of Scotland but also attended the Mission Sunday School. The Pastor held services once or twice a week.

4. In or about 1984 the respondent produced a written constitution which was adopted on 17 August at a meeting of the members. This was lodged (J6). The "objects" clause read

> "The object of the Society shall be to promote the spiritual welfare of the inhabitants of Arbroath, especially of those who generally attend no place of worship, and without distinction of political, religious or other opinions, to provide facilities in the interest of social welfare for education and recreation with the object of improving the conditions of life for the inhabitants of Arbroath and environs.

> For this purpose the Society shall employ a Superintendent for the prosecution of this work."

Under "membership" it states

> "Application for membership shall be approved by the Board of Directors. All members shall pay such subscriptions as the Board may from time to time determine."

Under "dissolution" it stated

> "If the Board by a majority decide at any time that on the ground of expense or otherwise it is necessary or advisable to dissolve the Society it shall call a meeting of all members of the Society of which meeting not less than twenty-one days' notice (stating the terms of the resolution to be proposed thereat) shall be posted in a conspicuous place or places in the neighbourhood and advertised in a newspaper circulating in the neighbourhood. If such decision shall be confirmed by a majority of those present and voting at such a meeting the Board shall have power to dispose of any assets held by or in name of the Society. Any assets remaining after the satisfaction of any proper debts and liabilities shall be applied towards purposes which the law regards as charitable for the benefit of the inhabitants of Arbroath and environs as the Board may decide."

5. In or about 1987 the respondent under Mr Clapham applied for funding from the Manpower Service Commission to employ someone full time as Superintendent. The claimant resigned from her position at the Inland Revenue and was appointed to this post. The claimant thought this was a good opportunity to get experience in social work. She discussed matters with Mr Clapham and the basic idea was to introduce services for young people in the Mission. After she started the claimant also commenced setting up services for elderly people. The funding from Manpower Services Commission ended but was replaced by funding first of all from Dundee City Council and thereafter from Angus Council. The claimant's wages were funded. Over time the claimant applied for additional funding so as to employ additional staff and cover overheads.

6. Over time there was a dialogue between the respondent and the local authorities whereby the local authority asked the respondent to take on various roles and the respondent set up a service to provide this. The claimant was heavily involved with all of this. Her title appears to have changed over the years from Superintendent to Centre Manager.

7. The respondent substantially increased the scope of the services provided following the claimant's appointment. The claimant was heavily involved in these additions. The respondent carried out extensive building work so as to provide new premises from which their new services could be carried out. In 1994 they completed a Day Care Unit with an adjacent garden room. They also had a dining hall and kitchen. This was in addition to the games hall and other meeting rooms they previously had. The respondent had run a lunch club prior to this but it was expanded after 1994.

8. Some of the funding for the various extensions came from charitable trusts including a large donation of £100,000 from the Bradbury Trust. The respondent was fundraising to complete the new building and add to their services more or less continuously from 1987 onwards.

9. One source of funding was a service level agreement with the local authority. One of these agreements was to provide day care facilities for 16 individuals each day. The lunch club catered for around 100 per day. In addition to this the respondent would arrange for the delivery of meals to those in the community who could not attend. The respondent had a bowling club and various keep fit clubs. They provided facilities for a girl's brigade. Latterly they also had a lighthouse kids' club and provided a clothes bank. There were youth clubs.

10. They operated a craft group which encouraged service users to make handicrafts which were thereafter sold at a weekly craft fair.

11. During this period the respondent was governed by a board. The claimant had at one time been a member of the board. At some point after she had been working as Superintendent/Centre Manager the respondent was visited by a representative of one of the charitable trusts who were providing funding. The claimant was advised that as a paid employee of

the organisation it was inappropriate for her to also be a member of the board. The claimant resigned at that point.

12. Despite the fact the claimant was no longer a member of the board she continued to act as Board Secretary. The claimant was responsible for preparing minute books and generally for all administrative work which required to be carried out.

13. Over this period the board held general meetings which usually took place after the church service on a Sunday. As a result the only people who usually attended such general meetings were people who had been attending the church service. There were generally no matters of controversy at these meetings and no votes were held. No issues arose as to who was a member and who was not a member. At the AGM when the board was required to stand for re-election the usual practice was for the board to stand down and thereafter be re-elected en masse. The claimant was paid a salary and every so often the board would agree to an increase. This was not something that happened every year. Over the period the respondent built up to be an extremely successful community organisation and it has to be recorded that it was clear to the Tribunal and indeed accepted by the respondent that the claimant had played an exemplary role in facilitating this expansion over the years.

14. As noted above the claimant was the only person within the respondent who carried out administrative tasks. One of her tasks was to make applications for funding to various fundraisers and to the local authorities. Generally speaking fundraisers would require sight of the respondent's constitution. The local authority would also require to see this constitution on a regular basis. At some point in the early 2000s the claimant was advised that the local authority required certain clauses to be in a constitution and it would appear that a new constitution was prepared.

15. As can be seen below the issue of the constitution later came to be a source of contention between the parties. Having heard all of the evidence the Tribunal's view as to the factual findings which it can make relating to the constitution is as follows.

16. A constitution was prepared in or about 2004 and according to the respondent's minute book was adopted. It is not clear whether the specific requirements set out in the 1984 Constitution were followed or not. This constitution was sent to the office of the Scottish Charity Regulator when that organisation was set up in 2005 or 2006. Given that the claimant was the person who carried out administrative work for the respondent at the time the Tribunal was satisfied that the claimant must have sent this document to OSCR in 2005 or 2006.

17. A meeting took place of the respondent's directors on 9 November 2005. A minute of this meeting was taken by the claimant in her handwriting and is in the respondent's minute book. A copy of the relevant page was lodged (J11). This states

> "The minute of the August meeting was read; approved by Peter Donald and Stephen Freeburn.
> Robert Marr pointed out that the Board were not constitutionally correct in having the AGM at this date as the constitution stated October as the AGM date. To avoid this error in future Mr Marr agreed to draw up a resolution to change the constitution to the effect that the AGM should be held by the end of December following the end of the accounting period, the resolution to be notified in the local press and passed in due course at a general meeting of members, probably after a Sunday evening service. This was unanimously agreed …."

There is no record of a further AGM or board meeting which specifically states that it approved this or any other alteration to the 2004 Constitution. That having been said the Tribunal were satisfied on the balance of probabilities that a document referred to as the 2005 Constitution was prepared by the claimant at around this time. That constitution states on its face that it was adopted at a general meeting of members duly convened at Arbroath Town Mission Centre on the Fourth day of December Two thousand and five. The respondent's records indicate that an Extraordinary General Meeting took place on that date but there was no minute lodged specifically stating that a constitution was approved on that date. Notwithstanding that omission the Tribunal were satisfied that thereafter (at least up until her disciplinary appeal meeting in 2017) the

claimant's understanding of the position was that the 2005 Constitution was the correct constitution of the respondent. This was the constitution which was kept by her in her office and copied and sent out whenever the respondent required to show the constitution to an external body. The 2005 Constitution was sent out by the claimant on many occasions to the local authority in connection with the various agreements they entered into with the respondent. It was also sent out to numerous outside funding agencies. The claimant did not send a copy of the 2005 Constitution to OSCR.

18. For many years after 2005 the board of directors simply carried on as before. As noted above these were successful years for the respondent as they were obtaining outside funding and expanding the reach of the organisation. No controversies arose and generally speaking no-one on the board had occasion to check the constitution or examine it in any way. At annual general meetings the respondent continued their practice of allowing the board to be re-elected en masse rather than individually as they ought to have been in terms of the constitution.

19. The terms of the 2004 Constitution and the 2005 Constitution were in many ways similar albeit there were differences. The 2004 Constitution for example includes additional clauses in its objects clause allowing the respondent to purchase and lease heritable property, to assist and co-operate with other charitable organisations and "to carry out any other activities within the Arbroath area and deemed by law to be charitable in furtherance of the foregoing objects". These clauses do not appear in the 2005 Constitution. Both constitutions state in their objects clause that

> "All trustees, directors (and associates) must profess their belief in the divine inspiration, authority, sufficiency and total inerrancy of the Holy Scriptures. Nothing shall be taught in the Centre opposed to the Holy Scriptures." (NB Only the 2005 Constitution refers to "associates)

With regard to membership the relevant clause in each constitution is similar but with a crucial difference. The 2004 Constitution states

> "Membership shall be open to all who regularly attend the Centre for spiritual, recreational or social purposes and appropriate membership

> records shall be maintained and regularly updated. All members shall pay such subscriptions (if any) as the Board may from time to time determine. In the event of any dispute as to eligibility for membership the decision of the Board will be final."

20. The 2005 Constitution on the other hand states simply

> "Membership shall be open to all who regularly attend the centre for spiritual, recreational or social purposes and appropriate membership records maintained and regularly updated."

Crucially the 2005 Constitution does not refer to a subscription and does not state that in the event of any dispute as to eligibility the decision of the board will be final.

21. Both constitutions and indeed the 1984 Constitution refer to the keeping of membership lists. The Tribunal was satisfied on the evidence that up until the events which led up to the claimant's dismissal the issue of membership was an entirely non-controversial one within the organisation and that the administration of membership records was somewhat disorganised.

22. A list of memberships of the Mission did exist and at some point membership cards for the Mission were issued. During the period after 1984-5 when the Mission greatly expanded its operations and in particularly following the additional building works in the mid-90s some members at least began to refer to the "mission" and the "centre" as two distinct entities albeit there was absolutely no organisational reason for doing this. Individuals who attended things like keep fit classes or bowling would require to pay a subscription. Some would be seen as members of a particular club. In addition there were records kept of the people who used the lunch club. These membership lists were ad hoc and were administered by the claimant. When the new Pastor arrived in 2013 the claimant provided him with copies of these lists.

23. Board meetings and general meetings were entirely uncontroversial and as before the tradition was that the general meeting be held immediately after a church service. This had the effect that generally speaking only

those who attended the church service would be present at general meetings. Members of the board would not always be attendees at church since some board members attended their own churches rather than the Mission service.

24. The Reverend Clapham retired in 2010 having been Pastor for 60 years. A replacement was not found for him immediately. The Reverend Clapham died in 2013. That same year the respondent appointed a new Pastor, David Webster.

25. By the time of Mr Webster's appointment, the claimant was not on the board. She did however attend board meetings every month in order to give a report on the activities of the centre. She also for a time took minutes although later on a separate minute secretary was appointed.

26. In or about February 2014 Ms Moira Milton jointed the board. Shortly after she joined she asked the claimant if the claimant had a contract of employment. The claimant provided her with a job description but did not respond as to whether or not she had a contract. It would appear that at some point the claimant consulted Messrs Thorntons who were the respondent's solicitors in relation to this.

27. At some point in or around November 2014 Derek Marshall joined the board. He was invited to join the board by another member who indicated that he had particular financial expertise relating to charities. Shortly thereafter Mr Andrew Inglis joined the board. Mr Inglis had worked as an architect and had previously been involved with the centre in relation to various construction projects. Both Mr Inglis and Mr Marshall are members of Strathmore Christian Fellowship which is an evangelical Christian organisation. Neither attended the Mission services but both continued to attend services at Strathmore Christian Fellowship.

28. In or about 2015 it was suggested to the board that they should look to incorporating the respondent as a SCIO. This is an incorporated charitable organisation which has the benefit of providing limited liability to the members. The respondent was at that time a charitable trust which meant that theoretically members might face unlimited liability. All of the board members including the claimant considered that it would be a good

idea to proceed to incorporate a SCIO. Mr Marshall and Mr Inglis indicated that they had been heavily involved in carrying out this process for Strathmore Christian Fellowship. They undertook to provide a draft constitution for the SCIO which was prepared on the basis of the constitution which had eventually been adopted for Strathmore Christian Fellowship.

29. The board met on numerous occasions during 2015 in order to discuss this. The claimant was in attendance at many if not all of these meetings. It soon became clear that there was a difference of opinion between the claimant and other board members in relation to the vital question of who was to be regarded as members of the existing organisation.

30. As mentioned above, up to at least the time Reverend Webster took over the issue of membership had not been something which anyone had considered. Although the 2004 Constitution refers to the possibility of members being charged a fee this had never ever happened and accordingly there were no subscription lists which could potentially show who had paid and who had not. The claimant had provided Mr Webster with what she believed to be a list of the members of the Mission. This was a very old list and when one weeded out the individuals on it who were no longer around there were only about 12 people on this. Generally speaking, there were probably around 30 to 40 who were reasonably regular attendees at the Sunday service. In addition to this the claimant had her various lists of members of the different clubs and groups which used the centre. There were probably around 150 to 200 on this list. The claimant's understanding of the position was that everyone who used the centre was a member of Arbroath Town Mission. The board's view on the matter was that only those members who regularly attended the church service could be regarded as members. Both parties appear to have arrived at these conflicting positions in the very early days of considering the SCIO and without either side consulting the constitution. Views appear to have been determined on the basis of extrapolating from what individuals understood had gone on in the past.

31. As part of the claimant's duties she would on occasions require to consult the Mission's solicitors Messrs Thorntons. At some point in 2013/14 it

would appear that she was in contact with them over her own contract of employment. It would be the claimant's responsibility to deal with contracts of employment for the organisation. She also at some point over this period spoke to Thorntons about updating the constitution. She provided Thorntons with a copy of the 2005 Constitution on to which she had made various alterations to various clauses (J65/3-J65/4). The alterations were to the objects clause so as to provide specifically that the Mission dealt with children's and youth activities providing that Missionary/Pastor would be appointed as well as a General Manager and appropriate staff to meet the demands the social services provided.

32. It would appear however that the board did not approve of this and a letter was sent by the board to the claimant in September 2014 dealing with a number of issues which had arisen where there appeared to be conflict (pages 79-81). This referred to the ongoing dispute regarding membership. Paragraph 3 on page 81 refers to a file note which the claimant had had with Thorntons regarding the telephone conversation and referring to the updated constitution being in process. The letter goes on to state that the board had no knowledge of this.

33. Following the claimant's dismissal Ms Milton wrote to Thorntons seeking clarification as to which constitution had been sent to them. They responded on 1 December 2017 indicating that the instructions had come in February 2014 from Ms Swankie and that they were provided with a pdf copy of the Mission Constitution marked with handwritten amendments. The constitution was noted as having been adopted on 4 December 2005. They then went on to say that they had advised the claimant on the process which would need to be followed to carry out the amendment and had then been instructed in May 2014 not to carry out any further work.

34. An extraordinary meeting of the members of the respondent was called for on 23 August 2016 in order to discuss the SCIO. This was lodged (J13). It notes that after opening prayers Derek Marshall was invited to explain the need to change the status to a SCIO. It was noted that Mr Marshall had already guided the "Kirriemuir fellowship" through this procedure. It is probably as well to set out the minute thereafter in full. It states

"Derek explained that at present we are an unincorporated organisation and therefore have no legal protection from litigation. We live in a society where charities are sued and at the moment the directors are financially responsible. If we become an incorporated charity two thirds of the members will have to vote in favour of it. We will still be a charity and once we change our status all assets and liabilities will be transferred to the incorporated charity or SCIO, which can take six to nine months. The chairman asked if there were any questions at this point.

Wilma Swankie, Centre Manager said that it was wrong that only Church members could vote and not Centre users.

Isobel Woods said that the meeting was unconstitutional as a notice of the proposed meeting had not been published in the newspaper. Derek then read from OSCA guidelines stating that it was only necessary to do that if the organisation was being dissolved. Isobel then apologised as she was unaware of that. She then went on to quote from the 2005 Constitution that membership of the Mission was open to all who used the facilities of the centre and that no vote had been taken at the last Extraordinary General Meeting. She wanted to know why only registered members were invited to the meeting. Derek replied that there was a lack of involvement of all the bodies. Pastor Dave said that he had no wish to disenfranchise anyone but the local Church Fellowship should have a spiritual membership. The previous meeting in April had explained membership to the congregation. Andrew Inglis asked if the Centre users were Christians who recognised the spiritual ethos of the Mission and the chairman said that some did but it was up to us to witness the others. David Searle then said that it was his fault that this had arisen and that he would go back and consider all social and recreational members. The Chairman then said that this was all the Lord's work and we should honour the Lord and walk together. He continued that it was worthwhile to be incorporated and expressed his gratitude to Derek for all the hard work he had put in. He also thanked David Searle for his comments. …"

35. The annual general meeting of the respondent was held every November. It is clear that in the run up to the November 2016 AGM there was a split within the respondent over the issue of membership with the claimant taking a particular view on this issue and the majority of members of the board taking a different view. The Tribunal's view was that by this stage each side had become somewhat entrenched in their position and the matter had been discussed at a number of board meetings. Given the claimant's position as the most senior member of staff and someone who had been associated with the Mission for a substantial number of years it is likely that there was to some extent the inevitable tensions which arise between the old and the new in any organisation. It was clear to the Tribunal that some members of the respondent board, particularly those who gave evidence, felt frustrated by the claimant's attitude.

36. The respondent's AGM took place on 22 November 2016. A minute of this was produced (R14). The minute was produced by the minute secretary. The introduction mentioning who was present shows that the issue of membership was still something which was to be resolved. The board members are mentioned by name as is Pastor Webster. The remaining attendees are then described as "the majority of members of the fellowship, Wilma Swankie, Centre Manager, and approximately thirty persons consisting of service users and centre staff were also present." Matters then proceeded to the election of board members. It is as well to set out what the minute states in this connection.

> "The Chairman announced that the next item on the agenda was the election of directors and Angus Thow asked if he could make a few remarks to which the Chairman agreed. Mr Thow advised there were people in the room who wished to put their names forward for election. He said that the Constitution allowed that and suggested that, contrary to tradition, the board should step down in its entirety as that would be more democratic.
>
> The Chairman replied that what he was suggesting was contrary to the established and long standing tradition of the Mission and stated that the board had always been re-elected en bloc. Stephen stated that those serving on the board were highly skilled and talented people

who provided their services at no cost to the Mission because they loved the Lord and the Mission. Mr Thow said that he was not questioning the integrity or motivation of the board members but there were other people in the room who wished to serve on the board.

Liz Brown pointed out that the Mission was a Theocracy and not a democracy and proposed that the board, as always, be re-elected en bloc. This was seconded by Rena Freeburn.

Mr Thow then stated that he wished to put forward an amendment that the board would not be re-elected en bloc.

Liz Brown said that the board had always been voted in en bloc and asked why the same could not apply this time. Isabell Woods replied that things had changed and in the past there had been no reason for the board to stand down. Isabell Woods asked what the board were fearful of and she, along with Angus Thow, called for democracy.

Rena Freeburn objected to the board standing down unless there were very valid reasons for it. Isabell Woods replied that there were valid reasons, one of which was dishonesty. This comment caused many of the members to gasp aloud. Isabell Woods was challenged to be specific and went on to say that she had issues with the board and had resigned from the board last year as she could not work with dishonest people.

When Mr Thow interrupted, he was asked by Andrew Inglis, Vice President, if he was a member of the Mission and if he attended regularly. Mr Thow replied that he was a member of the Mission who did attend regularly. Mr Thow's response was met with loud gasps of disbelief from members. The Chairman then called for order to give Eddie Woods the opportunity to speak. Mr Woods asked board members Andrew Inglis and Derek Marshall if they were members of the Mission to which they both replied that they were not.

There was further unrest. Mr Thow reiterated the amendment he was putting forward, that being the board were not re-elected. This was seconded by Isabell Woods.

The chairman went on to say that he was saddened by the insults and comments made. Firstly, by Mr Thow claiming to be a member of the Mission when he had, in fact, left the Mission a long time ago. Secondly, by Mr Thow's, Mr and Mrs Woods' lack of respect and

appreciation shown towards Mr Inglis, a skilled Architect who has served on the board and attended to the repair and maintenance work on the buildings, and to Mr Marshall, the Treasurer, who had brought a wealth of experience to the board. The Chairman said that the Mission had benefited greatly from the skills and services of both these men.

The Chairman advised that, due to the sad passing of Jack Picken who had served on the board for many years, there was a vacancy on the board for one individual. Morven Webster proposed Jane MacAskill and this was seconded by Liz Brown. Isabell Wood then proposed Angus Thow and this was seconded by Sadie Brown.

Wilma Swankie suggested that the board be elected individually and that the board members should stand down in accordance with the Constitution. The Chairman replied that the Constitution was silent in that it did not specify the process by which the board was re-elected and re-election had always been done in compliance with the Constitution.

Reverting back to the defamatory remarks made against the board, the Chairman called for the accuser to stand up and give reasons. Isabell Woods said that Derek Marshall was a liar and went on to explain why. Derek Marshall denied what Mrs Woods had said and gave his version of events. Mr Inglis corroborated Mr Marshall's version of events as he had been present at the time in question. The Chairman stated that he found it deeply disturbing that board members be accused of lying.

Mr Thow stated that if there was to be no vote, there would be no democracy. The Chairman replied that there is always democracy and every single year at an AGM the directors stand for re-election and are typically re-elected en bloc. Mike Allan sked Mr Thow how many AGMs he had attended at the Mission in the last ten years and, in that period, how many times had the board not been re-elected en bloc. Mr Thow did not respond to Mr Allan's question.

Jim Brown said that he was really saddened and disappointed that non-Christians had come in to witness such animosity. Mr Brown said that he had been a member of the Mission back in 1983 and had also served on the board then. Mr Brown said things had not been perfect

back then and he had gone elsewhere for a while. He was glad to be back at the Mission and said that Christians should be known by their love for one another instead of bickering with one another.

Pastor David Webster called upon those who were Christians to act and speak like Christians, with grace and gentleness.

Douglas Rule then stepped forward and testified. He expressed upset and sadness at tonight's events and said that he hoped we all had something in common in that we were one big family who loved the Lord and hoped that things could be resolved in one way or another.

Jean Thow said that things hadn't gone the way Angus Thow had hoped they would go but called upon the Chairman to allow people to air their differences in an attempt to resolve matters. The Chairman advised that meetings had been held for the purpose of discussing incorporation to change the legal form of the existing Charity to a SCIO which was something the Government had provided for in today's very litigious society. The Chairman explained that incorporation would not affect anything or anybody but the directors would be protected from incurring personal liability. Incorporation required a much more detailed constitution and that was what the board had been working on. The reasons it had not yet materialised was because the board had listened to members and as a result had taken considerable time in making changes to the proposed Constitution to make sure it was more acceptable to members.

The Chairman explained the reason for the board being voted in en-bloc instead of individually. Board members had been asked and were willing to stand for re-election, united, and en bloc. The directors' view was that if certain board members were not voted in who were respectfully appreciated by their fellow directors, then none of the directors would be willing to stand for re-election. The Chairman told the members that it was up to them. They could vote the board in or, alternatively, vote the board out.

Andrew Inglis commented that he felt he owed the Mission a debt (from the time of Mr Clapham) as it was through the Mission his wife came to faith. He said that the Mission was very influential in the area and held in high esteem by Angus Council and others. He was fearful that the long term future of the Mission's work would be placed in

jeopardy. His view was “If the thing is working, don’t fix it”. He strongly felt that the Mission had a purpose and a vision that ought to be expanded upon and if a regime change was sought, it would destroy the long term future of the Mission’s work. He encouraged members to vote the board in, fully support the Pastor and his wife and pray for them instead of bickering with some who don’t even know the details of what goes on at the Mission.

Wilma Swankie referred to the people whom she had invited to attend. She said that they supported the work of the centre. Some of them were members of other church fellowships. She took issue with the fact that all of them did not have voting rights and insisted that they were all members according to the constitution. Andrew Inglis acknowledged that they may well love the Lord which is respected but if they are a member of the Mission’s fellowship they should be part of the living witness here, meaning regular attendance at the worship meetings. Wilma Swankie insisted that the Mission was not a church. She was then asked why the Mission had a minister if it was not a church.

Pastor David Webster recognised that not everyone had the same opinion on things. He mentioned that the issue of membership had been discussed at board meetings and he referred to the Mission’s governing document, the constitution. Board members had been given a constitution dated 2005. Some board members had been surprised with that as they had previously been given a constitution dated 1984 and had no recollection of the 1984 constitution ever having been replaced with an updated version. The minutes book for the period 2005 has gone missing so could not be referred to. The 2005 Constitution stated that membership was open to all who regularly attended whilst the 1984 Constitution said that application for membership had to be approved by the Board. He said that as the Mission was a Christian organisation it should have a Christian membership. Simply by defining the membership as to whomever walks in the door would not make sense. Moira who is a board member and solicitor explained that it was open for anyone to apply for membership and where there was uncertainty or ambiguity the Minutes book and previous constitution should be referred to for

clarity. Following much discussion, the board agreed that the membership consisted of those in regular attendance at the church meetings who had membership cards and those in regular attendance at church meetings who had signed the new membership forms. The Pastor said that he had a great deal of respect for the board who were also his employer and if the board were voted out he would have to seriously question whether the Mission was an organisation which he would want to be associated with. He strongly recommended the board be re-elected en bloc.

David Pitblado, a member of the Mission who also attends the bowling said that he had asked bowlers if they were members of the Mission or the bowling club and the bowlers had all replied that they were not members. They had neither been issued with membership cards nor had they any idea of what membership was. Wilma Swankie responded by saying that every single person that comes to the Mission for whatever reason is a member and their names are recorded in a book. David Pitblado reiterated that the bowlers were not aware that they were members. When Wilma was asked whether her idea of membership included those persons in the community receiving meals she said that they were not members as they did not come into the Mission's premises.

The Chairman said that the organisation should continue its tradition of being a Christian organisation with our witness reaching out in a practical way to the local community.

With regard to the process for the appointment of directors the Chairman explained that the constitution did not define the process and it had always been the Mission's custom and practice for the board to be re-elected en bloc. No one had ever questioned that in the past. The board were elected for a period of one year which was not a long time especially when proposed changes were in process. At the end of the year, the whole board completes their duties as per the constitution. The Chairman thanked all the directors who had given their valuable time and talents for the benefit of the Mission for the past year and beyond. The Chairman stated that he had worked on many boards over time but had never been so privileged to work with such a group of people who cared or tried more than the people

serving on this board. The board were willing to stand for re-election but also accepted that they may not be re-elected. The Chairman then called for the voting papers to be given out. As President, the Chairman thanked everyone for their attendance and said that if he was re-elected he would continue to serve but if not he would respect their decision.

The voting papers were given out. Members were asked to print their name on the papers and 'Yes' if they were voting the board in and 'No' if they were voting the board out."

37. Thereafter the minutes record that voting papers were given out. The procedure adopted was that those present were asked to print their name on the paper. The papers were then taken into another room and counted. Members of the board were involved in the counting. After this it was announced that 15 had voted no to the board being re-elected, 30 had voted yes to the board being re-elected with three spoiled papers. It was also noted that "the actual member count was four voting no to the board being re-elected and 26 voting yes to the board being re-elected". It is unclear what definition of membership was being used.

38. Following the annual general meeting there still continued to be discussions at the board regarding the differing points of view of the claimant on the one hand and other board members on the other in relation to the issue of membership. The claimant decided to take legal advice. She contacted Messrs Thorntons. They gave her certain advice regarding matters. They indicated that the claimant should speak to AAVO which is (Angus Association of Voluntary Organisations) which is a voluntary body set up to assist voluntary organisations in the Angus area. They also explained the role of OSCR to her. They advised her that the method by which the board had been re-elected did not appear to be legally correct. They also gave her advice relating to the proposed SCIO Constitution.

39. The board were due to meet on 14 February 2017 and the claimant would normally have been in attendance at this as Centre Manager. On 14 February the claimant wrote to the President, Mr Freeburn (J15). The letter stated

> "I won't be present at the business meeting tonight and want to advise the Board that I have taken legal advice regarding the decision made that no members of the centre have a vote and respectfully ask that no date be made for EGM until this matter is resolved."

40. At the meeting on 14 February the respondent's board first of all deputed Moira Milton to speak to the claimant. Ms Milton reported back to the board that she had been unable to speak to the claimant and that the claimant said she was not willing to discuss anything with her. Ms Milton prepared a draft letter to the claimant which was approved by the board. This letter was sent by the board to the claimant on 23 February 2017 (J17). It is as well to set it out in full.

> "Arbroath Town Mission Board of Directors acknowledge receipt of your letter dated 14 February 2017 and respond herewith.
>
> We are disappointed that you have chosen to take legal advice on a matter upon which the Board has, after lengthy discussions, reached a decision. The Board are now in a position to arrange an Extraordinary General Meeting with a view to progressing incorporation and do not intend to postpone this indefinitely.
>
> We would ask that if you have any concerns with regard to the legality of the Board's decision on membership these may be provided to the Board together with your reasoning as soon as possible and no later than 1 March 2017.
>
> Since you are obtaining legal advice as an individual on a matter upon which the Board, your employer, has agreed, there is potential for a conflict of interest to you as an employee. For the avoidance of any doubt, Arbroath Town Mission will not, therefore, be liable for costs, if any, relative to the legal advice obtained by you."

41. On 24 February 2017 the claimant responded. She stated

> "Dear Stephen
>
> I acknowledge receipt of your letter received yesterday by the hand of Mike and Freda.
>
> I have already made my views clear on numerous occasions and see no point in reiterating them here. When I have clarity on what

concerns me I will of course advise the board but 1 March 2017 does not give enough time for this to be possible and I trust you will be kind enough to delay any EGM until then." (J17)

42. On or about 24 February the claimant also wrote to OSCR. A copy of this letter was not lodged. The Tribunal's view on the balance of probabilities was that the claimant raised with OSCR the same issues which she raised with her solicitors Thorntons. She advised them that the respondent was in the process of converting the organisation from a charitable trust to a SCIO. She advised them that in doing this the rights of membership and the voting rights of members were being changed. She advised them that the board were converting the constitution to a SCIO and that this involved changing the organisation from an organisation providing social services to what was essentially a church. She explained her view that members who were members of the organisation were being excluded from deliberation. She complained about the way the most recent AGM had been carried out and in particular that the board had been re-elected en bloc rather than resigning and then being re-elected individually. The claimant's concerns to OSCR were not that voting rights had been changed as such but that members had been excluded. Her concern with members being excluded from voting not just at the AGM in November but more generally. The issue was that the changes to the constitution would restrict membership to only people who were church members. She was concerned that the word church was continually spoken about at meetings. She was concerned that she spoke of the fellowship becoming a church. She felt that this would exclude a lot of people and that people who were currently members would not have a vote on whether or not to agree to this change. She raised a concern that individuals who were not actually members of the organisation were sitting as members on the board and had a vote on the board. In short she expressed the view that the board were not acting in compliance with the constitution. At around the same time the claimant also contacted AAVO and raised the same points with them.

43. On 17 March OSCR emailed the respondent. The email was lodged. It stated that it had received concerns and enclosed a booklet explaining how it dealt with these concerns. The first paragraph goes on to state

> "We have assessed that there are no regulatory matters that warrant investigation at this time and we will not be opening an inquiry. We will retain the concerns for our records.
>
> OSCR wishes to take this opportunity to suggest, that given the concerns which are listed below, the trustees might wish to consider seeking independent professional advice, and if necessary legal advice, to ensure that you act in compliance with your governing document, have the powers to make the intended changes, and that you follow the correct procedures."

They list the concerns as being

> "
> - The terms of membership and voting rights of the charity have been changed
> - The charity is intending to change its constitution
> - The charity is proposing to change its form to a SCIO
> - The charity is intending to change its name to a church
> - The resignation and (re)election of trustees at the most recent AGM was not done in compliance with the governing document
> - That trustees who are not members of the charity have a vote on the board"

44. The email goes on to indicate that advice and guidance can be obtained from Voluntary Action Angus and to ask for a copy of the charity's most recent governing document. It also refers to various other documents and then finally lists the duties of charitable trustees under the Charities and Trustees Investment (Scotland) Act 2005.

45. Ms Milton of the respondent contacted OSCR to ask them for a copy of the constitution they had which was registered with them. On 21 March OSCR responded (J21). They stated

> "As per the email received from Moira Milton 20th March 2017 requesting a copy of the charity's constitution.

Please find attached a copy of this for your records."

46. The respondent's position (which was not disputed by the claimant) was that the copy constitution sent by OSCR was a copy of the 2005 Constitution.

47. On 22 March Mr Marshall of the respondent wrote an email to the claimant. This was lodged (J22). He stated

"I trust you are well.
As you are aware the Board met last night to continue to process matters with regards to the SCIO and make arrangements for the EGM which has now been set for Tuesday 25th April. We were very saddened to receive from OSCR an email which said that a complaint had been lodged against the Board of the Mission but glad to see that they had said there was no case to answer and they would not be opening any investigation with regards to the complaint as it was unfounded.
We are however fully aware that although there is no base in law for this complaint and this is now in writing, there are matters of concern which you have with regards to the Day Centre and the board have asked that Jane, Moira and myself sit down with you as representatives of the board and talk things through with you both as a concerned member of the Mission and also as one of our employees as a matter of urgency. I would therefore request that you give us several dates which suit you and we will try and get this arranged asap."

48. The claimant did not respond to Mr Marshall. She felt intimidated by Mr Marshall. She had begun to feel very vulnerable going into board meetings. She felt that she was being accused of causing difficulty. Her view was that she just wanted to get on with her job at the centre. She was concerned at the way the board was behaving and that they may be acting illegally. She had taken legal advice and acted in accordance with that legal advice.

49. On 28 March Mr Marshall wrote again to the claimant stating

"Last Wed 22nd Mar I sent the email below to you on behalf of the Board and it disappoints me that after nearly a week you have chosen not to respond to our meeting request. You will by now be aware that the Board has set a date for the EGM on Tuesday 25th April and I would request a second time for a meeting between representatives of the Board and yourself as a matter of priority and urgency. If you could send us several dates and times when you are available I will make the necessary arrangements. Failure to respond to our meeting request Wilma will place the board as your employers in a very difficult position and which would necessitate further action.

I trust that for the sake of the witness of the Mission and the Kingdom we can sort out this situation before it escalates any further." (J23)

50. At some point around this time the claimant obtained a copy of the draft SCIO Constitution which was to be voted on in April.

51. A copy of the final constitution which was adopted was lodged. It is probably as well to highlight here the differences between this and the earlier constitutions. The organisation's purposes are set out in paragraph 4(4.1/4.3). This states

"4.1 The advancement of the Christian faith and the promotion of evangelical and Christian work primarily in the Arbroath area, throughout Scotland and the rest of the World, by all means consistent with the teachings of the Christian Bible, including worship, ministry, mission, prayer, witness, education, community service and the support of agencies and individuals and other charitable organisations involved in Christian missionary work and the relief of poverty or other social needs;

4.2 The relief of need by reason of age, ill health, disability, financial hardship or other disadvantage through the exercise of pastoral care and practical compassion and through the services provided to the most vulnerable members of the community; and

4.3 To provide facilities, services and recreational activities in the interest of social welfare to support and improve the conditions of life for the inhabitants of the Arbroath area including without prejudice to that generality, the provision of services in

accordance with the agreements for Day Care and Day Centre activities with Angus Council Social Work Department and their successors."

52. The provisions regarding membership are contained in page J8/4 and J8/5. These state

"**Qualifications for membership**

11 Membership is open to any individual who regularly attends the Arbroath Town Mission for spiritual purposes.

12 Members shall have the following obligations:

12.1 to seek to attend regularly at public worship;

12.2 to use their energy, abilities and talents in the service of Christ and His Church and contribute financially to the Church;

12.3 to maintain the spirit of Christian love and unity;

12.4 to show evidence of Christian character in their daily lives; and

12.5 to share the privilege of bearing witness to the Gospel of Jesus Christ;

13 Employees of the organisation may be eligible for membership, but the majority of the membership must always consist of non-employees.

Application for membership

14 Any person who wishes to become a member should complete a Membership Application Form. Following interview, the application for membership will then be considered by the Pastor and Elders or Board at its next board meeting.

15 The Pastor and Elders or Board may, at their discretion, refuse to admit any person to membership.

16 The Pastor and Elders or Board must notify each applicant promptly (in writing or by e-mail) of their decision on whether or not to admit him/her to membership.

17 The Constitution shall be made available and a copy given to each member either in printed form or by e-mail. Applicants for

membership shall be made aware of its contents before acceptance into membership.

Membership subscription

18 No membership subscription will be payable."

There are then provisions about the board keeping a register of members. There are also provisions regarding withdrawal from membership, re-registration of members and provisions regarding removal of membership which state

"27 A member may be removed where there is inappropriate unbiblical behaviour or prolonged absence from public meetings over a period of one year for what are deemed unreasonable reasons by the unanimous decision of the Board, provided the conditions in clause 28 are met. In all cases this will only be enacted when godly counsel and sympathetic overtures have failed to win over the member.

28 Any person may be removed from membership by way of a resolution passed by the Board providing the following procedures have been observed:-

28.1 at least 21 days' notice of the intention to propose the resolution must be given to the member concerned, specifying the grounds for the proposed removal;

28.2 the member concerned will be entitled to be heard on the resolution at the Board's meeting at which the resolution is proposed. In cases of disciplinary matters the Board will effect a settlement after seeking counsel from an independent source acceptable to the majority of the Board and the member concerned."

There are a substantial number of provisions regarding procedure at meetings. The constitution then goes on to provide for eligibility for appointment to the Board (page J8/11).

"56 The organisation shall be managed by a Board of Charity Trustees consisting of a number up to twelve including the Pastor

and Elders, a President, Vice-President, Secretary and Treasurer.

57 The Charity trustees shall be eligible to be appointed if they profess their belief in the divine inspiration, authority, sufficiency and total inerrancy of the Holy Scriptures.

58 A person shall not be eligible for election/appointment to the board unless he/she is a member of the organisation; a person appointed to the board under clause 66 need not, however, be a member of the organisation.

….

66 The board may at any time appoint any non-member of the organisation to be a charity trustee (providing he/she is not debarred from membership under clause 59) on the basis that he/she has specialist experience and/or skills which could be of assistance to the board."

53. On 10 April 2017 the claimant wrote to Ms Milton. Her email was lodged (J24). It stated

"Having read through the proposed SCIO Constitution and noting that any questions are requested by 10 April, my question for the board is as follows:

Why has the proposed SCIO Constitution, in the name of ARBROATH TOWN MISSION, been written with membership open only to those who sign up for 'church' membership and not being the right of all who come within its walls for whatever reason, be it spiritual, social or recreational. The provision of the present constitution is all inclusive for anyone in the community to find whatever meets their need. A mission is not a church and has a unique role in embracing every person and has been wonderfully successful over all the years of is ministry, offering spiritual, social, recreational and other facilities which continues to cater for all who come in.

Always, and it is still the case, that some members of the various groups are members of other local churches and are also members of Arbroath Town Mission. Those who attend social and recreational groups pay a modest fee on each occasion of attending, be it once or

more weekly, while the members of the craft group who meet weekly provide their own materials to make a variety of goods for sale at out monthly coffee mornings when they enjoy the opportunity to sell what they make, thereby helping to finance the work of the centre. Why then should all of these people be excluded from membership, many having been members for many years?

Thank you."

54. At around this time the claimant also instructed Messrs Thorntons to write to the respondent on her behalf. Their letter was lodged (J25/1 and J25/2). As noted above, the claimant expressed to Thorntons the same concerns which she had expressed to OSCR. The letter states

"Our Client: Wilma Swankie

<u>Concerns regarding compliance with Constitution of Arbroath Town Mission (the "Mission")</u>

We have been instructed by Mrs Wilma Swankie, in relation to concerns around compliance with the provisions of the Mission's Constitution, particularly in relation to the conversion of the Mission to a SCIO.

Our client is concerned that the trustees are failing to adhere to the Mission's Constitution, and in particular that the interests of the membership as a whole and the pursuit of the Mission's aims are being marginalised by a focus by the trustees of turning the Mission into an exclusively religious organisation.

<u>Exclusion of recreational and social members</u>

We understand from our client that an attempt has been made to exclude those members who have not signed up to 'church' membership from voting at general meetings. We note that the Mission's constitution states that:

'Membership shall be open to all who regularly attend the centre for spiritual, recreational or social purposes and appropriate membership records maintained and regularly updated.'

Therefore, the constitution does not distinguish between members that attend the Mission centre for spiritual purposes and those members that attend the centre for recreational or social purposes.

We would suggest that any attempt to categorise members, to exclude the rights of recreational and social members, or create different voting rights that in favour of 'church' members would contravene the Mission's constitution. Furthermore, we understand that the Mission maintains a register of all members which does not differentiate between any type of membership. The only method by which the membership requirements in the constitution could be altered would be by way of a validly passed resolution of the members.

Retirement and re-election of the trustees

We understand from our client that the procedure prescribed by your Constitution in relation to the retirement and reappointment of trustees was not followed at the Mission's previous Annual General Meeting. The Constitution provides that, at each Annual General Meeting, all of the trustees shall retire from office and will be eligible for re-election by the members. We understand that the trustees refused to stand down at the previous Annual General Meeting in accordance with the Constitution. As such, we understand that the current trustees may not be validly appointed in accordance with the Mission's Constitution.

Proposed incorporation of the Charity into a SCIO

On the basis of the concerns above, our client is concerned that proper consultation with the whole of the membership of the Mission may not be taking place in relation to the proposed conversion of the Mission to a SCIO. In particular, all members should be given proper notice of any meeting to consider the conversion and of the proposed constitution of the SCIO, and should be entitled to vote on the formal resolutions required to approve these matters.

We note that resolutions of the members will be required to approve: (i) the incorporation to a SCIO; and (ii) the proposed constitution for the SCIO. We have also noted the requirement in terms of the Constitution for 20 members to be present at the general meeting before a quorum is met.

Our client has expressed concern that the voting procedure used at previous meetings may have been such as to deter 'non-church' members from participating in the vote. As highlighted above, the current Constitution of the Mission does not provide for any distinction in terms of the voting rights of members, and any efforts to provide

otherwise will render invalid any such vote and the resolution passed pursuant to it.

We would recommend that the trustees seek legal advice on the issues raised in this letter. If the requirements of the Constitution are not observed in relation to the proposed general meeting to be held on 25 April 2017, our client will consider whether to raise her concerns more formally."

55. The Tribunal was not able to make a finding that the claimant had seen this letter in draft before it was sent. Although it would seem likely that a firm of solicitors would do this, the claimant simply could not remember if this had happened. The Tribunal did however accept that the letter was written on the basis of various telephone conversations which had taken place between the claimant and her solicitors and was written on the claimant's instructions.

56. On 12 April 2017 Ms Milton responded to the claimant's email (this letter was lodged J26). She stated

"I refer to your e-mail of 10 April 2017 and, on behalf of the board of Directors, respond herewith:-

Section 9.1 of the proposed SCIO constitution refers to the members with Sections 11 and 12 referring to the qualifications for membership and the obligations of members respectively. The current position, according to the constitution registered with OSCR adopted on 21 November 2004, is that in the event of any dispute as to eligibility for membership the decision of the board is final.

The board would again re-iterate that the Arbroath Town Mission under Dr Bob Clapham ran for many years and had a strong Christian ethos. Today we continue to express our Christian values in worship and in community service. Our emphasis on Christian values is strengthened by having our proposed membership of those who have declared Christian commitment. These individuals with voting rights are able with prayerful consideration to make the necessary alterations or improvements to the structure of the Mission. To consider membership as simply to include those who regularly use the facilities risks a future where individuals with little or no Christian

commitment could vote on matters where our Christian ethos is diluted or nullified.

I trust that the foregoing explanation satisfactorily answers your question."

57. Although Ms Milton refers to the 2004 Constitution in this letter the claimant did not pick up on the significance of this at the time.

58. Ms Milton also wrote to Thorntons Law on 14 April 2017. This letter was lodged (J27). Ms Milton expressed her disappointment that Miss Swankie should raise such concerns which she described as "unfounded and fictitious." She also referred to the claimant having raised the same with OSCR. She enclosed a copy of the letter from OSCR dated 17 March 2017 and asked Thorntons to note that there were no regulatory matters warranting investigation at this time. She then went on to refer to the objects clause in the Mission's Constitution and quote from this. She then went on to deal with the specific points raised by Thorntons. She stated

"1. The Mission's governing document is the constitution registered with OSCR and adopted at the Mission on 21 November 2004. Reference is made to the clause headed 'Membership' and, in particular, to the last sentence of said clause which states that '*In the event of any dispute as to eligibility for membership the decision of the Board will be final*'.

The terms of membership and voting rights have not changed. The members with voting rights have always been those who have declared Christian commitment and regularly attended the Mission for spiritual purposes. Shortly after the Town Missionary/Pastor, Mr David Webster, commenced his employment with the Mission in September 2013, Miss Swankie provided him with a list of the members as at that time. This list has since been updated due to some members having re-located, sadly passing away or having been removed due to non-attendance without justified reason whilst many new members have been added. To consider membership as simply to include those who regularly use the Mission's facilities would risk a future where individuals with little or no Christian commitment could

vote on matters where the Mission's Christian ethos would be diluted or nullified and such would be completely unacceptable.

2. The resignation and re-election of the trustees at the most recent AGM, held on 22 November 2016, was most certainly done in full compliance with the Mission's constitution. All trustees stood down, where voted in by members and were re-elected in mass, that being the long-standing custom and practice. (On looking at an old Minutes book I note that this has been the practice going back at least fifty seven years).

3. It is proposed to change the Mission's legal form to a SCIO and the process for this is being carried out in full compliance with the constitution and legislation. Members have been duly notified of the meeting to be held on 25 April 2017, notices have been posted at conspicuous places throughout the Mission and the meeting has been publicised in the local newspaper. Copies of the proposed constitution for the SCIO have also been issued to members. In addition, meetings have been held with members for the purpose of explaining and discussing incorporation and for going through the proposed constitution. Members' comments have been taken on board and numerous amendments made to the draft proposed constitution to meet members' satisfaction before the final version of the SCIO constitution was finally printed.

We are aware from the constitution that twenty members are required to form a quorum and we are also aware that a majority vote of those present is required in order to proceed with the proposed changes.

We trust that Miss Swankie will accept those assurances and be content to go along with the majority vote, whatever the outcome may be, following the meeting on 25 April 2017."

59. It was not clear whether this letter was ever copied to the claimant.

60. In the lead up to the special general meeting on 25 April 20017 the respondent received letters from various members of the congregation which were lodged (J28). It is clear that there was considerable public discussion in Arbroath with regard to what was happening at the Mission. It was suggested to the claimant by various attendees at the centre that it

would be appropriate for her to ask the local councillor to come along. The claimant contacted Councillor Fairweather who, as well as being the local councillor, was also leader of Angus Council in advance of the meeting and asked him to come along. The claimant had little opportunity to discuss matters with Councillor Fairweather in advance of the meeting. Councillor Fairweather's family had also been involved in the Mission over a number of years and Councillor Fairweather had previously been involved in fundraising for the Mission both in a personal capacity and as a Councillor. He attended because he understood that the issue was that the Mission had always been an open door. He understood the claimant's concern to be that the board were intending to turn it into a church.

61. In advance of the meeting the claimant produced a written statement. Her intention was that she be allowed to read this out at the meeting. The statement was lodged (J29). Given that the claimant was not in fact allowed to read it out it is unnecessary to quote it in full. Suffice to say that the claimant reiterated her concerns that the new constitution would give a vote only to those who signed up for church membership. It was her view that the Mission was not a church but a Christian organisation open for all to enjoy membership whether it be for spiritual, social or recreational purposes.

62. The meeting duly took place on 25 April. A minute of the meeting was lodged (J30). As with the previous general meeting it is probably as well to set these out in full.

> "Persons in attendance listed on the attached sign-up sheets were also present and members are highlighted in yellow. Ascertained the quorum, the minimum number of members required being twenty, as per the organisation's current Constitution, registered with the Office of the Scottish Charity Regulator and adopted at a general meeting of members convened at Arbroath Town Mission on 21 November 2004. The Chairman asked Pastor David Webster to open the meeting in prayer.
>
> The Chairman made some remarks about incorporation and stated that, for the avoidance of any doubt, the purpose of the meeting was to vote on the proposals to change the organisation's legal form from

an unincorporated to an incorporated organisation adopting the proposed Constitution. The Chairman referred to the Notice that had been issued for this meeting and advised that concerns submitted timeously had been duly considered and answered. The Chairman advised that the proposals put forward by the board, (whom members had duly appointed on their behalf), were considered to be in the best interests of members and the organisation.

Miss Wilma Swankie, employed as Centre Manager, asked the Chairman for permission to speak but the Chairman informed her that this was not a meeting for discussion. He stated that the concerns contained within the letter she had submitted timeously to the board had been considered by the board and responded to.

The Chairman then addressed a gentleman who raised his hand. He introduced himself as Mr David Fairweather, a local councillor. He questioned whether proper procedures had been followed for this meeting. The Chairman asked Mr Fairweather to refrain from making accusations which could not be justified. The Chairman informed Mr Fairweather that the elected board of Arbroath Town Mission were fully aware of what they ought to have done and have, indeed, done it. He assured everyone that proper procedures had been followed. Notices had been displayed and the meeting had been publicised, the proposed constitution had been distributed to all members, a period of consultation had been allowed and all comments taken into account.

Mr Fairweather interrupted and was then asked by the Chairman whether he was representing Angus Council or himself. Mr Fairweather responded that he was not representing Angus Council but some of the members. The Chairman advised Mr Fairweather that the members did not, at this time, require any representation as they had already been represented.

The Chairman explained that in any organisation there may not be complete agreement on things thus decisions will be made by the majority hence the reason for voting. The Chairman referred to the Annual General Meeting when twenty six members voted for the board of directors with only four members voting against the board. This was an overwhelming majority and, as in any democratic process, the majority prevails. The Chairman reminded everyone that the board

gave their time and talents for no remuneration and it had taken over two years to get to this point with regard to incorporation.

The Chairman then asked the vote to be taken. Voting papers were issued. The Chairman asked directors Mr Allan, Ms Luke and Ms Milton to take the count. On returning, the Chairman invited Ms Milton to announce the voting results. Ms Milton declared that forty five members had voted YES and five members had voted NO to the SCIO and constitution. There were seventeen spoilt papers (one being from a member and the remaining from non members). Proxy votes were included in the count. Ms Milton confirmed that the proposals had received a large majority.

The Chairman thanked everyone and confirmed that the majority were in support of the recommended proposals. He hoped that everyone would respect this decision in order that the organisation and the Christian work undertaken would continue to flourish.

Miss Swankie challenged the count raising the issue of membership. The Chairman asked Ms Milton to respond. Ms Milton reminded Miss Swankie that we had already addressed the issue of membership with her. Miss Swankie referred to the constitution. Ms Milton stated that the issue of membership had been discussed for some time and referred to the organisation's constitution and the clause therein headed 'Membership' which states that *'In the event of any dispute as to eligibility for membership the decision of the Board will be final'*. Ms Milton reiterated that everyone had the opportunity to make submissions to the board prior to this meeting, concerns had been raised and addressed, the vote had been duly taken and accordingly we would now proceed with the process for incorporation.

Miss Swankie and Mrs Woods raised issue again with regard to membership. The Chairman responded that the organisation had always been headed up by Town Missionaries appointed over the years with the nature and purpose of the organisation being the furtherance of Christian work and provision of spiritual welfare from the variety of services, social and spiritual, offered in the community. The Chairman advised that he had served on the board for almost twenty years, another board member had served in excess of thirty years, the membership had always consisted of those within the

church fellowship and the new constitution was not changing the basis for membership but merely maintaining the status quo. The Chairman stated that this was supported by the organisation's constitution adopted here in 2004 and being the most recent constitution registered with the Scottish Charity Regulator as confirmed by OSCR. Director Derek Marshall asked the Chairman to bring the meeting to a conclusion as the purpose of the meeting had been fulfilled, matters had been concluded and as the majority had voted in favour of the proposals put forward the process for incorporation would duly commence.

The Chairman, being in full agreement, closed the meeting."

63. As with the previous meeting people in attendance were asked to add their names to the voting slip so that the names could be checked against a membership list. The votes were counted in private by the three committee members. The claimant's belief was that she had handed in more proxy votes against the proposal than were counted. She accepted that she did not have any specific evidence that more than her votes were submitted than were counted. The claimant believed that there should have been an independent witness to the counting of the votes by the three board members. The claimant still had a concern that all along members of the centre were not included in what was going forward. She believed that some regular attendees at the centre who had been invited to come as members did not vote because of the unpleasant atmosphere and hostility coming from the board. It was her belief that the views of all the members had not been taken into account.

64. The claimant did not read anything into the fact that the respondent appeared to be referring to a 2004 Constitution as opposed to the 2005 Constitution which she understood to be the correct one. It did not occur to the claimant to ask to check whether they or she were working on the correct document. The fact that Ms Milton had written to OSCR and obtained a copy of the 2004 document was not advised to her.

65. Following the special general meeting the respondent held a board meeting on 2 May 2017. The meeting was minuted in the normal way and the minute was lodged by the claimant somewhat late in the day (pages

66-69). In the section of the minute headed Centre Manager's Behaviour the following is stated

"Stephen asked Moira if she would like to start. Moira said that trust had been lost between Wilma and the Board because of the things she had done such as going to OSCR and then to Thorntons and the Board had to sort out these issues with her. There was no longer a relationship between her and the Board which made her position untenable. She had provided the financial information the Treasurer required and Derek thanked Valerie for her help. Freda said that the Board were required to run the Charity to the best of their ability and at the moment we had a Manager who refused to provide the financial information required by the Treasurer or to meet with the representatives of the Board and the board had to deal with that or they were in dereliction of their duty. She suggested three options be put to Wilma; firstly that she continue in post on our terms and not hers, secondly she resign and retire with her reputation intact, and lastly that we terminate her employment. The choice would be hers. She went on to say that she knew that some members were reluctant to offer the dismissal option because of adverse publicity but she thought it would be wrong to cover up Wilma's behaviour for that reason and cited the Roman Catholic church and the BBC who had both tried to avoid adverse publicity with even more scandal when their behaviour was revealed. Moira said that the more people Wilma went to the more our reputation and our Christian witness was being tarnished now. Derek thought the Press was irrelevant but Peter Donald said that adverse publicity could tarnish the Mission's reputation for a long time. He asked if Wilma had a line manager and Stephen replied that she did not and reported directly to the Board. If Wilma were to choose the first option it was suggested that she needed a proper job description to define what exactly was expected of her in relation to her responsibilities to the Board, but Stephen said that he was not in favour of a list of demands on paper and as a Christian organisation would prefer to have a conversation with her to find a way forward together. He did not like the options suggested but agreed that we had to establish the authority of the Board and try to

> establish trust and respect from both sides. Andrew Inglis proposed sending Wilma a letter stating why the Board needed to meet with her and proposed that Stephen and Moira Meet her. It was agreed that the issues they wished to discuss with her such as her going to OSCR and to a legal firm should be stated in the letter as it was only fair to Wilma. Derek said that things should be done formally from the beginning and the meeting minuted. If she refused to meet disciplinary procedures would be started. Stephen said that we had no evidence for a Tribunal but Derek and Moira both stated the various occasions when Wilma refused to co-operate and that there was recorded evidence of them. Mike wanted an explanation from her as to why she had smeared our names with OSCR. Moira said that we had to show the authority of the Board and to do it as promptly as possible otherwise it would undermine our case. Stephen asked Moira if she would write to Wilma setting a date to meet with her within fourteen days."

66. The meeting then goes on to record an allegation that two named members of the congregation had verbally attacked the Pastor after the meeting on 25 April. He agreed that they would be sent a letter. It is then recorded that the Pastor left the meeting and in his absence it was agreed that he would receive a pay rise. It is recorded that he returned to a round of applause. The minute then goes on to state

> "Moira then informed the meeting that she had met with Councillor Fairweather who asked her to pass on his sincere apologies to the Board and anyone whom he may have upset at the meeting on the 25th April 2017. He recognised that he should not have listened to Wilma, Isobell and Eddie as he had clearly been misled, but ought to have also spoken to the board prior to the meeting."

67. It is probably as well to record at this stage that the Tribunal having heard the evidence of Councillor Fairweather was entirely satisfied that there was absolutely no truth whatsoever in Moira Milton's suggestion that she had met with Councillor Fairweather and that he had apologised or stated that he had been misled.

68. Following this meeting Ms Milton sent a letter by recorded delivery to the claimant on 15 May 2017. The letter stated

> "Dear Wilma
>
> I write to you on behalf of Arbroath Town Mission board of directors to explain why the board, your employer, feel very aggrieved by your behaviour and, in particular, with regard to the following:-
>
> You having expressed concerns regarding the board's conduct to the Scottish Charity Regulator, OSCR, that were inappropriate and untrue;
>
> You were asked to meet with representatives of the board to discuss your concerns and I refer to the e-mails Derek Marshall sent you on 22 and 28 March 2017 respectively. You did not respond; and
>
> Despite OSCR having assessed your concerns and advising you that there were no regulatory matters warranting investigation and your failure to respond to our meeting request to discuss these concerns, you instructed a solicitor and made unfounded allegations against the board bringing the board's integrity into question.
>
> As a consequence of the foregoing we are inviting you to attend an investigation meeting at Arbroath Town Mission, 95 Grant Road, sometime next week preferably on a day and at a time that is mutually convenient, in order that we may discuss and attempt to resolve these matters with you. In attendance at the meeting will be myself and Stephen Freeburn. I would ask that you co-operate by contacting me as soon as possible, using the contact details as noted hereunder, to let me know what day and time would suit you best and I will make the necessary arrangements. I would also mention that your failure to attend a meeting without having a legitimate reason may be viewed as refusing to obey a reasonable request and result in disciplinary action. I would hope, however, that this will not be necessary."

69. At some point following this the claimant contacted Ms Milton and asked if she could bring a friend to the meeting. She was advised that she could not.

70. On 23 May at 6:56 pm the claimant e-mailed Ms Milton. She stated that she was not prepared to attend such a meeting alone. She then went on to answer the points which she felt had been raised. She stated

> "With regard to approaching OSCR, as a concerned member of Arbroath Town Mission I had every right to act as I did following a meeting with the local AAVO where I expressed my concerns. They were of the opinion that under the terms of the 2005 Constitution everyone who attended the Town Mission was a member and following a telephone conversation by their staff member to OSCR, I was advised to write outlining my concerns which I did, not as a staff member of ATM or on Mission's headed paper, or making accusations but simply relating the events of the AGM which in my opinion were flawed and sought clarification on that matter. I could have approached OSCR anonymously by excluding my name from the communication but chose to be open about my concerns. …."

She went on to repeat her position which was that she contended that every person who was a member of any group within the Arbroath Town Mission was a member and entitled to a vote.

71. Following receipt of this letter Ms Milton spoke to some of the other trustees. She e-mailed the claimant to say that she would be reverting to her following these discussions. The respondent's minute book contains an entry which was lodged (page 100). This states

> "Due to Wilma having refused to meet for the investigation meeting on Friday, President Stephen Freeburn, following meeting and discussion with board members today, 28 May 2017, (with the exception of Valerie who has intimated she will not be taking part in any decisions in relation to disciplinary action against Wilma), asked Moira to immediately send letter to Wilma advising that she is now required to attend a disciplinary meeting. It was decided that Stephen, Derek & Moira be appointed as the disciplinary panel and Andrew and Freda as the appeal panel to deal with matters on behalf of the board. It was further decided that the disciplinary meeting should take place as soon as possible and before the board meeting arranged for 6 June 2017.

> As the meeting is to be held during Wilma's working time, the date agreed for the meeting was 1 June 2017."

It is clear that there was no actual meeting of the board during this period although it would appear there were various telephone conversations amongst board members.

72. It would appear that Ms Milton had in mind that although only three members of the board would attend the meeting with the claimant the decision on the outcome of the disciplinary action would be made by the whole board at their meeting on 6 June.

73. On 29 May 2017 Ms Milton wrote formally to the claimant and also e-mailed to her with a copy of the letter. The letter stated

> "Dear Wilma
>
> Further to my email of 25 May 2017 and on behalf of Arbroath Town Mission Board of Directors, I am writing to inform you that you are required to attend a disciplinary meeting on Thursday, 1 June 2017, at 2pm at Arbroath Town Mission.
>
> The meeting is to consider and discuss disciplinary allegations of misconduct, namely that of serious insubordination towards the Board of Directors, in accordance with the Acas Code of Practice on Disciplinary and Grievance Procedures, (enclosed with this letter). This said misconduct is causing the working relationship between you and the board to be untenable. It is damaging the Christian witness and testimony and bringing the organisation into disrepute.
>
> Details are as follows:-
>
> You expressed concerns regarding the board's conduct to the Scottish Charity Regulator, OSCR, that were inappropriate and untrue. You neither brought these concerns to the board nor did you inform the board that you had reported these concerns to OSCR. Copy email received from OSCR dated 17 March 2017 refers and is enclosed.
>
> The terms of membership and voting rights were not changed and the resignation and re-election of trustees at the most recent AGM, held on 22 November 2016, was most certainly done in compliance with the Charity's Constitution. As you know, all trustees stood down, were

voted in by members and were re-elected on mass, in accordance with the Charity's established and long-standing custom and practice;

You were asked to meet with representatives of the board to discuss your concerns and reference is made to the e-mails Director Derek Marshall sent you on 22 and 28 March 2017 respectively, copies of which are enclosed. You did not respond to these e-mails;

Despite OSCR having addressed your concerns and advising you that there were no regulatory matters warranting investigation and your failure to respond to our meeting request to discuss these concerns, you instructed a solicitor and made unfounded allegations against the board bringing the board's integrity into question. Copy letter dated 11 April addressed to the Trustees from Thorntons Law LLP is enclosed together with copy letter dated 14 April 2017 sent in response.

In response to the Notice of the Special General Meeting for members to be held on 25 April 2017, you submitted a question regarding membership in an e-mail of 10 April 2017. (Copies of said Notice and e-mail are enclosed). Your question was answered and reference is made to our letter dated 12 April 2017, copy enclosed. Despite having been provided with the board's response on your issue concerning membership, you chose to disrespect the board's decision and authority. You subsequently contacted Councillor Fairweather and asked him to attend and represent you at the Special General Meeting for members on 25 April 2017.

We note from your e-mail dated 23 May 2017 that you expressed your concerns to yet a wider audience, the Voluntary Action Angus (derived from the merging of AAVO into Volunteer Centre Angus). In support of your case, you refer to a 2005 Constitution, a Constitution which was neither registered with OSCR nor ever approved by members.

You continue to challenge the board's decision and authority on the issue of membership and claim that some members were excluded from voting at the EGM held on 25 April 2017.

In your e-mail of 23 May 2017 you state that you had every right to act as you did in expressing concerns to OSCR, instructing a solicitor etc. Irrespective of whether you did this as an individual or on the Mission's

headed paper, you are nevertheless an employee and such behaviour presents a conflict of interest.

We are obliged to inform you that your actions, if substantiated, either alone or taken together, may constitute gross misconduct within the disciplinary rules and procedure normally warranting termination of your employment.

You are entitled, if you wish, to be accompanied at the above meeting by a fellow employee or a trade union representative. However, it is your responsibility to make the necessary arrangements for their attendance and you should let me know in advance as to the identity of your proposed accompaniment i.e. by 12 noon on Wednesday, 31 May 2017.

Please acknowledge receipt of this letter and confirm that you will attend the meeting as schedule. If, for any unavoidable reason, you or your companion cannot attend, please contact me as soon as possible. You are reminded that failure to co-operate in a disciplinary process including failure to attend a meeting without good reason may itself be a disciplinary offence resulting in further disciplinary action."

74. In advance of the meeting Ms Milton produced an agenda. This was lodged (J36). It stated

"1. Notice of disciplinary meeting – allegations of misconduct, namely that of serious insubordination towards the Board of Directors. Acas Code of Practice on Disciplinary and Grievance Procedures being followed, copy of which was enclosed with notice letter. Conduct damaging trust and relationship with board, conduct bringing witness and testimony of the Organisation into disrepute.

2. Inappropriate and untrue concerns reported to the Scottish Charity Regulator, OSCR, copy email received from OSCR 17 March 2017.

3. Refusal to meet with representatives of board to discuss these concerns. Emails of 22 and 28 March 2017 refer.

4. Instructed a solicitor making unfounded allegations bringing board's integrity into question. Thorntons' letter dated 11 April and response 14 April 2017 refer.
5. Notice of Special General meeting for members on 25 April 2017. Question submitted on 10 April and board responded 12 April 2017. Chose to disrespect the board's decision and authority. Contacted Councillor Fairweather and asked him to represent at meeting.
6. Email of 23 May 2017 advised yet a wider audience with concerns – AAVO relying on a 2005 Constitution – a Constitution which was neither registered with OSCR nor ever approved by members.
7. Continue to challenge the board's decision and authority on the issue of membership and claim that some members were excluded from voting at the EGM held on 25 April 2017.
8. Conflict of interest.
9. Explanations provided by Wilma will be taken into consideration when reaching a decision and will report outcome of meeting to Wilma in due course."

75. There was an exchange of e-mails between Ms Milton and the claimant prior to the disciplinary hearing. The claimant advised that she would be attending the meeting and would be accompanied by a fellow employee Ms Sheena Swankie. Ms Milton advised the claimant that the board attendees at the meeting would be Mr Freeburn, Mr Marshall and Ms Milton. She did not advise Ms Swankie that the actual decision would be taken by the full board.

76. During the period before and after receipt of the invite to the disciplinary the claimant again consulted with Messrs Thorntons. Her solicitors submitted a letter to OSCR on 26 May raising the claimant's concerns regarding the AGM. The claimant did not specifically instruct them to do this. This letter raised concerns about the way that the meeting which agreed the conversion to a SCIO had been conducted. Following receipt of the letter of invitation to the disciplinary hearing, her solicitors advised her in general terms about the concept of public interest disclosure. They

prepared for her a document which they suggested she hand to the respondent. The claimant herself did not entirely take on board what it was that was being suggested and her understanding was that since she had made public interest disclosure she could not be disciplined for that.

77. The document provided to the claimant by Messrs Thorntons was lodged (J37). The claimant handed a copy of this over at the meeting. Again it is as well to set out this document in full.

> "The issues that I have been raising are protected disclosures in terms of the Public Interest Disclosure Act 1998 (ie whistleblowing) because I have a genuine and reasonable belief that the Town Mission has or was likely to breach a legal obligation by not following the constitution. As a whistleblower I have specific protection from repercussions, namely:
>
> 1. To subject me to disciplinary proceedings (and issuing me with any sanction less than dismissal) for whistleblowing is subjecting me to a detriment, which is unlawful; and
> 2. if I am dismissed because I whistleblew, my dismissal will be automatically unfair.
>
> It was wholly appropriate for me, as an employee, to raise my concerns with OSCR. OSCR is a prescribed person in terms of The Public Interest Disclosure (Prescribed Persons) Order 2014 and this means that there is no obligation on me to firstly make the disclosure to the Town Mission. However, in any event, I did raise the issues with the Board before speaking with OSCR and the board did not listen.
>
> It was also entirely appropriate for me to discuss the issues with Thorntons in the course of taking legal advice, which I am entitled to do, particularly as the Board were not taking me seriously. It is appropriate that Thorntons then write to the Board making disclosures on my behalf. Employees seeking legal advice regarding potential wrongdoing is expressly covered by the Public Interest Disclosure Act 1998 and I remain protected by the Act when I make a disclosure to a legal adviser.

In terms of contact with Councillor Fairweather, whose interest and support for the mission has been constant over many years, his presence was sought as an interested party to the EGM which was appropriate.

I discussed the matter with Voluntary Action Angus on the advice of OSCR and therefore this disclosure was also appropriate.

I did not attend the investigation meeting as it was clear that the Board was not taking my concerns seriously and was seeking to discipline me for whistleblowing rather than discuss my concerns. I was therefore very reluctant to engage with further discussions about the issues.

It is not correct that I was challenging the Board as the letter of 29 May alleges. I was whistleblowing (as set out above). It is not relevant whether the Town Mission agrees with my concerns or whether these concerns are actually founded. In order to be protected under the Public Interest Disclosure Act 1998, it is sufficient that I have a genuine and reasonable belief that a breach of a legal obligation has happened or is likely to happen.

I feel that the Board is seeking to silence dissenters. I have 30 years service with the mission and genuine concerns about the direct it is taking. It is reasonable and appropriate for me to raise my concerns about this and I have done so using the appropriate channels. Taking disciplinary action is typical example of the way in which the Board have been treating me for some time. The Board should be meeting with me to discuss my concerns as a protected disclosure rather than disciplining me."

78. There was extensive e-mail correspondence between the claimant and Ms Milton re who would be representing the claimant at the meeting and who would be representing respondent (supplementary bundle 17-18). The claimant duly attended the disciplinary meeting on 1 June.

79. The claimant believed that in advance of the meeting the respondent had already lost confidence in her. She was extremely anxious, particularly about the effect matters would have on her standing within the centre and in the community. She was concerned that they believed that the situation

was untenable. She felt that up until then she had got on well with everyone but that she felt bullied, intimidated and disrespected by the comments which had been made by the board. It is noteworthy that Ms Milton's comments at the meeting on 2 May show that the claimant was entirely correct in holding the view that the respondent had to some extent prejudged matters.

80. A minute of the disciplinary meeting of 1 June was lodged. The claimant's position regarding this meeting was that she did not have a particularly good memory of what had been said. The Tribunal were prepared to accept that the record of discussion contained within this minute was accurate.

81. The claimant was advised that "following today's meeting the board would have to decide whether or not her actions, if substantiated, either alone or taken together, warranted disciplinary action being taken against her and she would be informed of this in writing in due course." (J38/3/para 6).

82. It is then noted that Moira started to go through the points listed but the claimant told her she had the letter in front of her and she did not need to do this. There was a discussion regarding various concerns which the claimant had and in particular the claimant's view that the board were responsible for causing division by excluding centre members from having a voting right. The claimant then referred to the further advice she had received from her solicitor and handed each board member the typewritten document regarding protected disclosures lodged at J37. She stated that

> "As she has a genuine and reasonable belief that the organisation has or is likely to breach a legal obligation by not following the constitution she is protected from being subjected to disciplinary proceedings and dismissal."

Again a discussion regarding membership took place. During the course of the discussion Mr Freeburn advised that he had served on the board for over 20 years and in his view the membership had always been drawn from the Church Fellowship. He stated "to insist on a more encompassing membership would not have preserved the Christian ethos and values of the organisation." He stated that the board were not seeking to change

anything but merely maintaining the status quo. The claimant again made the point that the new constitution made provision for only church members to have a vote and the Town Mission was not a church (J38/5/para 5). Mr Freeburn made the point that the AGMs were changed to Sundays and immediately followed the Sunday fellowship services. He said this would not have been done if membership had included everyone who used the centre (J38/5/para 5). The minute then records that it was pointed out to the claimant that "we were not here today to debate this issue (membership)." Mr Marshall stated that the claimant was not entitled to have the final say in such matters and responsibility was in the hands of the elected board. The claimant said the matter was still in the hands of her solicitor. Mr Marshall then stated

> "Today's meeting was a disciplinary hearing to deal with Wilma as an employee and to discuss the allegations of misconduct, namely that of serious insubordination towards the Board." (J38/6/para 1).

83. There was then a discussion regarding the constitution. It is as well to set out the record of this discussion as contained in the minutes in full (J38/6). It stated

> "Constitution
> It was stated that the Constitution registered with OSCR was adopted on 21 November 2004 and this expressly states that *'In the event of any dispute as to eligibility for membership the decision of the Board will be final'*. OSCR had advised the board that this was the most recent Constitution registered with them and OSCR had no knowledge of a 2005 Constitution. Wilma advised that this had been a mistake and the 2005 Constitution was recorded in the Minutes. Moira asked Wilma to be more specific and Wilma made reference to an entry in the Minute book referring to 9 November 2005 when Robert Marr pointed out that we were having the AGM at the wrong time in December instead of October. Wilma went on to say that Robert Marr had arranged to have an EGM which took place on 4 December 2005 with forty five members present and a new Constitution was written at that time. In order to be absolutely clear about this, Moira produced the Minutes book and read out the relevant scripts.

Entry 1 – Minutes of meeting held on 9 November 2005… *'Robert Marr pointed out that the Board were not constitutionally correct in having the AGM at this date as the Constitution stated October as the AGM date. To avoid this error in future Mr Marr agreed to draw up a resolution to change the Constitution to the effect that the AGM should be held by the end of December following the end of the accounting period, this resolution to be notified in the local press and passed in due course at a general meeting of members, probably after a Sunday evening service. This was unanimously agreed.'*

Entry 2 – Extraordinary meeting of members held on Sunday, 4 December 2005 at 7.15pm. *'Following the directors' meeting on 9 November 2005 when it was proposed that a resolution be made to have the Constitution changed to alter the time of the AGM from October in the accounting year, to any date by 31 December in the accounting year, this resolution appeared in the Arbroath Herald on Friday 18 November 2005 and a meeting of 45 members took place on Sunday 4 December 2005. The resolution to amend the Constitution as stated above was put to the meeting by President Robert Scott. It was approved by Mrs Winnie Greenhill, seconded by Mrs Margaret McGill and unanimously approved by the members present.'*

It was noted that the EGM had been held on a Sunday, 4 December 2005, at 7.15pm, immediately following the evening church fellowship meeting. It was further noted that the only change recorded in the Minutes' books to alter the 2004 Constitution was to change the date of the AGM only and nothing else. Wilma's version of a 2005 Constitution, however, appears to be significantly different to the 2004 Constitution. Moira stated that there was no other Minute recorded in the Minutes' books that related to any other amendment or change to the 2004 Constitution. Moira asked Wilma if she agreed with that and Wilma stated that she did. Wilma also agreed that the resolution to alter the Constitution aforesaid had not been put to members of the Centre, bowling, day care etc. but only to those being in attendance at the church fellowship meeting."

84. The minute goes on to state

> "Today's meeting was a disciplinary hearing to deal with Wilma as an employee and to discuss the allegations of misconduct, namely that of serious insubordination towards the Board. This said misconduct has breached the trust between parties and caused the working relationship between Wilma and the board to be in an almost untenable position."

85. The note then goes on to list the various allegations as previously set out and note the claimant's response. With regard to the first allegation the claimant's response is noted as being that OSCR had told her to seek legal advice and that's why she instructed a solicitor. The claimant said she did not see any harm in this. With regard to the second point the claimant said that she recalled Ms Milton's conversation and advised that she had refused to meet as she was angry then about what was happening and she didn't think there was any point discussing matters. With regard to the third point the claimant is noted as confirming that she gave her solicitor the 2005 Constitution. With regard to the fourth point the claimant's response is noted as being that a member of staff had suggested she contact Councillor Fairweather and invite him along to the meeting which she did. With regard to the fifth point it is noted that the claimant agreed she continued to challenge the board's decision and authority on the issue of membership and claimed that some members were excluded from voting at the EGM held on 25 April 2017. There is a lengthy section dated to the sixth point however no responses from the claimant are noted within this section. On page J38/10/para 3 it is noted that Stephen Freeman asked the claimant whether the board could continue to work with her and the claimant's response is stated as being

> "Wilma responded that what effectively the board were really saying was that there was nothing she could do about it and the board was in charge therefore she would just have to accept it."

86. Following this meeting Ms Milton typed up the note of meeting which was eventually lodged (J38). Added to this was a lengthy section headed Finding which was prepared by Ms Milton. It appeared clear to the Tribunal that this part had been added at some time subsequent to the

report being considered by the board on 6 June since it refers to the second letter from OSCR which was not received until after 6 June.

87. The board met on 6 June and the board minute for this meeting was lodged. Under the heading Disciplinary Matters the following is recorded

> "**Disciplinary Matters:** Stephen thanked Derek and Moira for joining him on the Disciplinary panel, representing the Board, and asked Moira to read the report of that meeting. Before doing so, Moira suggested that Valerie might like to leave the room in view of her close connection with Wilma as it might be uncomfortable for her and present a conflict of interest. Valerie said that she could listen but would certainly not be making any decision in respect of Wilma's conduct. Valerie offered to leave the room and Stephen said he thought she may be more comfortable if she left. Valerie questioned why the Pastor was allowed to remain as he was a paid employee like Wilma, but Moira said that he did not have the same close relationship with Wilma who would be unlikely to put him in an awkward position by asking him questions regarding this matter. Valerie then left the room.
>
> Moira explained that the Chairman had pointed out to Wilma that this was a disciplinary meeting as she had refused opportunities to discuss matters on an informal level or attend an investigation meeting. The Acas Code of Practice on Disciplinary and Grievance Procedures was being followed which allowed a fellow employee or trade union representative to accompany the employee. Wilma's chosen colleague introduced herself as Sheena Swankie an employee at Arbroath Town Mission who had the same surname as Wilma but was not related.
>
> Moira referred to the Board's letter of 29th May 2017 giving Wilma notice of the disciplinary meeting to be held on 1 June 2017. The meeting was to consider and discuss disciplinary allegations of misconduct, namely that of serious insubordination towards the Board and the letter of 29 May 2017 gives details of these. Wilma was informed that following this meeting the board would have to decide whether or not her actions, if substantiated, warranted disciplinary

action taken against her and she would be informed of the outcome in writing in due course.

The panel went through the various points listed in the board's letter, giving Wilma the opportunity to respond to each one. During the disciplinary meeting Wilma issued a typewritten submission to the panel claiming that the issues raised by her were protected disclosures in terms of the Public Interest Disclosure Act 1998, that she had a genuine and reasonable belief that the organisation has or was likely to breach a legal obligation by not following the Constitution and, as a whistleblower, she was protected from being subject to disciplinary proceedings. The panel do not accept that, for the reasons given in the report, which is enclosed with the minutes.

Moira read out the entire Report of the disciplinary meeting and advised the Board that, whilst the disciplinary panel were willing to make recommendations, the Board should make a decision as the outcome. Moira informed the Board that, as it was customary for the Board to make decisions on important matters, this would not present a problem should Wilma appeal. Moira advised the Board of the options available. Following discussion, it was decided that Wilma's misconduct was sufficiently serious that it constituted gross misconduct with a sanction of summary dismissal but it was further decided that the appropriate disciplinary sanction in this instance should be a Final Written Warning to remain on Wilma's file for 24 months and any further misconduct would result in summary dismissal. It was also agreed that Wilma should be asked to provide written proof that she had withdrawn any pending or further opposition or challenge in respect of the Board's decision on membership or an invalid Constitution. Moira explained that as Wilma had been unchallenged in the past, a sanction of a Final Written Warning rather than summary dismissal would probably be considered more favourably, especially if Wilma takes her case to the Employment Tribunal. Jim suggested that if Wilma was to be dismissed we should close the Centre for a short period and make a fresh start but Stephen said that would not be possible because we had entered into an agreement with Angus Council and had to keep to it. Mike asked if we could offer Wilma the option of resigning but Moira said that if Wilma

offers to resign we can accept that but we should not ask for it. Stephen asked for the board's vote on whether we should issue a Final Written Warning, conditional on her written proof of withdrawal of all allegations or backtracking in behaviour, or face summary dismissal. The board's vote was unanimous in favour of Stephen's proposal."

88. An e-mail was lodged from the Minute Secretary Freda Luke to the board members dated 30 June 2017 (AI24). This states

"Hi All, I asked Moira to check over the disciplinary section in case of legal problems in the future and she very kindly sorted it out. Kind regards Freda."

In those circumstances the Tribunal is unable to make a finding that the minute accurately reflects the board's discussion on the matter. It does however appear to set out Ms. Milton's view of the position.

89. In any event Ms Milton then wrote to the claimant on 8 June 2017.

"Dear Wilma

On behalf of Arbroath Town Mission Board of Directors, I write further to the disciplinary meeting held on 1 June 2017. At this meeting your conduct was discussed with regard to allegations of serious insubordination towards the Board of Directors.

Having considered the evidence in the enclosed Report, it has been decided that the following allegations were proven:

Your unsatisfactory conduct constituted serious insubordination towards the Board of Directors that was not only detrimental to the board but also to the Christian witness and testimony bringing the organisation into serious disrepute.

Such gross misconduct is sufficiently serious to warrant summary dismissal but it has been further decided that the appropriate disciplinary sanction is a Final Written Warning which will remain on your file for 24 months from and including today.

The likely consequence of any further misconduct or insufficient improvement is dismissal. For the avoidance of any doubt, any pending or further opposition or challenge made by you in respect of the board's decision on membership or an invalid Constitution should

be withdrawn and cease with immediate effect. We understand that you recently instructed your solicitor, Thorntons, to report further concerns to OSCR, claiming that some members were excluded from voting at the Special meeting held on 25 April 2017 founding upon a 2005 Constitution. By your own admission, the 2005 Constitution is not a valid document. You are, therefore, required to rectify this immediately and inform OSCR, Thorntons, or anyone else to whom you may have reported such concerns, and provide the board with written evidence from OSCR, Thorntons, or anyone else aforesaid, confirming that this has been done.

You have the right to appeal against this decision. If you wish to exercise that right of appeal, you should do so by writing to the Secretary of the Board of Directors, 95 Grant Road, Arbroath, DD11 1JU within five working days of the date of this letter. You should state the grounds for your appeal in full.

Finally, I would remind you that, as advised in our letter of 23 February 2017, any costs incurred by you in obtaining legal advice on matters upon which you have been disciplined, will not be paid by Arbroath Town Mission."

90. The report letter was lodged (J38) along with the report which was attached to this. As noted before the section of the report entitled "Finding" makes reference to the claimant having instructed her solicitor to report further concerns to OSCR. Ms Milton did not give any satisfactory evidence about when she became aware of this but on the balance of probability and taking other matter into consideration the Tribunal's view is that the respondent became aware of this at some point after the disciplinary meeting on 1 June and after the board meeting on 6 June but prior to Ms Milton sending the letter on 8 June. It follows from this that the report of the disciplinary meeting sent to the claimant was not identical to the report which was before the board on 6 June.

91. The claimant decided to appeal the decision and wrote a letter of appeal dated 12 June which was sent to Ms Milton. The letter was lodged (J39). She asked the respondent to clarify "what act or omission constitutes 'serious insubordination' referred to in paragraph 3 and explain how I have

brought 'the Christian witness and testimony of the organisation into serious disrepute'".

92. With regard to the constitution she stated

> "You failed to consider or understand my comments in respect of the 2005 Constitution properly. As the 2005 Constitution was the only copy held on file it was natural for me to assume that it constitutes a legally binding document. My concerns raised with OSCR were therefore made in good faith and at no point were they designed to bring the Mission into disrepute."

93. The claimant also asked the respondent to clarify the position of Moira Milton in the proceedings. She noted her understanding that Ms Milton carried out the investigation in the matter and as a result should not have been involved in the disciplinary process. She asked them to clarify the purpose of the board meeting on 6 June. She indicated she considered the decision and the length of the final written warning for 24 months was wholly unreasonable. She went on to say

> "You failed to consider my comments at the disciplinary hearing on 1 June explaining that my concerns about the Mission raised with regulatory bodies such as OSCR constitute a protective (sic) disclosure under the Public Interest Disclosure Act 1998. As mentioned before I had a genuine and reasonable belief that a breach of a legal obligation had occurred and I was entitled to use appropriate channels (such as contacting OSCR) and seek legal advice to address my issues. This also means that as a whistle blower I am protected under the 1998 Act and should not be subject to any detriment including disciplinary action.
>
> You failed to discuss my previous concerns as a protected disclosure and instead decided to discipline me acting in breach of the Public Interest Disclosure Act 1998 and is unlawful.
>
> You stated in your letter of 8 June that any further misconduct or insufficient improvement may lead to my dismissal. However you failed to explain what improvements are expected from me. You also referred to the fact that I instructed my solicitor to raise further

concerns with OSCR. This is not true and I would be grateful if you could please clarify the basis for your comment. In any event, it appears that you are suggesting that any further similar disclosure which would be protected disclosures under the 1998 Act will result in disciplinary action being taken against me. Making threats to dismissing me for making further protected disclosures constitutes a breach of the Public Interest Disclosure Act 1998 and is unlawful.

In summary, I consider the circumstance leading to your disciplinary action against me, as a result of me making a protected disclosure under the Public Interest Disclosure legislation. In light of the above I ask that you retract your final written warning and refrain from making any further threats relating to my dismissal if any further protected disclosures are made."

94. On 15 June Ms Milton wrote to the claimant inviting her to an appeal hearing to be held on 19 June and advised the claimant

"Your appeal will be held by board directors, Andrew Inglis, (Vice President), and Freda Luke, who will be supported by board director, Moira Milton.

The Appeal Panel will consider the specific areas which you have identified as reasons for your appeal. During the disciplinary meeting held on 1 June 2017 you presented the board representatives with a typewritten sheet claiming that the issues raised by you were protected disclosures in terms of the Public Interest Disclosure Act 1998. As you did not give prior notification of this, it was not part of the discussion that took place on 1 June 2017. Moira will, therefore, explain why the board did not consider the issues discussed at the disciplinary meeting to be qualifying disclosures allowing you to claim the protection under this legislation. …."

95. The letter was e-mailed to the claimant on 15 June by Ms Milton. The e-mail was lodged (J41). The claimant responded on 16 June stating

"I acknowledge your e-mail and letter which I only received this morning and as I feel Monday is too soon for me to prepare for the appeal meeting I would suggest either Thursday 22nd or Friday 23rd

June at 2 pm and trust that one of these dates would be suitable for yourself and the other board members."

96. Ms Milton responded the next day stating

"Given that you intimated your appeal by letter dated 12 June 2017 and your reasons for appeal are specified therein, can you please explain why you would need more time than one week to prepare?
In accordance with the Acas guidelines which are relevant as we are following the Acas Code of Practice on Disciplinary Procedures, appeal should be heard without unreasonable delay and we are required to provide for appeals to be dealt with speedily."

The claimant replied later that day stating

"I feel Monday is too soon and as I have commitments with regard to centre activities on Tuesday and Wednesday afternoons, Thursday would be best. I hope this will be acceptable to all concerned."

Ms Milton then responded at 16:27 on 16 June stating

"It was difficult arranging a date suitable for all three board directors due to other commitments and holidays. As the meeting is arranged during your working time it will have to take place on Monday as intimated."

97. The e-mail chain was lodged (J42). Ms Milton made the decision to refuse the claimant's request to adjourn the hearing from 19 June to later in the week without consulting any of the other members of the board.

98. In advance of the appeal hearing the claimant again contacted her solicitors and was provided with a note confirming the protection which she had under the Public Interest Disclosure Act. She was told to clearly set out that the issues she had been raising were protected disclosures because she had a genuine and reasonable belief that the organisation had or was likely to breach a legal obligation by not following its

constitution. The note was lodged (J43). The claimant provided this to the appeal panel.

99. The appeal meeting took place on 19 June. The appeal was heard by Mr Inglis, Ms Luke and Ms Milton. Ms Milton took a full part in the discussion. She did more than support the other members. Ms Milton prepared a note of the meeting which was lodged (J44). The Tribunal did not find these to be an entirely accurate record of what had taken place. Mr Inglis' approach to the meeting was to try to be conciliatory. He had first met with the claimant in 1977 when he had been involved with her in planning alterations and extensions to the Mission's buildings. This had been in his capacity as an architect. He felt that the claimant had a very good reputation in the town. He felt that it would be unfortunate if he felt forced to leave.

100. There was a discussion regarding the constitution. Following this discussion the claimant for the first time realised that the respondent's position was that the 2005 Constitution was not valid and that the reason it was not valid was that it had never been sent to OSCR. She also appreciated that the board's position was that the fact that the 2004 Constitution said that the board had a final say in the matter of membership meant that it was open to the board to refuse someone membership on the basis of their lack of Christian belief and/or attendance at church services. There was a discussion regarding where the 2005 Constitution had come from. Wilma said she had probably typed it because she was the only person who typed things at the time. The members of the board said that because the 2005 Constitution was not recorded in the minutes having been approved it was not valid. The claimant indicated that she now accepted that this was what she had been told and was prepared to accept that. Mr Inglis felt that this was a significant concession. The claimant sought to find out what Moira Milton's involvement in matters had been. She said she was seeking this clarification on the advice of her solicitor. Ms Milton said that the claimant had of course refused to attend the investigation meeting and that perhaps her solicitor was unaware of this when he suggested it was inappropriate for Ms Milton to be involved at both investigation and disciplinary stage.

There was a discussion around the issues. Mr Inglis referred to the definition of membership being one issue but that there were other issues relating to the incorporation and "Wilma's failure to recognise the Mission was a church". The claimant indicated that she did not believe the Mission was a church. The claimant raised the issue of bullying. She was surprised during the meeting to be accused of bullying the Pastor. She had tried to raise the issue of bullying on the basis that she thought she was being bullied by the board. The respondent raised an issue where following the EGM it was alleged that the Pastor had been grabbed by the arm and hustled into a corner by another member. The claimant didn't know anything about this.

101. The claimant also raised the issue of public interest disclosure. Ms Milton indicated that the board did not consider that the claimant had made a qualifying disclosure. It was the board's view that what the claimant had said to OSCR was not true. Ms Milton also indicated that there was a requirement that the employee make the disclosure in good faith. She expressed the view that the board were of the view that making the disclosures the claimant was not acting in good faith.

102. Mr Inglis' view was that following on from St Paul's letter to the Corinthians, as a Christian, it was inappropriate for Wilma to have gone to a secular body with her dispute. He felt it appropriate to refer to a passage from scriptures to demonstrate the claimant should not go to secular parties.

103. Mr Inglis' view was that the whole issue was to do with control and that the new Pastor David Webster felt threatened by Wilma; that Wilma having lost control wanted to regain control of the Mission. Mr Inglis had formed that view shortly after he became a board member. Mr Inglis raised this issue during the appeal hearing despite the fact that the claimant had not raised it in her appeal.

104. There was some discussion about the suggestion by Ms Milton that a further complaint had been made to OSCR. At that point the claimant indicated that she didn't know anything about this. The matter was not explored and Mr Inglis was unaware of precisely what this second

complaint to OSCR was about or what the allegation against the claimant was. At the end of the meeting Mr Inglis and the claimant discussed whether the claimant was prepared to withdraw her complaints as requested. The claimant agreed that she would do that and furthermore agreed that she would do it in writing. During this discussion Mr Inglis told the claimant that there was absolutely no question of her being dismissed and that no-one on the board was thinking of dismissing her.

105. For her part the claimant indicated that she did not wish to bring the Mission into disrepute. She said she wanted the whole matter to stop and wanted to know where she stood.

106. Following the meeting Mr Inglis made a recommendation to the board that the appeal be upheld. His view was that given the claimant had now agreed to withdraw her comments the appeal should be upheld. Mr Inglis told the claimant that if she complied with the conditions he would uphold her appeal. He told the claimant this shortly after the board meeting.

107. Subsequent to the appeal meeting, it would appear that Ms Milton had some discussions with various members of the board. Despite Mr Inglis' understanding that given the claimant's undertaking to withdraw her allegations the appeal was to be upheld, Ms Milton wrote to the claimant on 23 June advising her that the board had decided to uphold their original decision. The letter was lodged (J45). This stated

> "The board have decided to uphold their original decision that the Final Written Warning will remain on your file for 24 months from and including 8 June 2017.
>
> You have now exercised your right of appeal under the Acas Code of Practice on Disciplinary and Grievance Procedures and this decision is final.
>
> I would remind you, as previously intimated to you, the board require you to withdraw all objections and comments that you have made challenging the board's decision on membership and an invalid Constitution. You are required to provide the board with written evidence that this has been done, (notifying all external parties to whom you have reported), and within seven days of the date of this

letter. Your failure to provide this written evidence within this timescale without good reason will result in further disciplinary action."

Following the appeal meeting the claimant's position was that she saw that the directors felt that they had proof that the 2005 Constitution was not the correct document. She still doubted that the 2004 Constitution was correct but was prepared to accept their position. She felt that she had to do that in order to keep her job. She was very keen on keeping her job. The Mission had been her entire life. The claimant felt totally confused about what was going on and wanted to know what she could do to resolve matters. At the end of the hearing her understanding was that all she had to do was send the letters and that would be the end of the matter and the warning would be withdrawn.

108. The claimant was surprised to receive the letter of 23 June which indicated that her appeal had not been upheld. Her understanding was that if she had agreed to do what she was asked to do then the original decision would not stand. She also noted that they were writing in something else and that she was now to write letters. She also noted that she was given a time limit. The claimant found the whole situation completely bewildering. She was unclear what to put in a letter. She knew she had to withdraw her allegations but was unclear how and what she should say. The claimant was also due to go on a pre-arranged holiday for a week from 25 June. The claimant received the letter of 23 June by e-mail on 24 June. She immediately e-mailed Ms Milton on 25 June at 16:31. She stated

"Hello Moira

I have received your letter in an e-mail attachment this afternoon but have to inform you that I am off on holiday for a week as from tomorrow afternoon. The matters raised by you will be dealt with on my return to work week beginning Monday 3 July and I trust this is acceptable to the Board." (J46)

109. Ms Milton wrote to the claimant at 23:22 on 25 June. She said

"I refer to your e-mail sent today and note that you are on holiday next week.

Given that you have already had two weeks to provide the board with written evidence, (the letter sent to you on 8 June 2017 specified this requirement), the board are agreeable to granting an extension of time to 5pm on Tuesday, 4 July 2017. No further time extension will be permitted and your failure to provide the written evidence by 5pm on 4 July 2017 will result in further disciplinary action being taken without delay."

110. The claimant took instructions from her solicitors as to how she should comply. On 30 June at 18:35 the claimant sent an e-mail to Ms Milton (J47). She stated

"Dear Moira

Having returned from holiday this afternoon, I write further to your appeal outcome letter of 23 June 2017 requesting that I notify the external parties of the withdrawal of my objections and comments made in relation to the constitutional affairs of the Town Mission.

For the avoidance of doubt please note that I'm intending to write to the following parties:

The Scottish Charity Regulator (OSCR)

Angus Association of Voluntary Organisations

Councillor David Fairweather

Please note the suggested wording for my withdrawal statements.

OSCR

'I write further to my letter of 24 February 2017 and the letter sent by my legal representatives, Thorntons Law LLP on 26 May 2017 regarding my concerns in relation to the constitutional affairs of Arbroath Town Mission. I would be grateful if you could please note my withdrawal from any comments and/or statements made in relation to the Arbroath Town Mission, its members, trustees, directors, officers, employees or workers of the Mission.

ANGUS ASSOCIATION OF VOLUNTARY ORGANISATIONS & COUNCILLOR DAVID FAIRWEATHER

I write further to our previous discussions regarding my concerns in relation to the constitutional affairs of Arbroath Town Mission. I would be grateful if you could please note my withdrawal from any comments

and/or statements made in relation to the Arbroath Town Mission, its members, trustees, directors, officers, employees or workers of the Mission.

I would be grateful if you could please:-

Clarify that you are satisfied with the list of the parties provided above

Confirm whether the suggested wording is appropriate, and

Clarify what it is that you require as 'written evidence' confirming that I have complied with your request.

Please note that although I am withdrawing my comments/statements as requested, I do not have, and will not have, any control over of the subsequent proceedings or investigations carried out by the parties referred to above or any other bodies or organisations. Please also note that my compliance with your requests to withdraw my statements does not mean that I waive any of my rights arising from the Public Interest Disclosure Act 1998 or the Public Interest Disclosure (Prescribed Persons) Order 2014.

I would be grateful if you could please respond to this e-mail by Monday 3 July to allow me to comply with your request timeously."

111. On 2 July 2017 at 20:49 Ms Milton sent an e-mail to the claimant stating

"I refer to your e-mail received on Friday evening and, on behalf of the board, attach copy letter herewith responding to your queries. A hard copy of the letter has been posted through the Mission's letter box this evening." (J47)

112. The letter attached to this e-mail and posted to the Mission letterbox was lodged (J48). This states

"I refer to your e-mail correspondence of 30 June 2017 and, on behalf of the board, respond herewith.

You reported concerns to external parties in opposition to the board's authority and decision on membership, founding upon a 2005 Constitution that was, as you were fully aware, an invalid document that had neither been registered with OSCR nor put to or approved by members. As stated in the letter sent to you on 8 June 2017, you were required to rectify this immediately and inform OSCR, Thorntons Law

LLP, or anyone else you may have reported such concerns, (and this would include the Care Inspectorate if applicable), and provide the board with written evidence from OSCR, Thorntons Law LLP, or anyone else aforesaid, confirming this has been done.

A letter or e-mail from the external parties will suffice as written evidence.

The list of parties, therefore, specified in your said e-mail is incomplete and the suggested wording insufficient.

For the avoidance of any doubt, the board are not asking, and would not ask you to waive any rights that you may have in terms of the Public Interest Disclosure Act 1998 but, as previously intimated to you, the board do not consider that, in the reporting of your concerns, you acted in good faith, you reasonably believed that the allegations made by you were substantially true and you did not report the concerns in the public interest. For these reasons, the board do not agree that the issues raised by you qualify as protected disclosures allowing you the protection under that legislation.

I trust this clarifies and look forward to receiving the required written evidence, as specified, no later than Tuesday, 4 July 2017."

113. The claimant was extremely concerned to receive this. She was aware that the respondent had given her a deadline of 5pm on 4 July. In an e-mail sent late in the evening of 2 July she was told that the wording which she had provided them with and which had been suggested by her solicitor was inadequate but she was not told what more was required of her.

114. On 3 July the claimant wrote to OSCR. A copy of this letter was lodged (J49). It stated

"I refer to my letter of 24 February 2017 and the letter sent by my legal representatives, Thorntons Law LLP, on 26 May 2017 regarding my concerns in relation to the constitutional affairs of Arbroath Town Mission. I would be grateful if you could please note my withdrawal from any comments and/or statements made in relation to the Arbroath Town Mission, its members, trustees, officers, employees or workers of the Mission.

> I would be very grateful if upon receipt of this letter an e-mail could be sent to Mrs Moira Milton, Secretary, Arbroath Town Mission (e-mail address) confirming that you have in fact received this communication. Thank you.
>
> Yours sincerely".

In the meantime, on 3 July at 10:16 Ms Milton received an e-mail from Wendy Marsden of OSCR. This was lodged (J50). Having set out the details of the Mission and its charity number. This states

> "I am writing to you as principal contact of the charity to notify you of concerns we have received regarding the procedures for changing the legal form of the Arbroath Town Mission and the dissolving of the charity. Please bring this letter to the attention of all the charity's trustees.
>
> Concerns
>
> We have received a copy of the governing document dated 4 December 2005, which would supersede the 21 November 2004 version currently held by OSCR. I am aware a copy of the 2004 version was sent to you on 21 March 2017. However, this is a matter that requires clarification as a matter of urgency because the trustees must act in compliance with the correct version when making changes to the charity.
>
> We have also received concerns that members of the charity were not permitted to vote at a general meeting. You stated in your letter of 5 April 2017 that 'the terms of membership and voting rights have not changed'. However, the Trustees Report 2016 states
>
> > Arbroath Town Mission is in the process of an overhaul of our governance and legal status which has included the formal formation of a membership of the Mission and the appointment of a recognised Eldership who will in time replace the Board of Trustees as the trustees of the organisation
>
> This matter also requires clarification."

The letter goes on to state that OSCR had opened an inquiry into the matter as they were concerned that the trustees may not be meeting their legal duties as trustees as laid out in the Charities and Trustee Investment

(Scotland) Act 2005. They then go on to indicate that they are seeking further information from the charity. The respondent was given until 28 July 2017 to produce the further information and documents requested.

115. On the evening of 3 July the claimant sent a further e-mail to Ms Milton. She stated

> "As time is running out for me to comply with your requests for letters to be produced by 5pm on Tuesday 4th July, I have in fact now written and posted letters, copies of which are attached for your information. You will note that I have requested the recipients to advise you by email when they have received their correspondence and trust this will enable the board to be able to make closure on this matter.
> Should you require any further action to be taken on my part, please let me know."

116. On 4 July Ms Milton responded to the claimant at 16:22. This was 38 minutes before the expiry of the deadline. The e-mail was lodged (J51). She stated

> "I refer to your emails received yesterday and comment herewith.
> I think the paragraph at the top of page 2 of the letter sent to you on 8 June 2017 is self-explanatory and sets out exactly what is required from you. You were required to notify all external parties to whom you had reported that you were wrong in founding upon a 2005 Constitution that was, in fact, an invalid document as it had neither been registered with OSCR nor put to or approved by members. By your own admission at the disciplinary hearing on 1 July 2017 you agreed with that and I refer to the section headed 'Constitution' in the Report of the hearing, copy of which was enclosed in the letter sent to you on 8 June 2017. The letters attached to your email sent yesterday failed to mention this and do not, therefore, meet the criteria required of you. I will, however, respond to you on behalf of the board once we have had the opportunity of considering your submission."

Ms Milton then e-mailed the claimant at 17:28 on 4 July. This e-mail was also lodged (J52). It stated

"Further to my previous email and for clarification, your letter to external parties should include a paragraph in terms as follows:-

'I would also like to inform you that I was wrong in founding upon a 2005 Constitution as that was, in fact, an invalid document as it had neither been registered with the Office of the Scottish Charity Regulator nor put to or approved by members. The current governing document of the Mission is a Constitution that was adopted at a General Meeting of members duly convened at Arbroath Town Mission on 21 November 2004.'

Please amend and re-send your letters aforesaid or let me know that you wish your letters emailed yesterday to remain as is.

I look forward to hearing from you as soon as possible."

117. On 5 July Ms Swankie responded to Ms Milton. She noted that no specific wording had ever been previously provided to her to be included in the letters. She goes on to say

"I am prepared to send the follow up letters as suggested in your email of 4 July although I do not think that it's needed or necessary and any further correspondence on the matter may have a negative impact on the image and reputation of the Mission.

Bearing this in mind and subject to your confirmation that the follow up letters are still required, I suggest that my follow up letters simply request that any investigations in relation to the constitutional affairs of the Mission are closed.

Alternatively, I suggest that your wording is amended as follows:-

'Further to my letter of 3 July, I would also like to inform you that I was advised by the Board of Arbroath Town Mission that I was wrong in founding upon a 2005 Constitution as that was in fact an invalid document as it had neither been registered with the Office of the Scottish Charity Regulator nor put to or approved by members.

The current governing document of the Mission is a Constitution that was adopted at a General Meeting of members duly convened at Arbroath Town Mission on 21 November 2004.'

Please let me know of the Board's position on the matter once you have had the opportunity to discuss my suggestions." (J53)

118. At some point either on 5 or 6 June Ms Milton responded stating

> "Dear Wilma
> I refer to your email of 5 July 2017 and, on behalf of the board, respond herewith.
> Following your appeal hearing on 19 June 2017 you were notified that the board's original decision was upheld and conditional upon you withdrawing all allegations and providing written evidence. The deadline for submitting the written evidence, as specified, has now past (sic) and unless full compliance has been made by 5pm on Friday, 7 July 2017, further disciplinary action will be taken."

It is not entirely clear when this e-mail was sent. The e-mail was lodged (J53 and also J54/1-54/2). Neither copy contains the sending details although it is clear from the fact that it appears to have been sent by the claimant to her solicitors at 13:12 on 6 July that it was sent to her prior to that time.

119. The claimant consulted her solicitors and they wrote to Ms Milton copied to Mr Freeburn on 7 July. Their letter was lodged (J54). They confirmed they acted for the claimant and then went on to say

> "As far as we understand Ms Swankie complied with your request of 8th June to withdraw any comments or statements made in relation to the constitutional affairs of the Mission. Copy of the letters withdrawing her statements were sent to you on 4th July.
> She took this action to bring this matter to a close notwithstanding our advice that given she reasonably believed that she was referring to the correct constitution she is protected from detriment, and your action towards her in this regard is unlawful.
> Ms Swankie is distressed by your continuing correspondence on this matter and she now feels that you are harassing her in regard to this. Your demand/threat that she should go back to all of the parties she wrote to on 4th July and amend her statements in line with the wording suggested by you on 5th July or face further disciplinary action is wholly unreasonable.

Ms Swankie would like to draw a line under this matter. I am copying Mr Freeburn to this email as President/Chair of Board so he is fully aware of Ms Swankie's concerns regarding how this situation is being handled and in the hope that this matter can now be closed."

120. On 10 July Ms Milton wrote to the claimant's solicitors Messrs Thorntons. The letter was lodged (J56). She stated

"…. Firstly, the board do not agree that Miss Swankie has complied with what was required of her as specified in our letter of 8 June 2017. A copy of said letter is enclosed herewith and reference is made to the paragraph at the top of page two. Any pending or further opposition or challenge made by Miss Swankie in respect of our decision on membership or an invalid Constitution had to be withdrawn and cease with immediate effect. Miss Swankie reported concerns founding upon a 2005 Constitution that was, by her own admission, not a valid document. Miss Swankie was required to rectify matters immediately and inform OSCR, her solicitors, Thorntons Law LLP, and anyone else to whom she had reported such concerns and provide us with written evidence from OSCR, Thorntons, and anyone else, confirming that this had been done. Our letter of 23 June 2017 reminds Miss Swankie of this and imposes a timescale for written evidence to be provided within seven days, by 30 June 2017. It was subsequently agreed to extend the timescale to 4 July 2017.

Miss Swankie emailed copy letters addressed to AAVO, OSCR and you at Thorntons Solicitors to Moira Milton and requested the recipients, upon receipt of the letters, to send an acknowledgement to Moira's email. To date, no acknowledgement has been received, not even from yourselves. Further, in her letters Miss Swankie failed to rectify the fact that, in the reporting of her concerns she founded upon an invalid Constitution. This was pointed out to Miss Swankie in an email sent to her on 4 July 2017 and she was given the opportunity to amend her letters. Miss Swankie chose not to amend her letters and in her email of 5 July 2017 stated that, as far as she was concerned, she had complied with our request of 8 June 2017. Miss Swankie was

> then sent an email on 6 July 2017, copy of which you have provided in your email of 7 July 2017."

She then goes on to repeat her assertion that the claimant was not acting in good faith and did not reasonably believe she was referring to a correct constitution. She went on to say the board objected to being accused of harassing the claimant. It was their position that the two emails sent on 4 July 2017 were sent to assist the claimant. She sets out the board's position that the continuing and protracted correspondence she referred to derived from Miss Swankie and not from the board. She went on to say

> "Finally, we, likewise, would like to draw a line under matters. Given that Miss Swankie has, however, failed to comply with her employer's instructions and continues to disrespect the authority of the board, a further disciplinary meeting will now be arranged, that being the appropriate recourse thereof. Miss Swankie will be notified of this in due course."

121. The claimant's solicitors responded to this in a letter dated 12 July 2017 which was lodged (J57). They confirmed their position which was that the claimant had acted in good faith. They genuinely believed the 2005 version on the constitution found on the file was a valid and binding document and she had no reason to suspect otherwise. They said that the claimant was not prepared to re-send the letters with the wording suggested in the respondent's e-mail of 4 July. They pointed out that the letter of 8 June did not state that the claimant was to provide acknowledgements from the third parties. They also note that the wording suggested on 4 July did not "provide reference or request for 'acknowledgements'". They also noted that the timescale given to the claimant was in their view unreasonable and unrealistic. They pointed out that the claimant had no control over the way third parties dealt with their correspondence. They went on to say

> "Your apparent allegation (contained in your email of 10 July) that our client produced and typed the 2005 version of the Constitution on her own initiative and without authorisation is new to our client and completely unfounded. We understand that this issue has not been

referred to in either your disciplinary outcome letter of 8 June or the appeal outcome letter of 15 June. Our client considers the claim of such nature as defamatory and requests that you refrain from making further allegations in this respect."

They went on to say that the claimant was unable to attend any further meetings with the board personally but would be prepared to respond in writing. The letter was written by Ms Fellows who is a partner in Thorntons accredited as a Specialist in Employment Law and copied to Mr Freeburn.

122. In the meantime Ms Milton and other members of the board were involved in responding to the request from OSCR for various documents. Ms Milton sent a detailed reply to OSCR on 7 July 2017 which was lodged (J55). Ms Milton and one or two other members of the board also met with a representative from OSCR on 14 July. On that date OSCR also e-mailed Ms Milton providing a copy of a letter which was to be given to the board (J58). The letter to the board from OSCR was lodged (J58/3-J58/4). This stated

"….We opened an inquiry into the matter because we were concerned the trustees might not be meeting their legal duties as laid out in the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act). We wrote to the charity trustees on 3 July 2017 requesting information which we received on 10 July 2017, and which was explained at our meeting of 11 July 2017.

Findings

After fully reviewing all information we consider the actions of the charity trustees to be consistent with the general duties that they are subject to under the 2005 Act.

Guidance going forward

From the information provided we note the charity's long standing practice of re-electing the trustees en bloc. OSCR considers it good practice for charities to ensure a combination of experienced board members and newer board members to encourage people to become involved and to allow succession planning.

….

Conclusion

We have not identified any matters of a regulatory nature that warrant any further action by us at this time and we are closing our inquiry.
In line with our *Inquiry Policy* we will write to the person who raised the concern and let them know in general terms the outcome of our inquiry. …."

123. On 17 July the respondent wrote to the claimant inviting her to a disciplinary hearing. The letter was lodged (J59). The letter is lengthy however it is as well to set it out in full. After setting out the date and time of the meeting the letter states

"The meeting is to consider and discuss disciplinary allegations of misconduct, namely that of serious insubordination towards your employer, the board of directors, in accordance with the Acas Code of Practice, (copy of which was provided to you on 29 May 2017). One of the most important implied terms in a contract of employment is that of the 'duty of mutual trust and confidence'. This said misconduct is causing the working relationship between you and the board to be untenable. It is seriously damaging not only the mutual relationship of confidence and trust between you and the board but also the Christian witness and testimony and bringing the organisation into disrepute.
Details are as follows:-
In the Notice of your Final Written Warning letter dated 8 June 2017 you were advised that
'The likely consequence of any further misconduct or insufficient improvement is dismissal. For the avoidance of any doubt, any pending or further opposition or challenge made by you in respect of the board's decision on membership or an invalid Constitution should be withdrawn and cease with immediate effect. We understand that you recently instructed your solicitor, Thorntons, to report further concerns to OSCR, claiming that some members were excluded from voting at the Special meeting held on 25 April 2017 founding upon a 2005 Constitution. By your own admission, the 2005 Constitution is not a valid document. You are, therefore, required to rectify this immediately and inform OSCR, Thorntons, or anyone else to whom you may have reported such concerns, and provide the board with

written evidence from OSCR, Thorntons, or anyone else aforesaid, confirming that this has been done.'

Despite being required to deal with the foregoing immediately, you made no attempt to comply with what was required of you until you were chased up and a timescale imposed. On 3 July 2017 you sent an email with three letters attached addressed to AAVO, OSCR and Thorntons Solicitors respectively. Nothing has been received from you in respect of Councillor Fairweather to whom you also reported misleading information. To date, we have seen nothing to prove that these letters were sent to or received by the addressees. On 14 July 2017 we made inquiry with AAVO to ascertain whether or not they had received your letter (that your email of 3 July 2017 states you had written and posted) and AAVO responded that the first time they had seen your letter was on 14 July 2017 when Moira Milton emailed it to them. (A copy of the email correspondence sent to and received from AAVO is enclosed herewith). We note that in your letter addressed to OSCR you also refer to a letter sent to them by your solicitor on 26 May 2017 yet, in your appeal letter dated 12 July 2017, you deny having raised further concerns with OSCR. Further, your letters fail to inform the parties that you erroneously relied upon a 2005 version of a Constitution that was, in fact, an invalid document. Despite having brought this to your attention by email on 4 July 2017 and giving you the opportunity to amend and re-send your letters, you chose not to. You also conceded at both the disciplinary meeting and appeal hearing on 1 and 19 June 2017 respectively that the 2005 version of the Constitution was an invalid document yet you refused to inform the external parties to whom you had reported concerns that you had, in fact, founded upon an invalid document.

Instead of complying with your employer's requirements, you continue to challenge the board's authority and competence.

Since you received our said letter of 8 June 2017, the board were notified by OSCR on 3 July 2017 that they had received concerns regarding the procedures carried out in respect of changing the legal form of the Mission and the dissolving of the charity and an inquiry was opened. (We are pleased to report, however, that OSCR did not identify any matters of a regulatory nature that warrant any further

action by them and their inquiry has since concluded and closed.) We have received further correspondence from your solicitors, Thorntons, on 7 and 12 July 2017 respectively claiming that, *inter alia*, our demands of you are unreasonable and advising that you are unable to attend any further meetings in person due to stress and the manner the meetings with you have been conducted to date. We strongly deny any allegations that the board, or their representatives, have conducted meetings with you in a manner anything other than courteous and professional. As far as we understand, you appear to be showing no signs of stress at work and are telling everyone that you are fine.

As advised to your solicitor in our letter of today's date, you are required to attend this meeting unless you can demonstrate by a letter from your doctor that you are genuinely too stressed to attend.

We are obliged to inform you that your actions, if substantiated, either alone or taken together with your previous warning or matters, may constitute gross misconduct within the disciplinary rules and procedure to warrant the termination of your employment.

You are entitled, if you wish, to be accompanied at the above meeting by a fellow employee or a trade union representative. However, it is your responsibility to make the necessary arrangements for their attendance and you should let me know in advance as to the identity of your proposed accompaniment, i.e. by 12 noon on 19 July 2017.

Please acknowledge receipt of this letter and confirm that you will attend the meeting as schedule. If, for any unavoidable reason, you or your companion cannot attend, please contact me as soon as possible. You are reminded that failure to co-operate in a disciplinary process including failure to attend a meeting without good and genuine reason may itself be a disciplinary offence resulting in further disciplinary action including dismissal."

The letter was prepared by and sent by Ms Milton.

124. Ms Milton also wrote to Thorntons on 17 July 2017. The letter was lodged (J60). Essentially she repeated the points made in the letter to the claimant.

125. The disciplinary hearing took place on 20 July 2017. The claimant was present along with Sheena Swankie, a fellow employee. Derek Marshall and Moira Milton represented the board. In advance of the meeting Ms Milton produced an Agenda which was lodged (J61). The Agenda simply sets out using different language the various concerns which the board has including those mentioned in the letter of invitation.

126. Paragraph 6 of the Agenda states

> "Further since 8 June 2017, on 3 July 2017 we were notified by OSCR that they were opening an inquiry as they had been notified of further concerns, namely that they had received a copy of the 2005 version of the Constitution and accusing the board of excluding members from the vote at a general meeting. Ask Wilma if she agrees that this was a result of her non compliance with what the board required of her in letter of 8 June? We are pleased to report that OSCR, after looking into matters, concluded their inquiries in respect of the governing document and to membership and found that the trustees had acted in full accordance with their legal duties. OSCR did not find any matters of a regulatory nature warranting any further action and they closed their inquiry. We are also pleased to report that OSCR have confirmed their acceptance of the SCIO application and the Mission is now ATM SCIO."

The last paragraph of the Agenda states "Explanations provided by Wilma will be taken into consideration when reaching a decision and, following consultation with board, will report outcome of meeting to Wilma in due course."

127. Following the meeting on 20 July a note of the meeting was produced by Ms Milton. This was lodged (J62/1-62/12). The last two pages appear to be findings which were written by Ms Milton at some point after the hearing.

128. During the meeting the claimant asked for clarification of the charges against her in particular what was meant by gross insubordination. She said she was sorry her actions had caused the board to lose trust in her but she disagreed that she had brought the witness and testimony of the

Mission into disrepute. At no point did the respondent clarify in what way the claimant was alleged to have brought the Christian witness and testimony of the Mission into disrepute. The claimant stated that she now accepted the respondent's position regarding membership. She indicated that previously following the board's decision on membership she had told the board that she would not be attending any further board meetings and was obtaining independent legal advice. She advised the respondent that she was entitled to do what she did as the constitution said membership was open to all.

129. The claimant was challenged that she had not written to Councillor Fairweather. The respondent had not indicated in their letter of 8 June that the claimant was expected to write to Councillor Fairweather. It was the respondent's position that the claimant ought to have known that she had to do this. In any event, the respondent's having raised the issue with the claimant, the claimant advised them that she had written to Councillor Fairweather who would be sending an e-mail to Ms Milton that day. The claimant also said that she had obtained acknowledgements and handed over correspondence from AAVO, OSCR and Thorntons. The letters were lodged. This includes a letter from Thorntons dated 19 July 2017 (J62/13), this includes a copy of the claimant's letter of 3 July 2017 to Thorntons (J63/13-62/14). It includes an e-mail from AAVO dated 17 July 2017 (J62/15). This states

> "I am emailing to confirm receipt of the correspondence dated 3rd July, as Wilma requested. Should either of you wish to speak to me regarding this then you can contact me by email or on the phone number below."

This bears to have been sent both to the claimant and to Ms Milton on 17 July 2017. There was also lodged an e-mail from the claimant to Councillor Fairweather dated 18 July 2017 at 7:40pm (J62/16). This states

> "I refer to my invitation to you to attend the EGM of the Town Mission regarding my concerns in relation to the constitutional affairs of Arbroath Town Mission. I would be grateful if you could please note my withdrawal from any comments and/or statements made in relation

to the Arbroath Town Mission, its members, trustees, officers, employees or workers of the Town Mission. My concerns were based on an invalid 2005 Constitution. I would be grateful if you could confirm today to Moira Milton (e-mail address) that you have received this e-mail."

The claimant also lodged a letter dated 14 July 2017 from OSCR (page 62/17). This states

"I wrote to inform you that we have concluded our inquiry into Arbroath Town Mission and to advise you of the outcome.

Concerns

Michael Royden wrote to us on your behalf on 26 May 2017 with concerns that you had about the charity's governing document, the register of members and that members had been prevented from voting at the Special General Meeting held on 25 April 2017.

Our role as regulator is to ensure that charity trustees are aware of and fulfilling their general duties under section 66 of the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act).

We determined on the basis of the information that you provided that it would be appropriate to seek further information from the charity trustees.

Outcome

We contacted the charity trustees to request information, and it was provided in full. The trustees also sought a meeting with us and it was held on 11 July 2017. All information has now been reviewed and given full consideration.

We consider the charity trustees to be aware of and fulfilling their general duties under the 2005 Act and we have offered guidance to support the charity going forward. We have not identified any matters of a regulatory nature that warrant any further action by us at this time and we are now closing our inquiry.

Letter of withdrawal

I acknowledge receipt of your letter of 3 July 2017 and have noted your withdrawal from any comments and/or statements made.

> Please be aware your letter did not affect the course of the inquiry. This is because as it states in the *Inquiry Policy* we do not act on behalf of an individual or group, it is our decision as to whether there is a regulatory matter that requires investigation, or not.
>
> We have not confirmed to the charity that we received your letter, nor was it discussed at the meeting, because in accordance with our *Inquiry Policy*, we do not tell a charity who has raised concerns, or in this instance withdrawn them.
>
> **Conclusion**
>
> We are grateful that you have brought this concern to our attention and we offer our sincere thanks for your contribution in maintaining public trust and confidence in the good work of charities."

130. During the disciplinary hearing there was also a discussion about the course of events regarding the letters of withdrawal. The claimant maintained her position that no time limit had been initially imposed upon her. She also noted that she had not been given any preferred form of wording until after she had sent the letters in.

131. There was a discussion regarding the appeal hearing. Mr Marshall stated that the outcome of the appeal hearing was to uphold the original decision namely that the final written warning stood and was conditional. Failing that it was dismissal (J62/6). Ms Swankie on the other hand said that at the last appeal meeting Mr Inglis and the claimant had shaken hands and drawn a line under everything. There was a discussion about the fact that Mr Inglis had said that he was not talking about anyone getting dismissed. Ms Milton claimed that had not been said and Mr Marshall said that even if it had that Mr Inglis was not in the position to say that and did not have authority to say that. The claimant maintained her position was that she thought that she had complied.

132. Ms Milton raised the fact that "Wilma had not only chosen not to accept the decisions but that since the EGM in April 2017 she had ceased attending the Sunday church services." (J62/8). There was a discussion regarding this and the claimant maintained her position that she was not doing anything to spoil the Christian witness or the Mission. There was then a discussion which made it clear that Ms Milton and Mr Marshall

blamed the claimant for various divisions within the Mission. At the end of the meeting the claimant was told that the board would be deciding in due course what should happen. The claimant said she was at the mercy of the board and a line would have to be drawn and she would have to accept whatever decision was made. The claimant was told that she would be advised of the outcome in due course. In the event of the outcome being summary dismissal, the board would be willing to give her the option to retire if she so wished. The claimant said that she would not choose that option.

133. The next meeting of the board was due to take place on 6 August. It would appear that prior to this there was a discussion between Ms Milton and other board members and the decision was made that the claimant should be dismissed. The respondent wrote to the claimant by letter dated 24 July 2017 advising her of this. The letter was lodged (J63). Again, although the letter is lengthy it is probably as well to set it out in full.

> "On behalf of Arbroath Town Mission board of Directors, I write further to the disciplinary meeting held on 20 July 2017 when you were informed that Arbroath Town Mission may decide to dismiss you and to summarise the discussion and confirm the outcome.
>
> At this meeting your conduct was discussed with regard to allegations of serious insubordination towards your employer, the board. Such misconduct was considered not only detrimental to the board but also to the organisation as a whole, damaging the Christian witness and testimony. Further your misconduct has seriously undermined the mutual trust and confidence and has caused the working relationship between you and the board to be untenable.
>
> Having taken all of the facts and circumstances into consideration, it has been decided that the following allegations were proven:-
>
> Your unsatisfactory conduct constituted serious insubordination towards the Board of Directors that was not only detrimental to the board but also to the Christian witness and testimony bringing the organisation into serious disrepute. In the letter of 8 June 2017 giving you notice of a Final Written Warning you were advised that your previous gross misconduct was sufficiently serious to warrant

summary dismissal but it had been further decided that the appropriate disciplinary sanction at that time was a Final Written Warning remaining on your file for 24 months from and including 8 June 2017. You were also told that the likely consequence of any further misconduct or insufficient improvement is dismissal. For the avoidance of any doubt, the letter expressly stated that

'any pending or further opposition or challenge made by you in respect of the board's decision on membership or an invalid Constitution should be withdrawn and cease with immediate effect. We understand that you recently instructed your solicitor, Thorntons, to report further concerns to OSCR, claiming that some members were excluded from voting at the Special meeting held on 25 April 2017 founding upon a 2005 Constitution. By your own admission, the 2005 Constitution is not a valid document. You are, therefore, required to rectify this immediately and inform OSCR, Thorntons, or anyone else to whom you may have reported such concerns, and provide the board with written evidence from OSCR, Thorntons, or anyone else aforesaid, confirming that this has been done.'

You failed to, with immediate effect, withdraw the pending opposition or challenge made by you to OSCR on 26 May 2017 and it was not until 3 July 2017 after a deadline of 4 July 2017 had been imposed for the submission of written evidence that you sent an email to Moira, board secretary, with three letters attached addressed to OSCR, AAVO and Thorntons respectively. The written evidence required by the board was something in writing from the external parties to prove that the letters had been sent. In your letter of 3 July addressed to OSCR you failed to rectify the position as to the invalidity of the 2005 Constitution had sent them. Despite being required to deal with any pending challenge as a matter of priority, you waited until 3 July 2017 and after OSCR had, that day, given notification that they were opening an inquiry based on two issues, namely the invalid 2005 Constitution that your solicitor had sent them and the issue of membership. The OSCR inquiry required the board to spend hours of time meeting to discuss and address the unfounded concerns your solicitor, on your behalf, reported to OSCR, in addition to having to provide OSCR with a voluminous amount of documentary evidence.

You did not seek to rectify matters with Councillor Fairweather until the evening of 18 July 2017, two weeks after the deadline of 4 July 2017.

At this disciplinary meeting you stated that the intention of your reporting to external parties was to seek inclusion of membership to everyone who attended Arbroath Town Mission. You expressed that it will always be your desire for everyone to be included and your sole interest is and has been for the inclusion of everyone who comes to the Mission. The board do not believe that you will ever accept or respect their decision on the fundamental issue of membership. Your misconduct in refusing to respect the board's decision and authority, combined with the manner in which you reported unfounded concerns to external parties in an attempt to overturn not only the board's decision but also that of the members collectively, has seriously undermined the mutual trust and confidence between you and the board.

Since you currently have an active Final Written Warning dated 8 June 2017 on your disciplinary record, it has been decided that your conduct is sufficiently serious that it constitutes gross misconduct, is still unsatisfactory and that you be dismissed. Your last day of service with the organisation will be Friday, 28 July 2017.

The arrangements in respect of your dismissal are:-

- Your dismissal will be effective from 28 July 2017 and your final day of employment is therefore Friday, 28 July 2017 (the Termination Date).
- You are not entitled to any period of notice or payment in lieu of notice.
- You will be paid in lieu of any accrued but untaken holiday, less normal deductions of tax and National Insurance contributions.
- If you are entitled to reimbursement of any genuine expenses incurred prior to the Termination Date, you must submit your claim by 28 July 2017.
- You must return any property that you may have belonging to Arbroath Town Mission.

- Your final payment of salary shall be made up to 31 July 2017 and shall be paid less normal deductions of tax and National Insurance contributions and your P45 will be sent to you in due course.

You have the right to appeal against this decision. If you wish to exercise that right of appeal, you should do so in writing to the Undersigned within five working days of the date of this letter. You should state the grounds for your appeal in full. The dismissal will still take effect as described above if you appeal, but if your appeal is successful then you will be reinstated with retrospective effect to the Termination Date and any lost pay will be reimbursed."

The letter was e-mailed to the claimant at 16:02 on 24 July and also posted to her (J63-J64).

134. Having received the letter the claimant was still not clear as to what the allegations were or what she was supposed to have done. Her view was that she had not done anything since 8 June which could possibly amount to gross misconduct. She found the whole matter to be extremely upsetting given that she considered she had been a loyal and hard working member of staff who had devoted a considerable part of her life to the respondent. She decided that she would not appeal, she felt it wouldn't do any good. She believed the decision had been made on behalf of the board and they had clearly made their mind up and that was it. The claimant was upset having lost a job which she loved and which had effectively been her life. She felt she had done everything she could to save her job by writing the letters as requested.

135. Since the date of her dismissal the claimant has not looked for any other job. The claimant was 79 at this point. She felt that her age would prevent her getting a job anyway. Around a week after her dismissal the claimant was approached by a group of ladies asking if she would hire a hall for a keep fit group. The claimant has done this and runs it every Friday on a voluntary basis. The claimant has done this on the basis that she still wishes to be of help in the community although she does not feel she necessarily wishes to have a job. She is not aware of any similar charities in the area who would have a similar job which she could apply for. The

claimant was extremely upset, her life was the Arbroath Town Mission. The dismissal made her sad and still does. It has not really affected her health in any way. The claimant felt that the whole issue was very well known in the Arbroath community. She felt that everyone knew that she had been dismissed. She has spoken to a number of people who have described themselves as being devastated at the way she was treated. Many people stopped going to the centre.

136. Subsequent to the claimant's dismissal Moira Milton was appointed as manager in place of the claimant. Since then the Mission had ceased to carry out many of the community activities which it did hitherto. Shortly after the claimant's dismissal the respondent erected new signage on the outside of the building describing it as Arbroath Town Mission Church and Centre. A copy of this was lodged (page 36).

Observations on the evidence

137. The Tribunal found this a difficult case largely because at the end of the day we did not feel that any of the three witnesses for the respondent were either credible or reliable witnesses.

138. Ms Milton was first to give evidence. Her evidence in chief was fairly brief. She indicated that she joined the board in 2014 and she indicated that up until then the claimant had attended meetings to take minutes but stopped around this time. She had known the claimant about 30 years, her girls went to the Girls' Brigade at the Mission when they were young children. In evidence in chief she stated that up until the constitution of the SCIO there was some confusion over the organisation's constitution. In evidence in chief she said that Ms Swankie had only produced the 2005 Constitution after the disciplinary process started. She said it had never been put to members and never adopted. Subsequently she spoke of having at one point searched for the relevant board minutes but been unable to find them. She set out her view of membership and indicated that from the outset the claimant had had a different view. She then accepted that the 2005 Constitution had been mentioned in 2013 and at that stage a search for the books had been made but they couldn't be found. It was her view that the AGM had been a very unpleasant meeting

and that the claimant had been the instigator of it. Her view was that the claimant had invited some people who were "new faces" and they had never been in the Mission before. Her position was that she had purely acted in an advisory capacity through the disciplinary process. She accepted that she had sent the letter at R31 to the claimant. Her position was that the claimant asked if she could bring a friend and Ms Milton refused this since she felt it would be best to "discuss her concerns in a Christian manner – it would just be the three of us". In evidence in chief she stated that by the time of the disciplinary meeting on 1 June 2017 the relationship had completely broken down. She stated

> "People had been ushered in to these dreadful meetings to witness dreadful behaviour."

She referred to having received further notification from OSCR on 3 July about further concerns having been reported to them. She said that it had been quite an intense investigation which required a lot of meetings and documents to be found. The position on this in evidence in chief was "I did not know who made the complaint – we had suspicions – concern was about the issue of membership, people being excluded from voting." She referred to the issue of membership, to the EGM and spoilt papers from members excluded from voting. She referred to the various letters which she had sent to the claimant. With regard to the issue of public interest disclosure she said "the advice I gave that I did not consider Wilma should be afforded protection as she had not acted in good faith. She knew the 2005 Constitution was not valid yet continued to write to external parties relying on it." Her view was that Wilma was the sole administrator and took all minutes so would know which was the correct constitution she considered it to be inconceivable the claimant would mistake this. Her view was that there was no public concern.

139. As can be appreciated by the end of her examination in chief there were a number of matters which we felt it was likely she would be cross examined upon particularly when her evidence was compared with the contemporary documents.

140. The cross examination was extremely lengthy. The principal reason for this was that Ms Milton kept changing her evidence. After a time it became clear to the Tribunal that rather than trying to assist the Tribunal by giving honest evidence as to her recollection as to what had occurred she would try to give whatever answer she thought might advance the respondent's case. Where she felt there was no answer she could give which would assist her case she would not answer a question. On many occasions when she had given an answer to a question and then the implications of that answer were explored by Mr Whelan she would change her evidence and contradict what she had said previously.

141. A flavour of the difficulties with Ms Milton's cross examination taken from a fairly early stage in the proceedings illustrates the difficulty. The claimant's representative put to the claimant Wilma was taking Ms Milton through the minute of the EGM on 23 August 2016. It was put to her that Isabell Woods mentioned the 2005 Constitution and Ms Milton agreed. The exchange goes on. The document states

> "Q. Pastor Dave said that he had no wish to disenfranchise anyone but the local church fellowship should have a spiritual membership. The previous meeting in April had explained membership to the congregation. Andrew Inglis asked if the centre users were Christians who recognised the spiritual ethos of the Mission and the chairman said that some did but it was up to us to witness to the others.
>
> A. People have to have faith before they can become a member.
>
> Q. Is it only if they have faith?
>
> A. But faith is open to all who accept it. It has always been based on one's faith.
>
> Q. David Searle mentions that it was his fault that it had arisen and that he would go back and consider all social and recreational members. Do you know what he meant? No, but he refers to social and recreational members.
>
> A. Some church members were involved with recreation.
>
> Q. Did you ask Mr Searle what this was about.

A. The board did. They recited a lot of scripture to back up why a membership should have faith in God. You say the claimant was bringing the Mission into disrepute.

Yes.

Q. To whom?

A. To members of the public. She was inviting members of the public into meetings.

Q. But you don't know if she was inviting them. You didn't ask them or her.

A. No, others asked them. Her conduct had caused division in the church, there was unpleasantness.

Q. What conduct?

A. She was objecting to the board taking the stance it was taking in relation to membership.

Q. How was that bringing the church into disrepute?

A. It was causing a disharmony and unpleasantness plus she was reporting to third parties that the board was not behaving correctly.

Q. She reasonably believed it?

A. We say she couldn't possibly reasonably believe it.

Q. What conduct was causing the disrepute?

A. The accusations telling members they couldn't attend the centre unless became a church member. They could attend.

Q. They just couldn't be a member.

A. They could if they wanted to.

Q. Who did she tell they couldn't use the facilities?

A. Users coming in for lunch saying can we still come in for lunch. It was filling people's minds with disharmony. She refused to do what the board asked her. She moved the charity shop into the main lounge.

Q. Why?

A. She said there would be more footfall. The first thing you saw was the charity shop. It has now moved back.

Q. The Mission is a charity not a church yes? You say that moving the shop to a better location is conduct likely to bring it into disrepute.

A. We challenged her and she said footfall and she asked people what the church use that lounge for a number of things it was not pleasant to see.

Q. Why do you think it would bring the church into disrepute?

A. She said to another board member I have done it if you object I will …

Q. Why do you think it would bring the church into disrepute – well, it didn't.

Q. Was this the reason for dismissal?

A. The reason was she was reporting unfounded allegations to OSCR and Thorntons.

Q. So it was not true when you said moving the charity shop brought the charity into disrepute?

A. It wasn't true.

Q. You are telling lies. It was not a ground for bringing the charity into disrepute.

Q. You accept it was a lie.

A. OK.

Q. You lied to the Tribunal to make up a reason for dismissal.

A. It wasn't a reason for dismissal.

Q. What other examples of bringing the charity into disrepute.

A. Reporting board to OSCR by making unfounded allegations. She said we were trying to change the name to a church ….."]

142. In evidence in chief she had said that the original decision at the meeting on 1 June had been taken by Stephen Freeburn and Derek Marshall. Mr Whelan attempted to explore with her what her role had been and also whether Mr Freeman and Mr Marshall had been given delegated authority by the board. Ms Milton's evidence was that they had been given delegated authority and that there was a minute to this effect. She then however went on to say that the decision had been taken by the whole board in any event. At that time the minute of the board meeting of 6 June had not been lodged. At the end of the day's evidence it was agreed that further board minutes would be lodged in order to deal with these points.

143. The subsequent cross examination of Ms Milton when she returned was even worse than before. By this time the Tribunal felt that we could not rely on anything she said. During the lunch break the respondent's agent indicated that although he did not have any direct instructions from Ms Milton he had become aware that she was in the middle of nursing a sick relative and had been up most of the previous night.

144. The Tribunal wished to give Ms Milton the benefit of the doubt and did not wish to make critical findings about her evidence if this was due to external causes. The Tribunal therefore adjourned the hearing early so as to allow her to have a night's sleep and then complete her evidence the following day. Unfortunately, having done this, matters did not improve.

145. At the end of the day the Tribunal found that it was unable to accept any of the evidence of Ms Milton as regards her motivation for doing what she did. The principal reason for this was that her evidence in relation to practically every point changed so many times. During re-examination she sought to withdraw many of the statements which she had made during cross examination. She indicated that she had sometimes been confused over what meeting Mr Whelan was talking about and also that if she had been misunderstood she could only put these down to nerves. At the end of the day on going through the notes of Ms Milton's evidence it is possible to find a number of different and mutually contradictory answers to the various questions that were asked.

146. The evidence of Mr Marshall was in similar form. He was more aggressive in his fencing with Mr Whelan than Ms Milton. Similarly he sought to back track when the answers he had previously given led him into difficulty once their implications were explored. He was also offhand in a number of his answers. For example when asked if he had attended the board meeting that decided to take disciplinary action against the claimant his statement was "I probably did". When challenged as to why he was on the appeal meeting when he had taken part in the decision to discipline the claimant he stated

> "I felt sorry for Wilma but I felt we had acted with regret to take this step."

He then went on to say "No I felt justice had been done." When asked if it should have been someone neutral hearing the appeal he said "I was not neutral, I didn't want this to go ahead, I didn't want Wilma to have to leave." It was his position that at the appeal meeting Wilma had been given seven days to produce the letters of withdrawal. There was then a discussion about the letters which had been sent by Ms Milton afterwards. Mr Marshall gave varying answers as to whether he had seen these or not. He then changed his evidence and said that he made a mistake about when he had told Wilma she had seven days at the meeting but that this was in the letter.

147. Mr Marshall similarly changed his evidence considerably on re-examination and withdrew various of the remarks he had made during the course of his cross examination.

148. Mr Inglis was similar although he was less aggressive in his dealings with Mr Whelan. Once again, he appeared unwilling to answer questions. When he did, he appeared to give whatever answer he thought would suit. Then he would withdraw that answer and give a different one once the implications of his previous answer became clear to him. A key feature of his evidence was that during cross examination he gave evidence agreeing with the claimant and her witness to the effect that his decision at the appeal hearing had been to uphold the appeal. He agreed that the parties had shaken hands and that he had said that there was no question of the claimant being dismissed. Mr Inglis also gave evidence which was contrary to that of the respondent's other two witnesses in relation to a number of other matters. It was his position that the main issue was that the claimant was in dispute with the board for two years up to 2017 and that this was really all about control. His position was that there had been two years of unpleasantness on the board. He agreed with Mr Whelan this was not all the claimant's fault. Interestingly, his position was that up until Ms Milton got the letter back from OSCR in March 2017 most of the board had thought that the 2005 Constitution was valid. He said that OSCR's response had come as a surprise. When asked to square this with the fact that in February 2017 the board were already stating they considered the claimant to be guilty of gross misconduct he could not give

an answer. When it was suggested that the chronology did not fit, the only answer he could give was "I cannot answer that. It would have been in order to say there had been a tedious process over two years because she was in disagreement with the authority of the board".

149. He also agreed with Mr Whelan that the claimant was correct in saying that the way that the board had stood for re-election was not in accordance with the constitution. He said he believed that it was legal to do it that way because of historical precedent. He agreed that the claimant would have a reasonable belief that the board were acting outwith the constitution. He eventually said that at the end of the day he was just one of a board of 12 and was accepting the board had made decisions.

150. Prior to Mr Inglis' re-examination the respondent's representative asked for and received permission to speak to the board to ascertain whether or not his instructions were altered. Subsequent to this Mr Inglis was re-examined. He changed his evidence in relation to a number of matters. In particular he stated that it was incorrect that he had decided by the end of appeal that he did not want to uphold the final warning. He said that he had sympathy in relation to Wilma's past history but that "the meeting I chaired was clear and unambiguous and passed on to the board for further action." He claimed that he had said the opposite in cross examination because "I was exhausted mentally and physically, particularly on Wednesday afternoon. He mentioned that he had had a stroke four years' previously and was on daily medication.

151. By and large the Tribunal accepted the evidence of the claimant's witnesses Mr Fairweather, Ms Walker and Ms Woods. In particular, we preferred the evidence of Mr Fairweather to that of Ms Milton. During cross examination Ms Milton was challenged over her statement that Councillor Findlay had apologised to her. Her evidence was that she had had a meeting and telephone conversation with him and that "he said he clearly had been misled by Wilma, Eddie and Isabell. He recognised he ought to have spoken to someone else on the board before turning up at the AGM and that he was out of order." Councillor Fairweather's evidence was exactly opposite. He did not apologise. His view was that the claimant should take legal advice. The Tribunal preferred Councillor

Fairweather's evidence. The Tribunal was in absolutely no doubt that this was simply something Ms Milton made up.

152. Unfortunately, the Tribunal also found the evidence of the claimant herself to be somewhat wanting. The claimant was comfortable giving evidence in relation to how she felt at each stage. Her recall of detail was however poor and in many instances, both in evidence in chief and cross examination she indicated that she simply could not remember. The board did however feel that unlike the respondent's witnesses the claimant was honestly trying to assist the Tribunal by giving truthful evidence as she saw it. Many of the instances where the claimant appeared unable to remember were in respect of matters where it would appear from the contemporary documents the answer would in fact have suited her case. It also appeared clear to the Tribunal that whilst her legal advisers at the time may have had a very clear idea as to the law on protected disclosures and gave clear advice to the claimant the claimant herself only appeared to have a vague understanding of what she was saying. At the end of the day what the board took from her evidence was that she had an immense commitment to the work of Arbroath Mission and that the events which had led to her dismissal had caused her a great deal of puzzlement as well as considerable mental anguish. It was clear that she had tried to reconcile what was happening with her Christian beliefs and the averred Christian ethos of the organisation. The Tribunal had absolutely no doubt that she genuinely believed that the individuals who attended the various activities within the centre had always been considered to be members of the Mission. We were also in absolutely no doubt that until she was pointed to the actual 2005 minutes at the meeting on 19 June there was absolutely no doubt in her mind that the 2005 Constitution was the correct one. We accepted her evidence that this was the constitution which she had sent out when she was required to do so in recent years. At the end of the day the difficulties we had with the evidence in this case meant that we required to rely more than usually on the contemporary documents. It also means that there are some lacunae in our findings in fact where the Tribunal simply could not make any decision as to what the board's actual position was. An example of this is in relation to the second report to OSCR. It appears clear from the written evidence that this was made to

OSCR around 26 May. The claimant's evidence was that she had not specifically instructed her solicitors, Thorntons, to write to OSCR. We accepted this evidence although we also believed the claimant's other evidence which was that during this time she was in a fair amount of contact with Thorntons and it may well be that they thought that she had their authority. In any event they wrote to OSCR on her behalf. It is totally unclear as to what point the respondent became aware of this. At various points the respondent's witnesses indicated that they were aware of the second approach to OSCR at the time of the original disciplinary meeting on 8 June. At other points they said that they were aware of it at the time of the appeal on 19 June. At other points they indicated that it was only when they received a letter from OSCR on 3 July that they became aware of it. At one point in evidence Ms Milton said that she was only certain it was the claimant who was responsible when she took along a copy of the letter from OSCR dated 14 July to the meeting on 20 July at which the claimant was dismissed. The Tribunal's view was that none of the respondent's witnesses wished to commit themselves to any particular date because they knew that whichever date they chose might cause them difficulty. We have not made any finding as to the specific point at which they became aware of this second disclosure however, what is clear is that they were aware of it as at the date of the dismissal meeting on 20 July.

153. The Tribunal was also unable to make any particularly specific findings about the method by which the respondent made decisions. There were three relevant meetings. Ms Milton was at all of them. We rejected her evidence that she was here in an advisory capacity. It is clear from the reports which she produced that she took a very active part in these meetings. What is unclear however is the precise methodology by which the decisions were made. It is clear that the board were involved in some way. There is a board minute of 6 June which we have quoted in our findings in fact. It would appear that the board were heavily involved in making the decision in relation to the written warning. With regard to the appeal hearing Mr Inglis' evidence was contradictory and at the end of the day fairly unhelpful. What does appear clear however is that there was a discussion amongst the board after the appeal hearing and that the

outcome of this was Ms Milton's letter. We did accept, however, the evidence of the claimant and her witness that at the appeal hearing she was told that her appeal was being upheld and the final written warning withdrawn and that would be the end of matters. We considered that Mr Inglis' evidence corroborating this in cross examination is more reliable than the evidence he gave in re-examination after he had clearly been told what the "board line" was. With regard to the meeting which decided to dismiss, Ms Milton's evidence was that the board were involved in this decision as well. Mr Inglis and Mr Marshall both corroborated this at least to some extent. Mr Inglis' evidence incidentally was that he understood that the board decision was that the claimant be dismissed but not summarily dismissed i.e. that she be dismissed with notice. His evidence in cross examination was that Ms Milton had changed things when she wrote the letter. He also withdrew this statement in re-examination.

Discussion and decision

(i) Issues

154. The claimant's claim was that she had been automatically unfairly dismissed by the respondent in terms of section 103A of the Employment Rights Act 1996 on the basis that the sole or principal reason for her dismissal was that she had made protected disclosures. She also claimed to have suffered a detriment on the ground that she had made protected disclosures. Her fallback position was that even if her dismissal was not automatically unfair in terms of section 103A her dismissal was unfair in terms of section 98 of the Employment Rights Act 1996. The claimant sought compensation. The respondent denied that the claimant had made protected disclosures. It was their position that the dismissal was by reason of gross misconduct and was procedurally and substantively fair. In the event that the Tribunal found against them then it was their position that the amount of any compensation should be reduced on the basis of the claimant's contribution. It was also their position that the claimant had failed to mitigate her loss. It was also their position that if there were any procedural defects then the claimant's compensation should be reduced on the ***Polkey*** basis since she would have been dismissed in any event had a fair procedure been adopted. It was also their position that any

compensation to the claimant should be reduced on the basis that she had not appealed in terms of the ACAS Code. Whilst their primary position was that the claimant did not suffer any detriment as a result of her protected disclosures their position in relation to compensation for injury to feelings was that this should be within the lowest band and should thereafter be reduced to take account of the claimant's alleged lack of good faith. Finally, during the course of the proceedings an incident occurred, the detail of which is set out in the Tribunal's note dated 17 August 2018. Following the resumption of proceedings the claimant had sought an order of expenses against the respondent. It was agreed that the issue be dealt with at the conclusion of the case and it is dealt with below. For the avoidance of doubt the claimant's representative confirmed at the close of the hearing that he was not seeking a wasted costs order against the respondent's representative.

Discussion and decision

155. Both parties made full submissions. The respondent's submissions were provided in writing and supplemented orally. The claimant's submissions were presented orally. Rather than attempt to summarise these the submissions will be referred to where appropriate in the discussion below.

Did the claimant make protected disclosures?

156. Part IVA of the Employment Rights Act 1996 deals with the definition of protected disclosures. A protected disclosure means a qualifying disclosure as defined by section 43B which is made by a worker in accordance with any of the sections 43C to 43H. It was common ground between the parties that the claimant was an employee of the respondent and therefore a worker for the purpose of this section. Section 43B states

> "(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

….."

157. Section 43C states

"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure . . . –

(a) to his employer ….

43D

A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.

……

43F

(1) A qualifying disclosure is made in accordance with this section if the worker –

(a) makes the disclosure . . . to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes –

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true. …."

It was the claimant's position that she had made qualifying disclosures to her employers (the respondent), to solicitors (she consulted Messrs

Thorntons), and to OSCR who are a prescribed body in terms of the Public Interest Disclosure (Prescribed Persons) Order 2014, SI 2014/2418 as amended. The description of matters for which OSCR is a prescribed person is stated in the regulations to be

> "The proper administration of charities and of funds given or held for charitable purposes."

158. With regard to the disclosure to the respondent the Tribunal accepted on the basis of the evidence that from at least shortly after the time the SCIO was first discussed the claimant had expressed concerns to the board in relation to the issue of membership.

159. The respondent has sought to characterise the relationship between the claimant and the board at this time as one of an ongoing conflict and struggle for control which started when the new Pastor was appointed in 2013. It was their position that the claimant had prominent and pre-eminent day to day control of the respondent's operations during the vacancy between the death of Mr Clapham to whom she had been close in 2010 and the appointment of the new Pastor in 2013. The respondent's witnesses spoke of the claimant being part of a group which was opposed to the new Pastor. All that may well be the case however it is entirely outwith the scope of the Tribunal. What the Tribunal has to decide is whether or not the claimant made protected disclosures. The fact that these disclosures may have been made against a background where the claimant already had a difficult relationship with the board for other reasons does not deprive the claimant of the statutory protection afforded to her.

160. One of the evidential difficulties in this case is that there is very little in the way of primary written evidence in relation to the disclosures which have been made. The Tribunal is in the position of having to infer from the evidence the terms of the exchanges which the claimant now considers to be protected.

161. Looking first of all at the issue of the claimant's interactions with the board the Tribunal is in absolutely no doubt that at various board meetings following the suggestion that the respondent converts to a SCIO the

claimant provided the board with the following information (1) that in her view, as someone who had been intimately involved with the organisation for a considerable period of time, membership of the organisation was not restricted to members who attended the church service. (2) That in terms of the constitution the board was not entitled to restrict membership only to those who attended church services. (3) That if the board sought to exclude members who did not attend church service from voting or deliberating at the AGM then the board would be acting illegally. (4) That the board were acting contrary to the constitution and therefore illegally when they insisted that the board be re-elected en bloc at the 2016 annual general meeting that the process adopted for voting at the 2016 annual general meeting was unlawful and incompatible with charity law.

162. As well as making these disclosures verbally to the respondent the claimant also repeated her position in the letter of 11 April (J24) and the e-mail she sent on 23 May (J32).

163. The respondent's agent makes the point that in addition to her concerns as to who the board members were presently treating as members of the organisation, the claimant was also opposed to the new definition of membership to be contained in the SCIO. It is certainly the case that the claimant was concerned both with what Mr McMillan described as the destination as well as the route to that destination. I would agree with Mr McMillan that there was nothing illegal if the members of the trust decided to convert to a SCIO and that the SCIO would have a more restrictive definition of membership going forward so long as all of the existing membership of the trust had arose on this. The claimant is not entitled to the protection afforded by the whistleblowing legislation in respect of her view that the trust should have decided to adopt a different definition of membership for the SCIO. This does not however remove her protection in respect of her disclosing what was in her view the clear illegality of the trust refusing to allow existing members to vote on the SCIO and retrospectively changing the membership definition.

164. With regard to her solicitors Thorntons, the Tribunal concluded on the basis of the evidence that the claimant made the same disclosures to Thorntons as she made to the board. This can be seen in particular from

the terms of Messrs Thorntons' letter to the board of 11 April 2017 (J25). This followed the claimant's letter of 14 February indicating that she was taking advice on the subject. Subsequently the claimant also made further disclosures to Messrs Thorntons in relation to the way the extraordinary general meeting had been carried out and the fact that individuals she regarded as members had not been permitted to vote. The terms of this disclosure can be ascertained from the claimant's own evidence on the subject and the letters which Thorntons subsequently wrote to the respondent.

165. Finally, the Tribunal were satisfied on the evidence that the claimant made disclosures to OSCR. The evidential difficulty here is that whilst the disclosures were made in writing neither of them were made available to the Tribunal. I raised this point with the claimant's agent at a fairly early stage during the cross examination of Ms Milton.

166. There was considerable discussion between the parties over documents after the first diet of hearing. The claimant obtained orders that the respondent produce various minutes. The respondent also produced various minutes of their own volition. The Tribunal had anticipated that the claimant might use this opportunity to ask the Tribunal for an order that OSCR provide a copy of the e-mail they had received from the claimant and indeed the e-mail sent it would appear by Thorntons on 26 May although by that stage the claimant's final position regarding the second OSCR complaint was not known. Somewhat surprisingly the claimant did not do this. In the event it was not until February 2019 that the claimant's representative sought to lodge documents which he had received from OSCR. He indicated that previously he had understood that OSCR would not provide these documents for data protection reasons. He had simply assumed that this would be the case without checking with OSCR. He indicated that he wished to lodge the letter of complaint of 24 February 2017 together with an e-mail acknowledgement of 16 March 2017 a letter from Thorntons to OSCR dated 26 May 2017 together with an acknowledgement of receipt as well as various other copies of documents, some of which were already in the bundle. It was his position that the letter of complaint dated 24 February 2017 was the only one which had

not as yet been seen by the respondent. The respondent's representative objected on the basis that this came far too late in the day. By this point the respondent's witnesses had already given their evidence. The claimant had commenced her examination in chief and Councillor Fairweather had already given his evidence out of sync. The Tribunal decided not to permit the documents to be lodged on the basis of the overriding objective in particular proportionality. Up until this point the Tribunal had been working on the basis that the letter the claimant sent to OSCR on 24 February could not be lodged. Witnesses had been examined on the basis of what it was assumed to contain and indeed cross examined. The matter had already been flagged up by the Tribunal and it was clear that this was what we were doing. The Tribunal was in absolutely no doubt that the terms of this letter would be relevant however if the Tribunal allowed it to be lodged then the Tribunal would as a matter of fairness require to allow the respondent to recall their witnesses. Quite apart from the fact that this would extend the Tribunal for even longer than it did. As a result the Tribunal has required to make findings of fact as to what was contained in the disclosures to OSCR from the other evidence in the case. The claimant's evidence was that in February she first of all spoke to a local solicitor she knew at Thorntons in Arbroath. She was then passed on to Thorntons in Dundee who dealt with the matter. She only ever spoke to them on the telephone. Her evidence was "I was concerned that members were to be excluded." She said that her local Arbroath solicitor had suggested she go to AAVO and OSCR. She said that prior to this she did not know what the legal opportunities were. She stated that she mentions about the AGM. She'd said she'd told them she didn't feel that the proper procedure had been carried out. She felt that members were not being allowed to vote. She stated that she mentioned that directors were not standing down as they were meant to do but were being re-elected en bloc. She said that members not being able to vote meant that the board were not following the constitution and were acting illegally. Her evidence was that the concerns listed in the e-mail from OSCR to Thorntons dated 17 March 2017 were the concerns which she raised with OSCR. She was advised that OSCR had advised her to speak to her solicitors and to AAVO. The Tribunal's view was that the disclosure made by the claimant to OSCR was that (1) the board were preventing bona fide

members of the organisation from voting and that accordingly the board were changing the voting rights of members and that the resignation and re-election of trustees at the AGM was not done in compliance with the governing document. It is clear from the terms of OSCR's letter that the claimant also made various other comments and provided information which the claimant did not claim to be a protected disclosure such as the bare fact that the respondent was proposing to change to a SCIO.

167. With regard to the second letter to OSCR sent by Mr Royden of Thorntons to OSCR on 26 May the Tribunal were satisfied that although the claimant did not give a direct instruction that this be done that it was sent by Mr Royden on behalf of the claimant. The Tribunal's view was that it contained the allegation that voting had not been carried out in accordance with the constitution at the most recent EGM which had approved the adoption of the SCIO. Once again the Tribunal accepted that many other things were probably mentioned in this e-mail.

168. Having set out the Tribunal's view as to what the disclosures were the Tribunal requires to answer the question as to whether these disclosures were protected.

169. First of all the Tribunal was satisfied that these were in fact disclosures of information. The claimant was providing information about what the respondent was doing as well as expressing the view that this appeared to be contrary to the constitution and contrary to charity law.

Reasonable belief

170. Her position was that she reasonably believed that the disclosure of information tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he was subject. In particular the claimant's position was that she reasonably believed that the respondent was acting contrary to charity and trustee law in that

(1) They were seeking to exclude from the decision making of the organisation individuals who were members.
(2) They were seeking unreasonably to limit membership only to people who were regularly attenders at the church service.

(3) That they acted unlawfully in insisting that the board be re-elected en bloc despite a motion from the floor at the AGM that board members be voted on individually.

(4) That individuals who were members of the Mission were excluded from having their votes counted at the extraordinary general meeting which approved the SCIO.

171. It was the respondent's position that the claimant's belief was not reasonable. The respondent's position in general terms was that the claimant's hostile mindset caused by the fear of change resulted in her being totally against the reasonable plans of the respondent. Primarily however, it was clear from the evidence of the respondent's witnesses that their position was that the claimant could not have a reasonable belief because the claimant was relying on what was described as an invalid 2005 Constitution. It is probably as well at this stage to set out the Tribunal's views regarding the 2005 Constitution issue in full.

172. The first point is that the Tribunal was of the view that to some extent the validity or otherwise of the 2005 Constitution is a complete red herring in the context of these proceedings. Both the 2004 and the 2005 Constitution state that membership is open to all who regularly attend the centre for spiritual, recreational or social purposes and that appropriate membership records shall be maintained and regularly updated. The claimant's position was that she did keep such membership records which included those who attended for social and recreational purposes. The only difference is that the 2004 Constitution goes on to state

> "In the event of any dispute as to eligibility for membership the decision of the Board will be final."

The 2005 Constitution does not contain this second sentence.

173. It was abundantly clear to the Tribunal that stating that in the event of any dispute as to eligibility for membership the decision of the board will be final does not in any way allow the board to ignore the first part of the membership criteria and apply a further set of membership criteria such as the requirement to attend church regularly. Any board which applied such criteria would almost certainly be acting ultra vires. Both

constitutions state that membership shall be open to all who regularly attend for spiritual, recreational or social purposes. The claimant's belief was that the respondent was acting illegally in excluding from membership those who did not meet the additional criteria of attending church regularly. The Tribunal considered that on any level no matter which constitution was in force the claimant's belief was reasonable.

174. Furthermore, we consider that the claimant's belief that what the respondent was doing was illegal was reasonable because the claimant herself had been responsible for sending out the constitution to public funding bodies in the period from 2005 to 2013. The claimant in evidence spoke of requiring to send the constitution to the local authority and obtaining public funding. The claimant spoke of sending the constitution to charitable trusts in respect of various applications for building projects and also for the purchase of a minibus. The claimant's evidence which was not controverted was that the constitution she had sent out in each case was the 2005 Constitution. The Tribunal's position was that any reasonable person would consider that there was at least an issue of illegality to be investigated if an organisation raises funds (including from public authorities) on the basis of a constitution which states that membership is open to all and then overnight states that only members who attend church services regularly will have a vote. This is particularly the case where at the same time the organisation is seeking to change its status and constitution and in doing so imposing extremely strict religious membership requirements including the need to be approved by the "Pastor and Eldership". The Tribunal's view is that looking at matters objectively, there is absolutely no question but that the claimant could sustain a reasonable belief that the respondent was acting in breach of a legal obligation. Whilst we are in no doubt that this was what was in the mind of the claimant's legal advisers at the time when they strongly advised the respondent to seek legal advice, as we have noted above, our view of the claimant's evidence was that she had not herself thought matters through and formalised them in that way. Even if we are entirely wrong that the issue of constitution is a red herring, it is our view that whatever the objective position the claimant's subjective point of view was

that her belief was entirely reasonable based on the information available to her at the time.

175. It is clear from numerous adminicles of evidence that when this matter blew up neither party were thinking in terms of looking at the constitution. Some members appeared to believe the 1984 or 2004 Constitution was the relevant one. Others appear to have, like the claimant, considered the 2005 Constitution to be relevant. The Tribunal's view was that it was not until fairly late in the day that the respondent's board appeared to have come to the view that the 2005 Constitution was invalid and that the 2004 Constitution was the correct one. It appeared to the Tribunal that the board came to this decision after Ms Milton wrote to OSCR on 20 March 2017 and received back from them a copy of the 2004 Constitution.

176. The claimant's evidence was that during the course of her duties she occasionally had to send off a copy of the constitution and the one she used was the 2005 Constitution, a copy of which was in the office. The Tribunal accepted her evidence that she had no real recollection of the events at the time this constitution was adopted nor indeed would the Tribunal expect her to. The Tribunal's view was that none of the other members of the board and, in particular, none of the respondent's witnesses also had any first-hand knowledge as to which constitution was the correct one. It appeared to the Tribunal that the respondent board seized with some glee on the issue around the constitution and sought to use this as a weapon against the claimant. It would also appear that at some point the minute books were consulted by members of the board. The Tribunal was not in a position to make any definite findings as to when this happened since there was also evidence from the respondent's witnesses that the minutes had been removed and that the claimant was suspected of removing them. No minutes relating to the adoption of the 2004 Constitution were lodged. The minutes which the respondent lodged with the Tribunal make it clear that there was some sort of general meeting on 4 December 2005 which is the date which appears on the docket to the 2005 Constitution as being the date it was adopted. The minute however simply refers to a change being made to the date of the AGM and does not refer to any other changes being made to the constitution on that date.

177. The respondent's representative makes much of the fact that the claimant eventually accepted that the 2005 Constitution was not the valid constitution and indeed that made the point in submissions that during cross examination she accepted that she knew it had not been adopted at the EGM on 4 December 2005. The Tribunal's view of the evidence was that although the claimant eventually came to understand the respondent's position regarding the 2005 Constitution and indeed in the absence of contrary evidence to accept it, this was something which came late in the day. The claimant's evidence was that at the time she initially raised the matter with the respondent, at the time she initially raised the matter with her solicitors and as at 24 February 2017 and 26 May 2017 when the letters were written to OSCR she was of the belief that the 2005 Constitution was the correct one. The Tribunal accepted her evidence. The respondent suggested that the claimant knew exactly or should have known exactly how the respondent's constitution operated and what meetings had approved which changes. The Tribunal rejected this. It was clear from the evidence that no-one within the respondent's organisation including the claimant had a clear idea as to what the constitution was. The Tribunal entirely accepted the claimant's evidence that the 2005 Constitution was the one which she had been using to send to fundraisers for a number of years. It was also significant that it was the 2005 Constitution that the claimant sent to Thorntons in 2014 for amendment which was before the SCIO issued raised its head. The respondent suggested that the claimant as the administrator must have known what happened back in 2005. The Tribunal did not accept this. The respondent stated that an administrator making funding application to public authorities from a regulated charity has to base applications on a constitution and indicated that the claimant was admitting an extraordinarily level of incompetence in her claim that she had been sending the wrong constitution for a period of years. It appeared to the Tribunal that the claimant although the only administrator was in no way a professional charity worker. Her view of the work of the Mission was that it was an expression of her Christian commitment, the sending of the constitution to fund holders was simply one of the hoops which had to be jumped through. At the end of the day the Tribunal were absolutely satisfied that the claimant had a reasonable belief that the 2005

Constitution was the correct one. The claimant had formed the view that what the respondent was doing may be illegal and had taken legal advice on the matter from Thorntons. This was an entirely responsible thing to do and entirely in keeping with her role as administrator. Messrs Thorntons had then advised her to make this information available to OSCR. The claimant had done this. In the view of the panel it was completely incontrovertible that the claimant had made a disclosure of information which she reasonably believed indicated the respondent was in breach of their legal obligation. With regard to the issue of public interest the Tribunal was entirely satisfied that this test was met. The respondent is a registered charity. They, as the claimant well knew, had been in receipt of public money. As it happens the claimant also knew that the public authorities who had funded the organisation had done so on the basis of the 2005 Constitution. The respondent's behaviour was in the reasonable view of the claimant preventing members from voting if they did not regularly attend the Mission church. The claimant based her view on the 2005 Constitution but as noted above the Tribunal's view was that even on the basis of the 2004 Constitution this was illegal and it was in the public interest for the matter to be raised. The Tribunal noted the fact that OSCR who are charged with supervision of charities did not consider that there was any regulatory matter which required further action on their part in respect of both of the letters sent. The Tribunal's view was that this did not mean that it was not in the public interest for the claimant to have raised the concerns in the first place. The Tribunal also notes that both letters suggest very strongly that the respondent take proper legal advice on the issue and this was something which the respondent was also advised to do by Messrs Thorntons. The Tribunal accepted that it was only when she sat down at the disciplinary appeal hearing on 19 June with Mr Inglis and he went over the position with her that she realised what the problem was. It was her clear evidence that prior to this stage she understood the 2005 Constitution to be the correct one. The Tribunal accepted this and on the basis of the evidence could see that such belief on her part was entirely reasonable given the information which she had. It therefore follows that whether one is looking at the objective position or the claimant's own subjective belief the claimant had reasonable belief that by restricting membership to regular attendees at church the

respondent was acting in breach of their legal obligation in terms of trustee and charity law to abide by the organisation's constitution.

178. Further and in any event, it is absolutely clear that the claimant held the reasonable belief that the respondent was acting in breach of their obligations in the way the committee had been voted in en bloc at the AGM. The Tribunal accepted the respondent's position, confirmed by the claimant's witnesses, that in the past, the re-election of the board had not been something which was at all controversial and that in practical terms the members present would be asked if the board should continue and the board would be re-elected en bloc. The Tribunal would however agree with the claimant's representative that the fact that matters have been done contrary to the constitution for a number of years does not make them right. The organisation was faced with an entirely new situation in 2016 when the issue of re-election of members of the board was highly controversial. There was a motion from the floor that the board do things properly and those conducting the meeting refused to do so. The Tribunal considered that the claimant had a reasonable belief that the respondent was failing to comply with their legal obligations in this respect. Disclosing this information and the information regarding membership in the various ways which the claimant did were all protected disclosures.

179. Having established that the claimant did make protected disclosures, it is appropriate to look at the two heads of claim relating to this separately.

180. With regard to the claim of detriment under section 47B the Tribunal's view was that the claimant did suffer a detriment by the respondent's acts in giving her a final written warning to stay on her record for 24 months and insisting that she write to various parties withdrawing her allegations. It was the Tribunal's view that these acts were done on the ground that the claimant had made protected disclosures.

181. The claimant had been intimately involved with the respondent organisation all of her life. Following many years as a volunteer she had become a key employee and as manager had seen the organisation grow in strength and influence. As a committed Christian the claimant believed that what she was doing was of great value in terms of her faith. The

claimant had never received any disciplinary warnings before. The Tribunal was in absolutely no doubt that she was extremely upset as a result of receiving the final warning. The claimant described herself as being in a state of shock. The Tribunal is also in no doubt that it was a detriment to be asked to write to the parties to whom she was alleged to have raised the matter. The claimant herself said that this was embarrassing. It was particularly so as matters developed when it became clear that the respondent appeared to have absolutely no trust in her and were not prepared to take her word that she had done so but insisted on her asking for proof of receipt of the letters withdrawing her allegations.

182. The Tribunal were in absolutely no doubt that this was done on the ground that the claimant made her protected disclosures. It makes absolutely no sense to ask the claimant to withdraw her allegations if the fact of the allegations was not part of the respondent's rationale. The Tribunal also observed in terms of section 48(2) that it is for the employer to show the ground on which any act or deliberate failure to act was done. In this case the respondent's witnesses have not properly made out any reason for their treatment of the claimant other than the fact that she had made these disclosures. Whilst for the reasons noted above by the end of the evidence of the respondent's witnesses the Tribunal was not prepared to accept their evidence as to their motivations having any real value it has to be noted that on many occasions during the hearing Ms Milton in particular indicated that the reason for the claimant's treatment was that she had brought the charity into disrepute by going to outside agencies. In addition Mr Inglis referred to the suggestion that as a Christian it was inappropriate for the claimant to go to the secular authorities. The Tribunal were entirely satisfied that the claim of detriment under section 49B was well made out.

Section 103A

183. The test under section 103A is different from the test under section 47B. It is not sufficient for the Tribunal to make a finding that the dismissal was on the ground that the claimant made a protected disclosure.

184. Section 103A states

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

It therefore follows that the Tribunal requires to look at the reason for the dismissal. If the Tribunal found that the reason or principal reason was that the claimant had made protected disclosures then the dismissal is automatically unfair. If, on the other hand, the Tribunal were to find that the reason was something different then the claim of automatic unfair dismissal would fail. The Tribunal would then require to go on to consider whether the reason was a potentially fair reason in terms of section 98 of the Employment Rights Act and if so, go on to consider whether the dismissal was fair in terms of section 98(4) of the Act.

- The first issue which the Tribunal required to determine was whether the sole or principal reason for the dismissal was the fact that the claimant had made her protected disclosures. The wording of section 103A indicates that there may be more than one reason for a dismissal. An employee will only succeed in a claim of automatic unfair dismissal if the Tribunal is satisfied on the evidence that the principal reason is that the employee made a protected disclosure. The case of ***Abernethy v Mott, Hay & Anderson [1974] ICR 323 CA*** provides a helpful discussion of the subject of what is meant by a reason. A principal reason is the reason that operated in the employer's mind at the time of the dismissal. If the fact that the employee made a protected disclosure is merely a subsidiary reason to the main reason for dismissal then the employee's claim under section 103A will fail. In this case the Tribunal laboured under the evidential difficulty that, during the evidence of the respondent's decision makers they set out a number of contradictory reasons. As noted above both Ms Milton and Mr Inglis specifically said at various points in their evidence that the disclosure was the reason. The Tribunal felt that the only approach we could take was a broad one looking at the whole of the employer's conduct. It appeared to the Tribunal that there had been an ongoing state of tension between the

claimant and the board for a number of years following the appointment of the new Pastor. Significantly however the claimant was not subject to any disciplinary proceedings over this period. It appeared to the Tribunal that it was not until 14 February when the claimant indicated that she was taking legal advice that the position changed. The discussion at the board meeting of 2 May is noteworthy in that it is clear that the board is very concerned about the impact of the matter on their image. They referred to poor publicity if the claimant is dismissed. They also make it clear that the issue they want to talk to her about is "her going to OSCR and to a lawyer". Whilst there is also some discussion of other matters where Wilma has failed to co-operate these matters were not at any point raised in the disciplinary process. It is also clear from the outcome of the disciplinary process that the issue of the disclosures made by the claimant was a key part of the rationale. There was nothing in the outcome such as suggesting that the claimant had to co-operate more with the minister in future or that she should provide better financial information in the future. The outcome was all about the claimant withdrawing the allegations she had made in the protected disclosures made to her lawyer, OSCR and AAVO. It is also clear from the documentation provided to the claimant at the time that the public interest disclosures were key matter which the respondent wished to address. The letter of 15 May 2017 inviting the claimant to an investigation meeting referred to the following

> "You having expressed concerns regarding the board's conduct to the Scottish Charity Regulator, OSCR, that were inappropriate and untrue.
>
> You were asked to meet with representatives of the board to discuss your concerns …. You did not respond; and
>
> Despite OSCR having assessed your concerns and advising you that there were no regulatory matters warranting investigation and your failure to respond to our meeting request to discuss these concerns, you instructed a solicitor and made unfounded allegations against the board bringing the board's integrity into question."

The invitation to the first disciplinary referred to "serious insubordination towards the board of directors …." The letter of invitation refers to the report to OSCR, not meeting with members of the board, instructing Thorntons to write to the board, disrespecting the board's decision and authority by contacting Councillor Fairweather, contacting AAVO – continuing to challenge the board's decision and authority and the issue of membership and claimed that some members were excluded from voting at the EGM held on 25 April. It is clear that the disclosures were the principal matter concerning the Board.

185. For this reason the Tribunal's view was that the principal reason for the dismissal was indeed the fact that the claimant had made these protected disclosures. The dismissal was therefore automatically unfair in terms of section 103A.

186. Having decided that the dismissal was automatically unfair in terms of section 103A the Tribunal strictly speaking does not require to go on to consider the alternative which is that the dismissal was unfair in general terms in terms of section 98. The Tribunal's view was that if we had not decided that the Tribunal was automatically unfair in terms of section 103A there is absolutely no doubt we would have made a finding that it was unfair in terms of section 98.

187. Since these matters are not relevant to the outcome of the case, rather than discuss the matter in detail the Tribunal will set out its findings in the form of bullet points.

Procedural unfairness

- Moira Milton was involved at all stages of the process. She was meant to carry out the original investigation. She did not do so but drafted the charges. She then was present and participated and was a decision maker in the original disciplinary hearing, the appeal and the final disciplinary hearing which led to the claimant's dismissal.
- At each stage in the process the decision making process was flawed because the decision was not taken by those who attended the meeting, who had heard the claimant give her side of the story. The

decision was made by the full board who had not been at the meeting but only saw a report generally prepared by Ms Milton.

- Mr Inglis who was supposed to be chairing the appeal meeting made a decision at the meeting which was communicated to the claimant which was that her appeal was upheld and that if she wrote the letters requested then that would be the end of the matter and her final written warning would be withdrawn. This decision was then reversed by the board after the meeting.
- Given that all of the board participated in the decision to dismiss the claimant the offer of an appeal could not have been a genuine one. The highest decision making body within the organisation had already ruled on the matter. There was no-one independent left to whom the appeal could be addressed.

Substantive unfairness

- There was no investigation prior to either the first or the second disciplinary hearing.
- Even if we had not found the reason to be the protected disclosure we would not have found that the reason was a potentially fair one of either conduct or SOSR
- The allegations which the claimant was required to meet were vague and framed extremely widely.
- During the disciplinary hearing the claimant was not listened to.
- There is total confusion about the outcome of the first disciplinary hearing. It was not clear to the claimant what was required of her.
- The claimant was then asked to provide something which was entirely outwith her power namely a receipt for her letter of withdrawal. The claimant was not told clearly what her letter of withdrawal had to contain until very late in the day.
- The claimant was not specifically told she had to write to Councillor Fairweather until after the respondent's alleged deadline for doing this had passed.
- During the hearing there was no clarity about what the allegation was in relation to the second report to OSCR. It is entirely unclear when

the respondent became aware of this and whether it was prior to the decision being made after the first disciplinary hearing.

- If the respondent was already aware of it at the time of the first disciplinary as is suggested or at the point of appeal, why was it not dealt with then?
- If the allegation was that this second report to OSCR was in breach of her injunction to withdraw and cease any pending or further opposition or challenge made by her in respect of the board's decision on membership or an invalid constitution why was this not clearly stated in the invite.
- It is unclear exactly what allegation was faced by the claimant in relation to this. The respondent's letter of 8 June refers to the claimant having recently instructed Thorntons to write again to OSCR about the EGM. It would therefore appear that on 8 June the respondent was aware of this. Despite this, the invitation to the second disciplinary meeting of 7 July refers to the fact that "since you received our said letter of 8 June 2017 the board were notified by OSCR on 3 July that they received concerns regarding the procedures carried out in respective of change in legal form of the Mission …."
- The respondent appears to some extent to be accusing the claimant of breaching an undertaking which she gave not to report further matters to OSCR based on an alleged report made before she gave this undertaking.
- No investigation was carried out in respect of the allegations for the second disciplinary meeting. At the tribunal hearing it was clear the claimant's position was that she had not made the second disclosure. This was not explored because the charge was never clearly put to the claimant
- There were numerous breaches of the principles of natural justice mainly due to the involvement of Ms Milton throughout. There are numerous incidents of the respondent prejudging the outcome of the process by stating that the claimant had made her relationship with the board untenable.
- It is clear that the decision to dismiss was not based on any genuine consideration of what the claimant was supposed to have done. The

discussion appears to have proceeded on the basis of what outcome would be best for the respondent's public image.

- The various versions throughout that the claimant had damaged the "Christian witness and testimony" of the respondent was entirely inspecific and did not give the claimant any understanding of what it was she was supposed to have done.

188. It has to be said that the above list of bullet points could well have been longer had the Tribunal felt it was worthwhile to devote more time to the issue. The Tribunal's view was that from the very beginning the respondent had made a complete mess of things and that quite apart from any issues arising from public interest disclosure the procedure they adopted and the way they went about dismissing the claimant was completely unfair and entirely out of line with employment law and practice.

189. The claimant's position was that she had continued working after normal retirement age and that if she had not been unfairly dismissed then she would still be working. Her view was that it was a unique job and for this reason she had not made any other job applications. The claimant's position was that it would be just and equitable to award 19 months' loss of earnings. This effectively covered the period from the claimant's dismissal to the last day evidence was heard at the Tribunal on 26 June 2019. It was the claimant's position that there should be no reductions either for contribution, ***Polkey*** or for a failure to mitigate. The claimant's position was that any appeal in the circumstances would have been pointless and that the claimant was not in breach of the ACAS code by failing to exercise her right of appeal in those circumstances.

190. With regard to remedy the claimant is entitled to a basic award of 30 weeks' pay. The Tribunal accepted the best evidence available to us which was that a week's pay in this case was £332.53 per week. This is based on £1441 per month. She was entitled to 30 weeks' pay based on her agreed service from 1987. The Tribunal's view was that although the claimant had an association with the Mission before this, 1987 was the date that her service had started as an employee. This was based primarily on her own evidence. The basic award is therefore £9975. With

regard to the compensatory award the Tribunal took on board the various criticisms the respondent made of the fact that the claimant had made no attempt whatsoever to mitigate her loss by finding another job. We found this a difficult decision to make since because we can see that from the claimant's point of view it was entirely reasonable for her not to seek alternative employment once the "one and only job" she had with the respondent had gone. As against that we accept that as a matter of employment law she was under a duty to mitigate her losses. We were given absolutely no evidence about jobs available in the area other than the fact that the claimant had been approached by a group of women and was now doing keep fit classes for them on a voluntary basis. It appears to us that if the claimant had made any real attempt to find alternative work then she would have been able to find this fairly readily. We also have to take into consideration that as a 79 year old woman working with an organisation with whom she appeared to be developing a number of philosophical differences it cannot be assumed that her employment would have continued indefinitely. The claimant may herself have resigned or indeed been dismissed fairly at some point.

191. At the end of the day our view is that primarily the reason for the claimant's wage loss after the first three months was the fact that she was not applying for other jobs. This is not therefore something which the respondent should be responsible for. Our view was that the claimant should be awarded 13 weeks' pay amounting to £4323.

192. We did not consider it was appropriate to make any award for loss of statutory rights given that the claimant has retired and has no intention of going back to the job market.

193. The Tribunal did not consider it appropriate to make any deduction for contribution in respect of either the basic or the compensatory award. The Tribunal's view was that the claimant had behaved perfectly properly in relation to those matters which had led to her being automatically unfairly dismissed. She had come to a view that the respondent was behaving in a way which meant they would be in breach of their legal obligations to follow the constitution. She had taken legal advice on the matter and she had then acted on that legal advice in bringing the matter to the attention

of the appropriate authorities. It was entirely appropriate for her to contact the local councillor, Councillor Fairweather particularly as she was aware that he and his family had a particular interest in the Mission. At the end of the day she did nothing wrong and did not contribute to her dismissal. The Tribunal's view was that given that we have found the claimant was automatically unfairly dismissed in terms of section 103A that a ***Polkey*** reduction would be inappropriate.

194. The Tribunal consider that the claimant's misgivings about appealing were entirely justified in the circumstances and that there was no breach of the ACAS Code by her such as would make it appropriate to reduce the compensatory award by any amount. It would certainly not be just and equitable to do so.

195. With regard to the claim of detriment we find that the claimant is entitled to compensation for injury to feelings. We were not provided with any medical advice given any effect on the claimant. It was however obvious to us from her evidence that her dismissal was a substantial blow to her. She has devoted many years of her life to the organisation and for the organisation to behave in the way they did was something which caused her a considerable amount of mental anguish. It is therefore our view that although compensation for injury to feelings falls within the lowest Vento band as contested for by the respondent it should be at the higher end of that band. The Tribunal's view was that the appropriate figure was £5000. The total compensation is therefore (£9975 + £4323 + £5000 = £19,298). The claimant was not in receipt of any recoupable benefits and there is therefore no prescribed element. We have set out our judgment in respect of the claimant's application for expenses below.

Expenses

196. The situation in which the issue arose are as described in the note issued by the Tribunal at the time. The hearing was adjourned and the further days set aside were postponed until after the appeal was dealt with. The appeal did not pass the sift. The letter from the EAT dated 3 September 2018 is referred to for its terms.

197. The claimant's representative submitted a claim for expenses in the sum of £2341.80 on the basis that the respondent, in their conduct of the case, had acted vexatiously, abusively, disruptively or otherwise unreasonably. The claim was principally in respect of the cost of the hearing on 22 August at which the decision was taken to adjourn until after the EAT had determined the appeal and of the cancelled hearing day on 23 August.

198. The Tribunal considered that, on balance, the threshold in terms of rule 76(1)(a) had been met. The tribunal believed that the action of the respondent was unreasonable. The issue of whether or not to make an award of expenses was therefore at large for our discretion. That having been said the unanimous view of the Tribunal was that we should not make an award. We did so essentially for two reasons.

199. We accepted that some sort of incident had genuinely taken place with remarks being made by children at the skate park which Mr Marshall had come to hear about. It was our view that his reaction to these remarks and the reaction of the respondent in trying to make the claimant's agent responsible for them was entirely disproportionate and inappropriate but we have to take into account the context. The parties were in the middle of a hotly contested hearing where passions were running high on each side. The Tribunal is clear that the respondent over-reacted. That having been said, sometimes decisions are made in the heat of battle which, in the cool light of day can be seen as disproportionate to the issues involved. In their letter the EAT specifically enjoins the Tribunal and agents to:

> "remind the parties that in a close knit society where there is press interest in a case and feelings are running high, that it is in everyone's interest to behave with restraint and caution so as not to generate further acrimony"

In this case the Tribunal took into account the heightened feelings of the parties and the fact that, although we believe Mr Marshall's reaction to be over the top he did see himself as responding to a genuine threat, albeit inappropriately.

200. The second reason is that on 22 August the Tribunal made it clear to the claimant and her solicitor that we wished to proceed with the hearing and not adjourn. The Tribunal went so far as to print out and present to the parties a copy of the EAT judgment in the case of ***McIntosh Donald Ltd v Anderson EATS/0018/02*** where Lord Johnstone indicated that where there is an appeal to the EAT whilst proceedings are ongoing it may often be better to proceed to hear evidence under reservation rather than adjourn and lose Tribunal time. The position however was that on 22 August the claimant was adamant that they wanted the hearing to be adjourned until after the EAT appeal had been determined. The respondent's position at final submission was that they had been neutral on this point. That does not accord with the Tribunal's recollection which was that we were prepared to proceed notwithstanding the appeal to the EAT and that both parties sought the adjournment and in those circumstances we acquiesced.

201. Although the decision is a narrow one the Tribunal felt that in all the circumstances it was not appropriate for us to exercise our discretion to award expenses. No order is therefore made. We should also say that if we had decided to exercise our discretion to award expenses we would have struck out the entry which related to the claimant's representative perusing the decision of the EAT. That would be an expense of the EAT process and a matter for the EAT.

Employment Judge: Ian McFatridge

Date of Judgment: 25 September 2019

Date sent to parties: 25 September 2019

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