



## EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Mattick

**Respondent:** Members of the Management Committee of Cylch Meithrin Aberystwyth

**Heard at:** Aberystwyth Justice Centre      **On:** 29 and 30 November, 2016

**Before :** Employment Judge R McDonald

**Representation:**

Claimant: Litigant in person

Respondent: Ms H Roddick,  
barrister.

## JUDGMENT

The judgement of the Tribunal is as follows:

1. The Claimant's dismissal was not unfair.

## REASONS

1. The Claimant alleges that her summary dismissal by the Respondent on 10 February 2016 was unfair.
2. The Respondent runs Cylch Meithrin Aberystwyth ("the Cylch"). The Respondent is run by a voluntary committee ("the Committee"). For clarity, Heulwen Davies should not have been named as an individual respondent

- in the case (other than as a member of the Committee) since the Respondent Committee was the Claimant's employer.
3. In the hearing the Claimant was a litigant in person and the Respondent was represented by Ms Roddick (barrister). For the Claimant I heard evidence from the Claimant herself and from her daughter, Cheryl Davies. For the Respondent I heard evidence from Heulwen Davies, chair of the Committee at the time of the dismissal; Morfudd Bowen, a member of the Committee at the time; Carys Lloyd, the leader of the Cylch; and Leanne Marsh, Head of Service Development and The Mudiad Meithrin Academi ("the Mudiad"). The Mudiad is the umbrella body for early years education and care in Wales.
  4. All witnesses had prepared written statements. As Welsh is the first language of the witnesses and Welsh is the language of the Cylch, witnesses for the Respondent had prepared their statements in Welsh but had also prepared an English translation of every statement for use in the hearing. The Claimant also speaks Welsh but as noted by the Regional Employment Judge at the preliminary hearing she felt more comfortable giving her evidence and conducting the hearing in English. She and her daughter had prepared statements in English. I am a Welsh speaker and simultaneous translation facilities from Welsh into English were available throughout the hearing.
  5. At the start of the hearing we had a discussion about the language of the hearing. In order to conduct a fair hearing it was important that the Claimant understood what was happening in the hearing and understood any legal points or points of process under discussion. This was particularly important as she was representing herself without legal advice. Therefore I decided to conduct the hearing mainly in English. On the other hand, I decided that it would be inappropriate and artificial to ask the witnesses for the Respondent to give their evidence in English, since Welsh is their first language and the day to day language of the Cylch. Consequently, the witnesses for the Respondent gave their evidence in chief in Welsh. In cross-examination, the Claimant asked her questions mainly in English and the witnesses responded mainly in Welsh. When questioning the witnesses for the Respondent I asked my questions in Welsh and responses were given in Welsh. Simultaneous translation facilities were available throughout the hearing. The Claimant did not suggest at any point that this approach to conducting the hearing caused her any difficulty.
  6. The parties had prepared a bundle of documents for the hearing. As is customary I read those documents specifically referred to by witnesses in their statements or at the hearing as opposed to the whole bundle.
  7. Having heard the evidence over the two-day hearing there was no time to hear the parties' submissions therefore I ordered that the parties send written submissions to the Tribunal. I am grateful to Ms Roddick on behalf of the Respondent for agreeing to send the Respondent's written submissions first (by 7th December) to give the Claimant an idea of the

structure and the points which needed to be discussed in her written submissions (by 14th December). In fairness to the Respondent I gave Ms Roddick the opportunity to send further submissions (by 19th December) in response to any points in the Claimant's submissions. I received an e-mail confirming that the Respondent did not wish to send any additional submissions.

8. To help the parties I drew their attention to case reports which I considered relevant. These are discussed in the "Relevant points of Law" below.
9. I apologise to the parties that I was unable to send the judgement through as quickly as I would have hoped due to illness and the need to prepare both Welsh and English versions of the judgment.

### **Issues**

10. The Issues were included in the order of the Regional Employment Judge following the preliminary hearing [pp 253-258]. I quote them in English which is the language of that order.
11. "[1.] The Respondent bears the burden of proving on the balance of probabilities, that the Claimant was dismissed for the potentially fair reason of misconduct [para 8].
12. [2.] If the Respondent does persuade the tribunal that its decision maker had a genuine belief in the claimant's misconduct and dismissed for that potentially fair reason, the tribunal must go on to consider the general reasonableness of that dismissal [para 9].
13. [3.] ...the tribunal will focus its enquiry on whether there was a reasonable basis for the respondent committee's belief and test the reasonableness of the investigation [para 11].
14. When it comes to assessing the reasonableness of this particular decision to dismiss the tribunal's attention will be focussed on two issues in particular...
15. [4.] The first is the claimant's criticism of the length of time it took the respondent committee to complete its investigation and provide her with a summary of the case against her, giving her inadequate time to respond.
16. [5.] The second concerns the role of Ms Davies. The claimant considers that Ms Davies was her primary accuser, the chief investigator and the decisionmaker all rolled into one, and was therefore not impartial." [para 14]
17. During the hearing it became clear that a further issue was relevant to the decision regarding the reasonableness of the dismissal. For consistency with the above matters I set it out in English, i.e:
18. [6.] Whether the refusal to call witnesses requested to the disciplinary hearing rendered the dismissal unfair?

### **Findings of Fact**

19. The Respondent is a charity which runs a Welsh language nursery in Aberystwyth for children aged 2-4. There are usually 4-5 staff working in

- the Cylch although the number working on any particular day depends on the number of children in the Cylch on that day. The Cylch is located in one room about the size of a large lounge.
20. The Claimant had worked at the Cylch as a Nursery Assistant since 28 November 2011.
  21. According to the Respondent the Claimant was dismissed on the grounds of gross misconduct, namely that she was under the influence of alcohol at work. The Cylch's Disciplinary Procedure specifically says that "being under the influence of alcohol" is an example of gross misconduct "which could lead to summary dismissal" [t.67]. According to the Respondent the dismissal arose from events which occurred on 4th and 5th November 2015.
  22. According to the Claimant the real reason behind the dismissal was that the Respondent wanted to get rid of her due to her health-related absences. The Claimant claims that a meeting held in October 2015 was at the root of the dismissal so I heard evidence about that meeting.  
*The meeting held in October 2015*
  23. The meeting took place between the Claimant and Heulwen Davies on 12th October 2015. The background was that the Claimant had been absent from work due to ill health. The Claimant maintains that Heulwen Davies requested that a meeting be held through Carys Lloyd. She suggests that, in the meeting, Heulwen Davies tried to persuade her to reduce her hours, take sick leave or give her hours up altogether so that Alaw Davies could take her place.
  24. The Respondent denies this. Ms Davies' evidence is that the Claimant requested a meeting. Ms Davies says that at the meeting she made it clear that she was keen to support the Claimant in every way to enable her to continue to work in the Cylch whilst coping with her illness. Ms Davies agrees that this did include a discussion about decreasing the Claimant's hours or the possibility of taking sick leave but she testified that these were suggested as temporary measures to help the Claimant. She denies that she suggested that the Claimant should resign or that she in any way tried to coerce the Claimant into leaving her post.
  25. Here we have conflicting reports from witnesses about an event. The Tribunal is required to decide between two versions of what took place in the meeting. Unfortunately, no notes of the meeting were taken.
  26. The Claimant claims that the fact that Alaw Davies replaced her in the Cylch immediately after her dismissal supports her allegation that the Respondent was looking for a way to get rid of the Claimant since at least October 2015. I do not accept that. There would need to be a need for someone to do the work in the absence of the Claimant particularly in light of the fact that the Cylch must keep to specific rules regarding the child-staff ratio. It seems natural to me that the Cylch would turn to a familiar person such as Alaw Davies who had been working in the Cylch from time to time as a "bank" worker to fill the staffing gap created by the Claimant's dismissal.

27. The text and Facebook messages that I read in the bundle about the meeting seemed to me to support Ms Davies evidence rather than the Claimant's. A Facebook message from Carys Lloyd to Heulwen Davies on 9th October 2015 [p.142] stating that "[the Claimant] has spoken with me on the phone this evening and she mentioned she was thinking of having a word with you to explain her condition, and I agreed with her that it would be better if she spoke to you and explained, so I hope she'll be in touch." There is a conversation via text messages between Carys Lloyd and the Claimant dated 11th October [pp 56-57]. The conversation contains a message from Carys Lloyd saying "I'll ask Heulwen to arrange to get in touch with you for a chat" and "I think it would be better if you met up with Heulwen for a chat like you said". For me, these confirm that it was the Claimant who requested a meeting with Heulwen Davies rather than the other way around.
28. More importantly, I do not accept that the Respondent tried to get rid of the Claimant in the meeting by urging her to resign. Having heard the evidence of the Claimant and Heulwen Davies, I prefer the Respondent's evidence regarding what happened and what was said in the meeting. The evidence given by Heulwen Davies was clear and sincere and consistent despite being cross-examined by the Claimant.
29. In addition the bundle of documents [p.141A] contained a text message to Heulwen Davies from the Claimant sent at 18:53 the afternoon of the meeting. In translation from the original Welsh the message reads "Thank you for listening, and for the lift x [i.e. a kiss]". I found it difficult to understand why the Claimant would have sent that text if the meeting had involved Ms Davies trying to force her out of her job. The Claimant explained that she was happy with the meeting when she sent the message and only later changed her mind after reconsidering what was said by Ms Davies. I do not accept that the Claimant would have sent that text message if the meeting had happened as she described. I find that text message corroborates the evidence of Ms Davies.
30. Therefore I find that the meeting was an attempt on the part of the Respondent to support the Claimant in coping with the effects of her health problems rather than an attempt to get rid of her in order to give her post to Alaw Davies.

*4th November*

31. According to the Respondent, the events leading to the dismissal of the Claimant started on Wednesday 4th November 2015. There is a fundamental difference between the Claimant and the Respondent about what took place that day.
32. According to Heulwen Davies, that morning she received a phone call from Eirwen Hughes, Mudiad Meithrin Support Officer for North Ceredigion. She in turn received a phone call from Sioned Evans, Manager of Camau Bach, a nursery which shares the building with the Cylch. Ms Evans was phoning because Nia Harries who worked on

- reception in Camau Bach had phoned her to report that the Claimant had arrived at work smelling of alcohol and not speaking clearly. According to the statement Nia Harries gave to the disciplinary investigation [p.154A], she noticed this because the Claimant had had to borrow the spare key Camau Bach kept on behalf of the Cylch. Ms Evans asked Ms Hughes to contact Ms Davies since Ms Davies was the chair of the Committee.
33. Ms Davies explained that she was not at the Cylch that morning. She did not visit the Cylch on a regular basis since she was a member of the Committee rather than the manager of the Cylch in respect of everyday matters.
  34. Heulwen Davies's evidence was that on receiving the call at about 10 o'clock she phoned Carys Lloyd in the Cylch to explain the situation. She says that her main purpose in doing this was to ensure the safety of the children in the Cylch. The evidence of Ms Lloyd confirms that they did have this conversation.
  35. Caryl Lloyd testified that Ms Davies arrived at the Cylch about 10.10 a.m. Ms Davies testified that (following a short conversation with Ms Lloyd) she asked the Claimant for a private chat. According to her evidence she met the Claimant in the office of Sioned Evans in Camau Bach. This is a small room and Ms Davies testified that the Claimant was flushed, confused, that her speech was slurred and that she smelt of alcohol. She says that she was of the opinion that the Claimant was under the influence of alcohol.
  36. According to Heulwen Davies, she reported the allegations and the Claimant responded in a defensive and tearful manner stating that she was a teetotaler and that she could not drink alcohol even if she wanted to due to the fact that she was taking medication. As the Claimant was tearful, Heulwen Davies asked Carys Lloyd to join the meeting in the office. Carys Lloyd gave evidence that after she joined the meeting Ms Davies reported that a complaint had been made that the Claimant was under the influence of alcohol and that the Claimant accepted Ms Davies' suggestion that the Claimant should go home.
  37. Heulwen Davies testified that she drove the Claimant home after the meeting. In her oral evidence she testified that there was a strong smell of alcohol in the car during the journey. According to Heulwen Davies there was still a strong smell of alcohol in her car later in the afternoon when she gave a friend a lift, so much so that her friend had asked her if she had had a party in the car.
  38. Apart from accepting that she had had to have Nia Harries' help to open the door of the Cylch on the morning of the 4th the Claimant's evidence was fundamentally different. As well as denying that she was under the influence of alcohol, she denied that she had a meeting with Ms Davies on the 4th, testifying that it was her daughter, Ms Cheryl Davies, who gave her a lift home. She claims that she did not hear about the allegations against her until a phone call from Heulwen Davies on Monday 9th November.

39. The Claimant testified that she was feeling particularly uncomfortable on the 4th as a result of her inflammatory bowel disease and therefore she had asked Carys Lloyd for permission to leave early. She claimed that she asked for permission to phone her daughter, Ms Cheryl Davies, and asked her to pick her up from work. She claimed that she left the Cylch about 11 o'clock without any kind of meeting with Heulwen Davies.
40. Cheryl Davies' written statement did not corroborate her mother's evidence on this point but in her oral evidence she stated that she had given her mother a lift home on the 4th. Under cross-examination, however, she acknowledged that she could not say for certain whether she had given her mother a lift home on any particular date due to the fact that she often did this.
41. Cheryl Davies maintained that her mother would not have accepted a lift from a member of the Committee. However, it is clear from the text message from the Claimant following the meeting on 12th October that Heulwen Davies had given the Claimant a lift on at least one occasion.
42. It is unfortunate that there is no record of the meeting on the 4<sup>th</sup>. There was also no other written evidence created at that time recording what was said at that meeting, e.g. by way of an email, text or other report from Heulwen Davies to her fellow Committee members. I do note that the Respondent's letter to the Claimant on 26th November 2015 [p.147] refers back to a meeting on 4th November but it gives no details of that meeting.
43. The Claimant did not (at the hearing or in her written submission) challenge Nia Harries's evidence in her statement to the disciplinary investigation that Ms Harries had called Sioned Evans on the morning of the 4<sup>th</sup> because the Claimant smelt of alcohol. The Claimant also did not challenge Sioned Evans's evidence that she then called Eirwen Hughes and that Ms Hghes was going to call Ms Davies as the chair of the Committee. [Ms Harries's and Ms Evans's statements to the disciplinary investigation were in the docuemtns bundle at pp.154-155]. In answer to my question about this at the hearing the Claimant said she had never had any problems with Ms Harries and could not think why she would make false allegations against her.
44. Whilst acknowledging that the Respondent is not Eirwen Hughes' employer it is unfortunate that I did not hear any evidence from her regarding what took place (on the 4th and subsequently). Having said that, it seems to me more probable than not that the call from Ms Evans about Ms Harries's allegation would have caused Eirwen Hughes to contact Heulwen Davies and that she in turn would have called an emergency meeting with the Claimant to discuss the allegation.
45. In terms of oral evidence I preferred the evidence of Ms Heulwen Davies and Ms Lloyd to that of the Claimant and her daughter. Ms Heulwen Davies's evidence in response to cross examination was clear and consistent whereas the Claimant's was less so. Although Ms Lloyd's evidence was hesitant about some matters, she was consistent in her evidence about Heulwen Davies's call and the meeting when challenged

in cross examination. I've referred in para 40 above to inconsistencies and uncertainties in Cheryl Davies's evidence.

46. Having considered the evidence as a whole I find that the meeting between Heulwen Davies and the Claimant (and Carys Lloyd) took place on the 4th as testified by Ms Davies and Ms Lloyd.
47. There was also a degree of contradiction regarding a phone call around 5.30 on the 4th. Ms Davies testified that she spoke to the Claimant on the phone who was upset and running her words into one another. Ms Davies states that she told the Claimant not to come to work the following day and then phoned Carys Lloyd to arrange for someone to take the Claimant's place. Under cross-examination the Claimant said that she did not remember the phone call. She did not deny that the phone call might have taken place. I accept Ms Davies' evidence regarding this phone call.
48. For convenience I note here what Carys Lloyd and Vicki Lowden said about the Claimant in their statements to the disciplinary investigation. According to Vicky Lowden [report Ch] it was obvious that the Claimant was "swaying back and forth when standing, that her speech was unclear, her eyes glazed and that she smelt of alcohol". According to Carys Lloyd [report C] having received the phone call from Heulwen Davies that morning she went to talk to the Claimant and "that was when I thought I could smell that she had been drinking, she was not unsteady on her feet at the time but when she went to get some fruit from a bag in the hall I noticed that her legs were a bit shaky". According to the Claimant it is significant that Carys Lloyd says that she did not notice this until after she had spoken to Heulwen Davies on the phone although she had spoken to her earlier that morning.

*5th November*

49. The Claimant testified that she asked Carys Lloyd on the 4th if it would be possible for her not to work on the 5th. In her statement to the disciplinary investigation [p.156] Carys Lloyd concurs that the Claimant asked whether it would be possible for Eleri Davies to come in instead of her on the Thursday. According to Carys Lloyd the reason given by the Claimant was that she intended to go on the bus to visit her partner who was in hospital in Carmarthen following a car accident. According to the Claimant she requested this because of the effects of her illness and claimed that her partner had not been in a car accident. The Claimant accepted that it was possible that Carys Lloyd had misinterpreted the reason for her request.
50. Be that as it may, the Claimant was not supposed to be working on the 5th. However the parties agree that she attended the Cylch in the morning and that she stayed there for about 10 minutes. According to the Claimant she went in to ensure that a sufficient number of staff were available as she was aware that Carys Lloyd was away in a family funeral and that Eleri Davies was not always punctual.
51. There is agreement that the Claimant spoke to two parents. One of the parents (Bethan Rees) gave a statement to the disciplinary investigation

- [p.157]. According to the statement Ms Rees contacted a member of the Committee (Kate Woodward) on the morning of the 5th because she had smelt alcohol on the Claimant's breath. Heulwen Davies testified that Kate Woodward phoned her about 9-9.30 that morning regarding Bethan Rees' report. Consequently Ms Davies says that she contacted Eirwen Hughes from the Mudiad for further advice. Having done that, she testified that she phoned the Claimant and told her that she would be taking further advice from the Mudiad following the serious allegations received. The Claimant did not specifically deny that this phone call had taken place nor did she challenge Ms Davies' evidence about its content.
52. According to a statement given by Vicki Lowden, another member of the Cylch staff, to the disciplinary investigation [report Ch - p.157A], during her time in the Cylch on the morning of the 5th the Claimant smelt strongly of alcohol and she "was not very steady on her feet, her eyes were still glazed and her voice sounded odd". In her statement, Eleri Davies (another of her colleagues) says that [the Claimant] "was not well" that morning and that she was "sure I smelt something strange which gave me a bit of a shock and made me think "I wonder" " [report D to the disciplinary investigation p. 158A].
53. Carys Lloyd was not in the Cylch but her statement to the disciplinary investigation [report C] says [in translation] that "it was likely that Rhian had come in smelling of alcohol and slurring her words". In her oral evidence to the Tribunal, Carys Lloyd explained that this is what Vicki Lowden told her when she came to the Cylch to work on Friday 6th November. In her oral evidence Ms Lloyd also confirmed that "it was likely" in the English version of statement C was a mis-translation of the Welsh "mae'n debyg" and that this should have been translated as "apparently".

*Monday 9th November*

54. Monday was the Claimant's next day of work. There is agreement that she worked in the morning as usual and that Heulwen Davies phoned her in the afternoon to tell her that she was suspended from work whilst the Respondent investigated the allegations against her. The Claimant says that this was the first time she knew about the allegations.
55. I have already found that Ms Davies met with the Claimant on the 4th to discuss the initial allegation made by Nia Harries. This is an opportune moment to deal with one of the Claimant's arguments in support of her version of events on the 4th. She argues that it is inconceivable that the Respondent would allow her to work on the 9th if they had already met with her on the 4th. If there were such serious allegations against her, they would have used any meeting before the 9th to suspend her from work in order to safeguard the children. According to this argument the fact that they did not suspend her before the 9th is evidence that the previous meeting had not taken place.
56. I accept that it is surprising that the decision was not made to suspend the Claimant from work either in the original meeting with Heulwen Davies on

- the 4th or during the subsequent phone calls with her on the 4th and 5th. These were serious allegations which could potentially affect the safety of the children in the Cylch. In her evidence, Ms Davies says that there was no reason to suspend the Claimant from work on the Monday as there was no evidence that she was under the influence of alcohol on the Monday. It is not clear what steps the Respondent took to ensure that this was how things were before the Cylch's working day started on Monday 9th.
57. It seems to me that the reason for the delay in suspending the Claimant was that Ms Davies was not clear what steps were appropriate and legal for the Respondent to take in the wake of these allegations. According to her own evidence (and the Respondent's written submissions) she had no experience of conducting disciplinary procedures and neither did she have the relevant training. According to Ms Davies' evidence the 9th was the first time she had met Eirwen Hughes to discuss the matter in full. It is understandable (but not necessarily commendable) that she was waiting for advice from the Mudiad before taking a serious step such as suspending a member of staff from the Cylch.
58. The Cylch's Disciplinary Procedure [t.137-140] confirms that the Chair of the Cylch has a power to suspend "for a brief period while the investigation is concluded". It also says that "The Committee will send a letter to the individual confirming the allegations against him/her and outlining the conditions of the suspension. The Committee will review the suspension weekly to ensure it does not continue unnecessarily." The Disciplinary Procedure does not specify when that letter should be sent but it seems to me a reasonable employer would send it as soon as the suspension started.
59. I did not see any written record of the call on the 9th. Nor was there a letter confirming the suspension and the allegations until 26th November 2015.

*The investigation*

60. According to Heulwen Davies the Mudiad advised her to conduct an investigation into the allegations. Carys Lloyd testified that Eirwen Hughes held a meeting with Cylch staff first thing on Wednesday morning 11th November. According to Ms Lloyd's evidence Ms Hughes explained that she had received a complaint that a member of staff had been drinking and asked them to send any written evidence relating to the events on the 4th and 5th to Heulwen Davies.
61. The bundle of documents contained 6 statements or reports labelled A-Dd. Reports A and B contained the statements of Nia Harries and Sioned Evans. Report C contained the statement of Caryl Lloyd. There were two statements from Cylch staff members (report Ch by Vicky Lowden and report D by Eleri Davies). Report Dd contained the statement of Bethan Rees, the parent who spoke to the Claimant on the 5th and smelt alcohol

- on her. There was no statement from Heulwen Davies herself regarding the events of the 4th.
62. According to Heulwen Davies, she received a statement via e-mail from Carys Lloyd and handwritten statements from the others. Kate Woodward typed up the Welsh versions in the bundle and later on the Mudiad prepared English translations of each report. The statements in the bundle were signed and dated January 2016. In her oral evidence, Heulwen Davies testified that the reports had been collected by 16th November and that they were ready by the end of November [para 26(ii) of her statement]. I take this to mean that the original reports had been received by 16th November and typed up in their present form by the end of November.
63. One point raised by the Claimant is that not every witness to the events which gave rise to the allegations has provided a statement. Specifically, not every member of staff working in the Cylch on the 4th and 5th had provided a report. I asked Ms Davies in the hearing what steps she had taken to secure their evidence or to request further details regarding any ambiguity or lack of explanation in reports A-Dd. Her response was that she had not taken any such steps - her understanding was that her task was to collect the "raw" evidence.
64. An investigative meeting was held on 16th November. Present in the meeting were the Claimant and her daughter, Heulwen Davies, Eirwen Hughes and Kate Woodward. Kate Woodward is the secretary of the Committee and she was responsible for producing the minutes of the meeting in the bundle of documents [p. 143]. The meeting lasted less than half an hour and it was held in English. The Claimant was not permitted to see reports A-Dd in the meeting. Unfortunately the minutes do not make specific reference to the details of the allegations, e.g. by noting what days the allegations were referring to.
65. The bundle did not contain a formal letter inviting the Claimant to the meeting on the 16th and explaining the allegations. It appears that communication between the Claimant and the Respondent tended to be via text messages. There was no copy of a text message inviting the Claimant to the meeting. Be that as it may, it is clear to me that the Claimant was aware of the nature of the allegations against her by 16th November. The minutes of the meeting refer to her denying that she had drunk alcohol for years and saying that she had contacted a solicitor on 9th November because she felt that the allegations were, as stated in the minutes, "defamation of character". According to the minutes, when asked why anyone would make such allegations against her, her response was "God knows". During the disciplinary procedure, the Claimant denied that she would use such an expression but this does not appear to me to bear any relevance to the issues I am determining. What is clear to me is that the nature of the allegations was explained and denied but the Claimant did not receive details of the allegations e.g. by sharing statements A-Dd.

66. The Cylch's written Disciplinary Procedure [p.137] explains the steps which should be taken in investigating allegations:

"The Committee will:

- ask each individual involved in the incident for a written statement at once, before memories fade.
- decide upon one or two members of the Committee to hold the investigation, gathering any evidence associated with the incident
- hold an investigative meeting with the witnesses and the members of staff involved"

67. It's not disputed that in this case, the Claimant was not asked to provide a written statement. Heulwen Davies's evidence was that the note of the investigatory meeting [p.143] was the equivalent of a written statement from the Claimant. The note does not include the sort of detail about what happened on the 4<sup>th</sup> and 5<sup>th</sup> according to the Claimant which I would expect in a "statement".

68. The minutes of that meeting clearly show no witnesses other than the Claimant attended the investigatory meeting.

69. As to whether "each individual involved in the incident" was asked for a written statement, the evidence is that all staff were collectively asked to volunteer written statements at the meeting on the 11<sup>th</sup> with Eirwen Hughes. There was no suggestion from the Respondent that there were further steps taken to ask those who did not volunteer statements to do so or to clarify any aspects of the statements given which were unclear or contradictory. Heulwen Davies did give unchallenged evidence that Kate Woodward had asked the second parent who had spoken to the Claimant on the 5<sup>th</sup> November to give a statement and she had declined to do so.

*After the investigatory meeting*

70. There was a delay between the investigative meeting and inviting the Claimant to a disciplinary hearing. The invitation came in the form of a letter on 25th January 2016 from Heulwen Davies, i.e. over two months after the investigative meeting. As noted by the Regional Employment Judge in the preliminary hearing [p.256, para 14], one of the Claimant's arguments was that the dismissal was unfair due to the time the Respondent had taken to conduct the disciplinary procedure and make the decision to dismiss.

71. It seems to me that after investigatory meeting there was communication between the Claimant and the Respondent either in person or via text messages which were not included in the bundle of documents. In relation to formal communication between them, the next step was a letter in English on 26th November 2015 from Heulwen Davies confirming "Suspension pending disciplinary investigation". The letter does not provide any details of the allegations against the Claimant apart from stating that she is being suspended from work "pending investigations into

an allegation of gross misconduct specifically that you have attended work under the influence of alcohol". The letter makes no reference to dates, nor does it contain any additional information regarding on what grounds the allegations were made e.g. by including copies or summaries of reports A-Dd that had already been collected.

72. There is no dispute that minutes of the investigative hearing were not sent with the suspension letter. According to the evidence given by Heulwen Davies the Mudiad had not told her that she needed to send a copy of the minutes to the Claimant. It was only when she received the letter dated 25th November 2016 inviting her to a disciplinary hearing on 28th January [pp. 165-166] that the Claimant received the notes of the investigative meeting.

73. In her statement to the Tribunal Heulwen Davies submits three reasons for the two-month delay between the investigative meeting and the invitation letter:

- that she was awaiting answers from the Claimant's doctor
- that the Christmas and New Year break had caused delay
- that she had to ask the Mudiad for advice on various matters.

74. The first reason was that she was awaiting answers from the Claimant's doctor to written questions she had sent to him following the investigative meeting. In that meeting the Claimant presented a medical report explaining her medical history and specifically the fact that she was taking medication for blood pressure. On the afternoon of the meeting, Ms Davies wrote to the doctor asking whether the medication would have caused the Claimant to smell of alcohol, to be unsteady on her feet or to be confused. The letter also asked whether there was another explanation for these conditions and whether the Claimant was fit to work with children.

75. On 18th November the doctor wrote to Ms Davies but it seems to me that the letter in question is a response to a visit from the Claimant on the 18th as opposed to Ms Davies' letter. The letter does not answer Ms Davies' specific questions. Rather it states that nothing in the Claimant's medical history suggests "any misuse of alcohol or alcohol dependency". It also confirms that blood tests taken in March 2015 did not suggest any liver damage which would imply alcohol-related problems. The doctor ends the letter by stating that he is unable to give an opinion about any specific incident where it is alleged that the Claimant had been drinking as he was not there at the time.

76. As it happens, this is not entirely correct. The doctor saw the Claimant later on the morning of 5th November, which was one of the days it was alleged that the Claimant was under the influence of alcohol. Ms Davies' letter does not refer to the dates but it is not entirely clear why the Claimant did not explain to her doctor that she had seen him on one of the days in question when she saw him on the 18th.

77. Text messages between Ms Davies and the Claimant [pp.92-94] show Ms Davies urging the Claimant to contact the surgery to ask for an answer to her letter and to “follow up the matter” because she “wanted to move things along now in fairness to you and the Cylch”. As no answer was forthcoming Ms Davies wrote to the doctor once again on 7th December. That letter repeats, word for word, the questions asked in the letter dated 16th November.
78. The doctor responded in a letter dated 23rd December 2016. He repeated what he had said in his letter of the 18th but also said that he did not think that the Claimant's blood pressure medication would cause her to smell of alcohol, to be unsteady on her feet or to be confused. He reported that the Claimant vehemently denies that she was under the influence of alcohol on the day in question. He says that he is not in a position to confirm this nor to give an opinion on the Claimant's fitness to work with children.
79. I accept that some of the delay was due to waiting for the doctor's response and that there is evidence that Ms Davies was attempting to move things along by advising the Claimant to contact the doctor to urge him to answer the letter. It is also clear that there would be some delay due to the fact that the doctor would have to have the Claimant's permission before answering.
80. The second reason for the delay according to Ms Davies was that the Christmas and New Year break had meant that it was not possible to contact the witnesses in order to have their permission to use their reports. Originally, reports A-Dd were anonymous but clearly someone produced a “permission to use evidence” form for the witnesses to sign as confirmation that they were happy for the Cylch to use their names on the report and to present it as evidence or to use it as anonymous evidence. Nia Harries and Sioned Evans gave their permission to use their names but the other colleagues requested to remain anonymous [reports C-D]. There is no form for report Dd, namely that of the parent who gave evidence. The permission forms were signed between 20th and 25th January 2016. It is not clear whose idea it was to produce the forms and I heard no evidence explaining why it had taken until three weeks after the New Year to collect the permissions. I have noted that the reports were available since the end of November and that the majority of the witnesses worked in the Cylch or in the same building as the Cylch, therefore it appears to me that it would have been comparatively easy to get hold of them to sign the forms.
81. The third reason for the delay according to Ms Davies was that she had to ask the Mudiad for advice on various matters. I have already noted that Ms Davies had no experience of conducting such an investigation therefore it is understandable that she would seek advice.
82. As I've alluded to above, it is evident that informal communication between Ms Davies and the Claimant continued in the period between November 2015 and January 2016. For one thing, a complaint from the Claimant prompted Ms Davies to hold a meeting with the staff of the Cylch

- in early December to remind them that the matter of allegations against the Claimant was confidential. This happened because the Claimant met one of the parents of the Cylch in town and the parent had asked her if it was true that she was not working in the Cylch. Carys Lloyd testified that Heulwen Davies held a staff meeting to emphasise that the matter was strictly confidential. Copies of text messages in the bundle of documents confirmed that the Claimant and Ms Davies “discussed” this; that Ms Davies contacted Eirwen Hughes about the matter; and that Ms Davies held a meeting with the staff about it.
83. It is evident that, at times, the Claimant had to press the Respondent for answers. For example, on 13th December 2015 [p.69] the Claimant wrote to Ms Davies referring to a telephone conversation and text message on 26th November asking if Ms Davies or anyone on the “investigation panel” had made a complaint against her. No answer is received from Ms Davies until 22nd January [p.75]. Even given that the Committee did not receive the Claimant’s letter until 18th December as Ms Davies says in her letter of the 22nd January, there is a month’s delay before responding. Again, the Claimant did not receive copies of the minutes of the investigative meeting until the letter dated 25th January despite her request that she receive them by 20th December at the latest and assurance from Eirwen Hughes that she would “get the minutes to you as soon as possible” [text messages p.65].
84. To summarise, I find that the delay between the investigative meeting and the disciplinary hearing was partly due to having to wait for the doctor’s answers to valid questions. There is evidence that the Respondent did take steps to progress things in this respect. The delay was also partly due to the fact that Ms Davies was unsure about the correct steps to take and partly, it seems to me, due to a lack of communication between the Mudiad and the Cylch. The specific example of this is the failure to pass a copy of the minutes of the investigative meeting on to the Claimant. According to Ms Davies she was not aware that she was required to do that but it is clear that Ms Hughes had agreed to provide them to the Claimant in December at the latest.

*The disciplinary hearing*

85. The disciplinary hearing was conducted on 8th February in the office of the Mudiad. 28th January was the original date but in a letter on the 26th the Claimant requested more time to consider the minutes of the investigative meeting and to wait for a response to her letter to the Chief Executive of the Mudiad Meithrin. The meeting was rescheduled for 3rd February and the Claimant agreed to this, but then it was postponed until the 8th at the request of the Respondent.
86. Initially, the intention was for Anwen Elias, Registered Person of the Cylch, to conduct the hearing with Kate Woodward as minute taker. Ms Elias is the former chair of the Cylch. By the 8th Anwen Elias was working abroad therefore it was decided that Morfudd Bevan, Cylch Treasurer,

would conduct the hearing with Heather Davis-Rollison, Regional Director of the Mudiad. According to Anwen Elias' letter dated 29th January [p.171-172] the reason for this was that Morfudd Bevan was the only member of the Committee who had not already been involved in the process. Unusually perhaps, given she was not part of the Committee, Ms Davis-Rollison Chaired the hearing. According to the statement given by Morfudd Bevan the reason for that was that Ms Davies-Rollison had experience of conducting and chairing such hearings. Ms Bevan did not have this experience and she had no training in disciplining staff. She confirmed that she was not familiar with the ACAS Code relating to discipline and grievance. According to Ms Bevan, she received a package containing reports A-Dd a couple of days before the hearing and read them thoroughly.

87. The Claimant had received copies of the reports and, although they were anonymous, she had guessed that report Ch was Vicky Lowden's statement. Therefore she sent a text message to Heulwen Davies on 3rd February [p.82] requesting that Vicky Lowden attend the disciplinary hearing so that the Claimant could question her. Ms Davies's response was to ask the Claimant to send any questions for Vicky Lowden beforehand so that they could have her answers down on paper for the hearing if she was not willing to attend. On 4th February Ms Davies confirmed in a text message [p.83] that Ms Lowden was not willing to come to the hearing and once again asked for written questions. The Claimant responded on the 5th by saying "I wanted Vicky to read out her statement but as Vicky will not be attending, I would like Eleri Davies to be present, just to read out her statement at the disciplinary" [p.84]. The Claimant accepts that she did not prepare written questions for Vicky Lowden or Eleri Davies and there is no suggestion in the text messages that she maintained that lack of time was what had prevented her from doing so.
88. Another matter worth mentioning is that the Respondent agreed that Kate Woodward would not be present to take the minutes of the hearing since she had taken part in the investigative meeting. Instead, Angharad Starr took the minutes.
89. The minutes of the hearing state that the meeting lasted from 14:24 until 15:10. It notes that Ms Davies-Rollison went through the allegations and gave the Claimant a chance to respond to each one. Regarding the allegations that she was under the influence of alcohol on the 4th and 5th the minutes report that the Claimant denied that she drank alcohol.
90. Regarding the 4th the Claimant noted that report C [by Carys Lloyd] refers to Heulwen Davies saying to her during the phonecall to the Cylch on the morning of the 4th that "one of the parents" had complained that [the Claimant] "smelt of alcohol". According to Heulwen Davies's evidence, the complaint was from Nia Harries, rather than a parent. In her statement to the Tribunal Ms Lloyd confirmed that this was her mistake and that Ms

- Davies had not said that a parent had complained, but rather that “somebody” had complained.
91. The Claimant maintains that rather than being a mistake, Ms Lloyd’s reference in report C to a complaint by a parent is actually a reference to a complaint by Heulwen Davies. That this is why, in the claimant’s view it was inappropriate for her to have carried out the investigation into her case.
  92. I accept that the reference to a “parent” in report C was a mistake on Ms Lloyd’s part. I’ve already found that it was Nia Harries rather than a parent who made the original allegation. In addition it does not strike me as likely that Heulwen Davies would ring Carol Lloyd to say she was coming in to the Cylch because a “parent” had made a complaint if it was she herself that had raised a complaint.
  93. It is evident, however, that there was some confusion surrounding this point throughout the disciplinary procedure. According to the minutes of a telephone conversation between Ms Bevan and Heulwen Davies following the disciplinary hearing [p.181], Ms Bevan asked Ms Davies “why no statement from the parent referred to as complaining on the Wednesday 4 November 2015”. Rather than say there was no such complaint, Ms Davies’s response was “the complaint of the parent from the 4th November 2015 cannot be considered in the disciplinary process”. It’s not clear whether what Ms Davies meant was that her own evidence from the 4<sup>th</sup> (of her meeting with the Claimant) could not be taken into account. What is clear, however, given her response to Ms Bevan is that there was no statement from a parent regarding the 4th under consideration at the disciplinary hearing.
  94. Part of the hearing related to an allegation that was not in the end part of the decision to dismiss. This allegation was that the Claimant had given one of the children yoghurt rather than fruit as a “token”. The allegation was that this was contrary to the Cylch’s policy of giving a piece of fruit as a “token”. The Claimant responded by saying that parents sometimes put yoghurt rather than fruit in their child’s bag and that other members of staff had also given children yoghurt in the past.
  95. Regarding the allegation of being under the influence of alcohol on the 5th, the Claimant asked the disciplinary hearing to take note of a letter from her doctor dated 27th January 2016. The letter states that the doctor saw the Claimant in an appointment on the morning of 5th November 2015 and that “I was not aware of her being under the influence of alcohol at the time of the consultation”. In the hearing the Claimant suggested that this was not consistent with the evidence in reports Ch and D which stated that she smelt strongly of alcohol that morning. The Claimant also raised the point that only one of the two parents who spoke to her gave evidence. She also enquired why she had not been suspended from work on Monday 9th November if there were such serious allegations against her.
  96. At the hearing, according to the minutes [pp.176-180], the Claimant agreed that she was not experiencing any side effects due to her blood

- pressure medication on the 4th or the 5th. She also agreed that she had had ample opportunity to consider reports A-Dd and that she did not have any further questions. In her letter of appeal the Claimant claimed that the minutes were not correct. Her daughter, who was with her in the disciplinary hearing, made the same claim. However, there were no details about the alleged inaccuracies and consequently I accept that the minutes accurately reflect what took place at the hearing.
97. After the hearing, Morfudd Bevan conducted telephone conversations with Heulwen Davies, Carys Lloyd and Vicky Lowden to gather answers to questions arising from the hearing [p.181]. In addition to answering the question regarding the complaint from a parent on the 4th already mentioned, Ms Davies explained that the Claimant had not been suspended from work on the 9th because she was awaiting advice from the Mudiad.
98. Carys Lloyd confirmed that children were sometimes given yoghurt as a “token” when there is no fruit available.
99. Vicky Lowden confirmed that the mistake with the yoghurt had not been raised with the Claimant at the time.
100. Despite the fact that Ms Davies-Rollison was chairing the hearing, she was not part of the Committee therefore it was Morfudd Bevan and Anwen Elias who made the decision to dismiss. They did this following two telephone discussions on 9th and 10th February. This had to be done on the phone because by that time Ms Elias was working abroad. Ms Davis-Rollison was present during the phone calls and Angharad Starr minuted the discussion. The accuracy of the minutes was not challenged. They show that the main content of the calls was a discussion about the evidence between Ms Bevan and Ms Ellis.
101. The minutes confirm that Ms Elias received a copy of the reports and documents in the hearing and that Ms Davis-Rollison read the doctor's letter of 27th January out to her. The minutes also report that Ms Bevan explained the content of her telephone conversations with Heulwen Davies, Carys Lloyd and Vicky Lowden after the hearing on the 8th. Specifically she notes Ms Davies' explanation for not suspending the Claimant from work on the 9th; that they could not consider the report of the parent who made a complaint on the 4th; that some children are sometimes given yoghurt as a “token”; that the Claimant had presented information suggesting that her blood pressure medication could cause side effects such as being unsteady on her feet but that she denied being unsteady on her feet on the days in question.
102. The decision to dismiss after considering reports A-Dd and the Claimant's response to this in the hearing is reported in the minutes of the telephone conversation of the 10th [pp.184-185]. In the wake of the evidence regarding the inconsistency of the policy in respect of giving yoghurt as a “token”, the minutes note “decide not to consider this matter any further as part of disciplinary proceedings”.

103. Ms Bevan confirmed the decision and the reasons for that decision in a letter dated 10th February 2016 [p.186]. As noted by the Claimant, the letter is printed on Mudiad notepaper not the notepaper of the Cylch. Ms Bevan explained that this had happened due to the fact that they had been using the Mudiad's resources for the telephone calls and that a member of the Mudiad staff typed the letter whilst Ms Bevan dictated it. I accept that this happened by mistake as opposed to the suggestion that it was the Mudiad rather than the Cylch who made the decision to dismiss.
104. The decision was based on the fact that Ms Bevan and Ms Elias accepted the evidence of the reports A-Dd over the evidence of the Claimant regarding what took place on the 4th and 5th, and crucially, that four out of the five witnesses said that she smelt of alcohol. The letter also deals with the Claimant's main arguments. The letter explains that it is reasonable to believe that the smell of alcohol would have faded significantly by the time of her medical appointment at 11:30 on the morning of Thursday the 5th and that this explains why the doctor did not notice it at the time of her appointment. The letter confirms that Heulwen Davies had no part in the disciplinary decision and that she did not give evidence. It also states Heulwen Davies' explanation for not suspending the Claimant from work on the 9th and confirms that they asked the second parent who spoke to the Claimant on the 5th to give evidence but she refused to have any involvement in the process.

*The appeal*

105. The Claimant appealed by letter on 11th February 2016. The grounds of the appeal were based on three points: Firstly that it was unreasonable to refuse to call Vicky Lowden so that the Claimant could cross-examine her. Secondly that she was not informed of the evidence given by Ms Lowden and Carys Lloyd in the telephone conversations following the hearing. Thirdly that it was unfair for Heulwen Davies to be made responsible for the investigation when she herself had made a complaint against the Claimant.
106. The appeal hearing was held on 23rd March. It was postponed from 9th March because the Claimant was indisposed. Leanne Marsh, Head of Service Development and AcadeMI in the Mudiad conducted the hearing. As explained by Morfudd Bevan in response to a letter from the Claimant, the hearing had to be conducted by someone from outside the Cylch since every member of the Committee had been involved either in the investigation or in the disciplinary hearing.
107. According to the minutes, the Claimant devoted some time to suggesting that reports C and Ch were inconsistent in respect of what took place on the 4th. She also suggested that the allegations were false. She said that a member of staff had sent a text message stating this but she was not willing to share the message. She shared text messages from Carys Lloyd [pp.208-209] saying "you know I'm not the one who

complained!” and that she did not want to lose the Claimant as a friend. The Claimant suggested that these confirmed that the allegations were false. The Claimant also said that she was still in contact with the parent (report Dd) and that she had received a Christmas message from her on Facebook.

108. In respect of cross-examining the witnesses, the Claimant had been given the opportunity to send written questions to them but she had not done this. In the appeal meeting Mrs Marsh gave her another opportunity to raise any questions for their attention but the Claimant confirmed that she did not have any further questions.
109. In the appeal the Claimant stated that Heulwen Davies was still involved in the process in early February 2016, just as the disciplinary hearing was about to start. The reason why this was a matter of concern for the Claimant was that she claimed that Ms Davies was not impartial. She had also received confirmation from Ms Davies in her letter dated 22nd January 2016 that her “role in this process is solely investigative”. According to the Claimant this was inconsistent with the fact that Ms Davies was still responding to messages about the disciplinary hearing on 3rd, 4th and 5th February.
110. It is evident from the appeal hearing minutes that the Claimant also raised the point that her appointment with the doctor was at 11 o'clock on the 5th not at 11.30 as suggested in report Ch. Her argument was that this undermined the finding at the disciplinary hearing that any smell of alcohol would have faded substantially before she saw the doctor. She also submitted a letter from a doctor on 18th February 2016 regarding how long it takes for the effects of alcohol to disappear from the body. The Claimant's argument was that the NHS Choices website suggests that after consuming 8-9 units of alcohol “your speech begins to slur and your vision will start to lose focus.” She noted that this was the level of alcohol that would be consistent with the allegations made against her in report Ch in respect of Thursday morning. If that was true, the Claimant said, the doctor's letter suggested that it would take eight hours for the effects of the alcohol to disappear (the letter states: “it could take roughly one hour per unit to get the alcohol out of the body's system”). It would have been impossible, then, for the effects to have disappeared by the time she saw the doctor at 11 o'clock on Thursday morning.
111. Once again, the Claimant and her daughter (who was witness to the appeal hearing) claim that the minutes are not correct but they did not raise a complaint in respect of the above matters. Therefore, I accept that, in respect of the matters noted above, the minutes are correct. On the other hand the Claimant and her daughter claim that the minutes do not contain everything Ms Marsh said. Specifically, it is suggested that Ms Marsh agreed that the Cylch should apologise for the allegation that she was “out of it” on the Tuesday 3<sup>rd</sup> and for the allegation regarding giving yoghurt rather than fruit to a child. It is also suggested

- that she said at the end of the hearing that the Claimant had brought sufficient evidence to disprove the allegations relating to Thursday.
112. Ms Marsh denies the suggestions. In her oral evidence she acknowledged that she had said that she apologised if the other allegations had added to the Claimant's stress. She also acknowledged that she was feeling less certain about the allegations made on Thursday compared to feeling 100% certain about the allegations made on Wednesday regarding being under the influence of alcohol. She was clear that she did not say that the Cylch should apologise or that there was sufficient evidence in support of the Claimant regarding Thursday. It seems to me that Ms Marsh' version of events is more likely and that the Claimant may have read more into any acknowledgement or statement of sympathy from Ms Marsh than was intended. Be that as it may, it is clear that Ms Marsh decided to reject all the grounds of the appeal.
113. Ms Marsh confirmed that she rejected the appeal in a telephone call after the hearing at approximately 4 o'clock. Unfortunately there is no record of the call. What is more unfortunate (to say the least) is that the letter confirming the decision and the reasons for the decision was not sent until 20th April 2016. The Claimant testified (and I accept this) that she contacted the Mudiad office on several occasions between the hearing and the letter asking for the minutes and the letter giving the reasons for the decision. According to Leanne Marsh she did not receive the Claimant's letters and messages. If so it seems to me that there is something lacking in the Mudiad's internal communication system. Even if it is accepted that Ms Marsh had been on leave and that she was also busy with meetings at work the Claimant was not given formal confirmation regarding the failure of her appeal for nearly a month.
114. The letter itself explains the decision in considerable detail. To summarise: Ms Marsh determined that minor discrepancies in the reports were not sufficient to render the decision to dismiss unreasonable; she did not accept that the doctor's appointment being at 11 o'clock rather than 11.30 would have made a sufficiently substantial difference; and she was clear that Heulwen Davies had no involvement in the decision to dismiss.
115. Although there was further correspondence between the Claimant and the Mudiad those documents do not appear to me to be relevant to the matters I am required to determine.

### **The Law**

116. The Employment Rights Act 1996 ("ERA") gives employees the right not to be unfairly dismissed.
117. The first question for the Tribunal is whether there is "a potentially fair reason for dismissal" as identified within Section 98(2) of the ERA. In this case the Respondent claims dismissal due to misconduct. Misconduct is one of the "potentially fair reasons" under Section 98(2)(b) of the ERA.

118. The next question is whether dismissal for this reason was “fair in all the circumstances” (Section 98(4) ERA).
119. In respect of dismissal due to misconduct the definitive case is **BHS v Burchell [1978] IRLR 379** which establishes a three step test (i) Did the employer have a genuine belief in the employee’s guilt? (ii) Was that belief based on reasonable grounds? (iii) Were those grounds formed from a reasonable investigation?”
120. According to **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** the question the tribunal is required to answer is whether the dismissal is within “the band of reasonable responses that a reasonable employer in the circumstances might have adopted.”
121. The same test of “band of reasonable responses test” is relevant in considering the reasonableness of the employer’s investigation (**Sainsbury’s Supermarkets v Hitt [2003] IRLR 23**).
122. According to the court in **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** “If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section [98(4)] may be satisfied.”
123. If the tribunal determines that the dismissal is unfair the employer is required to give as compensation “such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal” (s.123(1) ERA).
124. This means that it is possible to decrease the compensation should it be fair to dismiss the claimant later or had a valid procedure been followed (this is usually referred to as the “Polkey reduction” following the ruling of the House of Lords in **Polkey v AE Dayton Services Ltd 1988 ICR 142**).
125. According to s.123(6) ERA “where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding.”
126. According to s.122(2) ERA “Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the

- basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.”
127. According to s.207A(2) Trade Union Labour Relations (Consolidation) Act 1992 (TULR(C)A) it is possible for the tribunal “if it considers just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25% where the ACAS Code of Practice on Disciplinary and Grievance Procedures applies and an employer has unreasonably failed to comply with that Code or reduce any award by no more than 25% if the employee has unreasonably failed to comply with the Code.”
128. According to s.124A ERA, “any award under s.207A TULRCA and s.38 Employment Act 2002 shall be applied immediately before any reduction under s.123(6).”
129. During the hearing I drew the parties’ attention to cases which appeared to me to be relevant to the matters I was required to determine.
130. The first was **Linfood Cash and Carry v Thomson [1989] ICR 518, EAT**. In **Linfood** the court provided guidance on dealing with disciplinary matters where witnesses wish to remain anonymous. The guidance emphasises the need to keep a balance between safeguarding the witness and ensuring the fairness of any hearing. The guidance is referenced in “ACAS Guide: Disciplinary and Grievance at Work”. Point 4 under the sub-title “Preparing for a hearing” states “be careful when dealing with evidence from a person who wishes to remain anonymous. Take written statements, seek corroborative evidence and check that the person’s motives are genuine”.
131. The second was **Barlow v Clifford [2005] UKEAT 0910\_04\_2809**. This case pertained to the fairness of a dismissal where a witness to the relevant event was involved in the disciplinary procedure resulting from the event. This case refers back to a ruling in an older case on the same point; “Both Counsel referred us to *Moyes v Hylton Castle Working Men's Social Club and Institute Limited [1986] IRLR 482* which concerned a case where a club steward had allegedly sexually harassed a nineteen year old barmaid and one of the two incidents had been observed by the chairman and assistant secretary of the club who thereafter took part in the investigation and disciplinary hearing. The EAT held that it was a breach of natural justice rendering dismissal unfair for the two officials to be both witnesses and judges in that any reasonable observer would conclude that in view of the dual role, justice did not appear to be done nor was it done.”
132. However, in the **Barlow** case itself the EAT determined that it was “Not unreasonable for persons who take part in a decision to suspend to take part in the disciplinary or appeal hearing”. In those proceedings the employee was being disciplined at such a high level in the company that only a small pool of suitable individuals was available to

hear the matter. The fundamental question, according to the EAT, was whether the process was unfair to the employee?

133. The third relevant case was **Now Motor Retailing Ltd v Mulvihill [2015] UKEAT 0052\_15\_1506**. Here one reason for determining that the dismissal was unfair was that the employer had not interviewed witnesses who could have been relevant; “ The Employment Tribunal’s second criticism of process was that there were no interviews with two workers whose workstations were adjacent to the Claimant. Nor was there an interview with the Claimant himself. So far as the interview with workers is concerned, this appears to us to be a fair criticism. We can see that an Employment Tribunal, applying the correct test, could well find that the Respondent’s investigation fell below a reasonable standard in failing to interview such workers. So far as a failure to interview the Claimant is concerned, the ACAS Code does not mandate such an interview and there is, in our experience, a range of practice. The Employment Tribunal has not, as it should have done under section 98(4), considered whether the procedure adopted in this case fell within the range of such practice.”

134. In the same case the employer had used anonymous statements. The EAT stated: “The Employment Tribunal’s fourth criticism was that statements were given to the Claimant anonymously. Again the Employment Tribunal seems to proceed on the basis that anonymise witness statements must be unreasonable and unfair. Again, it is not necessarily so.....Again, the Respondent gave its explanation for anonymising statements. The Employment Tribunal has not mentioned it or evaluated it against the standard laid down by section 98(4). There is a further point concerning these statements. The Employment Tribunal said that “the Claimant had no means of challenging the content of those statements.” This conclusion by the Employment Tribunal appears to us to be without foundation. The Claimant could and did challenge the content of the statements, in particular in the quite lengthy written reply which he produced before the disciplinary hearing.”

#### **Discussion and determination**

135. I have read and considered the parties’ written submissions. I do not refer to all points in the following discussion, only to those which appear to me to be important or contentious.

136. Turning then to the issues for determination.

*[1.] The Respondent bear the burden of proving on the balance of probabilities, that the conduct was dismissed for the potentially fair reason of dismissal [para 8].*

137. The Claimant suggested that the Respondent (and Heulwen Davies specifically) had tried to get rid of her in October. As I noted above I do not accept this allegation. I accept that the reason for dismissing the Claimant was misconduct.

*[2.] If the Respondent does persuade the tribunal that its decision maker had a genuine belief in the claimant's misconduct and dismissed for that potentially fair reason, the tribunal must go on to consider the general reasonableness of that dismissal [para 9]..*

*[3.] ...the tribunal will focus its enquiry on whether there was a reasonable basis for the respondent committee's belief and test the reasonableness of the investigation [para 11].*

138. Before discussing the detailed points the Claimant has raised about the investigatory and disciplinary process it is worth taking a step back and looks at the process in general in the wake of the findings of fact. I have already criticized aspects of the process, particularly the delay between the appeal hearing and the explanatory letter and the failure to keep adequate records at various stages of proceedings. It appears to me that there is also reason to criticize other aspects of the process, e.g. the fact that the Claimant had to wait until 25th January to be informed of the details of the reports against her and was (originally) only given three days' notice of the disciplinary hearing.
139. However, it is important to remember that such failings do not necessarily mean that the dismissal is unfair. The test is the test set out in s.98 (4) ERA. In this case, I have accepted that the starting point was the allegation on 4th November made by a person who was independent of the Respondent that a member of the Respondent's staff was under the influence of alcohol whilst working with children. A similar allegation was made by an independent person (parent) on the 5th. Following the allegations a reasonable employer had no choice except to conduct an investigation.
140. Having collected statements (i.e. reports A-Did) which, on the whole, corroborated the allegations I accept that it was reasonable for the Respondent to determine that there were grounds for conducting a disciplinary hearing.
141. I also accept that it was within the "band of reasonable responses" for the Respondent to take the decision to dismiss the Claimant on the grounds of serious misconduct if the evidence showed that she was under the influence of alcohol. Considering the importance of the children's safety to the work (and continuation) of the Cylch such a conclusion would justify dismissal even taking into account that no complaint of any sort had been raised regarding the work of the Claimant prior to these events. I have already noted that misconduct of this kind was one example of gross misconduct given in the Respondent's written Disciplinary Procedure.
142. The crucial question in this case is whether the investigation and the process of deciding that the evidence showed that the Claimant was under the influence of alcohol is within the "band of reasonable

responses". That, really, is the question behind the specific points which follow.

*when it comes to assessing the reasonableness of this particular decision to dismiss the tribunal's attention will be focussed on two issues in particular...*

*[4.]..The first is the claimant's criticism of the length of time it took the respondent committee to complete its investigation and provide her with a summary of the case against her, giving her inadequate time to respond.*

143. Really, there are two elements to this complaint. The first is the delay before completing the investigation and the second is that the Respondent did not give the Claimant enough time to respond to the allegations. Dealing with the second element first. I would accept that the three days originally given to the Claimant to respond to the reports and to the minutes of the investigative meeting was unreasonable. However, when the Claimant raised this point (in her letter of 26th January) the Respondent agreed to postpone the meeting until 3rd February. Since the evidence consisted of one page of minutes and six pages of reports I am of the opinion that the Respondent thereby allowed sufficient time for the Claimant to respond to the allegations. This is particularly true considering the allegations deal with a short period of a few days and comparatively straightforward (but serious) allegations as opposed to, for example, allegations of misconduct by contravening technical rules over a period of time.
144. In respect of the first element, I find that there are grounds for Heulwen Davies' suggestion that the delay was due in part to waiting (and repeating the request) for evidence from the Claimant's doctor. Since the purpose of that was to find out whether there was another explanation for the alleged conduct of the Claimant (i.e. the side effects of medication as opposed to being under the influence of alcohol) I accept that it is reasonable for the Respondent to take the time to gather this information. This explains the delay up to Christmas 2015 but another month passed before the Claimant received the details of the allegations against her. I accept that the Christmas and New Year break would also cause some delay. Heulwen Davies explained that the time it took to gather the signatures of witnesses on the permission forms and to receive advice from the Mudiad was responsible for the remainder of the delay.
145. Considering the nature of the allegations, any delay was bound to cause extra stress to the Claimant. I accept, however, that the Claimant did not suffer any unfairness due to the delay. This was not a case where delay in gathering evidence meant a risk of memories fading. The evidence was in the form of reports A-Dd and the Claimant's response (in the investigative meeting) had been collected by the end of November (apart from the evidence of the Claimant's doctor). Since Ms Davies had not undertaken such a process before I also accept that it was

fair for her to get advice from the Mudiad regarding the next steps. Without doubt, it would have been better if the process had progressed more quickly in January but I do not accept that the delay caused the process to fall outside the “band of reasonable responses”. Taking into account the resources of the Respondent it was within that band for the Respondent to decide that advice needed to be taken prior to conducting a disciplinary hearing.

*[5.] The second concerns the role of Ms Davies. The claimant considers that Ms Davies was her primary accuser, the chief investigator and the decisionmaker all rolled into one, and was therefore not impartial.*

146. The Claimant claims that Ms Davies had wanted to terminate her post since October 2015 in order to create a post for Alaw Davies. I have already stated that I do not accept this. Having said that, it appears to me that the Respondent created a problem for herself in appointing Ms Davies to undertake the investigation. I have accepted her evidence regarding the events of the 4th. If she were a witness in the disciplinary procedure it seems to me that the evidence against the Claimant regarding the 4th would have been even stronger than it was. It seems to me that it would have been better if someone else had undertaken the investigation - someone from the Mudiad perhaps. Having said that, Ms Davies was the Chair of the Committee at the time, therefore it is understandable that she would lead the process.
147. The Claimant claims that Ms Davies was not impartial on the grounds that she made a complaint, investigated and made the decision in her case. I understand that to mean that the Claimant is of the opinion that Ms Davies either instigated or at least urged others to give evidence against the Claimant. The evidence does not support this claim. I accept that Ms Davies was involved in the investigative process and in organising the disciplinary hearing. Text messages sent a few days before the hearing show that she was the one communicating with the Claimant regarding requesting witnesses to attend the disciplinary hearing. It seems to me that this was because Ms Davies was really the one dealing with the work of the Committee.
148. As mentioned earlier, the report given by Carys Lloyd (report C) noted that Heulwen Davies had said that a parent had complained on the morning of the 4th. In the tribunal, Carys Lloyd said that this was a mistake and that “someone” had complained and I have accepted that explanation.
149. What confuses matters is what was said in the letter of dismissal [p.187], namely “the parent that rang Mudiad Meithrin on Wednesday 4th November to make a complaint was involved in the investigatory meeting and therefore their evidence has been excluded from the process. I can confirm that no-one on the disciplinary hearing panel have seen this evidence”. As the Claimant says, the only parent

- involved in the process was Heulwen Davies therefore she claims that Ms Davies made the complaint to the Mudiad on the 4th.
150. This does not appear to me to be consistent with the rest of the evidence which shows that it was the Mudiad which phoned Ms Davies on the 4th rather than the other way around. It appears to me that there is here a misunderstanding arising from Heulwen's Davies's response to Ms Bevan's question after the disciplinary hearing.
151. Be that as it may, I do not accept that Ms Davies in some way urged witnesses to build a case against the Claimant. I accept her evidence that her role was to receive statements rather than "edit" them. I accept that it would be difficult and artificial for Ms Davies to disregard her meeting with the Claimant on the 4th but I accept that she did not take any steps to influence the process in an unfair way. If anything, as I discuss under the next point, the possible criticism is that Ms Davies was not sufficiently resourceful in gathering evidence but merely accepted that which was given voluntarily.
152. Neither do I accept that Ms Davies had any part in the decision to dismiss nor in the appeal apart from responding to questions over the phone after the disciplinary hearing. Ms Bevan asked her about the decision not to suspend the Claimant from work on the 9th and about the parent's complaint on the 4th. As I've said it is evident from the minutes of the telephone conversation that she said no evidence from a parent on the 4th should be used. The minutes of the discussion between Ms Bevan and Ms Elias confirm that a report from a parent (other than Ms Rees's) was not one of the grounds upon which the decision to dismiss was made.
153. Considering the size and resources of the Cylch and Ms Davies' role as Cylch Chair I accept that it was not unreasonable for her to undertake the investigation and that this in itself did not cause any injustice to the Claimant. If anything it appears to me that Ms Davies's attempts to ensure her evidence was not part of the process caused problems for the Respondent. First, it meant her evidence about the meeting on the 4<sup>th</sup> could not be used. Second, the misunderstanding about evidence from a "parent" raised suspicions in the Claimant's mind about another complaint which she was not given the chance to answer.

*[6.] Whether the refusal to call witnesses requested to disciplinary hearing rendered the dismissal unfair?*

154. I must admit that this question is somewhat more difficult. In a way this case was a matter of one person's word against another. On the one hand witnesses alleged that the Claimant showed symptoms of being under the influence of alcohol whilst on the other hand the Claimant maintained that she was not. It seems to me that some employers would have concluded that it was necessary for the disciplinary panel to hear

from the witnesses [rather than read their statements] in order to determine who was reliable.

155. As already cited, the ACAS Guide advises as follows: “be careful when dealing with evidence from a person who wishes to remain anonymous. Take written statements, seek corroborative evidence and check that the person’s motives are genuine”. In this case the situation is slightly different. Although some of reports A-Dd are, in theory, anonymous, it is evident from text messages that the Claimant knew who the witnesses were. Vicky Lowden’s name was mentioned in the disciplinary hearing and she had already asked her and Eleri Davies to attend the hearing. It is clear to me that this was not a case where keeping statements anonymous meant that the Claimant did not know what the case against her was.
156. I note that Heulwen Davies asked Ms Lowden and Eleri Davies to be present in the hearing but both refused. I accept that the Respondent gave the Claimant an opportunity to send written questions in for the witnesses but the Claimant did not do so (either for the original hearing or the appeal hearing). I also accept that two of the reports (A and Dd) contain allegations from independent individuals who were not members of the Cylch’s staff.
157. The crucial question it seems to me is whether the Respondent should have taken further steps to confirm which version was correct - that of the Claimant or that of the witnesses in the reports. This was not a case where it was possible to pick through the detail in the documents to undermine the evidence of one party or the other through inconsistencies. It was rather a matter of who was most credible. Some employers, it seems to me, would have decided that the disciplinary panel needed to hear from the witnesses. That is particularly so given that in this case the Respondent failed to comply with its own written procedure by not hearing from witnesses at the investigatory hearing. That meant that there had been no opportunity to test the credibility of those witnesses.
158. However, the question I am required to answer is whether the decision was within the “band of reasonable responses”. On the one hand, these were serious allegations which were damaging to an individual’s reputation. On the other hand, there was written evidence from two independent witnesses and members of staff. It does not appear to me that the evidence before the disciplinary panel would cause them to doubt the validity of the witnesses who provided the statements. There was no indication in the statements that they had been put together at the same time as part of a conspiracy. The Claimant had not indicated in the hearing that the witnesses had reason to lie about her. She had been given the opportunity to ask written questions but had not done so. Although I am of the opinion that not calling the witnesses to the hearing means the process was on the borderline of the “band of reasonable responses” I find that it was within that band.

159. Another related element is the decision not to ask staff who were working on the 4th and the 5th to give evidence. Two members of staff did not respond to the invitation to provide a statement in November 2015 despite the fact that they were working on the 4th and on the 5th. Should the investigation have specifically requested a statement from them? As already mentioned, Heulwen Davies' understanding of matters was that her role was to receive evidence not to collect it. The "ACAS Guide: Disciplinary and Grievance at Work" advises (under the sub-title "Investigation"): "The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against".
160. As suggested in **Now Motor Retailing** failure to interview possible witnesses could mean that the investigative process falls outside the "band of reasonable responses". However, in this case, the situation was rather different. The two members of staff had been invited to give evidence (in the meeting by Eirwen Hughes) but had decided not to do so. Some employers would probably have decided to investigate by conducting individual interviews with each member of staff present in the Cylch on the days in question but I accept that the Cylch's approach was within the "band", particularly given its size and resources. I accept that had the Respondent "chased up" those employees who had not given evidence it could have been accused of coercing witnesses to give evidence.
161. Stepping back, therefore, despite the fact that I can see flaws in the process, I accept that the investigation and disciplinary procedure carried out was within the "band of reasonable responses" as was the decision to dismiss based on it. My judgement is that the dismissal in this case was not unfair.
162. Even though I have found the dismissal in this case was not unfair, there were elements of the case which were not satisfactory. Specifically, there were delays during the disciplinary procedure and examples of a lack of communication between the Cylch and the Mudiad (and between the Mudiad and the Claimant in relation to the appeal outcome letter) which led to additional unnecessary stress for the Claimant. In addition, there were examples of failures to keep a record of important conversations or meetings. Charities like the Cylch rely on volunteers to run committees and of necessity not all such volunteers will be experts in employment matters. Heulwen Davies and Morfudd Bevan confirmed in their evidence that they had had no training to deal with this kind of case. For the sake of those volunteers and employees it seems to me that there is a need for bodies like the Mudiad to ensure that procedures are in place to enable and support such volunteers to deal quickly and effectively with cases of this kind.

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Employment Judge McDonald  
Dated: 19 February 2017

JUDGMENT SENT TO THE PARTIES ON  
23 February 2017

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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**NOTE:**

This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.