Appeal No. UKEAT/0106/13/MC

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 24 February 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

KIDS CITY LTD — APPELLANT

MR C GAYLE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MICHAEL PAULIN (of Counsel) Instructed by: DAS Law Solicitors Ltd North Quay Temple Back Bristol BS1 6FL
For the Respondent	Written Submissions

SUMMARY

UNFAIR DISMISSAL

Reasonableness of dismissal

Contributory fault

Unfair Dismissal:

Employment Tribunal substituting its view of Claimant's conduct for that of reasonable employer. Similarly, ET falling into "substitution mind-set" (per Mummery LJ) in **Small v London Ambulance NHS Trust** [2009] IRLR 563, CA) as to what it was appropriate for the Respondent to take into account and as to sanction.

Further, given findings of fact as to incident in question, the evidence before the Respondent – including the partial admissions of the Claimant as to this and other previous incidents – and as to the Claimant's unhelpful responses in the disciplinary hearing, this was a case where the high test for perversity (**Yeboah v Crofton** [2002] IRLR 634, CA) was met.

Given the Tribunal's findings of fact: finding of Unfair Dismissal set aside. Dismissal had been within the range of reasonable responses of the reasonable employer in all the circumstances as found. Claim not well-founded substituted for original judgment of the Employment Tribunal.

Contributory Fault:

Had it been necessary to decide appeal on this issue, Employment Tribunal had erred in law in unduly restricting its consideration as to what was relevant in determining question of the Claimant's culpability for these purposes.

HER HONOUR JUDGE EADY QC

1. This is an appeal against a Judgment of the Employment Tribunal, sitting at London (South) under the chairmanship of Employment Judge Milton, sitting with members on 8 and 9 October 2012, sent to the parties on 7 November 2012. I refer to the parties as the Claimant and the Respondent, as they were before the ET.

2. At that stage the Claimant was represented by Ms Huie, a lay representative; the Respondent as it is today by Mr Paulin of counsel. The Claimant has not appeared before me today, but has written in, stating that he would intend to rely on written representations, and I have had regard to those in the course of deciding this appeal.

3. The Claimant had made claims of unfair dismissal and unlawful race, sex, and age discrimination. The Employment Tribunal dismissed the various discrimination complaints, but found for the Claimant on his unfair dismissal claim. It is that finding, adverse to the Respondent, that is the subject of this appeal. There was no cross-appeal in respect of the other aspects of the Tribunal's Judgment.

4. Upon an initial consideration of the papers in this appeal, the matter was set down for a preliminary hearing, which was heard by HHJ Shanks, sitting with members, and permitted to proceed to a full hearing by order seal dated 21 August 2013.

The background facts

5. The Respondent is a charity providing, relevantly, holiday camp types of care for local disadvantaged children in various locations at schools. The Claimant had worked for the Respondent for around one-and-a-half years as a Playworker when, in August 2011, a

complaint was made by the mother of a vulnerable eight-year-old child, who had been attending one of the Respondent's camps at which the Claimant was working. The initial note of the conversation with the Claimant about the injury the child was said to have suffered was made by the centre manager, Ms Vernon, and recorded:

> **"I went out to speak to [the Claimant] about what the child had said...he said yes he [had] done it..."**

6. In the subsequent meeting between the Respondent's Deputy Director, Ms Choong, and the Claimant, it was recorded that, although the Claimant had recalled some incident with the child on the day in question, he did not accept that he had caused an injury as complained of. When he made his first written statement about the incident, he volunteered some interaction with the child but not that he had caused any injury. He described the events in the following way:

> **"...as she had nothing to play with at the time E decided to play with me which was fine. At one point she hugged me meaning that I had to firmly restrain her by the shoulders and tell her that was not allowed. Later in the day when E was being picked up a Playworker came and told me that E's mum wanted to talk to me. Apparently there was a mark on E's nose and [E] said I did it. I went inside and was shown the mark. I had at first thought it was a birthmark but was told it was a bruise. I told the mother sorry...if I had hurt her I had not noticed and it was not intentional."**

7. The Claimant was invited to a disciplinary hearing on 26 August 2011. During the course of that hearing the Claimant admitted that he had previously tweaked the noses of children he had been looking after at other sites, and that he may have inappropriately interacted with E on the occasion in question.

8. The Employment Tribunal recorded various way in which the disciplinary hearing was less than satisfactory, including in respect of how the Claimant's case was presented by his friend, who happened to be a trade union representative, a Ms Harman, who had apparently arranged with the Claimant that he should decline to answer questions if she nudged his knee

under the table. This appears to have led to some confusion on at least one occasion, with the Claimant answering "No" when it was unclear whether that was in response to a question during the proceedings or to indicate to Ms Harman that he wished in fact to answer the question, notwithstanding her prompt.

9. Moreover, the Tribunal found the atmosphere between Ms Harman and Ms Nunn, the Respondent's chief executive, who was conducting the hearing, to have become frosty, and the meeting ultimately broke down as first Ms Harman, but then also the Claimant, decided to walk out.

10. By a letter dated 5 September 2011 Ms Nunn wrote to the Claimant, informing him that her decision was that he should be dismissed from his employment with one month's notice. The reason given was that there was a breach of trust. As it was put in the dismissal letter:

> **"The outcome of the meeting is that this is notice of termination of your employment with Kids City for the reason of Breach of Trust through your conduct or actions. This means that as your employers we do not believe that we can rely upon you to maintain appropriately high levels of conduct and the reasons for this are:**
>
> **Tweaking, twisting or otherwise touching children's noses at Kids' City play settings**
>
> **Giving untruthful answer or answers during a disciplinary meeting.**
>
> **Failing to follow reasonable instructions from your employer at the disciplinary meeting on 26 August."**

The letter further stated:

> **"In the meeting you were asked if you did touch children's noses, and you said that you only did this to children you knew and as you did not know this child, you did not touch her nose. You said that you did do this to one child and gave his name. When asked if there was more than one child you answered in the negative and there was time to change your mind, while my colleague and I consulted the notes that she had written. When I said that we knew there was more than one child, you then gave the name of a second child at another branch. Therefore your initial answer was untruthful. When this was raised, KH claimed that you only gave this answer because of her direction, by tapping your leg under the table in a secret signal. As your responsibilities to respond truthfully were being outlined, the meeting was disrupted to the extent that KH was asked to leave and you would not answer any more questions. You gave a pre-prepared written statement and I spoke to you in summary of the meeting during which time you took notes. Before this was completed KH returned to the room without permission and instructed you to leave, which you did.**

Consequently, we have not been able to establish with you what reasons there could be for the 8 year old child to have complained that you twisted your nose, or how her nose came to be bruised. Neither could we establish how you could know that the children whose noses you touched agree to this, or how you came to believe that this is an acceptable play behaviour in a professional play setting. We could not discuss why you believed it acceptable to behave in certain ways towards some children and not others, and on what basis you decided this. It was your duty to your employers to cooperate with the process of finding these things out and it was in your own interest to do this. You were given the opportunity to explain, but you chose not to take that opportunity.

You have received training since joining Kids' City which contained warnings about the risks of allegations of abuse and ways to conduct yourself that would protect you from these. You had attended Playwork Basics, Safeguarding, courses amongst others, and completed an NVQ level 2. You had attended positive behaviour management training. This range of training tells you about the required conduct of staff in the play setting and consequently, we are entitled to rely on you knowing that nose tweaking, twisting or touching for any reason is unacceptable play behaviour in a professional play environment.

Your personal conduct in the meeting was polite and respectful at all times. Your colleagues' testimony about your calm attitude and your clean record at Kids' City support the view that if the child's nose was twisted at playscheme, it was not done in anger, or as a punishment, or in any other way so at to deliberately harm the child.

It is an employee's duty to give honest and loyal service and there must be mutual trust between a person and their employer. The facts are that you have used an unacceptable type of interaction with children which means you are willing to go outside the established play protocols; you gave false answers or answer and were willing to do this when directed to do so by another person; you were also willing to avoid your employer's direct questions in the disciplinary meeting. This means that your continued employment with Kids' City is unsustainable for the reason that the trust between us has been breached.

Because of your clear record with Kids' City and our belief that you have not deliberately harmed a child, we are terminating your employment giving one months' notice with pay but we do not require you to attend work with us again. This letter is one months' notice that your employment formally terminates on 30 September."

11. The Claimant appealed against that decision, but then did not attend the appeal hearing. The outcome of the appeal was to uphold the original decision, but, as the Tribunal found, on more severe grounds, finding that the Claimant had been guilty of gross misconduct.

The Tribunal proceedings and Reasons

12. In addressing the unfair dismissal claim, the Employment Tribunal does not appear to have expressly set out its finding as to the reason for the dismissal, but it is tolerably clear that it accepted that the Respondent had an honest belief that the Claimant had mis-conducted himself. The reasoning starts with the Tribunal's consideration of what it describes as the "main classic **Burchell v BHS** issues". On the question of whether there had been a fair investigation, the Tribunal did not criticise the scope of the Respondent's investigation, but did consider it could

be criticised for giving such weight as it did to the issues arising from what it appears to have seen as the Claimant's choice of representative for the disciplinary hearing and for effectively adding to the charges against the Claimant following the hearing itself.

13. The Employment Tribunal put its finding in these respects as follows:

> **"23. Reasonable investigation however also includes the process of the investigation of the Claimant himself. As to this aspect of the case we have very considerable reservations. Perhaps it was an unwise/unfortunate decision to have allowed the Claimant to bring an experienced outside representative. However having taken that decision management should have gone along with it and not used the unfortunate consequences flowing from that decision and the friction in the meeting to damage a fair enquiry of the Claimant himself.**
>
> **24. We do not wish to fall into the trap of an age discriminatory attitude towards the Claimant but we are certainly entitled to point out that the Claimant had only worked at the Respondent's organisation for one and a half years and he was as it were caught in the middle between his senior line manager Ms Nunn and on the other hand an experienced trade union representative who believed that she was acting in his best interest. He plainly gave a number of answers which were not helpful and certainly gave the impression of being evasive and difficult. Our conclusion as to the unsatisfactory nature of this enquiry flows from the dismissal letter itself at the central paragraph on page 161 in Ms Nunn's own words 'consequently we have not been able to establish with you what reasons there could be for the eight year old child to have complained that you twisted her nose or how her nose came to [be bruised]. Neither could we establish how you could know that the children whose noses you have touched agreed to this or how you came to believe that this is an acceptable play behaviour in a professional play setting.'**
>
> **25. In the result the Claimant came to a meeting to face the particular allegation of his interaction with one child and ended up being found guilty of unprofessional conduct of some kind in relation to that child but additionally of having been untruthful and/or un-cooperative during the course of that disciplinary meeting and additionally of insubordination in his decision that he should leave [the] meeting when urged to do so by his independent representative.**
>
> **26. We do not accept that was a reasonable process at that stage. As a matter of everyday procedure it was further aggravated by the fact that the Claimant was not provided with copies of the minutes until a much later stage.**
>
> **27. Furthermore the Claimant was in effect presented with two charges as it were during the course of the meeting i.e not...cooperating with the meeting and/or being obstructive and/or finally leaving the meeting or in any other way prior to dismissal. Whilst of course we can accept that there may be a situation where an employee who is accused of something straightforward put forward a preposterous explanation of his case that he was completely innocent as being something which a reasonable manager may sometimes take into account when reaching the overall conclusion. In this case that approach has been taken in our judgment to a wholly unreasonable level and ended up as two further separate charges of which the Claimant was never given notice and which he never had the opportunity to rebut before the dismissal."**

14. Turning to the issue of sanction, the Employment Tribunal found that this was a case where the penalty was "completely outside the range of reasonable responses". Stating that it

was not for the Employment Tribunal to substitute its view for that of the reasonable employer, it went on:

> **"The Claimant had up until that time a perfectly good work record and was plainly regarded as a useful member of the team and the epithet polite and professional had been regularly used about him including during the course of that particular interview. So far as the interaction with the child E is concerned on the Respondent's own version they never reached a firm conclusion as to what had happened. On the other hand throughout the proceedings they always accepted that whatever happened it was not done deliberately or intentionally. Additionally it seems to have been taken into account and held against the Claimant that he may have behaved inappropriately on other occasions on other sites. That was confirmed in Ms Nunn's evidence before us in further detail. She asserted that it was unsatisfactory that the Claimant's approach was that it was perhaps acceptable to act in that way towards the children that he knew rather than the children whom he did not know. So far as the injury itself is concerned it is clear that the Claimant himself accepted that he saw some kind of sign on the skin of a young girl of mixed race. It was probably clear that nobody else had noticed the mark at any time during the preceding few hours. Furthermore nothing was visible to Ms Choong literally two days later when she interviewed the child. She recollected seeing a mobile telephone photograph with redness. Thus any reasonable manager would have assumed that physical contact would have been quite minimal particularly bearing in mind that the child herself did not apparently cry or make any fuss about it until her mother noticed it.**
>
> **29. We recognise of course that perhaps as a result of high profile childcare cases in the national press organisations such [as] the Respondent have to be ultra strict in their approaches to dealing with children in their care. We found however the decision that in effect the Claimant should lose a job at which he was clearly perfectly competent at that time for this particular incident to have been outside the range of reasonable responses. The fact that Ms Nunn and Ms Choong had as it were to include other charges in order to reach their conclusion and also still as we were told 'out of mercy' to the Claimant not treated as gross misconduct are all indicative of perhaps a desire to assuage an angry parent who was making a fuss with Lambeth. The extensive meetings with Lambeth and the presence of police officers and so on may have all added to the momentum to treat this as a serious offence rather than something requiring perhaps further training a period of monitoring and/or warning and something of that kind."**

15. The Employment Tribunal did not find that the appeal process and decision cured any of the defects it had found in the original decision and did not accept that the more severe finding of gross misconduct constituted a valid decision in this case.

16. On contributory conduct, the Employment Tribunal concluded this was not a case where it would be appropriate to make any reduction. Its reasons are set out at paragraphs 34-35 of it Judgment:

> **"34.... We find there were substantive failures in investigation/disciplinary process which resulted in the Claimant being found guilty of misconduct of which he had never been charged without the opportunity to respond and in any event that in our Judgment it was unfair and misconceived for the Respondent to hold him responsible substantially for the unhappy atmosphere and answers urged by his independent representative.**

> **35. The conclusion and partial admissions made by the Claimant went some way towards showing that he recognised that his interaction with that child and perhaps one and two others on different sites was inappropriate but we could not accept that this was anything other than a matter for monitoring and training rather than culpable blameworthy conduct deserving of a contributory conduct reduction in the Tribunal and we therefore find that the Claimant succeeds in full on his claim of unfair dismissal."**

The appeal

17. The main focus of this appeal is the contention that the Employment Tribunal reached a perverse conclusion, alternatively erred in law, by falling into the "substitution mindset" (per Mummery LJ in **Small v London Ambulance NHS Trust** [2009] IRLR 563 CA). There are essentially three grounds of appeal, which to some extent overlap, namely: (1) that the Employment Tribunal's decision was perverse; (2) that it erred in law by substituting its own views for that of the Respondent; and (3) that it erred in law in respect of the issue of contributory fault. In seeking to resist the appeal, the Claimant essentially relied on the reasons given by the Employment Tribunal for its Judgment in his favour.

The relevant legal principles

18. Section 98(1) and (2) of the Employment Rights Act provide that a reason relating to an employee's conduct is a potentially fair reason for a dismissal. Section 98(4), **Employment Rights Act**, then provides:

> **"In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

19. In dealing with the question of any compensatory award, section 123(6) of the **Employment Rights Act 1996** provides:

> **"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

20. In a conduct dismissal case, Tribunals are assisted in determining the statutory question of fairness by regard to the well-known standards laid down by Arnold J in giving the Judgment for the EAT in the seminal case of **BHS Ltd v Burchell** [1980] ICR 303. When applying the **Burchell** guidance, however, an Employment Tribunal's role is to review the Employer's decision, not to put itself in the position of the reasonable employer: see **Davies v Sandwell MBC** [2013] IRLR 374 per Lewison LJ at paragraph 33. This is so when considering the investigation and process carried out by the employer as much as the sanction applied: see per Mummery LJ in **Sainsburys Plc v Hitt** [2003] ICR 111.

21. Where an Employment Tribunal carries out its role in this regard correctly, it is not for the EAT to substitute its view for that of the Employment Tribunal, and I bear in mind the observations of Mummery LJ in **Brent LBC v Fuller** [2011] ICR 806 CA:

> **"28. The appellate body, whether the EAT or this court, must be on its guard against making the very same legal error as the ET stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the ET without committing error of law or reaching a perverse decision on that point.**
>
> **...**
>
> **30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the ET, but then overlooked or misapplied at the point of decision. The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

22. Moreover, on the question of perversity, the EAT should not interfere with the decision of the Employment Tribunal unless there is no proper evidential basis for it or unless the

conclusion was perverse, a very high hurdle for an Appellant, **Yeboah v Crofton** [2002] IRLR 634 CA.

23. On the question of contributory fault, section 123(6) requires a Tribunal to consider the conduct of the employee. The guidance offered by HHJ Peter Clark in the case of **Optikinetics Ltd v Whooley** [1999] ICR 984 is helpful:

> **"(1) Before making any finding of contribution the applicant must be found guilty of culpable or blameworthy conduct. The enquiry is directed solely to his conduct and not that of the employer or others.**
>
> **(2) For the purposes of s 123(6) the employee's conduct must be known to the employer at the time of dismissal...and have been a cause of the dismissal.**
>
> **(3) Once blameworthy conduct causing, in whole or in part, the dismissal has been found, the tribunal must reduce the compensatory award by such proportion as it considers just and equitable. … …**
>
> **(4) A finding of contribution under s.122(2) does not require a finding that the conduct is causatively linked to the dismissal. ... The wording of s.122(2) grants to the Employment Tribunal a wide discretion as to whether to make any, and if so what, reduction in the basic award on the grounds of the applicant's conduct.**
>
> **(5) ... it is now clear that different proportionate reductions are permissible in relation to the basic and compensatory awards...**
>
> **(6) The appellate courts will rarely interfere with the Employment Tribunal's assessment of the percentage reduction for contribution..."**

Submissions

24. Mr Paulin, acting for the Respondent on the appeal, puts forward essentially three main arguments (addressing the grounds of appeal in reverse order). First, in addressing the contributory fault ground of appeal and drawing on HHJ Clark's guidance, as cited above, he contends that the Tribunal misconstrued the reason relied on by the Respondent. The Respondent was not, as suggested by the last sentence of paragraph 34, holding the Claimant responsible for the "unhappy atmosphere and answers urged by his independent representative" but, as the dismissal letter put it, giving "false answer or answers...willing to do this when directed to do so by another person...willing to avoid your employer's direct questions in the disciplinary meeting."

25. Furthermore the Employment Tribunal's own findings of fact demonstrated that the Respondent was entitled to find the Claimant's behaviour culpable in this regard, see its finding at paragraph 24 to the effect that the Claimant gave a number of answers not helpful to himself and gave the impression of being evasive and difficult. The Respondent had been entitled to seek to get to the bottom of the matter and take the Claimant's responses into account in doing so.

26. Similarly, the Claimant's admitted conduct towards the child in question and towards other children was relevant to contribution; see, in particular, the finding at paragraph 32 that, on the information available "there had been some sort of inappropriate conduct".

27. On ground 2 Mr Paulin argued this was a classic case of the Employment Tribunal falling into the substitution mindset. He noted that the language of the Tribunal throughout was littered with references to the terminology of criminal proceedings, suggestive of its applying a higher test. Moreover, the Employment Tribunal had failed to make reference to the case against the Claimant. That included the interview with the child, her evidence that the injury had been caused by the Claimant's action meted out as a punishment, the interview obtained from her with her social worker to the same effect, the evidence from her mother, referring to the hurt caused to her child and the visible injury shown on the photograph. The Employment Tribunal's summary did not begin to set out a fair record of the evidence.

28. Furthermore there was a partial admission from the Claimant. He had been unclear in his evidence as to his previous interactions with other children where he had also tweaked their noses, and he had given inconsistent evidence. The Respondent had been left with an unclear picture as a result of how the Claimant had chosen to present his case. By agreeing to his

representative, the Respondent was not agreeing the Claimant engaging in tactics designed to avoid its questions. That this had been taken into account by the Respondent was wrongly criticised by the Tribunal. The Claimant had only been presented with these additional matters after the disciplinary hearing because they had arisen out of what had happened at the hearing. Moreover the Claimant's politeness was not relevant to the issues the Respondent was faced with, and the Tribunal's repeated references to this factor suggested substitution – it was considering what it felt should have gone into the balance rather than what the Respondent had considered relevant.

29. Moreover the apparent criticism of the Respondent for having taken into account the fact that the Claimant may have acted inappropriately on other occasions on other sites was inexplicable: why would that not be a relevant matter for the Respondent to take into account? In particular, when the Tribunal went on to make observations as to whether the injury to the child was visible to others, that could not be relevant to the exercise it was charged with carrying out. It was engaging in speculation, and substituting its view of the evidence rather than having regard to the Respondent's position and the evidence it had before it. Part of that evidence included the fact that the child in question had special needs. The Tribunal failed to make any reference to that, but it was an important part of the context for the Respondent. Similarly, paragraph 36, whilst dealing with compensation/remedy, very much suggested the Tribunal was taking its own view and bringing in considerations which suggested that it was substituting its conclusions for those of the employer. At paragraphs 29 and 35, when the Tribunal referred to training and monitoring perhaps being a more suitable sanction than dismissal, that was both ignoring the evidence before the Respondent (see the express reference to this in the letter of dismissal) but was also substituting the Tribunal's view for that of the employer in this case.

30. Finally, the Tribunal's findings in these respects were simply perverse. For example, when dealing with the process of appeal, the Tribunal stated "...even if there was a conclusion that there was a tweaking or twisting of the nose". That was perverse given the Employment Tribunal's own finding (paragraph 32) that there had been some sort of inappropriate conduct.

31. In his written submissions in this appeal the Claimant relies on the reasons given by the Employment Tribunal for its Judgment and notes that he had not been aware that there was any problem with the child in question till the matter was drawn to his attention, and he immediately apologised. He also observes that Miss Nunn of the Respondent was, in her own words, unclear following the investigation whether the Claimant had done anything wrong. He further notes that a lot of emphasis was put on his conduct in the disciplinary hearing, and his response to his representative; the "No", was relied on as a reason to dismiss him, which he plainly felt was unfair. He repeated again that he would never hurt anyone, child or adult, in his care.

Discussion and conclusions

32. This was a case where the Employment Tribunal plainly had some sympathy for those involved: the Respondent, operating in a difficult climate; and the Claimant, in that he was a young man, with a clean disciplinary record, a relatively short employment history, and an ill-advised choice of representative for what appears to have been his first disciplinary hearing. Having accepted, as I understand the Tribunal to have done, that the Respondent had an honest belief that the Claimant had mis-conducted himself, however, it was required to look at the steps taken by the Respondent from the perspective of a reasonable employer in those circumstances. The circumstances here included: an allegation of injury to a vulnerable child in the Respondent's care; evidence as to how that injury arose from the child herself, consistently

given, both directly to the Respondent and through her interview with her social worker; photographic evidence of the injury; and an evasive and inconsistent response from the employee concerned.

33. This was not a case where the Employment Tribunal felt there were further steps the Respondent could have taken in its investigation. It was satisfied that it had been reasonable as to the steps it had taken.

34. Moreover, on the Employment Tribunal's own finding of fact at paragraph 32, the employer was entitled to take a view

> **"...that there had been some sort of inappropriate conduct by playing or jumping and hugging or indeed all three which resulted in a very small inflammation of the child's nose for a day or so."**

35. To seek to form its own view as to the conclusion that the Respondent should have formed as to the seriousness of the child's injury (see paragraph 28) was, in my judgment, a classic case of substitution by the Employment Tribunal. Moreover, as the Tribunal found, the Claimant had admitted that his interaction towards the child in question was inappropriate in this particular incident and "one or two others on different sites" (paragraph 35). That the Tribunal appears to have thought that the Respondent should not have had regard to the admission in respect of the Claimant's conduct towards other children on previous occasions I can only characterise as perverse.

36. Furthermore the Employment Tribunal appears to have misunderstood the Respondent's concern and, therefore, its finding at the dismissal stage. Again, I suspect, that was because it substituted its own views for those of the Respondent. So the ET suggests (see paragraph 28):

> **"So far as the interaction with the child E is concerned on the Respondent's own version they never reached a firm conclusion as to what had happened."**

That is simply not a fair summation of the Respondent's position. It was the Claimant's evasive response and his decision to walk out of the disciplinary hearing that meant the Respondent had been unable to establish why he had conducted himself as he had. That is apparent from the first two paragraphs of the dismissal letter. The Respondent was plainly satisfied that the Claimant had "used an unacceptable type of interaction with children which means you are willing to go outside the established play protocols". What the Respondent had done was to give the Claimant the benefit of doubt - contrary to the evidence of the child - as to why he had behaved in this way. On the question of what had happened, however, it had made a finding adverse to the Claimant, which was capable of constituting misconduct on his part. On the Employment Tribunal's findings of fact, that was a conclusion, on the evidence before it, that the Respondent was reasonably entitled to come to.

37. Similarly the Employment Tribunal's view that it was in some way wrong for the Respondent to have regard to the Claimant's conduct at the disciplinary hearing was again an error of substitution, alternatively, it was simply a perverse conclusion for the Tribunal to have reached. Given that this was a matter that only arose at the hearing, it could not have been raised before. Equally, however, given that the Claimant walked out of a disciplinary hearing that he had been instructed to attend by his employer, it could have come as no surprise to him that it was a matter taken into account by the Respondent in reaching its decision.

38. Moreover, it was more than simply a matter of the conduct of his representative. On the Employment Tribunal's own finding (see paragraph 24) the Claimant had given a number of answers unhelpful to his case and he was evasive and difficult. Contrary to the suggestion it made at paragraph 34, the Respondent was not simply holding him responsible for his

representative's conduct, but for his own. This was apparent from the letter of dismissal, where the Respondent said:

> **"The facts are...you gave false answers or answer and were willing to do this when directed by another person; you were also willing to avoid your employer's direct questions in the disciplinary meeting. This means that your continued employment with Kids' City is unsustainable for the reason that the trust between us has been breached."**

39. Given the need for trust between the employer and employee, and given the particular difficulties facing the Respondent in circumstances where it had to make a judgment as to an allegation made by a vulnerable child (which it could not simply ignore or disregard), the decision to take into account the Claimant's evasive and unhelpful responses could not have been outside the range of reasonable responses for a reasonable employer.

40. Further, when addressing the question of sanction, the Tribunal's reference, at both the end of paragraph 29 and in paragraph 35, to this situation "requiring perhaps further training a period of monitoring and/or warning and something of that kind" is again a substitution of the Tribunal's view of what would be appropriate rather than having regard to what the reasonable employer, operating in this difficult context, might consider appropriate. It was also a conclusion that simply ignored the evidence that the Respondent expressly considered the question of training. That is apparent from the reasons given in the dismissal letter, where the Respondent specifically refers to the training given to the Claimant on joining its organisation; not only as to how he should behave in terms of not putting the children in his charge at risk, but also as to how to conduct himself so as to protect himself from the risk of allegations of abuse. If the Tribunal had not focussed on its own view but had, instead, had regard to the evidence and circumstances facing the Respondent, then it is hard to see how it could have suggested some lesser sanction involving a further period of training/monitoring would have been the only reasonable response.

41. Given the conclusions I have come to on the grounds of appeal relating to substitution and perversity, it is unnecessary for me to deal with the finding on contributory fault. Had I needed to do so, however, my view is that the Employment Tribunal unnecessarily restricted the matters that it took into account in dealing with the question of contributory conduct in this case, and that further would have amounted to an error of law.

Disposal

42. If the Employment Tribunal had simply erred in terms of substituting its view for that of the reasonable employer in these circumstances, then I would have been reluctant to step in to state any concluded view as to the fairness of the dismissal in this case. That would have been so, notwithstanding the length of time that has passed in this matter and the difficulties that that might represent. In this case, however, I have found that – having regard to the Tribunal's own findings of fact - the Employment Tribunal's conclusion that the dismissal was unfair was perverse.

43. In particular, I have had regard to the findings as to the evidence before the Respondent of some injury to a child caused by the Claimant; to the Claimant's own admission as to his conduct and how that had been inappropriate towards this child and to one or two others. That is not to say that I am falling into the error of thinking that this amounted to a necessarily serious assault, but - recognising the context in which the Respondent operates - I can see that those findings alone would be sufficient for it to find misconduct. That being so, the Respondent was entitled to an open response from the Claimant, and he failed to give that. It may be that he was ill-advised, but – again, on the Employment Tribunal's own findings - he gave answers that were unhelpful to his case and the impression of being evasive and difficult.

44. In all those circumstances, my judgment is that, on the findings of fact made by this Employment Tribunal, the only outcome could be that the decision to dismiss was within the range of reasonable responses. It may be that not all employers would have taken that decision, but it would be perverse to find that it was outside the range.

45. In those circumstances I uphold the appeal. I set aside the finding that there was an unfair dismissal, and I substitute a finding that the claim of unfair dismissal is not made out and should be dismissed.