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EMPLOYMENT TRIBUNALS

Claimant: **Miss S Misiri**

Respondents: **(1) New Generation Nursery Ltd**
(2) Miss Chichi Ikenga

Heard at: **East London Hearing Centre** **On: 9-11 May 2017**

Before: **Employment Judge Martin**

Members: **Ms J Houzer**
Mr M Rowe

Representation

Claimant: Mr P Tsamados (Solicitor)

Respondents: Miss E Rowley (Employment Consultant)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The Claimant's complaint of direct discrimination on the grounds of sex pursuant to section 13 of the Equality Act 2010 is dismissed upon withdrawal by the Claimant.

(2) The Claimant's complaint of discrimination on the grounds of pregnancy and/or maternity pursuant to section 99 of the Employment Rights Act 1996 and Regulation 20 of the Maternity and Parental Leave etc Regulations 1999 is not well-founded and is hereby dismissed.

(3) The Claimant's complaint of discrimination on the grounds of pregnancy and/or maternity pursuant to section 18 of the Equality Act 2010 is not well-founded and is hereby dismissed.

(4) The Claimant's complaint of unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 is well-founded and the Claimant is awarded compensation in the sum of £3,579.58.

(5) The Claimant's claim for damages for breach of contract pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 is not well-founded and is hereby dismissed.

REASONS

Introduction

1 The Claimant and her mother Ms Ahmet gave evidence on behalf of the Claimant. The Second Respondent who is the Director and Manager of the First Respondent gave evidence on her own behalf and on behalf of the Respondents. Ms Racheal Agunbiade the Deputy Manager for the First Respondent; Miss Shericha Lewis and Miss Marjana Aktar employees of the First Respondent and former colleagues of the Claimant all gave evidence on behalf of the Respondents.

2 The Tribunal was provided with a bundle of documents marked Appendix 1.

The Law

3 The Tribunal considered the law as follows:-

3.1 Section 99(1) of the Employment Rights Act 1996:

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section " prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to –

(a) pregnancy, childbirth or maternity."

3.2 Regulation 20(1) of the Maternity & Parental Leave etc Regulations 1999:

"An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if –

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3)…"

3.3 Regulation 20(3):

"The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with –

(a) the pregnancy of the employee;

…

(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave …"

3.4 Section 18(2) of the Equality Act 2010:

"A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

…

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise … the right to ordinary or additional maternity leave."

3.5 Section 98(1) of the Employment Rights Act 1996:

"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

3.6 Section 98(2):

"A reason falls within this subsection if it –

…

(b) relates to the conduct of the employee …"

3.7 Section 98(4):

"…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."

3.8 Section 123(1) of the Employment Rights Act 1996:

"… the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

3.9 Section 123(4):

"In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales …"

3.10 Section 123(6):

"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."

3.11 Section 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992:

"If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

4 The Tribunal took note of the ACAS Code of Practice, Disciplinary and Grievance Procedures 2015 and in particular noted paragraphs 5-17 of that code.

5 Regulation 3 of the Employment Tribunals (Extension of Jurisdiction) Order 1994:

> "Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum … if –
>
> …
>
> (c) the claim arises or is outstanding on the termination of the employee's employment."

6 The case of *British Home Stores Ltd v Burchell* [1978] IRLR 379 where the EAT held that in cases of misconduct there must be established by the employer they had a reasonable belief that the employee had committed an act of misconduct; that the employer had reasonable grounds upon which to sustain that belief and that they carried out as much investigation into the matter as was reasonable in all the circumstances.

7 The case of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 where the EAT held that the function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.

8 The case of *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR page 23 where the court of appeal held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to the other procedural and substantive aspects of the decision to dismiss.

9 The case of *Neary and Neary v Dean of Westminster* [1999] IRLR page 288 where it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment. Whether the particular misconduct justifies summary dismissal is a question of fact. It considered the character of the employer, the role played by the employee and the degree of trust required which are all factors that need to be considered in determining the extent of the duty of trust and the seriousness of any breach thereof.

10 The case of *Igen Ltd v Wong* [2005] IRLR 258 where the Court of Appeal endorsed the guidance issued by the EAT in the case *Barton v Investec* in relation to the burden of proof. It held that first it is for the Claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant. It went on to say that it is important for the Tribunal to consider what inferences can be drawn from the primary facts. It then goes on to state that the second stage is for the Respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the Respondent to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of any discriminatory act or conduct. Accordingly the Court of Appeal referred to the shifting burden of proof in such cases from the Claimant to the Respondent.

11 The case of *Kuzel v Roche Products Ltd* [2008] IRLR 530 where the Court of Appeal held that when an employee positively asserts that there was a different and inadmissible reason for his dismissal he must produce some evidence supporting the positive case. That does not mean however that in order to succeed in an unfair dismissal claim the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer. It will then be for the Employment Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence. The Employment Tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it is for the employer to show what the reason was. If the employer does not show to the satisfaction of the Employment Tribunal that the reason was what he asserted it was, it is open for the Employment Tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or of logic, that the Tribunal must find that, if the reason was not that asserted by the employer, then it must be that asserted by the employee.

12 The case of *Polkey v A E Dayton Services Ltd* [1987] IRLR 503 where the House of Lords held that in judging whether what the employee did was reasonable, it is right to consider what a reasonable employer would have had in mind at the time he decided to dismiss as to the consequences of not consulting or not warning as provided for in the code of practice. If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless, he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee. In considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Employment Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

13 The case of *Gardiner-Hill v Roland Berger Technics Ltd* [1982] IRLR 498 where the EAT held that in the case of a failure to mitigate, it is not appropriate for the Employment Tribunal to make a percentage reduction in the total sum of compensation. In order to show a failure to mitigate, what has to be shown is that if a particular step had been taken, the dismissed employee, after a particular time, on the balance of probabilities, would have gained employment.

14 The case of Nelson v BBC (No. 2) [1979] IRLR page 346 where the Court of Appeal held that in determining whether to reduce an employee's unfair dismissal compensation on grounds of his contributory fault, an Employment Tribunal must make three findings. First there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. Second there must be a finding that the matters to which the complaint relates were caused or contributed to, to some extent, by action that was culpable or blameworthy. Third there must be a finding that it is just and equitable to reduce the assessment of the Claimant's loss to a specified extent.

15 The case of *Hollier v Plysu Ltd* [1983] IRLR 260 where the Court of Appeal held that in considering whether compensation should be reduced on the grounds of the employee's contribution to the dismissal, the Employment Tribunal's function is to take a commonsense view of the situation, to decide what part, if any, the employee's own conduct played in causing or contributing to the dismissal and then, in the light of that finding, to decide what, if any, reduction should be made in the assessment of the employee's loss.

16 The case of *Vento v Chief Constable of West Yorkshire Police* (No. 2) where the Court of Appeal set out three broad bands of compensation for injury to feelings:- the top band normally being in the region of £15,000 to £25,000; the middle band being between £5,000 to £15,000 and the lower band of awards being between £500 to £5,000. The Tribunal were also referred to the case of *Da'Bell v National Society for Prevention of Cruelty to Children* [2010] IRLR 19 where the EAT issued a formal revision to those figures endorsing a 20% increase to each of the limits so that the top band is now £18,000 to £30,000, the middle band £6,000 to £18,000 and the lower band £600 to £6,000. We were also further referred to the case of *Beckford v Southwark London Borough Council* UKEAT/0210/14 which also applied an uplift to those figures.

17 The Tribunal was also referred to two unreported cases from the Employment Tribunals - the first being the case of *Attwood v Heart of England Tourist Board* where an injury to feelings award of £1,000 was made to a claimant who was dismissed after seven months for absences which were pregnancy related. We were also referred to the case of *Cunningham v Maxine Parsons trading as Langdon's Hair Saloon* where the claimant was dismissed in that case 10 days after announcing that she was pregnant and was awarded an injury to feelings award in the sum of £1,000.

The Issues

18 The parties agreed a list of issues as set out below.

Automatic unfair dismissal

18.1 Was the reason or principal reason for the Claimant's dismissal her pregnancy, childbirth or maternity and/or the fact that she would be availing herself of the right to ordinary/additional maternity leave?

Unfair dismissal

18.2 What was the reason, or if more than one the principal reason for the Claimant's dismissal?

18.3 Was it a reason as defined under sections 98(1) and (2) of the Employment Rights Act 1996?

18.4 Was it for gross misconduct or some other substantial reason? If the Respondent shows a potentially fair reason, does this satisfy the test of reasonableness within section 98(4) ERA 1996, with particular reference to the ACAS Code of Practice on disciplinary and grievance procedures 2015, the test within *British Home Stores v Burchell* and the band of reasonable responses test?

18.5 Did the First Respondent follow a fair procedure?

18.6 If not, would a fair procedure have made any difference to the outcome? And did the Claimant contribute to her dismissal pursuant to section 123(6) ERA 1996.

Pregnancy and maternity discrimination

18.7 Was the Claimant treated unfairly by either or both of the Respondents because of (a) her pregnancy and/or maternity or (b) any illness suffered by her as a result of it or that she was seeking or sought to exercise her right to ordinary/additional maternity leave?

Damages for breach of contract

18.8 Was the Claimant dismissed by the First Respondent without notice or pay in lieu of notice and if so, is she entitled to damages for breach of contract being her two weeks statutory notice?

Findings of Fact

19 The First Respondent is a small nursery in the East End of London. It now operates out of two premises, one in Hackney and one in Bow. It is owned and managed by the Second Respondent. The First Respondent employs approximately five staff at the nursery where the Claimant was employed in Bow.

20 The Claimant initially worked for the First Respondent as a volunteer.

21 The Claimant commenced employment as an apprentice Childcare Practitioner in April 2014. Her contract of employment is at pages 43-44 of the bundle.

22 Her duties as an apprentice are set out at page 42 of the bundle. She was largely expected to undertake the same role as a qualified Childcare Practitioner because she was effectively learning on the job. The Second Respondent said that the Claimant would have less children to look after than a qualified Child Nursery Practitioner. We will deal with that issue further in due course.

23 As an apprentice the Claimant was studying towards a Level 2 qualification in childcare. The apprenticeship was for a year. She commenced it in August 2014 and had still not completed it when her employment terminated some 18 months later in May 2016. The apprenticeship was originally provided by a training provider called CDC which went into liquidation in April 2015. Another provider, Haringey College then took over the apprenticeship in the summer of 2015 so there was some disruption to the Claimant's apprenticeship training for a number of months.

24 The Claimant was initially paid the lower apprentice minimum wage of £2.68 an hour. The Claimant said that she complained about this to the Second Respondent. She said that she was not able to live on that wage. The Second Respondent said that the Claimant did approach her about her wages. She said that she put up the Claimant's wages in or around the summer of 2015 because she did not think that the lower minimum wage for apprenticeships was adequate for the Claimant who was living on her own. She increased the Claimant's rate of pay to £5 an hour.

25 The Claimant worked Monday, Tuesday, Thursday and Friday at the First Respondent. The Second Respondent says that when the Claimant joined the First Respondent she worked Wednesdays at a retail store called "Lush". After the Claimant left that employment she kept Wednesday as a study day with the agreement of the First Respondent. In the staff attendance records at pages 266-269 of the bundle the Claimant is crossed out on each Wednesday.

26 The Claimant says that she had to open and close the nursery on her own on occasions. The Second Respondent says that the Claimant was regularly late for work or left early. She accepted that other staff were also late for work or had to leave early. She said that she was fairly flexible about starting times and finish times and tried to accommodate staff as much as possible but had to ensure that she had sufficient cover at the nursery to have the appropriate ratios of staff to children.

27 The Second Respondent has produced some handwritten notes of a couple of occasions in mid-October 2015 when the Claimant arrived late at work. Those notes are at pages 94-97 of the bundle. However it is noted that at least on one of those occasions Racheal Agunbiade the Deputy Manager, was also late. All of the Claimant's former colleagues, Ms Abunbiade, Ms Lewis and Ms Aktar all say that the Claimant was late on occasions although they acknowledged that others were late as well. Ms Agunbiade says that she was occasionally late but the Claimant was much worse than all of the others. She said that this could cause issues with ratios of children to staff. She said that on one occasion she had to ask the cleaner to stay around so that there was the right number of adults to children otherwise she would have had to have turned some of the children away.

28 The Claimant was in a long-term relationship with her boyfriend. She discovered in late 2015 that she was pregnant. The Claimant's boyfriend did not want the Claimant to keep the baby so the Claimant did consider a termination initially. It appears that subsequently the Claimant and her boyfriend reunited and looked to resolve their issues and keep the baby. However, by early 2016 the Claimant had broken up with her long-term boyfriend and had decided to keep the baby. This is noted in the Claimant's medical records at page 77 of the bundle. However, it seems that there was still ongoing issues between the Claimant and her boyfriend during February 2016.

29 It is quite clear from the evidence which we heard in Tribunal that this was a very difficult time for the Claimant having heard evidence from both the Claimant and her mother in Tribunal. She was effectively having to choose between her long-term boyfriend and her baby.

30 In November 2015 the Claimant told the Second Respondent that she was pregnant.

31 The Claimant says that the Second Respondent did not show any interest in her pregnancy and never carried out any risk assessments. The Second Respondent says that she was supportive of the Claimant and discussed the Claimant's pregnancy with her. She admitted that she did not do any formal risk assessments but she says she discouraged the Claimant from picking up babies when she moved to the nursery unit and once stepped in to change a nappy when the Claimant was feeling nauseous. The Second Respondent says that another member of staff, Tania, was pregnant around the same time as the Claimant, albeit a few months later than the Claimant. The Second Respondent says that staff would help out other members of staff regularly. She acknowledged that she was asked at one stage by the Claimant if she could drive to pick up a child from school because the Claimant was finding it difficult to walk but the Second Respondent says that she had to refuse that proposal because the Claimant was not insured to drive a car pick up the children in that situation. She did say that she however discouraged the Claimant from walking to pick up the children if she found it too difficult to do so.

32 The Claimant's former colleagues all said in evidence before the Tribunal that the Second Respondent was supportive of the Claimant in relation to her pregnancy and that other staff would help if someone needed something doing, although they acknowledged that by about early 2016 the Claimant was in a room working with only one other member of staff.

33 In or about January/February 2016, the Claimant was moved to the nursery from the pre-school room. The Claimant says that she was moved at a time when she was pregnant. The Second Respondent says that the Claimant was moved due to a restructure. She says that the Claimant was going to help work on helicopter stories with the young children. She says that the Claimant was very good with babies and young children and had a great imagination. In fact all of the Claimant's former colleagues indicated that they thought she was very good with babies and described her as imaginative and someone with good ideas.

34 The Claimant worked in the pre-school unit with Ms Lewis before the move but it does not appear that the two of them had a particularly good relationship although they seemed to get on as work colleagues.

35 The Claimant moved into the baby room with Tania. Subsequently a few months later Tania became pregnant. She is still on maternity leave. The Claimant did not suggest in evidence that Tania did not assist her or ever refused to assist her during the Claimant's pregnancy. She said that other members of staff were not really able to help her because they were in a different, albeit, adjoining room.

36 The Claimant said in evidence before the Tribunal that she had responsibility for three key children. In her claim form she said that she was responsible for four key children. During her evidence in Tribunal the Claimant identified two of those key children by initials. However, she could not recall the name or initials of the third child who she said was sickly and did not attend nursery very often.

37 The Second Respondent said that the Claimant would not have had three or four key children at any one time because she was only an apprentice. She said that the Claimant would only have one or possibly two key children at any one time. The Second Respondent said that qualified staff would have somewhere between three to six key children. All of the Claimant's former co-workers all confirmed that the Claimant would only have one or two key children at any one time during her employment. They were able to identify those children by initials and at least one of them expressed some surprise that the Claimant did not recall the name or initial of someone she said was a key child of hers.

38 The Tribunal noted that most of the Claimant's former colleagues gave evidence separately and were not present when the others were giving evidence. We prefer the Respondent's evidence regarding this issue as all four of the Respondent's witnesses were consistent in relation to the number of key children the Claimant would have had and that explanation was clearly plausible taking account of the Claimant's experience. We found the Claimant's evidence on this issue inconsistent. Her evidence in Tribunal was different to that in her claim form and we too are surprised that she could not recall the name of the other key child or children that she was apparently looking after.

39 In or about February/March 2016 both parties agree that they Claimant approach the Second Respondent about attending other classes in college. The Tribunal notes that this was at a time when the Claimant was clearly under a lot of strain due to the difficult relationship with her partner and the difficult decisions which she was having to consider at that time.

40 The Second Respondent says that the Claimant told her that due to the break in her study because of her training provider that she had a lot of catching up of work to do and asked her to attend additional classes. The Second Respondent said that she told the Claimant that she could not accommodate this request because of the ratio of numbers in the nursery. She said that she suggested that the Claimant talked to her tutor and consider other options. The Second Respondent has produced a handwritten memorandum which is at pages 98 to 99 of the bundle. She admits that this document was produced after the Claimant issued these proceedings. The Second Respondent says that the Claimant never came back to her regarding this matter.

41 In evidence before the Tribunal the Claimant says that she did start a short course in February through to March on Tuesdays and Wednesdays. She said that this course was designed to increase her qualifications and that the Second Respondent knew all about the course.

42 The Second Respondent says that she did not know about this other course until much later and that she would not have agreed to the Claimant doing this course at all, because it was a home based childminding course which was not relevant to the Claimant's job at the nursery.

43 In March 2016 the Claimant provided the Respondent with her MATB (page 85 of the bundle). The Second Respondent says that she had to chase the Claimant about the date that she intended to commence her maternity leave. She refers to a text that she sent to the Claimant which is page 106 of the bundle.

44 Ms Lewis says that the Claimant told her that she was doing a childcare course and the Second Respondent had told her that she could not have the day off but that she was going to take it anyway. Ms Lewis says that the Claimant told her that when she finished the course that she was not interested in going back to work at the nursery. The Claimant says that she did not say that to Ms Lewis and as they did not have a very good relationship it was unlikely that she would do so. Ms Lewis admits that they did not have a particularly good relationship but worked together as colleagues and did discuss matters.

45 The Claimant's course ran from 23 February to 23 March for five weeks. It ran on Tuesdays and Wednesdays. The Claimant did not work at the nursery on a Wednesday.

46 The Tribunal have been referred to the staff attendance records for that period and note that each Wednesday is, as indicated earlier, crossed through for the Claimant because she did not work on Wednesdays. However on Tuesday 23 February it is noted that the Claimant was marked absent as noted at page 266 of the bundle.

47 On Tuesday 1 March 2016 the Second Respondent says that the Claimant left nursery at lunchtime as is noted in the staff records at page 267 of the bundle. The Claimant says that staff were allowed to leave after lunch sometimes if it was not busy in nursery which the Respondents do not dispute.

48 On Sunday 6 March 2016, the Claimant texted the Second Respondent to say that she had pains in her back and stomach and asked if she could just do the morning of Monday 7 March to which the Second Respondent agreed. A copy of that text is at page 105 of the bundle.

49 The Second Respondent then texted the Claimant on 7 March to find out the position regarding Tuesday 8 March. She was subsequently told by the Claimant that she would not be able to come in on Tuesday 8 March as is noted at page 105 of the bundle. The Claimant did not produce any sick note or self certification for that date. The Claimant did not attend work on Tuesday 8 March and is noted as absent on the staff attendance records at page 268 of the bundle.

50 On Monday 14 March 2016, the Claimant texted the Second Respondent to say that she had been involved in a driving accident with a bike and that she had gone to hospital and that she was going to hospital on Tuesday 15 March so she could not come in. A copy of that text is at page 107 of the bundle. The Claimant is noted as absent on the staff attendance record for Tuesday 15 March as is noted at page 269 of the bundle. There is no note in the Claimant's medical records of her attending hospital on either of those dates as is noted at page 69 of the bundle.

51 Ms Lewis says that she told the Second Respondent about her conversation with the Claimant in relation to the Claimant attending a course even though the Second Respondent had told her that she could not take the time off. The Second Respondent said that she became suspicious about the number of Tuesdays that the Claimant was having off. She said that on 17 March 2016 she therefore contacted the college and spoke to the Head of Department and asked about the course which the Claimant was attending, as well as the days and times for that course. She said that she was given the name of the tutors for the course. Again she has made a handwritten note about this discussion which is at page 99 of the bundle. She again admits that this was made after the Claimant had commenced these proceedings. The Second Respondent also sent an email to the course tutors on 17 May asking for details about the course which the Claimant was attending. That email is at page 129 of the bundle.

52 The Claimant was also absent on Tuesday 22 May and was marked absent in the staff attendance records as is noted at page 270 of the bundle.

53 In evidence before the Tribunal the Claimant could not properly explain why she had texted the Second Respondent on a number of occasions as is noted at pages 105 and 107 of the bundle, telling the Second Respondent that she was not able to come into work on a number of Tuesdays if, as she alleges the Second Respondent was aware that she was attending a course on those dates. She says that she was letting the Second Respondent know because she was her employer.

54 The Claimant was absent on annual leave between 18 and 26 April 2016. She told the Respondent that she was going to Cyprus with her mother.

55 On 28 April 2016, the Claimant was sent home after she told the Second Respondent that she had been vomiting.

56 The Second Respondent says that the Claimant's absences were affecting the children. She says that a number of the parents complained about the Claimant and that the Claimant was not completing the children's records properly. It is not clear from the evidence of the Second Respondent whether these complaints came before or after the Claimant left the Respondent's employment. The Claimant's former colleagues say that she seemed to struggle at times to complete the children's records but that she had been shown how to do so.

57 In evidence before the Tribunal, Ms Agunbiade suggested that after the Claimant had left, one of the parents had asked her about the Claimant and how her business was going. Ms Agunbiade said that she could not recall that parent actually

asking anything about the Claimant's pregnancy. The Tribunal did find the latter somewhat surprising in the circumstances.

58 The Claimant says that she contacted Tower Hamlets College in about April 2016 regarding her rate of pay. She was aware that the National Minimum Wage had gone up again and she was concerned that she was not being paid the right rate of pay. She says that Tower Hamlets sent her some emails to confirm that the correct rate of pay was £7.20 an hour. She has not produced copies of those emails to the Tribunal. The Claimant says that she contacted the Second Respondent about her rate of pay again because she was concerned that she was not being paid the correct rate of pay. The Second Respondent says that she was somewhat confused about the correct rate of pay because of the Claimant's position as an apprentice. She says that she was not sure what rate of pay was payable in those circumstances. She says that she contacted HMRC about this issue. The Second Respondent said that she subsequently accepted that £7.20 was the correct rate of pay and paid the Claimant back pay for the underpayment of her wages. She said that similar issue arose with another employee. The correspondence between the Second Respondent and HMRC is at pages 141-148 of the bundle.

59 The Second Respondent says that when the Claimant did not attend for work on 2 May 2016, she went to the Claimant's college to see if the Claimant was there. She said that she was told on that occasion that the course had finished and that the Claimant had been attending the course over the last few weeks.

60 On the same day, 2 May 2016, the Claimant texted the Second Respondent to say that she had to take the following Tuesday, 3 May 2016, off to take her partner to hospital as he had an operation and there was no-one else to take him there. That text is at page 106 of the bundle.

61 In evidence before the Tribunal we heard from the Claimant's mother who was clearly worried about the Claimant's mental and physical state. She said that she tried to contact the Second Respondent on 4 May 2016 on several occasions but was not able to speak to her. She said that eventually she texted the Second Respondent on 4 May and asked the Second Respondent to contact her. That text is at page 129a of the bundle.

62 In evidence before the Tribunal the Claimant's mother said that the Claimant was very depressed and that she had been worried about her from about February onwards. She said that the Claimant was often sick and was having a difficult pregnancy and was having to contend with considering a termination because her boyfriend did not want to keep the baby. She said that by 3 May the Claimant was in a bad state. She said that the Claimant went to work that morning and had to leave to come home. In fact the Claimant had already texted the Respondent to say that she was not going to be going in on 3 May because she had to take her partner to hospital.

63 The Claimant's mother said that the Second Respondent called her on 4 May 2016 at about 8 to 9pm. She said that the call lasted about an hour and that she told the Second Respondent all about the Claimant's ailments and depression and the concerns about whether the baby was going to be kept. She said that she told the Second respondent that she was worried about the Claimant's duties at work and the

difficulties the Claimant was having with her pregnancy. She said that the Claimant was having coughing fits and she was taking her to the doctors the next day. She also told the Second Respondent that the Claimant was staying with her.

64 The Second Respondent says that the call could not have lasted an hour and she thought it lasted about 15 minutes. She has produced a copy of her telephone records which is at page 129(b) which shows a call to the Claimant's mother's mobile number at 20.39 hours which is noted as having lasted just over five and a half minutes. Both parties agree that there was only one call made.

65 The Claimant has produced a handwritten note of that call (page 101 of the bundle) which again was produced after these proceedings were commenced. In evidence before the Tribunal she admits that the Claimant's mother told her that the Claimant was not well and the Claimant was having difficulties with her partner and was depressed. The Second Respondent says that the Claimant's mother also told her that the Claimant and her boyfriend had broken up a few weeks earlier. She said that the Claimant's mother told her that the Claimant was staying with her and that she was taking her to the doctor and that she would not be coming into work for a while.

66 The Claimant and her mother say that the Claimant was on the sofa listening to this call when it was made and could hear part of the conversation.

67 In evidence before the Tribunal the Claimant admitted that she lied in the text message about taking her boyfriend to hospital. She said that she was in a terrible state at the time and was not thinking straight and not able to go to work. It is clear to this Tribunal that the Claimant was going through a difficult time. However we note that in her witness statement to the Tribunal she said that she was too ill to go to work on 3 May, but she does not say that anything about the text she sent saying that she was taking her boyfriend to hospital or indeed that she lied in that text.

68 On 6 May 2016, the Claimant's mother brought in a sick note for the Claimant. That sick note is at page 88 of the bundle. The Claimant was signed off sick from 6 May to 13 May. She is signed off sick due to musculoskeletal chest pains. There is no reference to this being pregnancy related. The Claimant and her mother say it was related to her pregnancy. Her medical records are at pages 73-78 of the bundle. At page 63 the doctor has indicated in late June that the pregnancy was uneventful to date. The Claimant's mother said that all illnesses in pregnancy are pregnancy related and that she would not have raised issues about her daughter's depression with the doctor in case the GP decided to contact social services. No sick note or self-certification certificate was produced for 5 May 2016.

69 The Claimant's mother brought in the Claimant's sick note. She says that she handed it to someone at the nursery. Ms Agunbiade thinks that it was handed to her and she thought the Second Respondent was not at the nursery that day. She could not recall when she handed it to the Second Respondent but thought it must have been given to her the following Monday 9 May 2016. The Second Respondent could not recall whether she came into the nursery that day but did not think so. She also could not recall when the sick note was handed to her.

70 On 6 May 2016, the Second Respondent wrote on behalf of the First Respondent to the Claimant to terminate her employment. The letter stated that was due to her high level of absence and lateness and in particular because of her failure to tell management that she was undertaking a course which had nothing to do with her work in the nursery and taking time away from work without the permission of management to effectively do that course. The Respondents indicated in that letter that this amounted to dishonesty and was considered to be an act of gross misconduct. Nevertheless, the Respondent gave the Claimant notice that the termination would be effective on 20 May. They also indicated in the letter that if the Claimant was not happy with the decision to arrange a meeting when she could discuss the matter with the Respondent. That letter is at pages 130-131 of the bundle.

71 In evidence before the Tribunal the Second Respondent said she was not entirely sure when this letter was written or posted. She said that it was written so far as she could recall before 6 May and probably posted on the morning of 6 May. She said that the letter was sent to the Claimant's address.

72 The Second Respondent said that she decided to write the letter when she discovered on 2 May that the Claimant had been attending another course even though she had told the Claimant that she could not have the time off. The Second Respondent says that the final straw for her came after the telephone call with the Claimant's mother on 4 May 2016 when she realised that the Claimant had lied about her absence on 3 May when she had indicted that she was taking her partner to hospital because the Claimant's mother had told her that they had split up some time previously. The Second Respondent thought that she must have therefore completed the letter after that call, namely on 5 May 2016 although she acknowledged that the letter makes no reference to that incident other than the general references to lateness and absence but no specific reference to her concerns about 3 May.

73 The Second Respondent said that as far as she could recall she had not received the Claimant's sick note at the time when she wrote and posted the letter. She thought she did not receive the sick note until a few days later. However she said that the sick note did not make any reference to pregnancy and that in any event she was principally dismissing the Claimant for her dishonesty which she considered to be an act of gross misconduct.

74 The Second Respondent said that she sent a copy of the letter to the Claimant's mother's address. She had to ask the Claimant's mother for her address on the evening on 6 May when she sent a text to her which is at page 129 of the bundle.

75 The Second Respondent said that she sent back the Claimant's sick note and her claim for SSP and statutory maternity pay (SMP) together with a copy of the letter of dismissal. She said that that letter was sent to the Claimant's address and her mother's home address.

76 The Second Respondent believed mistakenly that she was not liable for SMP as the Claimant had been dismissed from her employment. She was not aware that if the Claimant was pregnant at the time of dismissal and fulfilled the requirements for the payment of SMP that she, as the employer was still liable for SMP.

77 On 16 May 2016, the Claimant was issued with a further sick note. She was signed off work from 16 to 30 May. The reason for sickness is noted as cough under investigation. There is no mention of this being pregnancy related. The sick note is at page 89 of the bundle.

78 On or around 18 May 2016 the Claimant went into nursery with her further sick note. She says that the Second Respondent asked her where she had been and she told her that her mother had phoned to say that she was not well and had brought in a sick note for her and that she was now bringing in a further sick note. She said that the Second Respondent told her that she had been dismissed and had sent her letters and was not prepared to pay her any sick pay or maternity pay.

79 The Second Respondent says that when the Claimant turned up with a further sick note she asked the Claimant to come into a room and told her about the letter terminating her employment and the reason for the termination. In particular she says that she referred to the course which the Claimant was attending on days when she should have been at work. The Second Respondent said that the Claimant told her she was not doing a course, but she told the Claimant she had been to the College and was given the information. The Second Respondent says that the Claimant then said that they should not have done so. The Second Respondent says that she told the Claimant that if she was going to deny it, she would call the College in front of the Claimant and that the Claimant replied that the College had no right to tell the Second Respondent about the course.

80 The Second Respondent says that she also told the Claimant about the fact that she had lied about her absence when she said that she had been taking her partner to hospital because her mother had told her that they had broken up weeks before.

81 The Second Respondent said that she told the Claimant she was not paying her SSP or her SMP because her employment had terminated and that the Claimant should take the forms back with her but the Claimant insisted on leaving them.

82 The Second Respondent has again belatedly made notes of this discussion which are not contemporaneous but which are in the bundle at pages 102-104 of the bundle.

83 We have noted that the Second Respondent told us during her evidence that she did on a couple of occasions contacted ACAS although we have not heard about any of the advice given to her. It is not clear to us why there was no contact made with ACAS made prior to steps taken by the Respondent to dismiss the Claimant.

84 The Second Respondent sent back the Claimant's SSP form to her.

85 As is noted above in late June/early July the Second Respondent entered into correspondence with HMRC to resolve the issues regarding the Claimant's appropriate rate of pay. This related to both the Claimant and another apprentice. The Claimant was ultimately paid all the outstanding wages which were due to her.

86 In evidence before the Tribunal the Claimant said that she intended to start her maternity leave with the Respondents on 1 July 2016.

87 The Claimant's son was born in August 2016.

88 The Claimant issued proceedings to this Tribunal in September 2016.

89 In November 2016, Tower Hamlets confirmed to the Second Respondent that the Claimant had attended a five week course from 23 February to 23 March 2016. The course was for a Certificate in preparing to work in home based childcare. They also confirmed that the Claimant attended each of the sessions which the Claimant confirmed herself in evidence before the Tribunal. Those emails are at pages 138-140 of the bundle.

90 Both parties agreed that the Claimant's gross weekly wage was £230.40 and her net weekly wage was £197.66.

91 The Claimant in evidence before the Tribunal said that she intended to go back to work at the nursery and was not intending to start childminding. She said that she had undertaken this course to assist her in her Level 2 course and gain additional knowledge.

92 The Claimant said that she did not look for work after she was dismissed because she was going on maternity leave and after her son was born she had been at home looking after him.

93 The Claimant says that she wants to continue to work in childcare but she never completed her course. She said that she had a couple of pieces of coursework that she still had to complete. She said that in order to complete those pieces of course work she had to be a nursery setting to finish the course and would now have to start again. She could not really explain to the Tribunal why she had not completed the course before her employment had terminated as the course was only supposed to be for a year and although there had been a change of providers she had still not completed it some 18 months after she had first commenced it. She also said that she would find it difficult to find work at another nursery because the Respondents still had some of her certificates which they had not returned to her.

94 The Claimant signed on for Job Seekers Allowance from 19 May 2016.

95 The Claimant said that she was not sure how long it would take her to look for another job. She acknowledged that she had worked in retail before and would not have any problems getting a job in retail. She accepted on cross-examination that she would probably be able to get a job within a few weeks of her starting to look for work. She acknowledged that there was a large retail park close to her where she had worked previously and that there should be a number of jobs available there. She did however say that she would have to sort out some childcare arrangements. The Claimant also said that she wanted to go back into childcare work which was really what she wanted to do.

Submissions

96 The Claimant's representative made oral submissions. He referred to a number of cases as referred to earlier in this judgment.

97 The Claimant's representative submitted that the reason for dismissal was pregnancy or maternity and he referred to the burden of proof. He relied on the timing of the dismissal and referred to the Claimant's illness at that time. He argued the Claimant's mother's evidence was clear about the Claimant's illness being pregnancy related. He argued that the Respondent's dismissal was dressed up as conduct and referred to their approach to the failure to pay SMP.

98 The Claimant's representative further submitted that in any event the dismissal was unfair. The Respondents did not follow the ACAS Code of Practice and no procedure whatsoever was undertaken. He submitted that the dismissal was unfair and there was little chance the Claimant would have been dismissed in any event. He did not think that she contributed to her dismissal and submitted that there should be an uplift for failure to follow the ACAS Code of Practice. He also sought injury to feelings.

99 The Respondent's representative filed written submissions. She submitted that the reason for dismissal was conduct. She argued that the Claimant had contributed to her dismissal and would have been fairly dismissed even if a fair procedure had been followed. She relied on the evidence of the Second Respondent, the further oral evidence submitted by the Respondents and the documentary evidence which she said supported the Respondents' case.

Conclusions

100 The Claimant has proved facts from which this Tribunal could conclude that she was dismissed because she was pregnant or for maternity reasons, namely the timing of her dismissal whilst she was pregnant and on sick leave.

101 However, we then went on to consider the burden of proof and looked to the Respondent for an explanation for the Claimant's dismissal. We accept that the explanation given by the Respondent is an adequate explanation for the Claimant's dismissal and we find that the reason for the Claimant's dismissal was conduct.

102 We would like to comment on the evidence of both parties:-

102.1 We found the Second Respondent's evidence, although not always clear, to be credible. It was largely supported by all the evidence given by the Claimant's former colleagues. The evidence was furthermore consistent with the documentary evidence, namely:-

102.1.1 The email sent by the Second Respondent to the College on 17 March asking about the course which the Claimant was attending. There is no reason why the Second Respondent would have sent that email if, as is suggested by the Claimant, she was aware that the Claimant was attending that course and had agreed to it.

102.1.2 The text messages by the Claimant to the Second Respondent on 7 and 14 March informing the Second Respondent that the Claimant was not coming into work on those days. Again there is no reason why the Claimant would have sent those text if, as she suggested in evidence, the Second Respondent was aware of and had agreed, to the Claimant having those days off. We should add that we think it is unlikely that the Second Respondent would in any event have agreed to the Claimant attending such a course as it is wholly unrelated to and effectively in competition with her work at the First Respondent.

102.1.3 We also accept the Second Respondent's evidence about the telephone call with the Claimant's mother which is consistent with the telephone records.

103 On the other hand we found the Claimant's evidence to be inconsistent with both the documentary evidence, her own evidence and that of her mother, namely:-

103.1 She said in her claim form that she was responsible for four key children yet in her witness statement and her evidence to the Tribunal she said that she was responsible for three key children.

103.2 She said in evidence that she had told the Second Respondent about the course yet there is no reference to that in either her witness statement or claim form and she was unable to give us any reasonable explanation why she texted the Second Respondent on two occasions to tell the Second Respondent that she was unable to attend work on two of those Tuesdays if the Second Respondent had already agreed to her having that time off.

103.3 She admitted in evidence in the Tribunal that she had lied in the text to her employer on 3 May about taking her partner to hospital. We do accept that the Claimant was under a great deal of stress at that time. However, we also note that she does not make any reference to that text or the lie that she says was now contained in that text in either her claim form or her witness statement.

103.4 Furthermore her evidence in relation to her attendance at work on 3 May is entirely inconsistent with the evidence given by her mother who suggested that the Claimant went into work on that day.

104 This Tribunal finds that the Claimant was dismissed on 20 May by way of a letter dated 6 May principally for dishonesty in attending a course unrelated to her work with the Respondent and taking time away from work when she was specifically told that she was not able to take time off in order to do a course.

105 Misconduct is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

106 We believe that the Respondent did have reasonable grounds to believe that the Claimant had committed an act of misconduct. The Second Respondent had made enquiries with the College and noted the Claimant's absences each Tuesday that the course was running. She was also aware of the different excuses given by the Claimant on a number of occasions on some of those days when she should have been at work.

107 We further believe that this concern about the Claimant's dishonesty was further escalated in the Second Respondent's mind when she found out that the Claimant had lied about her non attendance at work on 3 May after the Second Respondent had been told by the Claimant's mother that, contrary to what the Claimant had told her in the text the previous day, the Claimant had not on that occasion been taking her partner to the hospital.

108 We find that this kind of dishonest misconduct would amount to gross misconduct, particularly in the circumstances of a nursery setting where the effect of the Claimant's non attendance would have an impact on whether the First Respondent could continue to operate bearing in mind the ratios for adult supervision of children.

109 We consider that the Respondents did undertake some investigation into these issues. However we do not consider that investigation was adequate as they did not at any time make any attempt to investigate the matter with the Claimant before deciding to dismiss her and on that basis we consider that the dismissal was procedurally and substantially unfair.

110 We also find that the procedure followed by the Respondents was wholly inadequate and completely outside the ACAS Code of Conduct. We note that the Second Respondent had in fact had some previous contact with ACAS, yet failed to make any attempt to follow any form of procedure before dismissing the Claimant. In that regard, we note that the Respondent failed to put any of the allegations to the Claimant, give her the opportunity to respond or put forward any mitigating factors. They failed to meet with her before deciding to dismiss her. Further, we do not consider that they gave her any form of right of appeal. We consider that the comment in the letter about arranging a meeting would not amount to a right of appeal, not least because it would seem that the person who was going to meet with the Claimant, as indeed was subsequently the case, was the person who originally made the decision to dismiss, namely the Second Respondent.

111 We also do not consider that the meeting on 18 May amounted to any form of meeting to discuss the allegations as the decision to dismiss had already been made. Nor do we consider that it could amount to any form of appeal.

112 Accordingly we find that the Claimant's dismissal was unfair.

113 We do not consider the Claimant has acted reasonably in mitigating her loss. She has made no attempt to seek alternative employment, although that she has been at home looking after her son, but she herself indicated that she was originally intending to return to work in 1 July 2017, yet has made no attempt to seek work to be in a position to do so. We have considered the case of *Gardiner* and we consider based on the Claimant's own evidence that she would find a job fairly quickly even if

that was in the retail sector. This might well be the reason why she has not looked for work in the meantime. She acknowledged that she had worked in a retail park close to her home previously and indicated that if she started looking for a job she thought she would find a job within a few weeks.

114 We consider that there is a chance that the Claimant would have been fairly dismissed in any event even if a fair procedure had been followed. We have put that chance at 40%. Although at that stage there were clearly further issues about the Claimant's dishonesty which were not actually referred to in the letter of dismissal, namely the fact that she had effectively lied about her non attendance on 3 May, we do nevertheless think there were a number of factors that the Respondent would have had to consider if they had properly put these allegations to the Claimant and given her the opportunity to respond. In that regard, it is clear to us that the Claimant was under a lot of stress and pressure at the time. It is possible that if the Respondents heard that explanation they might have taken a different position. They had been fully aware of what was going on with the Claimant at the time. We found the Claimant to be sincere in relation to the effect the difficulties with her partner was having on her at the time and the effect this was having on her pregnancy and her health. Accordingly although we think there is a good chance the Respondents would probably have dismissed her, we have noted this was an employer who was sympathetic to their employees (eg having been accommodating with start and finish times) who might have taken a different approach if they had sat down with the Claimant.

115 We did however find that the Claimant's behaviour contributed to her dismissal. In that regard, we have noted her behaviour with regard to the course but also her dishonesty with regard to her non attendance at work on 3 May, albeit that we accept that she was under a great deal of pressure at the time. We find that behaviour was both culpable and blameworthy and it did contribute to her dismissal substantially. We have decided the Claimant's conduct was at least half the reason why she was ultimately was dismissed. In that regard we have taken account of the fact that the Respondents failure to follow any form of procedure equally contributed to the Claimant's dismissal. We did not make any deduction from the Claimant's basic award for contribution.

116 Finally we find that the Respondents failed to follow the ACAS Code of Conduct at all and in that regard we have decided to increase the award payable to the Claimant by the figure of 25%.

117 Accordingly, we have awarded the Claimant the sum of £3,579.58 compensation for unfair dismissal. The compensation is payable by the First Respondent. This figure has been calculated as follows:-

Basic award

2 x £230.40 £460.80

Compensatory award

Loss of wages from 21 May to 30 June 2016
6 weeks at £197.66 £1,185.96

Loss of statutory maternity pay

Period 1 July 2016 39 weeks 6 x 90% of net weekly pay (£177.89)	£1,067.34	
33 weeks x £139.58	£4,606.14	£5,673.48
Future loss		
4 weeks from 1 June 2017-1 July 2017	£790.64	
Sub total		£7,650.08
Less *Polkey* reduction 40%	£3060.03	
Sub total		£4,590.05
Add 25% uplift for failure to follow ACAS Code of Practice	£1,147.51	
Sub total		£5,737.56
Less contribution at 50%	£2,868.78	
Sub total		£2,868.78
Add loss of statutory rights	£250.00	
Sub total		£3,118.78
Total compensatory award basic and compensation		£3,579.58

118 The Employment Protection (Recruitment of Benefits) Regulations 1996 apply to this award. The prescribed period is 19 May 2016 -1 July 2017. The prescribed amount is £2,868.78.

Employment Judge Martin

13 June 2017