THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

MEMBERS: **Ms J Forecast**
Ms M Foster-Norman

BETWEEN: **Ms E Edwards**
Claimant

and

London Borough of Sutton
Respondent

ON: **11-17 July 2018**
18 & 19 July 2018 in chambers
20 July 2018 (Judgment and oral reasons given to the parties)

Appearances:
For the Claimant: **Mr A MacPhail, Counsel**
For the Respondent: **Mrs H Winstone, Counsel**

REASONS

(requested by the respondent for the Judgment on liability given to the parties on 20 July 2018)

1. In this matter the claimant complains that she made protected disclosures and because of that she was automatically unfairly dismissed and subjected to the detriments outlined in EJ Baron's Order dated 22 August 2017 (subject to the amendments made on day 4 of this Hearing). Further, that she was unfairly dismissed on ordinary principles.

Evidence

2. We heard evidence from the claimant and for the respondent from:
    a. Ms A Kathan, Head of Service;

b. Mr R Nash, former Acting Director;
c. Mr J Williams, Assistant Director;
d. Mr N Ireland, Acting Strategic Director; and
e. Ms N Piracha, former Councillor for the respondent.

Relevant Law

3. 'Ordinary' unfair dismissal By section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

4. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

5. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing her.

6. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
    a. genuinely believed the claimant was guilty of misconduct;
    b. had reasonable grounds on which to sustain that belief; and
    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

    Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

7. The approach in Burchell is modified to the extent that even if the respondent fails to establish one or more of those three limbs the Tribunal must still ask itself if the dismissal fell within the range of reasonable responses referred to below.

8. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR

23). One factor to consider is whether the respondent has acted inconsistently in its treatment of employees but only where those employees are in "truly parallel circumstances". The EAT emphasised in Hadjioannous v Coral Casinos Ltd ([1981] IRLR 352) that flexibility must be retained and employers are not to be encouraged to think that a tariff approach to misconduct is appropriate.

9. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

10. In coming to these decisions, the Tribunal must not substitute its own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

11. If a dismissal is found to be unfair, compensation payable to the claimant may be reduced if it is just and equitable to do so having regard to any blameworthy conduct of the claimant that contributed to the dismissal to any extent. This reduction can apply to both the basic and compensatory awards (section 122(2) and section 123(6) of the 1996 Act.)

12. In order to justify a specific reduction, the Tribunal has to find:
    a. culpable or blameworthy conduct of the claimant in connection with the unfair dismissal;
    b. that that conduct caused or contributed to the unfair dismissal to some extent;
    c. that it is just and equitable to make the reduction.
    (Nelson v BBC (no 2) [1979] IRLR 346)

13. Whistle-blowing: In addition to a dismissal being unfair as described above, an employee who is dismissed where the reason or principal reason for the dismissal is that he or she made a protected disclosure (commonly referred to as whistle-blowing), shall be regarded as unfairly dismissed i.e. the dismissal is automatically unfair (section 103A of the 1996 Act). Further, section 47B gives a worker the right not to be subjected to any detriment by the employer "on the ground" that he or she has made a protected disclosure. This imports a causation test but the protected disclosure need not be the only or main reason for the act in question provided it had a material (i.e. more than trivial) influence (Fecitt v NHS Manchester [2012] ICR 372).

14. It is for the claimant to prove that the act or omission complained of amounts to a detriment. It is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2)).

15. Any disclosure of information which in the reasonable belief of the worker making the disclosure tends to show one or more of the matters listed at section 43B(1), and if made on or after 25 June 2013 is reasonably believed

to be made in the public interest (not defined), will be a qualifying disclosure. That list includes that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and that the health and safety of any individual has been, is being or is likely to be endangered. The disclosure must identify, albeit not in strict legal language, the breach relied upon (Fincham v H M Prison Service EAT 0925 & 0991/01).

16. To be protected a qualifying disclosure has to be made in accordance with one of six permitted methods of disclosure which include to the person's employer (section 43C(1)(a)).

17. Following guidance from the Court of Appeal in Kilraine v LB of Wandsworth ([2018] EWCA 1486), it is now clear that there is no rigid dichotomy between the concepts of information and allegation; (they are not mutually exclusive. The context of the statement made has to be taken into account in deciding whether it amounts to a protected disclosure.

18. Whether a worker had a reasonable belief, as required by section 43B, will be judged taking into account that worker's individual circumstances. Accordingly those with relevant professional knowledge will be held to a higher standard than laypersons in respect of what is reasonable for them to believe (Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4).

19. The information does not have to be true but to be reasonably believed to be true, there must be some evidential basis for it. The worker must exercise some judgment on his or her own part consistent with the evidence and resources available (Darnton v University of Surrey [2003] ICR 615).

Findings of Fact

20. Having assessed all the evidence, both oral and written, we find on the balance of probabilities the following to be the relevant facts.

21. <u>The claimant</u>

22. The claimant commenced employment with the respondent in August 2013 as a Team Manager (TM) in its multi-agency safeguarding hub (MASH) based at Sutton police station. She qualified as a social worker in 1994 and has considerable experience in that field including senior management roles.

23. The claimant reported to the Head of Service responsible for various teams within Child Services including the MASH. There were a number of holders of that role (including Mr D Porter-Moore) but Ms Kathan was appointed to it in August 2015. She was based at offices some distance away in Carshalton and reported to the Executive Head of Safeguarding, then Mr Nash, who in turn reported to the relevant Strategic Director.

24. The respondent

25. The respondent operates a number of policies and procedures the relevant parts of which are as follows.

26. Grievance: it states:

> 'Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently. The matter of grievance must be resolved before the outcome of a disciplinary hearing is finalised.

27. Discipline: this provides for the usual steps of investigation, disciplinary hearing and appeal. Under 'Aim' it states:

> 'This procedure deals with misconduct and should not be confused with capability that is primarily concerned with a lack of knowledge, skills and aptitude, and is covered under a separate procedure…'

It sets out a range of disciple penalties including action short of dismissal such as a disciplinary transfer and demotion. It also gives a non- exhaustive illustrative list of examples of gross misconduct including:

> 'Causing loss, potentially serious loss, damage or injury through serious negligence.'

28. Capability: this sets out both an informal and formal procedure for dealing with capability issues. Under 'Aim' it states that it is to help and encourage all employees to achieve and maintain standards of capability and under General it says:

> 'In exceptional circumstances there may be cases of gross incapability/incompetence, which are so serious as to bring into question the continued employment of the person concerned. Examples of this may include: –
> - Actions which have, or could potentially, seriously endanger life or the health and safety of staff and/or the public;
> - Serious professional misjudgement which has, seriously damaged or has serious implications that the Council's property or reputation;
> - Significant failure to adhere to statutory requirements or professional standards.'

At the formal stage and where dismissal is the outcome, it provides that it may be appropriate to redeploy, transfer or demote (with agreement) and that a trial period of 4 weeks (or exceptionally up to 6 months) will apply in the new post. Any dismissal will be on notice.

29. Whistle-blowing: this states that the first step for a concerned employee is normally to raise the issue with their line manager, but that a whistle-blowing hotline was available as an alternative as was the Head of Audit.

30. Background

31. As MASH TM, the claimant was responsible for an Assistant Team Manager (ATM) and a team of four social workers. The purpose of the MASH, established in 2013, is to work in partnership with other agencies' children's

services, police, education, early help and health) to promote children's welfare and prevent them from suffering harm.

32. The MASH team screens all referrals/notifications into the respondent relevant to safeguarding children and determine what further steps, if any, are required. Information is collated and reviewed from a number of sources and recommendations as to next steps are signed off by the TM or ATM. A red, green and amber (RAG) rating system is used to categorise the assessed urgency in responding to a matter.

33. A green rating usually requires provision of information only. An amber rating is more serious and indicates that more checks are required. It indicates risk of harm and is the threshold for intervention. A red rating is the most serious and requires a statutory responses under the Children Acts 1989 and 2004. The MASH team pass any red rated referrals to the Referral and Assessment team (RAS) within 4 hours. The RAS team then review it, confirm the rating and where appropriate take immediate steps to protect the child.

34. MASH teams exist in all London Boroughs and a London MASH Project resource pack complied by the Metropolitan Police MASH project team provides guidance and instruction to all those involved in MASH processes. It is a lengthy and comprehensive document.

35. Specific to the respondent is the Sutton Local Safeguarding Children Board Multi-Agency Threshold Guidance document which the claimant helped to draft in 2015. Included within that document is a colour coded one-page summary of 4 tiers of need. Tiers 2-4 correspond to the RAG ratings described above (tier 4 being red and labelled 'children in acute need'). The claimant had a laminated copy of that page on her desk as a reference resource.

36. <u>2014</u>

37. In April 2014 Mr Williams conducted a Quality Assurance MASH deep dive. His report identified that although in general there were no alarming issues there were emerging themes. One theme was that the application of thresholds needed to be more clearly and consistently applied together with better use of triaging. He made a number of recommendations - including a need for training on consistency - but acknowledged that this was a relatively new team.

38. <u>2015</u>

39. On 5 February 2015 Mr Nash emailed the claimant asking for a review of the treatment of a specific case in the MASH. The claimant says this email is an example of how issues were dealt with by Mr Nash before she had made any of what she considered to be protected disclosures.

40. On 24 March 2015, 30 April 2015 and 4 June 2015 the claimant sent emails to Mr Yates (Policy & Performance Manager), Mr Porter-Moore and Mr Nash

respectively which she relies upon as protected disclosures. The relevant content of those emails is described in the conclusions section below where we set out why we have concluded that they were not protected disclosures.

41. On 2 June 2015 Mr Nash held a service improvement meeting with his TMs, including the claimant, and at that meeting he shortened the green RAG rating timeframe from 72 hours (which was the London wide protocol timescale) to 24 hours and set up weekly performance meetings. This was confirmed in his email to the claimant on 2 June 2015 where he stated there was a need to screen all contacts within 24 hours. The claimant replied on 4 June 2015 stating that she was clear that all contacts were to be screened by a manager in 24 hours but that it was completion within 24 hours that needed to be improved. She said she would like the opportunity to discuss further and looked forward to meeting him and the social work team that day.

42. A meeting was then held on 4 June by Mr Nash firstly with the claimant and others and then with the claimant individually. The reason for the individual meeting was in response to the claimant's email of that day rather than any specific performance issues that Mr Nash wished to raise with her.

43. In an email on 8 June 2015 the claimant also referred to completion of contacts within 24 hours but did not distinguish what colour rating this applied to. Mr Nash says there was no misunderstanding between them, but we conclude that, at least on the part of the claimant, she believed there was increased pressure to complete <u>all</u> contacts within 24 hours. This would very likely have an adverse impact on workload within the team albeit within the general remit of achieving service improvement.

44. As well as normal occasional business contact with the claimant and her team, Ms Kathan held regular and frequent one to one supervision meetings with the claimant. The first was held on 26 August 2015 very shortly after Ms Kathan commenced employment. Ms Kathan's approach to supervision was conscientious and thorough with detailed notes which were copied to the claimant afterwards (although not always promptly). The claimant on no occasion sought to correct those notes or raise any concerns regarding their accuracy. We find that they are accurate albeit not verbatim.

45. A number of the alleged protected disclosures were made orally during supervisions in 2016. The relevant contents and our findings are set out below in the conclusions section.

46. <u>2016</u>

47. In February 2016 a further audit was conducted on the MASH by Mr Williams and Ms Kathan as part of the Local Safeguarding Children's Board's auditing work plan. It was a desktop exercise exploring threshold and decision making on contacts entering the MASH. The audit exposed a number of issues within the team including a significant number of cases not being assessed appropriately. It made a number of recommendations including that staff have training on thresholds and London child protection

procedures with the aim of improving decision making and compliance. It also led to a performance improvement plan (PIP) in March 2016 which identified 12 specific areas of concern, targets and success criteria. One of those areas was that RAG ratings were not linking clearly to threshold guidance.

48. A meeting was held with the claimant on 8 March 2016 to feedback those results. Our findings as to this meeting are set out in the conclusions section below.

49. The claimant made many requests for training in respect of thresholds, but these were for her team not for her personally. The fact that these requests had not been fully responded to at the time of the events in question is not directly relevant, therefore, to the state of the claimant's knowledge or skill.

50. The context for and our findings in respect of an email dated 19 May 2016 are set out in the conclusions section below.

51. On 23 May 2016 there was a meeting between the claimant and Mr Weathers, TM of RAS (and the claimant's peer). Following that meeting Mr Weathers emailed the claimant. The claimant described this email in her witness statement as 'rather curt' and says it is evidence of a resistance from RAS to accept cases. We do not agree with her description or interpretation of the email. It was confirming that it was RAS's decision whether a case met the relevant threshold and that referrals from the MASH should use the agreed RAG rating rather than terms such as 'needing urgent assessment'. Ultimately however this is not relevant to the three cases that led to the claimant's dismissal.

52. On 6 June 2016 the claimant's appraisal for the year April 2015 to April 2016 was completed. The structure of the appraisal form is somewhat complex. The performance review section rates performance in the last 12 months against objectives both by an objective rating and a behaviour rating. An objective rating of 2 is defined as 'partly met' and a behaviour rating of 2 is defined as 'sometimes acts in line with the behaviour, counter examples are rare'.

53. The claimant was awarded objective ratings of 2 in a number of areas, including '85% of all contacts to be signed off within 24 hours' and 'effective use of the thresholds'. She was also awarded a behaviour rating of 2 in relation to 'focusing on solutions and taking responsibility for good outcomes' and it was noted that she needed to continue to work with RAS and have discussions with various parties regarding thresholds.

54. Overall however she was awarded an overall performance rating of 3 which equated to 'Good' – defined as:

> 'Meets expectations – Performance is consistent, dependable, and requires little or no review; accomplishes and supports organisational or service requirements. Performance consistently met expectations in all areas of responsibility which targets met and the quality of work overall good. Critical annual objectives were met. Demonstrates good relevant behaviour most of the time.'

The definition of a 'critical annual objective' is one that has significant business impacts or if not achieved would have a significant negative impact on customers or services. The claimant's performance grading for 2015/16 seems to be inconsistent with the findings of the February 2016 audit.

55. In the section for agreed objectives and behaviours for the next 12 months, the following objective was set:

'- Have a consistent and appropriate response to s17 and s47
- Ensure all s47 potential cases are referred to RAS…within 4 hours'

The associated required actions were identified as:

'All RAG ratings to be appropriate…When the toxic trio are evident (DV [domestic violence], substance/alcohol misuse and mental health), there should be no doubt related to safeguarding steps to be taken.'

56. At this point in the chronology, therefore, taking into account the findings of the audits in 2014 and 2016 as well as the detailed comments within the appraisal, it is clear that the respondent was fully aware that there were issues within the team and the claimant's management of the team as to the accuracy of RAG ratings. Also that Ms Kathan, through the supervisions, was fully aware that the claimant felt - whether rightly or wrongly - under extreme work pressure.

57. On 28 June 2016 Ms Kathan was informed of the death of a baby and she was required to consider the decision-making in that particular case. In the process of doing that she became aware that the mother had previously been referred to the MASH (case number 161392 below). She met the claimant on 30 June 2016 and discussed the case and the decisions made with her.

58. At about the same time Ms Kathan had been conducting an audit of the section 47 cases within RAS including those referred to it by the MASH. As a result she became aware of a further case which caused her concern and she met the claimant on 1 July 2016 to discuss that (case number 184037). A third case causing her concern (case number 492492) was then also highlighted by the audit. On this occasion she did not discuss it with the claimant but, having taken advice from HR, referred all three matters to Mr Nash.

59. The claimant's case is that these cases came to the attention of Ms Kathan because she had conducted a 'trawl' of her files. The respondent says there was no trawl and they came to light through business as usual processes. We find that there was no 'trawl'. Continuous audits are operated in the MASH and RAS teams by way of quality assessment and as part of a wider programme of service improvements. In order to establish the quality of work, managers review casework, sample cases and complete case audits. The practice of casework review is fundamental to ensuring the safety of the service.

60. The key circumstances of each of the three cases and Ms Kathan's concerns in respect of the claimant's role in each are as follows:

61. Case number 184037 – date of contact 11 April 2016 – referred by London Ambulance Service – assessed by Ms Richardson on receipt in the MASH as amber. Ms Richardson noted, inter alia, that:
    a. Three separate incidents had been reported to the police in 24 hours.
    b. The father had taken an overdose.
    c. The mother and children were reportedly taken by the grandmother to her house.
    d. The mother alleged that the father had pointed an air rifle at her head a couple of weeks previously and had made threats to kill himself and her family.
    e. Both parents' mental health was questioned as well as drug use.
    f. The parents were child-minders.

    She recommended section 17 assessment

62. The claimant reviewed the assessment and confirmed the rating as amber. She expressly referred to the 'toxic trio' being present.

63. Ms Kathan's specific concerns were that when she discussed the case with the claimant, she failed to recognise the risk of harm to the children and that there was a combination of serious risk factors that warranted a more immediate response (i.e. a section 47 assessment and red rating).

64. Case number 161392 – date of contact 18 April 2016 – referred by police - assessed by Ms Richardson on receipt in the MASH as amber. Ms Richardson noted, inter alia, that:
    a. Young female, who had previously taken an overdose, found at address of known sex offender. When questioned she said she was a friend of the man and that she was 18.
    b. Calls left for mother but not returned.
    c. Need to contact young female and mother urgently and to address the issue before she turned 18 and would no longer be protected.

    She recommended strong advice to mother and daughter and letter requesting they contact the MASH.

65. The claimant reviewed the assessment. She agreed that no further action as required and that it should be rated as green.

66. Ms Kathan's specific concerns were that the information provided presented a concerning picture of a vulnerable 17-year-old at the home of a sex offender lying about her age and the police reporting child sexual exploitation concerns. Ms Kathan considered the matter should have been rated red.

67. The young female involved in this referral was the mother of the baby who died in June 2016. Clearly it is not known if that death could have been avoided if different decisions had been made in MASH in April.

68. Case number 492492 – date of contact 20 May 2016 – referred by a health visitor - assessed by Ms Achaw on receipt in MASH as amber. Ms Achaw noted, inter alia, that:
    a. At a first baby review the mother had disclosed a history of violence by the father and showed injuries to herself and reported being kicked while pregnant. Also of being assaulted whilst holding the baby.
    b. She said the father was living in Sweden and was not expected to return for 6 weeks.
    c. Despite the violence the mother wanted to continue her relationship with the father and had not reported the events to the police.

69. The claimant reviewed the assessment and confirmed the rating as amber. She noted that there had been significant domestic abuse, that the father was in Sweden, was a frequent visitor and the mother would not involve the police.

70. Ms Kathan's specific concerns were that procedures required that domestic abuse incidents involving a child under the age of one year must be considered as child protection issues and therefore rated red. Although the father was abroad, he could have returned at any time.

71. We accept the respondent's case that the proper application of the thresholds to all three cases would have resulted in a red rating and this was the claimant's responsibility as the MASH manager who signed them off.

72. Disciplinary process against the claimant

73. Mr Nash agreed with Ms Kathan that there was serious cause for concern. They met the claimant and she was advised that allegations of misconduct were made against her. Mr Williams was asked to conduct a disciplinary investigation and Mr Nash wrote to the claimant on 6 July 2016 notifying her of this. He also confirmed in this letter that she would not be suspended during this process but would remain in the workplace undertaking restricted duties under the direction of Ms Kathan.

74. Investigatory interviews were conducted between the claimant and Mr Williams on 18 and 21 July 2016. The claimant was accompanied by her union representative, Mr Cody. Case numbers 184037 and 161392 were discussed at the first meeting and case number 492492 at the second. The claimant accepted in relation to case number 184037 that on reflection it should have triggered a section 47 investigation. On case number 161392 she accepted that more effort should have been made to contact the young person. They also discussed training, workload levels and practice within the team and its interface with RAS.

75. Mr Williams conducted witness interviews with Mr Weathers and Ms Kathan on 29 July 2016 and with Mr Nash on 18 August 2016. He produced a thorough disciplinary investigatory report for Mr Nash on 9 September 2016 with all relevant supporting documents. The overall conclusions were that in all three cases there were clear indicators that would have led to a RAG

rating of red, that they were not borderline cases and that for an experienced social worker/manager there should be no confusion about threshold. He said that the claimant could clearly recognise her decision-making was flawed in all cases and that the mitigation she had provided was not acceptable or proportionate. He said that the claimant had not undertaken her responsibilities in accordance with her role as an experienced MASH manager and that her actions amounted to repeated professional negligence with the potential to cause serious harm to children and bring the council's reputation into question. He recommended that the case be taken to a formal panel for a disciplinary hearing in relation to all three cases. He also recommended that a referral to the Health and Care Professional Council for consideration under their standards of proficiency.

76. Mr Williams wrote to the claimant informing her that the case would be presented to a disciplinary hearing. That decision was however made by Mr Nash.

77. Mr Ireland was appointed to deal with the disciplinary hearing. He worked in Adult Services and was independent of the area under review and had had no previous contact with the claimant. He was a suitable person to appoint to the role. He wrote to the claimant on 14 September 2016 inviting her to attend a disciplinary interview on 23 September 2016. The charges put to her in that letter were:

> '1 That you had neglected to follow statutory procedures…or use relevant legislation…to take all reasonable steps to reduce the risk of significant harm.
>
> 2 That you failed to assess risk and apply the correct thresholds in order to safeguard and protect children and young people from all harm, including the risks of significant harm. This is a fundamental and central part of your current role. By your admission, you did not do this in respect of the three cases.
>
> 3 By the nature of the above, your actions may have caused serious harm, through serious professional negligence which could potentially constitute gross misconduct…
>
> 4 That your actions bring into question the mutual trust and confidence that the Council has been you as an employee/manager to perform your role safely.'

She was also advised that if proven the charges could result in her demotion or dismissal and that a disciplinary pack would be sent out to her separately.

78. On 15 September 2016 the claimant commenced a period of sick leave due to stress at work. She did not return from this period of absence prior to her dismissal.

79. In response to a request from the claimant's representative the respondent postponed the disciplinary hearing and referred her to its occupational health (OH) service.

80. The claimant attended OH on 10 October 2016 as a result of which the service prepared a report, initially dated 12 October 2016, stating that she was fit to attend a formal hearing or disciplinary meeting but that she should be accompanied and given adequate notice and all necessary information

as to what would be discussed to enable her to be prepared and that the meeting be held in a neutral venue with regular short breaks. They also advised that the claimant would likely be fit to return to work when an outcome was known.

81. In accordance with usual practice this was initially sent to the claimant for her comments. She objected to some parts of it and therefore the final version was not received by the respondent until 15 November 2016.

82. On 10 November 2016 Mr Ireland wrote to the claimant advising that in the absence of advice from OH, he had to proceed on the basis that she was fit to attend a disciplinary hearing and advised her that that would be held on 8 December 2016. Further that if she was not able to attend it would proceed in her absence but she would have the opportunity to submit evidence. That letter was copied to her representative.

83. In the meantime, however, the claimant had attended her GP and had obtained a letter dated 19 October 2016 stating that she was not ready to undertake a hearing. The claimant sent this to HR on 9 November 2016 and informed Mr Ireland of it by email on 14 November 2016. She specifically asked whether he had given consideration to that opinion and if the hearing would still go ahead.

84. In reply on 15 November 2016 Mr Ireland confirmed that it would proceed and that as previously advised she was entitled to attend with her representative and/or may submit a written response if she felt unable to attend. He also said that he would ensure there would be regular breaks and asked her to confirm if there were any other reasonable adjustments she required including changes to the venue or time and if she required transport. He also said that he believed it was in her best interests to hear the matter to allow her an opportunity to discuss and respond as soon as possible.

85. The claimant replied the next day saying that she remained not fit to attend or prepare. This correspondence continued in this vein and on 22 November 2016 the claimant requested access to a council computer so that she could print out relevant documentation and to approach colleagues to get witness statements. HR replied the following day indicating that arrangements would be made for her to access documents and witnesses upon receipt of further information.

86. Also on 22 November 2016 the claimant raised a grievance which in summary complained of a lack of support from her line management, outstanding requests for training on thresholds for her team, relentless workload and that if there were concerns about her practice, she would expect to be subject to the capability procedure. The contents of the grievance suggest that the claimant was able to engage with the issues and present her case.

87. On 28 November 2016 Mr Vouyioukas, of HR, wrote to the claimant advising her that her grievance would be dealt with as part of the disciplinary hearing on 8 December 2016 with no need for a separate investigation.

88. On 30 November 2016 Mr Cody requested a postponement of that meeting as he and the claimant had not been able to meet to prepare due to her ongoing ill health. There follows correspondence where a possible postponement is discussed but ultimately the respondent is unable to agree as it would not be possible to reconvene until mid to end January 2017 at the earliest.

89. The claimant confirmed on 2 December 2016 that she would not be attending and was not well enough to attend to look at the case notes and accordingly the disciplinary hearing proceeded in the claimant's absence on 8 December 2016. Although Mr Cody was present his attendance was limited to again requesting a postponement. He took no active part in the hearing in terms of representing the claimant although he stayed throughout and was given the opportunity to ask questions at each stage which he declined.

90. The disciplinary hearing commenced at 9.43am and concluded at 11:23am. Mr Williams presented the management case and was asked questions on it by both Mr Ireland and the HR representative. Mr Nash then joined the meeting and he was asked a series of questions by Mr Williams and Mr Ireland. Mr Nash left and Ms Kathan joined the meeting and the same approach was adopted. After she left Mr Williams made a closing statement.

91. On 21 December 2016 Mr Ireland wrote two letters to the claimant first confirming that her grievance had not been upheld and second that she had been found guilty of gross misconduct and was summarily dismissed. Both letters set out his rationale in full and informed her of her rights of appeal.

92. On 6 January 2017 the claimant submitted detailed appeal letters in respect of both her grievance and dismissal.

93. The claimant attended the respondent's offices to view documents relating to the three cases in question on 25 January 2017, 20 February 2017 and 10 April 2017. She had first requested access to these during her attendance on 25 January 2017 and on that date was given some papers by Ms Kathan. She wrote to HR on 27 January 2017 complaining about her treatment on that day and that she was not given full copies of the case records. Ms Power of HR replied explaining the respondent's position that the claimant had been given what was relevant and we find that to be the case.

94. On 2 March 2017 the claimant submitted a whistle-blowing grievance to the respondent's Chief Executive. She set out her alleged protected disclosures (which largely overlap with those relied on below), the detriments she believed she was subjected to as a result and that her dismissal was because of those disclosures. She was advised by letter on 24 March 2017

that that grievance would be dealt with as part of her appeal against dismissal. Mr Nash prepared a relatively brief, unsigned response to the whistleblowing grievance.

95. The appeal against the outcome of the November 2016 grievance was heard on 12 April 2017 in a meeting chaired by Ms M Morrisey, Strategic Director, assisted by HR. The claimant and her union representative were present. Ms Morrisey sent a detailed letter to the claimant on 17 April 2017 confirming that the specific reason for her appeal was that she had been unwell and unable to attend the disciplinary hearing on 8 December 2016 which also considered her grievance. Ms Morrisey set out the conclusion that her appeal was not upheld and the reasons why.

96. The appeal against the dismissal and the hearing of the whistleblowing grievance was heard on 24 April 2017. The claimant submitted a 12 page appeal statement which was detailed and well organised. It raised various points that were clearly carefully thought through and, at the very least, arguable. It was a document that warranted serious consideration and analysis. The format of that letter is such that at first sight it does look as if there are only two grounds of appeal. However, if the letter is read properly, it is very clear that the scope of the appeal was wider than that and encompassed the merits of the disciplinary hearing conclusions which she challenged. It was very clear that she was challenging the substance of the decision made against her not just the failure to adjourn the hearing. It is also very clear from that document that she was arguing she should have been dealt with under the capability procedure in relation to the allegations.

97. The appeal hearing started at 9.30am. Apart from occasional short breaks and an hour for lunch, it continued until conclusion at 16.36. At 17.05 the hearing reconvened and the appeal committee delivered its decision that the whistleblowing grievance contained no protected disclosures and the decision to dismiss was upheld. Those conclusions were confirmed in a brief letter on 2 May 2017.

98. <u>Ms Thomas & others</u>

99. At the time of the events in question Ms Thomas was the ATM for the RAS team. She had also failed to rate the three cases in question as red when they came into the RAS team.

100. Mr Nash wrote to Ms Thomas on 6 July 2016 advising her that there would be a disciplinary investigation in respect of her actions on those three cases.

101. Mr Williams conducted that investigation and interviewed Ms Thomas on 20 July 2016. He emailed Mr Nash and Ms Kathan on 21 July 2016 confirming the outcome of his investigation, namely that it was clear that all three cases warranted a section 47 intervention and that Ms Thomas clearly demonstrated at their interview, upon reflection on her practice, that she had failed to comply with procedure and recognised the potential impact on the children. He set out factors that led him to the conclusion that this amounted

to a serious capability matter rather than disciplinary and recommended that it progress at stage 2 of the capability procedure.

102. Mr Nash accepted that recommendation. Ms Thomas was supervised for a period of two weeks and then returned to solo decision-making. It is clear that she was effectively back operating in her original role by 31 July 2016. Mr Nash explained, and we accept his explanation, that there was a difference between the claimant and Ms Thomas as the latter was an assistant team manager and, importantly, when her failings were put to her she understood what she had done was wrong and had demonstrated insight. He believed this was in stark contrast to the claimant who was at a more senior level within the management structure. He felt that the claimant admitted fault to some degree but had not demonstrated insight.

103. No investigation was carried out in relation to the other members of the MASH who had been involved in the initial assessment of the three cases in question. There is no record of any words of advice or other notification to them that they had made flawed decisions. We accept the respondent's position that there was a distinction between the claimant and those others as she was the team manager, was the most experienced and was expected to role model and lead on threshold decisions. We are surprised however that it seems absolutely no action was taken in this regard.

Conclusions

104. Alleged Protected Disclosures

105. Taking each of the alleged protected disclosures we find as follows:

a. Email 24 March 2015 claimant to Mr Yates. This email was a response by the claimant to a request from Mr Yates for information and an explanation of why some cases were taking 3+ days. The claimant explained her view of the reasons for the delay which included increasing numbers of contacts and referrals whilst staffing numbers remained the same and a vacancy which impacted on performance and that at times they were struggling to keep up and this caused delay against approved timescales. The claimant did not, however, give any indication that this was presenting any risk to children or a failure of the respondent's legal obligations. We conclude that this was not a protected disclosure.

b. Email 30 April 2015 claimant to Mr Porter-Moore. This was to the claimant's then line manager. She referred to previous discussions and sets out details regarding staffing within the MASH together with datasets for the previous three months which she said highlighted the high volume of work they were currently progressing. She set out a predicted shortfall of work (as a result of staff moves) and then suggested the appointment of a full-time locum social worker:

'…to support us through this transition period. This would afford us the opportunity to clear our backlog of work…and to ensure more robust and consistent implementation of thresholds.'

She then suggested a particular social worker for that appointment which in time was agreed and actioned. The claimant did not, however, give any indication that this was presenting any risk to children or a failure of the respondent's legal obligations. We conclude that this was not a protected disclosure.

c. Email 4 June 2015 claimant to Mr Nash. The context for this email is that in the 2 June 2015 email referred to above, Mr Nash had also highlighted service improvements needed in the MASH and asked her to discuss with her line manager any support needs she had. The claimant's case is that Mr Nash had shortened timescales for completing green ratings from 72 to 24 hours which, she says, caused her concern. In this email she requested a meeting with him (Mr Nash's evidence was that cases had only to be screened within 24 hours) and set out for him her experiences of working in the MASH which included having a number of different line managers, a lack of support, being short staffed at various points and other miscellaneous issues. The claimant did not, however, give any indication that these issues were presenting any risk to children or a failure of the respondent's legal obligations. We conclude that this was not a protected disclosure.

d. Meeting 8 March 2016 between the claimant, Ms Kathan and Mr Williams. The context is that the February 2016 audit had happened resulting in a PIP for the MASH. Mr Williams and Ms Kathan were feeding back those results and recommendations to the claimant. The claimant says that in the meeting she raised concerns about high volumes of work. Mr Nash accepted that that was the case and this is reflected in the email that day from Mr Williams to Mr Nash. The claimant also said that she raised the impact of this on the service. There is no evidence however that she went as far as saying that these issues were presenting any risk to children or a failure of the respondent's legal obligations. We conclude that this was not a protected disclosure.

e. Supervision 25 February 2016 between the claimant and Ms Kathan. The claimant says that she raised concerns about understaffing and workload. We find it is very likely she did as this was a constant theme and it is reflected in notes where it is recorded that she was 'feeling the pressure'. The claimant also says that she explained that work continued to be relentless, the team were working at capacity resulting in no resilience (Ms Kathan accepted that that was said) and that she was concerned about the health and safety of the team when they worked extended hours without proper breaks (Ms Kathan said there was a discussion about taking time off in lieu) which could result in mistakes being made, putting the staff and children at risk (Ms Kathan said that this was not said). The claimant's account was not reflected in the notes of the supervision produced by Ms Kathan which were sent electronically to the claimant on the following day. There was no reaction from the claimant to say that there was

anything missing in those notes. If she believed she had raised an issue about risk/legal obligations etc we would expect her to have questioned what would be inaccurate notes on an important issue. Ms Kathan struck us as a committed professional with high standards but also one who supports her teams. We find that if the claimant had said mistakes could be made putting children at risk Ms Kathan would have noted and reacted to that. Accordingly we find that the claimant did not say to Ms Kathan that children were at risk and no protected disclosure was made.

f. Supervision 27 April 2016 between the claimant and Ms Kathan. The claimant says that at this supervision she told Ms Kathan that the MASH was over-worked and children were at risk. More specifically that because of the more robust checks and delays in processing work, cases were waiting while the team did not really know if there was further risk to the child. The notes prepared by Ms Kathan (on this occasion sent late on 21 June 2016) do reflect a discussion about timing suffering as a result of more robust checks but also that 'reds and ambers go quickly, so greens take a back seat'. Again the claimant did not challenge these notes when they were received. Ms Kathan accepted that there was a constant theme in their discussions about the work being relentless but denied that it was said by the claimant that children were at risk. We repeat our findings above about Ms Kathan and find that if the claimant had said children were at risk, Ms Kathan would have recorded and acted on it. Accordingly we find no protected disclosure was made.

g. Email 19 May 2016 claimant to Ms Kathan. Important context to this email is that the claimant had been chased the day before by Ms Kathan for a reply to an outstanding audit and had been offered another person to do it for her. The claimant accepted that offer of help and then in this email she repeated that there was no resilience within the MASH and that:

> '…therefore any time that either Libby [then ATM] or I are at a meeting/training or leave results in work being out of time frame. Because the work coming in is relentless we are constantly trying to keep up and ensure that no child is at risk. In order to undertake the tasks below I have to leave day to day referral work and then we play catch up.
>
> I continue to work extra hours on a daily basis but we are still left with outstanding work…
>
> Historically we have used the senior social workers to RAG cases as they come in when we have been struggling to keep up but of late we have not had this capacity because the volume of work has been such that we have needed them to focus on the contacts being processed.
>
> I know there is no magic answer but would appreciate your thoughts and suggestions on how we manage this.'

The claimant then set out a list of outstanding tasks – all of which appear to be routine rather than delays in RAG rating contacts.

In the context of the previous statements by the claimant to the respondent (and the reaction of Ms Kathan at the supervision the following week – see below) we find that the claimant's statement 'we are constantly trying to keep up and ensure that no child is at risk' is a disclosure of information that does tend to show, in her reasonable belief, that a person is failing or likely to fail with legal obligations and/or that the health and safety on an individual is being or is likely to be endangered.

h. Supervision 26 May 2016 between the claimant and Ms Kathan. The claimant's evidence was that at this meeting she told Ms Kathan that the MASH was understaffed (Ms Kathan denied she said this) and that the work was relentless (Ms Kathan agreed this was said). It was put to Ms Kathan that the claimant made it obvious she was concerned about the state of affairs in the MASH to which Ms Kathan said the claimant would say she was concerned but would then say she was 'ok'. The notes (sent to the claimant a month later) reflect much of this – specifically that the claimant said she was 'mind blown' - and that in response, Ms Kathan agreed to the claimant reducing the number of cases she oversaw to two per day and raised the possibility of appointing RAS officers to help process matters. For the same reasons as above we find that this was not in itself a protected disclosure but this discussion and in particular the marked increase in offers of support, suggests the claimant had raised her level of concern on 19 May 2016.

106. Accordingly we find that the claimant made one protected disclosure which was in her email to Ms Kathan on 19 May 2016.

107. Detriment

108. We then consider whether the claimant was subjected to any detriment by the respondent on the ground she made that protected disclosure. Taking each alleged detriment in turn:

a. Ms Kathan trawled through the claimant's cases: We have found that there was no trawl of cases by Ms Kathan. In any event, even if we are wrong about that and there was a trawl, we do not find that it was because of the protected disclosure but solely in response to the concerns that arose from the death of the baby.

b. Mr Nash decided to commence disciplinary action: We conclude below that Mr Nash's decision to commence disciplinary action against the claimant was flawed – in that he would reasonably have used the capability process - but we do not conclude that his decision was made on the ground of the email of 19 May 2016. He made it having received Mr Williams's investigation report which contained substantial information supporting the recommendation of disciplinary action.

c. (formerly d) Mr Williams was prejudiced against the claimant in the production of the investigation report and at the hearings when he presented the investigation report: We have set out below in the context of ordinary unfair dismissal, some concerns we have specifically about how Mr Williams recorded supposed admissions by the claimant, but do not conclude that any of those issues arise in any way because of the protected disclosure. We have considered the other criticisms of Mr Williams set out by the claimant, in her further amended particulars. It is almost always possible to point out some respects in which a detailed investigation could be improved and some of the claimant's points may have some merit, but we find that any other deficiencies in Mr Williams's approach were minor and in any event were not on the ground that she had made a protected disclosure.

d. & f. (formerly f & i) Mr Nash and/or Ms Kathan gave inaccurate and/or misleading information at the disciplinary and appeal hearings: we find that neither Mr Nash nor Ms Kathan knowingly gave inaccurate information to either hearing. If they were inaccurate this was due to a genuine error or their different recollection or understanding of events to the claimant. Similarly, they did not intend to mislead either hearing and where the claimant believes they were misleading it is due to their different recollection or understanding to hers. Any inadvertent inaccuracy was not because of the protected disclosure.

e. (formerly g) Mr Nash failed to properly investigate the claimant's whistle-blowing grievance: it was not Mr Nash's task to investigate the whistle-blowing grievance. That was the role of the appeal hearing. Mr Nash prepared a response which although relatively brief, was not unreasonable. We find no causal link between the protected disclosure and Mr Nash's response document.

109. Automatically Unfair Dismissal

110. We do not conclude that the protected disclosure was the reason or the principal reason for the claimant's dismissal. The only reason was the respondent's genuine belief that she had made dangerous, flawed decisions in breach of procedure. This is demonstrated by the letter written to the claimant by Mr Ireland (who was wholly independent of the claimant and her department) setting out his decision on 21 December 2016. We have considered the alleged difference between Mr Nash asking the claimant to review a case in February 2015 and the approach to the three cases in 2016. We find however that any difference in approach is readily explained by the very different circumstances rather than the protected disclosure.

111. Ordinary Unfair Dismissal

112. First we find that the respondent, through Mr Ireland, had a genuine belief in the misconduct of the claimant. He expressed that belief in his decision letter when he concluded that:

'…on all three occasions you did exercise poor judgement which amounts to negligence in performance of duty which did place children at risk of harm.'

113. As to whether Mr Ireland had reasonable grounds upon which to sustain that belief, we have considered that decision letter where he set out the factors he had taken into account. These included the evidence of Mr Nash and Ms Kathan that she had not exercised professional judgment expected from a manager working at her level and with her experience, the feedback and action plans agreed, her mitigation re lack or training, workload and changes in line management. He concluded however that:

'…these issues…were [not] material justification for the failure to accurately RAG rate the three incidents investigated or your failure to put systems and process in place to manage the staffing resources available to you and implement the necessary safeguards to ensure the best outcome for our service users.'

114. He also relied upon her acceptance with Mr Williams that the decision had been flawed. As a result of his understanding of that admission, he did not consider each case in detail.

115. In cross-examination Mr Ireland confirmed that in his view the claimant's decision making was not as it should have been and in his view the information in the contact forms made it absolutely clear that they should have been rated as red. In answer to questions from the Tribunal he confirmed that he believed the claimant had been negligent and although he believed she had admitted making mistakes, she did not have complete insight into her decision making.

116. In assessing the reasonableness or otherwise of the grounds for Mr Ireland's genuine belief, we consider it is very important context that failings in the MASH team had been identified in audits in both 2014 & 2016. Further, the very existence of a PIP in March 2016 for the claimant's team suggests that at the very least there might be performance issues on the part of the manager of that team. There were also the concerns repeatedly expressed by the claimant at her supervisions and, at other times, regarding pressure of work, resource issues and training for her team. Mr Ireland was fully aware of these matters as he was dealing with her grievance and in the grievance outcome letter he specifically noted that the audits had shown the team was appropriately staffed which meant the issue was whether the claimant, as TM, had put appropriate processes in place. He also noted that a capability process had not previously been started as Ms Kathan and Mr Nash had wanted to allow the claimant time to deliver the goals. This all suggests that it was recognised there were capability issues but they were being managed 'softly'.

117. The dates of the three contacts in question (11 & 18 April and 20 May) are also significant. In the supervision on 27 April 2016 it was noted that it had been a busy period and the claimant said the work was relentless. On 19 May 2016 the claimant's email recorded that there was no resilience, the work was relentless and she was constantly trying to keep up and set out a long list of outstanding tasks. At the supervision of 26 May 2016 she said

she was 'mind blown' and under 'performance' there was recognition that application of thresholds was still not good enough.

118. In this context we find that there were not reasonable grounds for a conclusion by Mr Ireland that the RAG rating errors of the claimant was gross misconduct as opposed to a capability issue, notwithstanding that the errors would appear to be on the face of it obvious. The very fact that a senior and experienced manager was apparently making obvious and serious errors calls into question why. The claimant herself suggests the answer on 26 May 2016 when she said she was 'mind blown'.

119. As far as the appeal is concerned, we find that the appeal panel did not engage at all with the merits or otherwise of the claimant's case regarding the decisions made on the three cases. This was despite the claimant referring to and handing in a copy of a very detailed appeal document that clearly set out her arguments on this and other issues. Accordingly we do not find that at appeal stage there were reasonable grounds for concluding that the claimant was guilty of gross misconduct.

120. There had however been a reasonable investigation. Mr Williams was thorough; he explored the correct issues (including the mitigation raised by the claimant) and interviewed the right people. The claimant has said the investigation should reasonably have looked at the wider case files. We do not agree. It was reasonable to only consider the information on the contact forms as it was her decisions based on that information that were under consideration. We have already commented above on the fact that it is usually possible to say that any investigation could have been done better. Any deficiencies in Mr Williams' approach to this investigation were minor and did not seriously undermine its reasonableness or fairness.

121. The claimant has also criticised Mr Ireland's investigation of her grievance but we find that he did put the issues she raised to both Ms Kathan and Mr Nash. It is correct that he did not look at the supervisions but whilst this may have been preferable, it did not fatally undermine the fairness of the process.

122. Overall the investigation was reasonable.

123. Turning to whether the process was fair, we conclude first that it was it reasonable for Mr Williams to do the investigation notwithstanding that he had conducted the 2014 and 2016 audits of the MASH and formed views at those stages. There was no objection from the claimant at the time of his appointment.

124. The claimant says that it was unfair and misleading of Mr Williams to say in his report that she had admitted in her interviews with him that she had made flawed decisions. In respect of cases 184037 & 161392 he said that the claimant could clearly recognise that her decision making was flawed, and for case 492492 he said that the claimant 'immediately acknowledged and confirmed that the RAG rating should have been red'. The notes of the interviews do not expressly reflect such admissions and are not completely

clear as to whether the claimant was admitting flawed decision making at the time or with the benefit of hindsight with regard to cases 184037 and 161392. The notes of the second investigatory meeting (regarding case 492492) certainly do not show her 'immediately' etc. Mr Williams's evidence was that he had what he believed was a 'shared understanding' with the claimant that that was her position 'perhaps through her body language' and that it was that understanding that he reflected in his investigation report. Although Mr Williams might have been more accurate in his use of language, we conclude that his approach and conclusions were not unreasonable and, in any event, the notes were made available both to Mr Ireland and the claimant who had not sought to correct them at the time.

125. The claimant also says there was a focus on earlier performance issues but she was not given a chance to comment and having brought performance into play, her latest appraisal should have been considered. The claimant was given a chance to comment as the report was sent to her and her written submissions were invited. We agree that best practice would have meant including a copy of her appraisal in the supporting documents but this was not a significant flaw and does not take the investigation outwith the band of reasonableness.

126. There were aspects of the commencement of the investigation that cause us some concern in that Mr Nash requested the investigatory report, was interviewed as a witness as part of that process, Mr Williams then formed a view and referred it back to Mr Nash who then made the decision to proceed. In the round, however, this was not an unreasonable approach and we note that the same approach was taken with regard to Ms Thomas which led to a decision to take the capability not disciplinary route suggesting that Mr Mash did not have a closed mind.

127. As for the respondent's failure to adjourn the disciplinary hearing as requested by the claimant. We conclude that this was reasonable. There was one postponement and there were discussions about a further one. By the time the final decision was made to proceed, the respondent had the OH report as well as the claimant's GP's report. The claimant was given the opportunity to comment and a copy of the investigation report. She had been offered adjustments and it as clear that she was able to engage with the issues due to the content of her grievance. In the claimant's absence, Mr Ireland conducted the disciplinary hearing well. He sought to cover the relevant ground on her behalf. He was clearly not just paying lip service to the process. He was thorough and fair.

128. We contrast that approach however to tat taken at the appeal. As the claimant had not been present at the disciplinary hearing, there was all the more responsibility on the appeal panel to properly engage with her arguments when she was present. Very regrettably the appeal panel chose to focus solely on the two points highlighted at the start of her appeal letter. They singularly failed to engage properly, or at all, with the wider points she raised. It was undoubtedly a wholly deficient appeal process. The appeal hearing lasted all day – dealing both with the appeal against dismissal and her whistleblowing grievance. The panel however met for only 30 minutes

and managed to conclude on both matters. Ms Piracha told us that in that break they read the claimant's appeal submissions, discussed both aspects and made a conclusion. We find that to be completely implausible. They cannot possibly have given proper consideration to the claimant's case in that time. The claimant was denied an effective and fair two stage disciplinary process.

129. Turning to whether the sanction of dismissal was reasonable, we find it was not.

130. If the respondent had treated it as a capability issue, which we have found would have been reasonable, then according to their own procedure dismissal would not have been the first step.

131. Even adopting the respondent's conclusion, however, that it was a conduct matter, summary dismissal was outside the band of reasonable responses.

132. The claimant was charged with 'serious professional negligence' which could potentially constitute gross misconduct according to the discipline policy at paragraph 3.80. That paragraph also refers to serious negligence. In his conclusion letter Mr Ireland referred to poor judgment amounting to negligence placing children at risk of harm leaving him extremely concerned about the claimant's 'inability'. We read that as indicating that the respondent had no trust and confidence in the claimant's ability to perform her role safely. Using his own words, therefore, it would be out with the band of reasonable responses to label the claimant's conduct as gross misconduct and therefore summary dismissal must also be outside the band.

133. Further, it was outside the band of reasonable responses to not offer action short of dismissal. Mr Ireland considered it but did not properly explore it or the possibility of supervision, trial periods, other roles etc. Proper exploration was warranted given the claimant's clean record and that her career was at risk.

134. The claimant has compared herself to other employees (the other employees in the MASH who made recommendations on the three cases and Ms Thomas) and said that she was treated inconsistently. We have noted above our surprise that no action at all was taken with regard to the other MASH employees, but they were clearly all more junior than her and working to her direction and leadership. As for Ms Thomas, she was also the claimant's junior, performing a different role in a different team and the respondent believed was more remorseful and showed better insight when she was interviewed. We conclude that those other employees were not in truly parallel circumstances and the differences in treatment is readily explicable.

135. For the other reasons set out above, however, we find that the claimant was unfairly dismissed.

136. A separate remedy hearing to assess compensation payable to the claimant will be listed (a reemployment order having been considered by the Tribunal and rejected for the reasons given orally to the parties). Having heard submissions on whether the claimant contributed to her dismissal by her own blameworthy conduct, we conclude that she did not. We find that although the claimant exercised poor judgment, she did nothing culpable.

_____
Employment Judge K Andrews
Date: 29 October 2018