



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Ariene Clarke

**Respondent:** North Halifax Partnership Ltd

**Heard at:** Leeds                      **On:** 10 September 2018  
19 October 2018

**Before**                      **Employment Judge Dr E Morgan**

## **Appearances:**

**Claimant:** In Person  
**Respondent:** Ms Dickson

## **RESERVED JUDGMENT**

1. The Claimant was unfairly dismissed.
2. In the view of the Tribunal, there was a 50% prospect of the Claimant being fairly dismissed in the event of a fair procedure being followed by the Respondent.

## **REASONS**

### **The Claim**

1. By her claim form lodged with the Tribunal on 16 May 2018, the Claimant advances a single claim of unfair dismissal. The fact of dismissal is

admitted. The Respondent asserts that the reason for dismissal was conduct and that such dismissal was fair. It is agreed that the effective date of termination was 19 January 2018. There is no issue of contractual notice; the claimant having been paid her contractual notice pay.

### **Procedure**

2. Upon receipt of the Claim, standard directions were issued; including the listing of the hearing with an estimated length of hearing of 1 day. The directions required the parties, amongst other things, to exchange documents and compile a hearing bundle for use upon the hearing. However, and despite both parties expressing agreement with the contents of the hearing bundle, it became apparent that relevant documents had not been included. As a result, the case was adjourned part-heard and additional directions given for the production of relevant documents and the provision, by the Respondent, of a supplemental bundle. Additional documentation was provided in accordance with those directions.

### **Evidence**

3. The Tribunal received evidence from Mr Mir (Senior Family Support Team Manager) and Ms Samantha Wright (Board Member) on behalf of the Respondent. The Claimant gave evidence in support of her claim. She did not call any additional witnesses.
4. Within the course of the hearing, reference was made to a number of former and existing employees of the Respondent. Following direction of the Tribunal documentation was disclosed by the Respondent and formed a supplemental bundle. Much of that material related to the Claimant's former colleagues and, specifically, disciplinary proceedings to which they were subjected. In a number of cases, the disciplinary proceedings continued in the absence of the employee in question. The Claimant relies upon the proceedings against her colleagues as informative of her contention that the sanction of dismissal was disproportionate.
5. In order to ensure that the rights of these third parties are preserved, the Tribunal has proceeded upon the basis that the individuals to whom the Claimant has referred are known to the Claimant and the Respondent. The comparison which the Claimant seeks to make is not dependent upon the identities of the persons concerned and no useful purpose would be achieved by their public citation within the course of a judgment which is both public and accessible upon the internet. Accordingly, for the purposes of this judgment, the identity of the individuals has been concealed and they have been referred to in Colleague A-D.

## Findings of Fact

6. For the most part, the Claimant gave her evidence in a clear and helpful manner. However, it was clear to the Tribunal that when tested with questions which challenged her case, she became guarded; suggesting a lack of understanding when it was apparent that the issue to which she was being directed was readily grasped and understood. Similarly, Mr Mir expressed himself familiar with the detail and application of the Respondent's policies and procedures. However, on closer analysis, it became apparent to the Tribunal that he had been presented with allegations compiled by Ms Rossi and further, that decisions concerning the information to be released to the Claimant were made, not by Mr Mir, but by his HR colleagues. As will become apparent in what follows, this reality had an important impact upon the conduct of the disciplinary procedure and the detail provided to the Claimant in advance of the disciplinary hearing itself.
7. Having had the benefit of hearing the parties, and upon the balance of the probabilities, the Tribunal makes the following findings of fact:
  - 7.1 The Respondent is concerned in the operation of nursery and early years foundation facilities. Its undertaking extends to 10 Children's Centres from which a range of services are provided. The services themselves extend to care for infants aged up to 5 years, Family Support Services and programmed activities for parents and children;
  - 7.2 The Claimant commenced her employment with the Respondent on 24 March 2014. As at the date of her dismissal, the Claimant held the position of Deputy Children's Centre Manager of the 'Creations Centre'. She was required to work at this location upon a full time basis. In that role she was responsible for the management of a number of care workers. The Claimant's own line manager was the Centre Manager (A). 'A' was concerned in the direct supervision of, and management responsibility for, a total of 4 Centres. Within the centre in which the Claimant worked, she was rightly recognised by her colleagues as acting as A's deputy in respect of certain operational matters. The Tribunal is satisfied that the Claimant's principal duties and those of 'A' are detailed within the job descriptions provided within the supplemental bundle at pages 342 and 337 respectively;
  - 7.3 The job description applicable to the Claimant defined the purpose of her post as extending to "take complete responsibility" and to "provide effective management and clear leadership". Key areas were said to include: "support, supervise and coordinate" EYFS and being responsible for: "decisions regarding the day to day running of the Nursery within the Children's Centre" . The

reference to main duties expressly included: “To ensure that the needs of all children are met and work in partnership with parents/carers...” and “to have a clear understanding of safeguarding policies and procedures and to act appropriately should areas of concern arise...”;

- 7.4 The job description applicable to A’s post included reference to “overall responsibility” and “to ensure the correct use and implementation of company policies and procedures...” The duties expressly included: “to take overall responsibility for day care in Children’s Centre through effective work with Deputy Children’s Centre Managers...” In contrast to that applicable to the Claimant’s role, ‘A’s job description also made express mention of health and safety obligations;
- 7.5 The working environment in which the Claimant was required to participate was not without its difficulties. There were issues of low staff morale and adequacy of staffing levels;
- 7.6 In or about July 2017, a workplace investigation was commenced due to a perception of low morale amongst staff. According to Mr Mir, this initial investigation was instigated by ‘A’. This in turn prompted the appointment of Ms Rossi as investigator. It is said that this exercise continued until October 2017;
- 7.7 Within the course of the Response, it is said that the investigation did not initially lead to any form of disciplinary process. However, in the course of his witness statement Mr Mir confirms that by 25 August 2017, concerns had been expressed that staff and children had been ‘put at risk when the correct ratios were not adhered to’. He adds that it was this concern which prompted the decision to relieve the Claimant of her management duties within the “Creations Centre”. It is said that this was a ‘temporary relocation’ and further, that it had been accepted by the Claimant on her return from short-term sickness absence. This absence was recorded as arising from work related stress;
- 7.8 According to the Respondent, the Claimant met with Ms Rossi on 2 and 5 October 2017 and was required to provide a witness statement. She did so on 26 October 2017;
- 7.9 The Rossi Report detailed 12 disciplinary allegations against the Claimant. There were also allegations against others. Mr Mir was invited to endorse the recommendation of disciplinary action in relation to those allegations and did so. He played no part in the formulation of the allegations themselves or determine which aspects of the evidence compiled by Ms Rossi was to be released to him. He is clear, however, that it was his decision that disciplinary action should be taken against 4 colleagues within the Creations Centre team;

- 7.10 Those implicated by the Rossi Report included the Claimant and her manager 'A' 'B', 'C' and 'D';
- 7.11 'A' was invited to attend a disciplinary hearing by letter dated 10 November 2018. The disciplinary allegations she faced concerned unsafe practices, failure to notice and act upon management failures and inadequate staffing arrangements. It is evident from the terms of that document [p413] that the allegations themselves related to, inter alia, an incident with Child J and staff-infant ratios. It appears that the disciplinary hearing proceeded in 'A's absence on 28 November 2017. The outcome letter is critical of A's management in a number of areas. These include staff ratios. The letter confirms that by reason of her previous 'excellent' record, the outcome would have been one of a final written warning [p421] However, by that stage, 'A' had already given notice of resignation of her employment;
- 7.12 Others were subjected to disciplinary action in advance of the Claimant. 'B' was said to have contributed to a culture in which safety was not prioritised. It was also alleged she had 'failed to ensure that' children were kept safe. Again, reliance was placed upon staff ratios [p422]. Mr Mir's response to these allegations was that of demotion and a written warning. The allegations of misconduct directed against 'C' were directed to treatment of others [p427]. These were said to justify a decision of demotion coupled with a written warning. These sanctions were imposed by Mr Mir on 13 December 2017 [p431];
- 7.13 By letter dated 20 November 2017, the Claimant was informed she was to be subjected to a disciplinary process in relation to a total of 12 discrete allegations. The Claimant was duly suspended pending the outcome of the disciplinary hearing;
- 7.14 The hearing was ultimately convened on 13 December 2017 and conducted by Mr Mir. Ms Rossi presented the management case and the Claimant was provided with an opportunity to respond. Mr Mir concluded the allegations were well founded and decided that the Claimant should be dismissed. In his view, the Claimant was unable to acknowledge 'the enormity of the situation'. He considered the allegations themselves to be wide-ranging and significant. In the course of his witness statement he observed: "It was hugely significant that the [EYFS] Statutory Framework was not complied with by the Claimant, The breach of the Statutory Framework for example, in relation to ratios of adults to babies and children, placed the whole organisation at risk..." In fact, as he conceded in cross-examination, he had no real understanding of the nature of the ratios themselves, what the ratios required in connection with trained and untrained personnel, or, for that matter, how the validity of the ratios complaint had been

authenticated. He was unable to shed any light upon this issue because, amongst other things, he had not asked questions of any one else in connection with this issue;

- 7.15 Importantly, in the course of his witness statement Mr Mir confirms had conducted the disciplinary processes against all 4 members of staff implicated by the Rossi Report. However, the statement was silent as to the decision to permit 'A' to resign. In the view of the Tribunal, this is significant. First, as Mr Mir knew and understood there were issues of potential co-responsibility between the Claimant and 'A'. In cross-examination, he confirmed that there could well be different levels of responsibility, and thus accountability, as between 'A' and the Claimant. It was within his evidence before the Tribunal that Mr Mir, for the first time, indicated that but for her resignation, 'A' would in all probability have been subjected to a final written warning;
- 7.16 Whatever else may be said regarding the disciplinary hearing, Mr Mir candidly and properly conceded that the Claimant was not provided with full details of the allegations upon which the Respondent relied in advance of the disciplinary hearing itself. When questioned by the Tribunal as to why information had been withheld and the potential impact upon the fairness of the process, he expressed the view that this procedure remained fair by reason of the fact that the detail would be provided to the Claimant during the disciplinary hearing itself. It is clear to the Tribunal that Claimant was not given any adequate information or particulars in support of a number of the matters which were alleged against her. These included the allegation that the Claimant had failed to comply with instructions from HR and the withholding of the statement of 'D'. Mr Mir candidly accepted that the detail of the non-compliance with HR instruction or advice was made available for the first time during the disciplinary hearing itself. As to the statement from D, this was made available to the Claimant in readiness for the appeal. In the view of the Tribunal, however, the lack of supporting details was not confined to these matters. As previously noted, 12 allegations of misconduct were raised. Mr Mir concluded 5 were 'partially upheld'. When requested to clarify how an allegation could be partially upheld, Mr Mir suggested that he had in effect considered the allegation to be rather general and vague, and may have concluded that whilst the allegation was supported by the evidence, there were 'mitigating reasons' identified by the Claimant. In the view of the Tribunal, whilst he was undoubtedly being advised and guided by others, Mr Mir entered into the disciplinary hearing in the belief it was a matter for him (or another officer of the Respondent) to determine when, how and by what means, information was to be released to the Claimant and paid little or no regard for the right of the Claimant to advance notice of not only the headline of the allegation but also its substance *prior to* attendance at the disciplinary hearing.

In approaching the Rossi Report, Mr Mir was lulled into a false sense of security. In the view of the Tribunal, he did not scrutinise the material relied upon in support of the allegations. Instead, he accepted the evidence as being adequate and sufficient, thereby placing the burden upon the Claimant to refute the allegations themselves. The impact of this mindset was evident in connection with Mr Mir's lack of familiarity with (and understanding of) the issue of staff-infant ratios. The allegations facing the Claimant were serious. The allegations had been categorised by Mr Mir as generating significant risk for the Respondent. Upon the issue of staff ratios, the Tribunal is satisfied that Mr Mir did not engage with the quality of that risk. Mr Mir was clear in his evidence to the Tribunal to the effect that he had not placed the allegations in any order of precedence. For him, it was the totality of the concerns generated by the Claimant and her lack of appreciation of them, which prompted the decision to dismiss;

- 7.17 The Claimant was informed of her dismissal with notice on 19 December 2017. In support of that decision, the Respondent pointed to the fact that of the original allegations of misconduct, 5 were upheld, 5 'partially upheld' and 2 were not upheld;
- 7.18 The Claimant exercised her right of appeal by letter dated 13 February 2018. Her appeal was held on 13 February 2018. According to the Response, 'Board Members' dismissed the appeal and 'agreed with the decision to dismiss'. In her evidence to the Tribunal, Ms Wright confirmed this was her first appeal within the organisation but was aware that her role was to review the quality of the decision adopted by Mr Mir; not to revisit the evidence. Ms Wright was in no doubt as to the seriousness of the allegations. In the course of her witness statement, she observes that the Claimant appeared to be unduly focused at the appeal upon 1 allegation, when in fact a total of 9 had been held or 'partly upheld'. It is clear to the Tribunal that Ms Wright considered these allegations from a regulatory perspective. She was particularly exercised by what she considered to be the Claimant's working practice of spending excessive amounts of time in the office away from direct supervision of her 'Seniors'. She also placed particular store by the allegation of failure to maintain adequate staffing ratios. In this respect, she drew comfort from the fact that 11 witness statements had been compiled which supported the allegation. However, there is no suggestion that Ms Wright had any more of an understanding of the ratios themselves than that enjoyed by Mr Mir. She confirmed she was unaware of any material not having been made available to the Claimant prior to the disciplinary hearing. It was also clear that Ms Wright had not given any consideration to the notion of any of the charges being 'partially upheld'. There was nothing within her statement to suggest any form of inquiry was undertaken in this regard. She was, however, adamant that the matters which had been

identified could only be classified as issues of misconduct and when viewed in their totality, justified the decision to dismiss;

- 7.19 The Claimant was informed of the appeal outcome by letter dated 20 February 2018;
- 7.20 The disciplinary issues raised in connection with 'D' were 5 in number. They were determined in her absence. They related to Child J, staff ratios, and non-compliance with procedures. In February 2018, Mr Mir concluded these offences justified the sanction of dismissal; and
- 7.21 There is nothing to suggest that at the time of formulating the decision to dismiss, Mr Mir considered or attempted to reconcile in his own mind, the relative culpability of these various individuals in the matters of safety and regulatory compliance re ratios and the like. Before the Tribunal, however, he expressed the view that he had tried to take into consideration the seniority and level of responsibility which each employee carried. He rejected any suggestion that the matters which formed the subject of the allegations against the Claimant and her team could be considered issues of capability. However, the Tribunal notes that in the case of 'C' the question of continued support was relied upon in the formulation of the disciplinary sanction.

### **Submissions**

- 8. On behalf of the Respondent, it was submitted:
  - 8.1 The reason for dismissal was 'conduct';
  - 8.2 The conclusion of misconduct was the product of a fair investigation and fair procedure;
  - 8.3 Any procedural error which may have occurred in the disciplinary hearing or investigatory process was repaired on appeal;
  - 8.4 In the event that the Tribunal is minded to conclude that there were deficiencies of a procedural kind, there was in any event a 100% prospect that a fair procedure would have culminated in the dismissal of the Claimant; and
  - 8.5 Insofar as the Claimant was seeking to draw any distinction or comparison between herself and others (e.g. 'A', 'B', or 'C') there were material differences between those parties, their duties, roles and responsibilities.
- 9. On behalf of the Claimant, it was submitted:



- 9.1 There was insufficient investigation of the allegations levelled against the Claimant;
- 9.2 The allegations upon which the Respondent relied had the very real potential to undermine the Claimant's ability to work in her chosen role; with the result that there was a heightened duty upon the Respondent to investigate matters thoroughly;
- 9.3 Ms Rossi exercised too much control over the investigation;
- 9.4 The material relied upon did not justify the sanction of dismissal;
- 9.5 The matters which may have caused the basis of legitimate concern on the part of the Respondent, should have been treated and actioned as issues of capability rather than conduct;
- 9.6 In any event, the sanction of dismissal was disproportionate when compared to the manner in which management responded to the issues directed against 'A'. If properly considered, the Claimant could have been given a demotion and a warning (as had been applied to others); and
- 9.7 The appeal was a rubber-stamping exercising; affirming the decision made by Mr Mir. As such, the Claimant was for all practical purposes deprived of the opportunity and benefit of an authentic appeal process.

## **Discussion and Conclusions**

10. As discussed with the parties at the outset of the hearing, the issues requiring determination by the Tribunal are defined by statute and are to be found in the Employment Rights Act 1996. The fact of dismissal being admitted, the first issue for the Tribunal comprises the reason for the dismissal. The principal reason relied upon by the Respondent is that of conduct. The Claimant does not in fact assert an alternative reason.
11. The Tribunal has reminded itself that it is for the employer to establish the reason for dismissal. However, the burden facing the employer on this issue is notoriously low. It has long been recognised that the reason relied upon by the employer may be a set of facts known, or, beliefs held. More fundamentally, in cases of alleged misconduct, the employer is not required to establish guilt. It is sufficient for the employer to form a reasonable suspicion of misconduct; founded upon a reasonable investigation. Applying these principles, the Tribunal is satisfied that the reason for the Claimant's dismissal was conduct. This was the reason relied upon by Mr Mir and it is his deliberations with which the Tribunal is concerned on this issue.

12. The next issue for the Tribunal concerns the sanction of dismissal. In short: was the sanction of dismissal fair. In this respect, it is no part of the Tribunal's role to substitute its own view for that of the employer. This aspect of fairness must be viewed from the perspective of a reasonable employer; with consideration being given to whether a reasonable employer might consider dismissal one of the potential responses to the conduct or concern which has been identified. In this respect, the Tribunal has reminded itself of the fact that the conduct issues identified by Ms Rossi and relied upon by Mr Mir can be classified within three broad categories, namely: a) inadequate supervision or oversight; b) failure to personally comply with standard procedures and/or to require others to do so; and c) regulatory non-compliance. There is no mistaking the fact that the issues have been identified very broadly. Nonetheless, whether viewed individually or collectively, the matters cited by the Respondent called into question the Claimant's compliance with the standards of behaviour which were expected of her as a member of the management team. It is an obvious but nevertheless important observation that most employers recognise the need for confidence in those who discharge managerial functions on their behalf. Managers will often be required to work autonomously and are expected to ensure that others discharge their obligations. In the majority of commercial operations, the dynamic of this relationship requires considerable trust and confidence. This is particularly so where, as here, the employer's undertaking is directly concerned in the provision of a service which has the care and welfare of others as a core component. Bearing these principles in mind, having regard to the conduct identified by the Respondent and the position, seniority and duties of the Claimant, the Tribunal is satisfied that the sanction of dismissal was within the band of responses available to a reasonable employer and was, therefore, potentially fair.
13. The Claimant suggests that the sanction of dismissal was nonetheless disproportionate. In support of this proposition, she points to management's actual or intended response to the misconduct of others. The Tribunal is unable to accept this contention. In reaching this conclusion, the Tribunal is mindful of the fact that whilst senior to the Claimant, A did not have a full time presence at the Creations Centre. As noted in the evidence, she was required to conduct managerial duties elsewhere; hence the need for the Claimant to deputise for her. This reality meant that the Claimant was, in practice, the person principally responsible for the operations at that centre. Whilst it may well be true that the Claimant was line managed by A, she was intended to serve as the principal guardian of working practices at this location; an arrangement which recognised A's inability to perform this role upon a day to day basis. It is not difficult to see how a senior manager may be considered to have some vicarious or overarching responsibility for the failings of those who report to them. The character of that responsibility will necessarily be fact-sensitive. By way of example, it may be dependent upon the extent to which, if any, a manager was aware, or ought to have been aware of, operational practices. It was common

ground before the Tribunal that the level of service demand and attendance at the centre might vary from day to day. It was necessary for the Respondent to ensure that the staffing and service levels were sufficient to accommodate variations of this kind. Given that A was also responsible for operations elsewhere, it is clear (not to say inevitable) that she would legitimately look to the Claimant to alert her to concerns, practices and regulatory issues likely to require managerial response. It was no part of the Claimant's case that A was on notice of such matters, or, that she had been given notice of matters by the Claimant and had failed to act upon them. Put simply, therefore, the Claimant's submission (insofar as it related to a comparison with A) was directed to A's seniority. In this respect, the Tribunal is in agreement with Mr Mir that having regard to the roles and duties of both A and the Claimant, it is possible to have shared accountability with differing responsibility. Upon this basis, the Tribunal is satisfied that the suggestion of unfairness based upon a disparity of sanction when compared with A is not made out.

14. The Claimant advances the same argument in relation to B-D, inclusive. In fact, D was, like the Claimant, dismissed; upon the facts found by the Tribunal, there was no disparity of sanction between the Claimant and D. Insofar as the Claimant relies upon the difference of treatment of B and C as indicative of unfairness, the Tribunal is not able to accept this submission. Both 'B' and 'C' were junior to the Claimant. Neither held a managerial position or participated in duties of the same level or responsibility as those undertaken by A or the Claimant. The Tribunal readily accepts that it is possible for non-managerial personnel to share a responsibility for matters of poor practice and/or non-compliance with regulatory standards. According to the Respondent, this was not undertaken in isolation. The non-compliance of which the Respondent makes complaint is said to have been practised and/or acquiesced in by more senior personnel, including the Claimant and her own line manager. In circumstances such as these, it will often be necessary for an employer to balance the roles and responsibilities of those who have been implicated. Where those implicated include line managers or supervisors, a reasonable employer might come to the conclusion that the non-compliance of non-management staff is due to a lack of instruction or supervision on the part of managers, or, managerial conduct which has caused junior staff to conclude the behaviour in question is acceptable or will go without challenge. It is no part of the Tribunal's role to substitute its own view for that of the reasonable employer, still less the Respondent. Taking these realities into account, the Tribunal is satisfied that the difference in sanction between the Claimant and B-C is explicable and is not indicative of any lack of fairness or otherwise support any complaint of lack of proportionality.
15. The final question requires the Tribunal to consider and determine whether the dismissal was in fact procedurally fair having regard to all of the circumstances of the case. The Respondent is a significant undertaking. It has expertise upon which it can draw at various levels of management. That said, as with any employer, it is not required to

replicate the procedural standards of the courts or Tribunals. The employers are, however, required to ensure that they adhere to core elements of fairness.

16. In approaching this aspect fairness, the Tribunal reminds itself that the disciplinary process begins with the investigation and ends with the determination on appeal. In the view of the Tribunal, the disciplinary process was procedurally unfair. This unfairness commenced with the failure at the investigatory stage to release to the Claimant the details of the allegations upon which the Respondent relied. In the view of the Tribunal, this was compounded by the decision on the part of Mr Mir and/or Ms Rossi not to disclose the full report to the Claimant and/or provide the Claimant with the evidence upon which the Respondent relied in support of each of the 12 disciplinary allegations in advance of the disciplinary hearing. As the Tribunal has found, Mr Mir relied upon evidence provided to him in relation to the allegation of non-compliance with HR instructions, received by him during the disciplinary process. It follows this had not been disclosed to the Claimant. Similarly, the statement from D had not been provided to the Claimant.
17. It is the responsibility of the investigating officer to consider material which exonerates the employee. It is, of course, the role of the disciplinary office to consider and test the material relied upon in support of an allegation of misconduct. Likewise, the disciplinary officer must consider whether the allegations as articulated against the employee are supported by the evidence and are made out.
18. Mr Mir made no attempt to come to a clear understanding of the infant-staff ratios, nor of the precise occasions upon which those ratios had been breached. Nor did he investigate the position when the Claimant raised matters during the disciplinary hearing. By the same token, the charges or allegations communicated to an employee in advance of a disciplinary hearing are intended to form the subject matter of the disciplinary hearing itself. A fair procedure requires that sufficient notice is given to the employee of the nature and *detail* of the allegation. In the view of the Tribunal, it follows that the allegation of which notice is given is either made out or it is not. In contrast to a grievance related process, in which a broad sentiment may be considered in the round, a disciplinary process makes heavier demands of the employer; especially where, as here, the conclusions may impact upon the ability of the employer to continue to work within what is a highly regulated sector. In such an environment, it is not open to the employer to resort to generalities. In the view of the Tribunal where an allegation is advanced, it is either upheld or it is not. Clearly, there will be occasions where an allegation will have a number of component parts; some being supported by the evidence and others not. In such cases, it may be permissible for the employer to uphold certain aspects of the charges, whilst dismissing others. In such a case, however, the employer will clearly communicate to the employee which components are relied in support of the disciplinary sanction and which are not.

19. From the evidence adduced before the Tribunal, it is clear that Mr Mir considered himself entitled to simply adopt the Rossi Report and accept its conclusions in certain important respects without the need for challenge or inquiry. That is not to say that he adopted it in its entirety. However, it is clear that he did not subject the report, or, disciplinary allegations to the scrutiny that might reasonably be expected. This conclusion is supported by his adoption of the infant-staff ratio issue which was central to allegations of non-compliance with safety standards, placing service users at risk and failure to adhere to relevant policies. In the view of the Tribunal, this approach is consistent with the manner in which Mr Mir felt himself able to 'partially uphold' allegations which were made against the Claimant and his inability before the Tribunal to provide a clear explanation as to what that phrase was intended to convey. Mr Mir ventured to suggest that it could mean he considered the evidence supported the allegation, but recognised there was some form of mitigating feature. It is not apparent from the letter of dismissal or the evidence before the Tribunal as to where, how, or upon what basis the mitigating features (if any) have been accommodated. The procedural unfairness of such a position ought to have been self-evident: the Claimant is seemingly entering into a disciplinary hearing to face a specific allegation, but finds herself being judged upon a different basis to that of which she has had notice. This situation is compounded by the fact that Mr Mir did not attempt to place the allegations of misconduct in any order of precedence; instead, indicating that he approached the question of sanction by reference to the conduct in its totality. It is, of course, perfectly legitimate for an employer to consider the totality of the misconduct in question. It is clear that here, however, the totality included reference to those allegations which had been upheld in part.
20. The question arises: were these procedural failings corrected upon appeal? The appeal took place as a review. By the time of the appeal, the Claimant was in possession of D's statement. Ms Wright approached the appeal with a clarity of purpose. She considered the issues to be serious matters of regulatory compliance. She was not aware of any procedural failings which had occurred previously. She did not engage with the substance of the allegations; only the sustainability of Mr Mir's decision. Upon this basis, the Tribunal is satisfied that the procedural failings which have been identified were not corrected by the appeal.
21. In these circumstances, the claim of unfair dismissal succeeds. The Tribunal finds that the Claimant's dismissal was unfair within the meaning of section 98(4) of the Employment Rights Act 1996.
22. Having concluded that the Claimant was unfairly dismissed, it is necessary for the Tribunal to consider whether the Claimant would have been dismissed in the event a fair procedure had been followed. The judicial guidance makes clear that this requires the Tribunal to embark

upon what may be termed an informed hypothesis. In some cases the procedural defect may be considered slight, and viewed as readily remediable. In such cases, it is possible for the Tribunal to readily come to a conclusion that the prospects of a fair dismissal are high. In others, the evidential position might be such as to preclude the Tribunal from coming to any meaningful conclusion. In the view of the Tribunal this case falls into neither category. The Tribunal is satisfied that this is a case in which there was a 50% prospect of a fair dismissal in the event of a fair procedure being followed. In coming to this conclusion, the Tribunal bears in mind the following matters:

- a. The Claimant occupied a senior position and was required to work autonomously;
  - b. A core element of her role was the upholding and maintenance of standards within the workplace;
  - c. The evidence implicated the Claimant in matters of material misconduct. The conduct issues relied upon by the Respondent were not confined to staffing ratios;
  - d. The volume of evidence held by the Respondent, including the fact that it would ultimately be necessary for the employer to make a decision where such conflict cannot be resolved; and
  - e. The sector in which the Respondent operates is highly regulated.
23. These factors point to a very real prospect of a fair dismissal. Doing the best it can, the Tribunal assesses the prospect of a dismissal at 50%. The compensatory award payable to the Claimant shall be reduced accordingly. The Tribunal has made no order in respect of contributory conduct. The parties will be given the opportunity to address the Tribunal on this issue upon the resumed hearing.
24. The matter shall be listed for a remedy hearing with an estimated length of hearing of 1 day.

Employment Judge Morgan

Date 27 December 2018