EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		**RESPONDENT**
MS C HUGHES	**V**	**MRS SUSAN WEST** **T/A SCALLYWAGS DAY NURSERY**

HELD AT: MOLD ON: 4 & 5 DECEMBER 2017

EMPLOYMENT JUDGE: MR M EMERY

REPRESENTATION:

FOR THE CLAIMANT	**In person**
FOR THE RESPONDENT	**Ms L Halsall (Consultant)**

JUDGMENT

The Judgment of the Tribunal is:

1. The claim for unfair dismissal succeeds
2. The claim for automatic unfair dismissal pursuant to Regulation 7 Transfer of Undertakings (Protection of Employment) Regulations 2006 fails
3. The claim for a redundancy payment pursuant to s.148 Employment Rights Act 1996 fails
4. The claim for notice pay succeeds
5. Claim for holiday pay succeeds

The claimant is awarded the following sums:

6. Notice pay: £3,670
7. Basic award: £4,803

8. Compensatory award: £3,602
9. Holiday pay: £558

TOTAL: **£12,633**

REASONS

The Issues

1. The claimant was dismissed following a disciplinary process on the grounds that she had committed gross misconduct in her role as Deputy Manager of Scallywags Day Nursery in that she had mishandled and force-fed babies in her care at the Nursery, and for some other substantial reason – a failure to inform the respondent her DBS certificate had been suspended.

2. The claimant alleges the principle reason for her dismissal was to avoid making her a redundancy payment and/or to avoid her transfer under TUPE. She also alleges her dismissal was procedurally unfair, she alleges the respondent unfairly disciplined her for the same allegations twice, the first process concluding the allegations were not substantiated, the second process ending with her dismissal for gross misconduct. The claimant also alleges that the respondent tampered with evidence, which meant that material discrepancies in the evidence was not disclosed during the second process.

3. The respondent argues that given the seriousness of the issues and given the evidence it was reasonable to dismiss the claimant; the first disciplinary meeting was in fact an investigation meeting, and the process was reasonable, given the size and administrative resources of the business. It denies the reason for dismissal was to avoid the claimant's TUPE transfer and/or to avoid paying the claimant a redundancy payment.

4. At the outset of the case we discussed the issues. Following clarification from the claimant and based on the wording of the ET1 and email dated 26 June 2017 amending her claim (pages 18-19 - the respondent accepted this email amendment was in-time and did not challenge this amendment), Ms Halsall accepted that the claimant was alleging her dismissal was unfair, that it was automatically unfair as it was to avoid her transferring under TUPE, and that she is alleging another reason for her dismissal was to avoid making a redundancy payment.

5. The issues for the Tribunal to determine are:

   Unfair dismissal

   a. Can the respondent prove the real reason it dismissed the claimant was for the reasons as alleged - gross misconduct and/or some other substantial reason? If not, the claim of unfair dismissal succeeds.

b. Has the claimant provided evidence to suggest the principle reason for her dismissal was a TUPE transfer? If so, is this the principal reason for her dismissal? If yes, her claim for automatic unfair dismissal succeeds.

c. If the respondent can prove the reason for dismissal was misconduct, was the dismissal fair, considering the following issues?

   a. Did the respondent have reasonable grounds for believing that the employee was guilty of that misconduct?

   b. At the time it held that belief, had it carried out as much investigation as was reasonable?

   c. Did the decision to dismiss fall within the range of reasonable responses available to a reasonable employer in the circumstances?

   d. If the respondent can prove the reason for dismissal was for some other substantial reason, can it show that this decision was reasonable in all the circumstances (including the size and administrative resources of its undertaking)?

   e. If the dismissal was unfair, would the claimant have been dismissed under a fair process, had one been followed, if so when? Alternatively, under a fair process, what was the percentage prospect of the claimant being dismissed at some point?

   f. If the dismissal was unfair, did the claimant contribute to her dismissal by way of her conduct, and if so would it be just and equitable to reduce compensation by any extent?

<u>Claim for redundancy payment:</u>

   g. Is the claimant entitled to a redundancy payment by virtue of her being 'laid off', under the provisions of s.147 – 153 Employment Rights Act 1996? Has she lost entitlement to a redundancy payment by virtue of her dismissal?

<u>Holiday pay</u>

   h. The claimant asserts she is owed holiday pay. The respondent accepts that she is owed holiday pay, but did not accept the sum claimed. The parties agreed to cooperate to see if the sum owed could be agreed.

<u>Notice Pay</u>

   i. The claimant assets that she did not commit gross misconduct, and accordingly her contract was terminated without notice in

breach of contract and she is owed 12 weeks' notice pay. The respondent denies any notice entitlement.

Additional Documents

6. At the outset of day 2 the respondent handed new documents to me. It became apparent that these had not been provided to the claimant before being handed to me. On sight of the documents the claimant objected to their inclusion. I noted that one document was an emailed statement dated the previous day from the dismissing manager, commenting on material which had been redacted from statements provided to her and the claimant by the respondent prior the disciplinary hearing. This witness was not present at the tribunal, and had not provided a statement in the proceedings. I did not allow this document because the witness could not be examined on it, it was not a document in the proceedings instead a statement provided for the hearing, and there was no reason given for a failure of this potential witness to provide a statement earlier. The other documents handed up were, I determined, not relevant to the issues in dispute.

Witnesses

7. I heard evidence from the claimant and from the respondent. On the first morning of the hearing and prior to hearing evidence I read all witness statements and the majority of the documents within the Tribunal bundle.

8. At 2.00 on the 1st day of the hearing the respondent made an application to adjourn the hearing, on the basis that the dismissing manager, Mrs Harvey, who lived in London may be able to give evidence the next day. The respondent had not been able to speak to Mrs Harvey to see whether she could attend. I did not adjourn the hearing; if Mrs Harvey could be contacted and was available I would hear an application in relation to her evidence. In the event, Mrs Harvey was not available

9. I do not recite all of the evidence I heard, instead I confine the findings to the evidence relevant to the issues in this case. Also, this judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The Facts

10. The claimant was employed by the respondent as Deputy Manager in 1998. She had no prior disciplinary record. The claimant's role included supervising staff, ensuring care standards were met, and she worked with babies in the babies' unit, often alone, occasionally with another member of staff. Mrs West was the owner and designated Manager of the Nursery, but was rarely present as she also worked full-time as a social worker.

11. In October 2016, a 3 year old child left the Nursery premises unnoticed, and the parent was concerned that lessons had not been learned because the premises remained unsecure after this, leading the parent to complain to

social services. This was an ongoing issue because in July 2016 the Care and Social services Inspectorate Wales (CSSIW) had issued a Non-Compliance Notice because of concerns about site security. On Wednesday 26 October 2016 two Inspectors from CSSIW visited the premises on an unannounced inspection. The Inspectors found the entrance to the premises left open enabling children to leave; numerous potential hazards including no perimeter fence to enclose the play area which backs on to waste ground and a busy road; numerous hazards in reach of children including opened shears, chemicals in jars, wood with rusty nails, and an unlocked cupboard with hazardous chemicals.

12. Mrs West's husband was working at the premises during the inspection, and according to an Inspector's statement, *"he became angry and asserted that the business belonged to him."* The claimant was on leave the week of the visit, returning to work the following day.

13. During the course of the inspection, the Inspectors observed staff at work, and chatted with Ceri-Ann Gaunt, the pre-school Supervisor who was in charge that day, and India Steel who worked with the claimant in the babies' unit. The Inspectors observed professional standards of staff to be positive, and there was a nurturing, caring and happy atmosphere in staff and baby/children interactions. The Inspectors asked Ms Gaunt to show how the front door worked, and discussed the access issue with her.

14. During the inspection, Beth Jones, an apprentice, was asked questions by the Inspectors, including about her induction, the fire procedures, which she answered. She was asked about child-protection issues and she confirmed she would report an issue to the respondent or the claimant, or the person in charge. When asked a question about whistle-blowing *"she became flustered and asked to speak with me in private about something she was deeply worried about. …* [Ms Jones] then *made a child protection disclosure to be regarding incidents she had witnessed … by [the claimant] involving force-feeding and physical mistreatment. She said that incidents had been witnessed by her and other practitioners…"* that she had not approached the respondent, feeling she was not *"approachable, confidential or professional". (*pages 102-103 & 110*).*

15. Ms Gaunt was then interviewed and *"…she immediately confirmed that she had witnessed incidents and this was why the cook [Lorna Davies] had walked out two weeks ago… left in tears after confronting [the claimant] about force feeding the babies. I was then told that India Steel ... had witnessed many incidents and had told [the respondent] about her concerns."* (page 103)

16. Ms Steel was also interviewed, and said she *"had tried to tell [the respondent about this treatment] but was not believed then dismissed by her …".* (page 103).

17. On 27 October 2016 CSSIW issued a Notice of Decision to Suspend Registration under Regulation 42 of the Children and Families (Wales) Measure 2010. The reasons being: issues with entry, exit and perimeter

security and safety, numerous dangerous hazards including chemicals and implements to which children had ready access, no fire drills, and allegations of mistreatment relating to the claimant which were under investigation. The decision also stated *"there is no person in charge who was suitable to care for children at the service. You are both the registered person and the person in charge but are unable to be in full day to day charge of the service given your employment elsewhere."* (page 89).

18. On 31 October 2016 claimant was given written notice of suspension on pay to allow an investigation to take place into allegations of child mistreatment. The claimant was told she was 'laid-off' along with all other staff and would receive Statutory Guaranteed Pay, because the Nursey's licence had been suspended (page 94).

19. The respondent was also under investigation by the Police and the Care Inspectorate were investigating an objection as to whether she could continue to work as a social worker (page 124).

20. Mrs West appealed the CSSIW decision to suspend. The Inspectors prepared statements detailing the numerous issues they witnessed during the inspection, including the child protection issues. As part of the appeal process Mrs West contacted a former employee, Diane Bloor, asking her for a statement rebutting some of the allegations, including those made against the claimant. Mrs Bloor readily agreed, and she provided a glowing written statement, rebutting some of the allegations, and including very positive comments about the claimant's professionalism at work, and Mrs West's proactive management (pages 113-114).

21. At this time the claimant and respondent were texting each other, including the following. On 20 November and 2 December 2016 Mrs West texted the claimant saying *"Lorna [Davies] has said that everything was made up. She didn't see you force-feeding anyone, never got upset and didn't walk out not to return!"* … *"Well there are differing statements. They have interviewed Lorna [Davies] who denies seeing any abuse and India [Steel] has been proven not to tell the truth with regard to that and in her interview with the CSSIW"… "The police asked Lorna if in her option she would be happy to leave you in charge of the nursery and she said yes!"* (page 125). The claimant was also told that other staff *"have resigned for now… Because there is no business to work for".* The claimant was also told by the respondent she *"was not going to send letter and statements if you resign … as will not have to conduct investigation which I do not want to do"* (page 126). On 20 November 2016 she texted *"How would you feel about coming back if all the charges are dropped? Lol".* On 9 December, the respondent told the claimant *"I am really good at cvs so if you want to come round next week I'll help you do one its half the battle when applying for jobs…"* (page 126).

22. In her evidence at tribunal, the respondent stated that she *"did not believe"* Ms Steel's evidence relating to the claimant, because her role was at risk due to poor performance, because the claimant had raised concerns with Ms Steel

and had discussed the issue with the College training provider, and that Ms Steel *"could be malicious … her evidence was questionable".*

23. Two of the respondent's former employees, Ms Rebecca Wright and Ms Rebecca Artell, gave evidence at the appeal hearing on the respondent's behalf. Ms Gaunt, Ms Jones and Ms Steel did not turn up despite having been witnessed summonsed, although Ms Gaunt and Ms Jones gave reasons why they did not attend. Ms Wright gave evidence that she had *"witnessed a safeguarding incident"* a couple of weeks before the inspection, but had not reported it as Ms Steel had said she would do so to Mrs West, once the claimant went on annual leave (page 120). The decision on Appeal dated 2 December 2016 referenced the ongoing investigations into the safeguarding allegations and determined that the respondent's suspension should continue.

24. Following suspension of the Nursery's registration, the respondent was taking steps to sell the premises, potentially as a going concern as a nursery. On 12 December the local authority received a request from the respondent to cancel her licence registration to run the Nursery; the local authority cancelled the registration on 21 December 2016. This meant the respondent could not reopen the nursery under her management without applying to renew this registration.

25. On 15 December 2016, the claimant wrote to the respondent stating she wished to claim redundancy, holiday and notice pay because she had been laid off for 4 or more weeks without pay (page 128). On 16 December 2016 the respondent texted the claimant saying *"…had confirmation today I have lost my social work licence…. I have tried to support you with this investigation but it obviously hasn't been enough for you… I have emailed you Peninsula letter…"*

26. The 'Peninsula letter' dated 16 December 2016, was a letter from the respondent to the claimant asking her to attend a disciplinary hearing on 20 December, the allegations were:
    a. force feeding a child,
    b. shouting aggressively towards bables,
    c. pinning down a baby to feed her
    d. forcing babies mouth open in order to feed them
    e. making a child sick following force feeding
    f. Creating an environment where staff could not raise concerns of mistreatment
    g. Dismissing concerns raised by staff to yourself regarding mistreat of children
    h. Instructing staff to mistreat children
    i. Using time out with bables inappropriately.

    The claimant was told the allegations would be regarded as gross misconduct if substantiated. She was told that the *"hearing will be conducted"* by Nikki Taylor (aka Nikki Morris-Jones), who owns and runs another nursery in Wrexham. Several statements of staff, a Police officer's email and the statements of the CSSIW inspectors were included, typed and unsigned on

two sheets of paper. The claimant was informed of the right to attend with a colleague or trade union representative.

27. The staff statements provided to the claimant say the following (page 131):

    Ms Bethany Jones: *"I have seen [the claimant] force food into [x] and made himself sick. She has also pinned [y] down for her to have her food. … she also shouts aggressively towards them"*

    Ms Ceri-Ann Gaunt*: "I haven't any concerns... myself… but [Ms Steel] has told me she has seen [the claimant] force-feeding the children, that she was holding [x] down … pushing the spoon into [x's] mouth until one day he was sick…"*

    Ms India Steel: *"I told [the respondent] that the cook that left I think has left because of what she saw [the claimant] doing to another child. [the respondent] was in shock and told me she will out it out after [the claimant's] holiday".*

    Ms Rebecca Wright: *"… all staff have had concerns but we were waiting to tell [the respondent] when [the claimant] was on holiday to express our concerns".*

28. The claimant said that she would not be attending the disciplinary as there were no statements *"just extracts at best"* and she required evidence of incidents alleged. She asked for evidence of what she was alleged to have said when allegedly shouting at babies, and when this occurred. She said that Ms Lorna Davies, the former cook, would attend as her companion (pages 134-5).

29. In response the respondent said that the information given *"is all that we have to give you. As an impartial person has been recruited to chair this hearing there is no bias or unfairness by us"* and she was told she should attend or a decision would be taken in her absence (page 137).

30. In response, the claimant provided a written statement responding to staff allegations, describing the situation with one baby, who was reluctant to eat and who she would encourage to eat. She denied holding the child down or pushing a spoon into his mouth which made him sick, she said the baby sprayed out food when being fed. She said she communicated daily with the baby's parents about his eating and behaviour at meal times (pages 139-140). The claimant said that she had not pinned a child down, instead using her hand to place her hands on her lap, and using language to establish basic table manners. She included messages of support from a former staff member. She said she had *"numerous issues"* with Ms Steel including her taking time of sick but being seen socialising via social media, issues with piercing and tattoos, her ability to interact with the children, her tone of voice and managing children's behaviour and Ms Steel's conduct whilst on training at college … *"her tutor came in to inform me in front of India about her conduct … All of these matters I have informed [the respondent] of. And noted them*

for discussion during one to one meeting." She referenced what she characterised as Ms Steele being *"rather influential over the younger staff … It is evident from the staffs statements that they have all been discussing me while I was on holiday, gossiping which always ends up being blown out of proportion and taken out of context, of which I believe has happened".* She said she would attend the hearing reluctantly, saying there were no specific incidents, date, time, people involved (pages 139 - 145).

31. On 19 December 2016, the respondent wrote to the claimant inform her that the respondent intended to reopen the nursery within 13 weeks of the lay-off and there is *"every expectation you will be reoffered within that time therefore redundancy is not a viable option at this time"* (page 136). The respondent contends that this was a 'counter-notice'. In her evidence the respondent was questioned about this, given that the respondent had handed in her licence registration. The respondent initially said she was not sure of the dates, that the claimant was not providing the correct date of handing in her registration; on being shown the documentation, the respondent conceded she had handed in her registration prior to her issuing the counter-notice, and that a TUPE transfer was the reason why she considered the claimant would be offered a new role within 13 weeks of the lay-off.

32. At the disciplinary hearing, the claimant denied the allegations, and discussed the concept of "force-feeding", which she described as *"feeding a child against their will".* She described the issue with the child in question, that *"mealtimes were the same all the time, sometimes he refused to open his mouth to eat the main course until he saw his pudding,..".* The claimant read out a supportive message from the child's mother, saying *"I am sorry what you are going through … I feel it's my fault I'm the one who told you to do what it takes for [x] to eat. Obviously whoever has made this allegation hasn't got a clue what their talking about! [x] absolutely adores you! You're the person he always looks for whenever we drop him off. I'm behind you whatever it takes I am right behind you and will be letting the police know as much…"* (page 147)

33. Regarding the allegation of *"pinning"* a child's arms down, the claimant said that the child gets excited and waved her hands vigorously and knocked a spoon out of her hand *"… I had to hold one of her hands in her lap so I could get the spoon in her mouth … it was just that she was so excited that her hands kept getting in the way. Ceri-Ann Gaunt says she heard from India Steel of the force feeding, but her statement said she heard it from the cook Lorna, its hearsay and basically gossip"* (page 147).

34. At the hearing's conclusion, Ms Lorna Davies, attending with the claimant, said *"she was not happy with some of the statements that had been made, and there were some things that had been said by the staff at the nursery that were not true*" (page 148).

35. Ms Morris-Jones drafted a decision dated 22 December 2016 which said: *"my conclusions for the Disciplinary Hearing was there was not enough evidence to substantiate the findings and as such I would not be prepared to make any recommendations for any disciplinary action*" (page 149). She discussed her

conclusions with Peninsula. On 9 January 2017, she wrote to the claimant saying that *"I have decided that no disciplinary action will be taken against you… the matter is now closed"* (page 178).

36. On 10 January 2017 the claimant wrote to the respondent, saying she continued to claim a redundancy payment on grounds she was on lay-off. In response, the respondent emailed the claimant saying that Ms Morris-Jones' letter *"was incorrectly handed to you … was not authorised by the nursery and was therefore totally incorrect. The decision advised has therefore been fully retracted and is not considered to be valid in any way… A full review if the entire process and evidence will be arranged."* (180). In her evidence the respondent stated that at the 20 December meeting *"we decided we needed further evidence…"* and that the decision was not final.

37. I did not accept that it was decided at the 20 December meeting that the disciplinary process should be adjourned to seek further evidence, this does not appear in any of the correspondence from Mrs Morris-Jones, and in fact it was clear that Ms Morris-Jones, chairing the disciplinary meeting, decided that the allegations were not proven and that this was her final decision. In her evidence, the respondent said that Ms Morris-Jones made a *"recommendation, and I overturned it."* While Mrs Morris-Jones did say she was not prepared to make any recommendations for disciplinary action in her initial draft letter which she discussed with Peninsula, in her decision letter to the claimant there is no reference to this being a recommendation only, and I did not accept that this was Ms Morris-Jones' intention when she sent this letter, which was after discussion and advice from Peninsula. In her evidence, the respondent accepted that she had asked Mrs Morris-Jones, who owned her own nursery, to conduct a disciplinary meeting. I concluded that the respondent believed her to be the decision maker. The respondent's evidence was that it was *"a miscommunication within Peninsula who told her to send the letter out…"*. I concluded that there was no miscommunication, that Mrs Morris-Jones believed she was the decision maker and sent out the decision accordingly.

38. On 12 January 2017, the claimant was informed by SHAP Ltd, a company which was interested in taking on the Nursery, that it was considering taking over and reopening the business, the deal had not been done; however, if it was completed TUPE would not apply (page 181).

39. On 17 January 2017, the respondent wrote to the claimant saying that there were allegations against the claimant which had been discussed "*at the investigatory meeting on 20 December … at this time [Ms Morris-Jones] found that … further investigation was required*" (page 182). The respondent said she *"had subsequently received three further written statements from staff which were more detailed"*. The respondent also provided a statement. The claimant was informed she was to attend a further disciplinary hearing on 18 January - the next day - to be conducted by Mrs Dawn Harvey. The allegations were the same as at the 20 December disciplinary hearing. The claimant was told she was entitled to have a colleague present, but if she did not attend this hearing without good reason this may be regarded as further

misconduct (pages 182-83). In her evidence, the respondent said that only 24 hours' notice was given because this was the only time the Chair could do it; she *"could have given"* more time, but this was the availability.

40. The detailed statements were from Ms Jones, Ms Gaunt and Ms Wright. Statements were signed, by the respondent pasting a copy signature of the witnesses onto each statement received by her. Ms Gaunt said in her statement that the claimant was initially *"great at encouraging the children to eat, sit nicely and use manners"* but that the claimant became stressed in part due to overwork; she referenced allegations told to her by Ms Steel, and discussions amongst staff about the claimant's conduct. She referenced issues she had seen with the claimant. She said that the claimant *"could be quite frightening. She made all the staff there cry in my time…".*

41. The respondent also deleted significant passages from Ms Gaunt's statement prior to providing it to the claimant in the disciplinary process. After her dismissal the claimant obtained from Ms Gaunt her original emailed statement. As well as being tidied up, it is apparent that a large statement regarding Ms Lorna Davies alleged involvement had been deleted (see pages 174-175 and 257-258). The respondent was also actively involved in discussing the contents of the witnesses' statements. Ms Gaunt said that the respondent had been involved in staff statements *"... she did get us to write so it had looked like she had already started to investigate … she reworded them a bit…"* (page 225). In text messages Ms Gaunt says that the respondent *"took bits out"* of the statement ... *"she changed one of the statements sent it back to me and I sent her my signature to put to it… she changed it because it said that I have told her and as I've said she never followed procedures…"* She said that the respondent told her she was allowed to reopen the business *"only you won't resign so that she needed another statement off me…"* (page 262). In her evidence the respondent denied making anything other than change to paragraphs and add punctuation *"I have not reworded anything".* The respondent then conceded she had made material deletions, saying that this evidence was *"not relevant"* to the disciplinary hearing.

42. I did not accept the respondent's evidence, finding that she had been involved in editing, changing and deleting significant parts of the evidence. I found that in particular the evidence of Ms Gaunt relating to Lorna Davies was relevant and the respondent knew this to be the case; at the first disciplinary hearing Ms Davies had rebutted allegations that she had witnessed incidents and been upset; comments relating to her were removed by the respondent from the statement at the second disciplinary hearing. It appears that Ms Davies rebuttal evidence played at least a part in Mrs Morris-Jones disciplinary decision. The respondent accepted in her evidence that if the redacted material had been available at the disciplinary she didn't know whether the disciplinary outcome may have been different.

43. In her statement for the disciplinary hearing, the respondent says *"… Bethany Jones and India Steel have both stated to me that they have witnessed [the claimant] force feeding baby [x]. … Bethany and India have stated to me that this has occurred over a number of months and more than once. … India has*

further stated to me that [the claimant] used aggressive language …" (page 177). However, in October 2016 the respondent had completed a "staff concerns/discussion form" of a conversations with Ms Steel. This references Lorna Davies resigning as cook, *"India then said she thought that Lorna had not returned because a couple of weeks before she had been crying in the kitchen saying she was upset because she had just seen the claimant trying to get [x] to eat by forcing a spoon into his mouth. [x] was then sick. She said that the staff had all been wanting to tell me about it …"* (pages 268-9). This form did not reference the allegations which appeared on page 177 and on being questioned on why there is no staff concerns/discussions form recording Ms Steel's further allegations, the respondent said that the nursery had closed at this stage, so she did not put it in writing. However, Ms Steel also provided a statement to the CSSIW Inspectors which did not reference her seeing incidents, it referred instead to Ms Steel's belief that Lorna Davies had left because of the claimant's conduct (page 86).

44. I concluded from the discrepancies between pages 86 and 268 on the one hand and the respondent's statement at page 177, and also on the basis of the material changes the respondent had made to Ms Gaunt's statement, that the respondent's comments at page 177 are materially inaccurate, that the respondent had not heard such statements from Ms Steel. Because of the issues raised by this evidence I asked whether any emails or other communication between the respondent and the witnesses to evidence their statements could be provided on day two, but such evidence was not forthcoming.

45. On the same day as receiving notice of the disciplinary hearing - 17 January - the claimant emailed Peninsula, saying that she had a disciplinary hearing, but that the respondent had *"voluntarily handed in her registration … and has actually leased out the premises so is no longer trading … [the respondent] basically doesn't want to pay me my redundancy. And the persons she has instructed to chair the meeting tomorrow are actually her best friend and husband…"* (page 184).

46. The claimant attended the disciplinary meeting and was questioned on the statements. At the outset of the hearing Mrs Harvey stated she *"will make-up my own mind based solely on the evidence provided..."* – and I concluded that the respondent was considering Mrs Harvey to be the sole decision maker. The claimant said that she had not enough time to prepare based on the extra material – she said that he felt Ms Wright, whose initial statement had been 4 lines long, was *"prompted to make this statement and given encouragement about what to write..";* she asked how Ms Jones' statement had *"escalated to this compared from original statement?".* She said that the other staff were *"incompetent and inexperienced"*. Ms Davies commented that she had been in the room when a feeding incident with the child had occurred, *"…nobody else was in the room, so how would they have seen?"* (page 188). The claimant provided comments in relation to the other witness evidence, for example saying that she had told Ms Gaunt off, who had cried, but that she did not scare staff. At the end of the hearing she said that she would have liked more time to prepare, to fully understand the allegations and prepare

evidence (page 191). Mrs Harvey said she would not make a decision today, that she would carefully consider all the evidence and inform her in writing.

47. In reaching her decision to dismiss the claimant for gross misconduct, Mrs Harvey said that staff had corroborated the allegations which were specific and had occurred over a period of time, that staff had, she had been informed, given the statements independently with no collaboration. She said the police were investigating the claimant for child neglect. Mrs Harvey recommended the claimant's dismissal because of her behaviour towards children and staff *"and the adverse effect this has had on the business*" (page 191).

48. This decision was not communicated to the claimant. Instead, the respondent wrote to the claimant saying that she remained on lay-off, that *"following the hearing I need to conduct further investigations"* and that there would be a delay pending the outcome of the investigations (page 192). On 30 January 2017, the claimant chased a decision, and was told this was pending, on 3 February she was told that Mrs Harvey *"will be dealing with the disciplinary and the further investigations"* (page 194).

49. On 22 February 2017, the respondent provided due diligence under TUPE in respect of the claimant, enclosing copies of the disciplinary documentation to date (page 195) and the claimant attended a TUPE consultation meeting on 21 February 2017 (pages 197-8). On 10 March 2017 SHAP wrote to the respondent saying they were surprised to receive the TUPE information, because *"throughout our discussions it has been made clear to you that it has never been the intention of SHAP Ltd to either acquire and/or continue with the activities of Scallywags and therefore that TUPE would have no application here."* The letter says there is no agreement to acquire the business or continue with childcare activities, that the respondent has ceased all business operations trading as Scallywags, that CSSIW had cancelled the respondent's registration with effect from 21 December 2016, that there is no firm plan to continue childcare provision from the premises, but that the identity of the business would change completely, as would the nature of the service provision, the operations, and the identity of any clientele (pages 200-201). On 23 March 2017 the respondent wrote to the claimant saying that she considered TUPE did apply, that her employment would transfer to SHAP; the letter makes no reference to the fact that SHAP disputed TUPE applied (page 203).

50. The Disclosure and Barring Service (DBS) wrote to the claimant on 28 March 2017 saying that they had received information from the police about allegations of inappropriate behaviour towards children, and the DBS was considering whether to place her on a barred list (page 207).

51. In the meantime, the claimant and respondent had been texting each other about the police investigations and the claimant's police interview. On 27 March 2017 the respondent said to the claimant *"I told the police about how India had been inappropriate with college etc. and how you had to talk to her and she had resented that…"* (page 204). On 28 March 2017 the respondent texted the claimant *"… there were a lot of questions as to why I felt you were a*

suitable person to be in charge of the nursery, it's all absolutely ridiculous they have got no evidence of any wrongdoing as far as I am aware" (page 206). . In a response dated 29 March 2017, the respondent tells the claimant *"If you have got that email from the college about India [Steel] then take it as it shows from an independent party her attitude"* (page 209). In another text the respondent tells the claimant that she could *"refuse"* to answer the CSSIW questions into the investigation into the respondent, referencing that Ms Gaunt had refused to cooperate (page 210). On 24 April 2017 he respondent asked the claimant to check and complete appraisal forms, saying she would not necessarily give them to CSSIW, that she may say they are now in storage; *"Alternatively I could forward you the appraisal forms and you could complete them",* to which the claimant responded she would not "… *I am not going to lie on anything! I've also got my reputation to think of which at the moment is mud!"* (page 211).

52. On 7 May 2017 the respondent checked the DBS for the claimant's DBS certificate, the email response was that the claimant's certificate *"is no longer current"* (page 212).

53. On 16 May 2017 the respondent wrote to the claimant making the same allegations of mistreatment of children. The claimant was told that the disciplinary had been *"adjourned on the grounds that a potential TUPE transfer had arisen … and because the outcome of the Police and CSSIW investigations were still ongoing."* The claimant was told TUPE did not in fact apply, that the police and CSSIW investigations were still ongoing, that *"investigations into the allegations will be resumed";* the claimant was told that her DBS certificate was no longer current, that the employee handbook required employees to inform the company about *"personal disqualification"* and that if certificates are not supplied, the employment of those individuals would be terminated. *"We therefore request from you with the next 7 days an up to date copy of your current DBS certificate... if you are unable to provide a current DBS certificate … your employment will be terminated with immediate effect for some other substantial reason"* (page 214). On 18 May the claimant responded, saying that the nursery was not trading, there was no possibility of her returning to work, that DBS was had informed her that there was *"no legal restrictions placed upon you from engaging in regulated activity"* and that DBS had confirmed a new certificate could be applied for. The claimant informed the respondent that she must apply for a certificate because *"as an employee I cannot apply for a certificate".* She said she could meet with the respondent to assist with the application and provide her with the relevant documents (page 216).

54. The respondent did not have a further disciplinary meeting, instead writing to the claimant on 6 June, dismissing her for gross misconduct and some other substantial reason. The letter sad that the respondent had made findings, that all allegations were substantiated. In relation to the DBS certificate, *"you did not inform your employer in March 2017 when, according to yourself, you first became aware that your DBS certificate was no longer valid."* She said that this failure was a fundamental breach of her contractual terms which

"irrevocably destroys the trust and confidence necessary" to continue the employment relationship (pages 220-223).

55. The claimant was informed by the Police that the CPS had decided to take no further action in respect of the allegations made against her (page 228). Without hearing from the claimant, the Independent Safeguarding and Reviewing officer at Wrexham County Council said that the allegations of handling children roughly, force-feeding and speaking to children harshly were *"substantiated"* but that no further action would be taken and the matter was concluded (page 231).

56. The claimant appealed against the decision to dismiss, saying that the respondent had said she did not believe the allegations, the police were not taking the issue further, that the counter-notice on redundancy payment, stating the respondent intended to reopen the premises was not accurate because she had voluntarily handed in her registration, the statements were contradictory, statements had been altered, and the respondent did not have a fair or reasonable belief in misconduct (pages 229-230). The claimant attended the appeal hearing the outcome of which was that none of the grounds of appeal were upheld; the decision stated there was no evidence that statements had been altered.

Submissions

The respondent:

57. Ms Halsall said the dismissal claim was resisted on two grounds; firstly it was reasonable to dismiss the claimant for her conduct and secondly there was some other substantial reason, and the respondent acted reasonably in treating it as such. The dismissal was therefore fair under the provisions of s.98(2)(b) ERA. She argued there was a sufficient and reasonable investigation given the capacity and resources of the respondent. She argued that there were exceptional circumstances which justified having a second disciplinary meeting – the respondent had to investigate further and it was reasonable to reconvene the process.

58. In relation to changes made by the respondent to witness statements, Ms Halsall conceded that the changes shown from Ms Gaunt's original statement at page 258 made the decision was procedurally unfair, but that statements had initially been provided to Inspectors, there was clearly no collusion at this stage. The respondent is a small business, there was procedural unfairness in the witness statements which she conceded did not comply with the ACAS Code, but the respondent was acting without advice from Peninsula. She argued that the respondent had a genuine belief in misconduct, that the allegations must be put in the context of the suspension of the licence. She accepted that the statement of Ms Bloors was not provided at the disciplinary stage, but that this had been provided for another context, to appeal suspension of the licence, and texts received was for the same reason (see pages 87 and 112). In relation to the texts from the respondent to the claimant which were supportive, at this time the respondent had no reason to disbelieve

the claimant; however the respondent's view changed in light of subsequent evidence provided and there was a reasonable belief of the claimant's guilt at the time of dismissal.

59. In respect of re-opening the hearing after a decision had been made; referencing the 'Baby P' case Ms Halsall argued it was not necessarily unfair to reopen a disciplinary process. She argued that Ms Morris-Jones who heard the initial disciplinary was getting advice from Peninsula but that the assistance was given to Mrs Morris-Jones in the context of her owning Playlands and this was not advice given to the respondent.

60. Ms Halsall argued the decision to dismiss fell within the reasonable range of options open to the respondent. There was an irrevocable breach of trust and confidence, the claimant had 19 years' service and the nature of her role meant they had to have trust. The claimant had risked putting babies in danger with the subsequent risk to the respondent's licence. There was no realistic alternative to dismissal.

61. On the some other substantial reason for dismissal. The claimant did not have a DBS certificate as she was required as part of her t&c of employment. The claimant did not inform the respondent of this; it lead to a breakdown of trust and confidence for which the respondent would have dismissed the claimant on notice.

62. On a Polkey deduction, Ms Halsall argued that the claimant would have been dismissed in any event, and this would have occurred at the same time.

63. Contributory fault: Ms Halsall argued that had it not been for the allegations made by staff, the claimant would not have been dismissed – it was her conduct which led to the allegations being made. Also, had the claimant told the respondent of the DBS certificate suspension, the decision may have been different on the day.

64. On the claim for notice pay, Ms Halsall accepted that if the dismissal was only for some other substantial reason, she would be entitled to notice pay.

65. On the claim for arrears of pay, the claimant is not entitled as she received Statutory Guaranteed Pay throughout the applicable period.

66. On holiday pay, she argued under ERA s.13(9) that the claimant was not entitled to carry-over holiday from the previous year, at most the claimant is owed 12 days from 1 January to 8 June 2017.

67. On the lay-off, Ms Halsall initially argued the letter at s.136 was not a counter-notice because it does not refer to a redundancy payment. She conceded that in saying that "redundancy is not a viable option" the letter was effectively saying the claimant was not entitled to a redundancy payment. She argued instead that the claimant's dismissal meant the claimant was not entitled to a redundancy payment under the provisions of ss.136 and 139-141.

The claimant:

68. The claimant argued that it was clear from page 148 – the statement of Lorna Davies – that some things said by staff were not true. The second disciplinary and the appeal were conducted by friends of the respondent who had *"too much influence"* and these hearings were not impartial as the first hearing had been. While them respondent had said that she was awaiting the outcome of the Police/CSSIW process, the fact was that she did not wait for outcome of this process, which concluded after she had decided to dismiss

69. In respect of the DBS, she had a valid DBS through until March 2017, i.e. during the disciplinary hearings. On her holiday pay entitlement the claimant argued she was owed 7 days accrued but untaken holidays from 2016 plus her holiday entitlement to the date of dismissal – she had taken no leave in 2017.

The Law

70. Employment Right Act 1996

Fairness s.98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
  a. the reason (or, if more than one, the principal reason) for the dismissal, and
  b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…

(b) relates to the conduct of the employee

…

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

87 Rights of employee in period of notice.

(1) If an employer gives notice to terminate the contract of employment of a person who has been continuously employed for one month or more, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(1).

…

(3) In sections 88 to 91 "period of notice" means—

(a) where notice is given by an employer, the period of notice required by section 86(1), and

(b) where notice is given by an employee, the period of notice required by section 86(2).

(4) This section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1).

88 Employments with normal working hours.

(1) If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours—

(a) the employee is ready and willing to work but no work is provided for him by his employer

…

the employer is liable to pay the employee for the part of normal working hours covered by any of paragraphs (a), (b), (c) and (d) a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours.

118 General.

(1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with sections 119 to 122 and 126), and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).

119 Basic award.

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) "the appropriate amount" means—

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

122 Basic award: reductions.

(1) Where the tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly

...

(4) The amount of the basic award shall be reduced or further reduced by the amount of—

(a) any redundancy payment awarded by the tribunal under Part XI in respect of the same dismissal, or

(b) any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise).

123 Compensatory award.

(1) Subject to the provisions of this section and sections 124, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—
(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
(b) any expectation of such a payment,
only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
…
(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

147 Meaning of “lay-off” and “short-time”.

(1) For the purposes of this Part an employee shall be taken to be laid off for a week if—
(a) he is employed under a contract on terms and conditions such that his remuneration under the contract depends on his being provided by the employer with work of the kind which he is employed to do, but
(b) he is not entitled to any remuneration under the contract in respect of the week because the employer does not provide such work for him.

(2) For the purposes of this Part an employee shall be taken to be kept on short-time for a week if by reason of a diminution in the work provided for the employee by his employer (being work of a kind which under his contract the employee is employed to do) the employee’s remuneration for the week is less than half a week’s pay.

148 Eligibility by reason of lay-off or short-time.

(1) Subject to the following provisions of this Part, for the purposes of this Part an employee is eligible for a redundancy payment by reason of being laid off or kept on short-time if—
(a) he gives notice in writing to his employer indicating (in whatever terms) his intention to claim a redundancy payment in respect of lay-off or short-time (referred to in this Part as “notice of intention to claim”), and
(b) before the service of the notice he has been laid off or kept on short-time in circumstances in which subsection (2) applies.

(2) This subsection applies if the employee has been laid off or kept on short-time—
(a) for four or more consecutive weeks of which the last before the service of the notice ended on, or not more than four weeks before, the date of service of the notice, or
(b) for a series of six or more weeks (of which not more than three were consecutive) within a period of thirteen weeks, where the last week of the series before the service of the notice ended on, or not more than four weeks before, the date of service of the notice.

Exclusions

149 Counter-notices.

Where an employee gives to his employer notice of intention to claim but—
(a) the employer gives to the employee, within seven days after the service of that notice, notice in writing (referred to in this Part as a “counter-notice”) that he will contest any

liability to pay to the employee a redundancy payment in pursuance of the employee's notice, and

(b) the employer does not withdraw the counter-notice by a subsequent notice in writing,

the employee is not entitled to a redundancy payment in pursuance of his notice of intention to claim except in accordance with a decision of an employment tribunal.

150 Resignation.

(1) An employee is not entitled to a redundancy payment by reason of being laid off or kept on short-time unless he terminates his contract of employment by giving such period of notice as is required for the purposes of this section before the end of the relevant period.

(2) The period of notice required for the purposes of this section—

(a) where the employee is required by his contract of employment to give more than one week's notice to terminate the contract, is the minimum period which he is required to give, and

(b) otherwise, is one week.

(3) In subsection (1) "the relevant period"—

(a) if the employer does not give a counter-notice within seven days after the service of the notice of intention to claim, is three weeks after the end of those seven days,

(b) if the employer gives a counter-notice within that period of seven days but withdraws it by a subsequent notice in writing, is three weeks after the service of the notice of withdrawal, and

(c) if—

(i) the employer gives a counter-notice within that period of seven days, and does not so withdraw it, and

(ii) a question as to the right of the employee to a redundancy payment in pursuance of the notice of intention to claim is referred to an employment tribunal,

is three weeks after the tribunal has notified to the employee its decision on that reference.

(4) For the purposes of subsection (3)(c) no account shall be taken of—

(a) any appeal against the decision of the tribunal, or

(b) any proceedings or decision in consequence of any such appeal.

151 Dismissal.

(1) An employee is not entitled to a redundancy payment by reason of being laid off or kept on short-time if he is dismissed by his employer.

(2) Subsection (1) does not prejudice any right of the employee to a redundancy payment in respect of the dismissal.

152 Likelihood of full employment.

(1) An employee is not entitled to a redundancy payment in pursuance of a notice of intention to claim if—

(a) on the date of service of the notice it was reasonably to be expected that the employee (if he continued to be employed by the same employer) would, not later than four weeks after that date, enter on a period of employment of not less than thirteen weeks during which he would not be laid off or kept on short-time for any week, and

(b) the employer gives a counter-notice to the employee within seven days after the service of the notice of intention to claim.

(2) Subsection (1) does not apply where the employee—

(a) continues or has continued, during the next four weeks after the date of service of the notice of intention to claim, to be employed by the same employer, and

(b) is or has been laid off or kept on short-time for each of those weeks.

Supplementary

153 The relevant date.

For the purposes of the provisions of this Act relating to redundancy payments "the relevant date" in relation to a notice of intention to claim or a right to a redundancy payment in pursuance of such a notice—

(a) in a case falling within paragraph (a) of subsection (2) of section 148, means the date on which the last of the four or more consecutive weeks before the service of the notice came to an end, and
(b) in a case falling within paragraph (b) of that subsection, means the date on which the last of the series of six or more weeks before the service of the notice came to an end.

154 Provisions supplementing sections 148 and 152.

For the purposes of sections 148(2) and 152(2)—
(a) it is immaterial whether a series of weeks consists wholly of weeks for which the employee is laid off or wholly of weeks for which he is kept on short-time or partly of the one and partly of the other, and
(b) no account shall be taken of any week for which an employee is laid off or kept on short-time where the lay-off or short-time is wholly or mainly attributable to a strike or a lock-out (whether or not in the trade or industry in which the employee is employed and whether in Great Britain or elsewhere).

71. Transfer of Undertakings (Protection of Employment) Regulations 2006/24

Reg 7. Dismissal of employee because of relevant transfer

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act3 (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—
(a) paragraph (1) does not apply
(b) without prejudice to the application of section 98(4)4 of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—
(i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
(ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

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72. I also considered the relevant case law. As this was a conduct dismissal, I noted that the dismissal would be fair if, at the time of dismissal:

- The employer believed the employee to be guilty of misconduct.
- The employer had reasonable grounds for believing that the employee was guilty of that misconduct.
- At the time it held that belief, it had carried out as much investigation as was reasonable.

British Home Stores Ltd v Burchell [1978] IRLR 379.

73. I reminded myself that in determining fairness, it is not for the Employment Tribunal to consider whether the claimant is guilty of misconduct, but whether the employer believed, and had reasonable grounds for believing, the claimant was guilty of misconduct. Reasonable belief means the investigation must be within the 'range of reasonable responses' that a reasonable employer in those circumstances might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439). The next question is whether the employer acted within the

band of reasonable responses in treating this misconduct as a sufficient reason to dismiss.

74. Range of reasonable responses: I noted that it is irrelevant whether the Tribunal would have dismissed the employee in these circumstances, that I must not "substitute" my view for that of the employer's reasonably held views (*Midland Bank plc v Madden [2000] IRLR 827*), and I must not 'retry' the evidence to determine whether the respondent had reasonable grounds for believing in the misconduct – this amounts to a substitution mind-set. To put it another way, I accepted it was not my role to focus on my view of the claimant's guilt or innocence but I should confine myself to reviewing the reasonableness of the employer's actions.

75. What is a fair process? An employer must hold such investigation as is "reasonable in all the circumstances", judged objectively by reference to the "band of reasonable responses" (*Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588*). "All the circumstances" includes the potential effect of the finding upon the employee (*A v B [2003] IRLR 405).*

76. In some cases an employer will consider more than one allegation of misconduct on the part of the employee. In these cases, the reason for dismissal will be the set of facts which lead it to dismiss the employee (Abernethy v Mott Hay and Anderson [1974] ICR 323). As explained by the EAT in Governing Body of Bearwood Humanities College v Ham UKEAT/0379/13, this means that the question for the Tribunal is not whether the individual acts of misconduct individually, or cumulatively, amounted to gross misconduct but whether the conduct in its totality amounted to a sufficient reason for dismissal.

77. In *A v B [2003] IRLR 405*, it was stated that the employer's investigation should be particularly rigorous when the charges are particularly serious or the effect on the employee is far-reaching. Elias J made the following points:

- Serious allegations of criminal misbehaviour must always be the subject of the most careful investigation (at least where they are disputed), bearing in mind that the investigation is usually being conducted by laymen and not lawyers.

- Even in the most serious cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial. However, careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as they should on the evidence directed towards proving the charges.

- This is particularly the case where, as is frequently the situation, the employee is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses.

- Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future

employment in their chosen field. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.

78. I noted also the case of *Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721* which states that an even-handed process may mean following up aspects of a witness's evidence that raise unanswered questions, for example if the evidence is inconsistent, or conflicts with the views of others. In *Roldan*, a nurse disputed the account of a colleague but was dismissed, the panel determining that they saw no reason why the colleague would lie. The Court of Appeal accepted that the employer should have made further enquiries into the colleague's evidence, and should have questioned other witnesses about the claimant's interactions with the patient.

The Tribunal's conclusions on the facts and law

79. The claimant asserts that her dismissal was to avoid making her a redundancy, alternatively to avoid her transfer under TUPE. It is for the respondent to prove the reason for dismissal.

80. Having considered the evidence, I noted the following in respect of the first disciplinary process: the respondent was fully aware, and appeared to accept, that Lorna Davies had not seen any incidents, as had been alleged by staff; the respondent accepted that Ms Knight's evidence was potentially unreliable, that the claimant had been in contact with the college about her work, there was a significant chance Ms Knight could be disciplined or dismissed. I noted the supportive texts from the respondent to the claimant prior to the decision to discipline. I noted also the text saying that the claimant would not be disciplined if she resigned, she referenced the claimant's return to work if the charges were dropped, and she offered to assist with her cv.

81. I also noted that there appeared to be issues of timing – the claimant was told she would be subject to a disciplinary process on 16 December, the day after she had requested a redundancy payment. The respondent's text of 16 December references the following "*I have tried to support you with this investigation but it obviously hasn't been enough for you… I have emailed you Peninsula letter…"* and I concluded that it was because of the claimant's request for a redundancy payment (referenced by *"it obviously hasn't been enough for you"*) that the respondent decided to proceed with the disciplinary hearing. The respondent included a statement from Ms India Steel in the disciplinary process without any comment on it, having told the claimant that she did not believe Ms Steel's evidence. The respondent was aware, and appeared to accept, that Lorna Davies was saying she was not a witness to any incident; which cast doubt on the credibility of Ms Gaunt and Ms Steel's statements at the least. I concluded that the timing of the decision to proceed to the first disciplinary was because of the claimant's request to seek a redundancy payment on grounds of lay-off and that at this time the respondent was not of the genuine view that the claimant may have committed the acts as alleged in the disciplinary letter.

82. The respondent was also effectively the investigating manager. The disciplinary process was "*conducted"* (in the words of the disciplinary invitation letter) by Mrs Morris-Jones, who was, I find, the decision-maker in the disciplinary process as agreed with the respondent. At the end of the process and having discussed the issue with Peninsula, she emailed the claimant saying the allegations had not been proven and the process was closed. I do not accept that there was a decision taken by Mrs Morris-Jones that "*further investigation was required*" as alleged by the respondent at (page 182).

83. In relation to the second disciplinary process, I noted that on 10 January 2017 the claimant again wrote requesting a redundancy payment, and in her response the respondent asserted that the decision on the disciplinary was not authorised and *"was therefore totally incorrect"* and would be reviewed (page 180). I concluded that the decision to continue with a disciplinary process was because the claimant was continuing to claim a redundancy payment.

84. The second hearing proceeded with haste, only one day's notice. I concluded that the Chair was chosen because she was a friend of the respondent, and I did not conclude that there was neutrality on her part. I also concluded that the respondent had deleted evidence in Ms Gaunt's statement, and had added her own evidence purporting to be conversations with Ms Knight which I concluded were materially inaccurate. Again, the respondent did not refer to the contrary evidence of Ms Davies, evidence which cast doubt on the veracity of some of the other evidence. I noted that Mrs Harvey was clear that she had been told there was no collusion with witnesses, this I concluded was because the respondent had misled Mrs Harvey on the extent she had altered statements.

85. In relation to the second disciplinary hearing, I also noted I had not been provided with emails between the respondent and witnesses relating to the drafting of the witness statements for the second disciplinary hearing, it having been alleged by the claimant that these could have been altered, as was Ms Gaunt's. I concluded that the respondent had embellished at least some of the evidence statements provided for the 2nd disciplinary hearing, and had deleted other evidence, including that relating to Lorna Davies.

86. Following this correspondence, and despite Mrs Harvey concluding the claimant should be dismissed for gross misconduct, the disciplinary process was inexplicably stopped. While the respondent says this was to make further enquiries, it appears none were made. While she references the police and CSSIW investigation as being the reason for the delay, she later made a decision to dismiss despite these investigations continuing. Another reason for the delay was the potential sale of the business; following the second disciplinary hearing it became apparent that SHAP was considering taking on the nursery, and the respondent engaged in a consultation process with the claimant to transfer her employment. I concluded that the respondent believed the claimant's employment may transfer, and if it did this would mean the respondent was not required to make a redundancy payment to the claimant. The texts between the claimant and respondent into March 2017

show that the respondent still did not believe Ms Knight's statement, and at this time was asking the respondent not to cooperate with the police investigation, and asking her to complete appraisals for staff members. Had the respondent had a genuine belief in the claimant's guilt, I do not consider the respondent would have written these texts.

87. By early May 2017 the respondent had concluded that TUPE did not apply. At this stage she decided to proceed with the disciplinary, and I concluded that it was because the claimant's TUPE transfer would not happen, and it was as a consequence that on 16 May she wrote to the claimant outlining the original disciplinary allegations and a new allegation – that the claimant did not have a certificate as required, and that she would be dismissed unless she could supply a valid DBS certificate within 7 days. I concluded that the claimant's response was reasonable – she was not barred but the respondent would need to apply for a certificate, and that as a consequence the respondent changed the disciplinary allegation to say the claimant had failed to inform the respondent of her failure to have a certificate.

88. Did the respondent have a genuine belief that the claimant should be dismissed because she had irrevocably breached the trust and confidence between employer and employee? I concluded not. The claimant was fully aware that the respondent had handed in her registration, that the nursery would not reopen under her management and she had been told that TUPE did not apply. There was therefore no need for the claimant to have a certificate. I also concluded that the respondent would have been and was aware that the investigation being undertaken by CSSIW and the Police would mean the claimant's DBS certificate was suspended. I concluded that the respondent did not believe that trust and confidence was irrevocably breached by the claimant's failure to tell her of this. I noted also that the initial allegation was that the claimant had no certificate; when the claimant pointed out it was a simple process to apply, the respondent changed tack to a different disciplinary charge. I concluded that the respondent's belief was not a genuinely held belief, and that the claimant's failure to inform the respondent did not lead the respondent to conclude trust and confidence had been destroyed.

89. On the basis of this evidence, I concluded that the principle reason for dismissal was not gross misconduct and/or some other substantial reason but was instead to avoid a redundancy payment. I concluded that the respondent did not have a genuine belief in the claimant's guilt of child-mistreatment or that there was an irrevocable breach of trust and confidence and I concluded that this was not the reason for dismissal. I concluded that the real reason why the claimant was dismissed was to avoid paying her a redundancy payment.

90. I next considered whether the sole or principle reason for her dismissal was a TUPE transfer. I concluded not, I concluded that had the transfer taken place she would not have been dismissed; this is one of the reasons for delaying the disciplinary decision to her. I concluded that the reason for her dismissal was

because the transfer was not taking place, and hence the claimant would be entitled to a redundancy payment, rather than because of a transfer.

91. I am wrong on the finding that the reason for dismissal was to avoid paying the claimant a redundancy payment, I also considered whether the dismissal was fair. Bearing in mind the requirement not to substitute my own views for that of a reasonable employer, I considered whether the respondent's investigation met the standard of a reasonable investigation – whether, given the issues involved, it was within the range of reasonable responses of a similar sized and resourced nursery.

92. For the reasons set out above, I concluded that the respondent did not have a genuine belief that the claimant had committed misconduct as alleged. I also concluded that the investigation and process into the misconduct allegations was wholly flawed, unreasonable, and outside of the range of responses of a reasonable employer: as investigator the respondent had amended and deleted evidence, had concocted evidence and had misled at disciplinary stage. She overturned a decision of an independent decision maker – again acting outside of the range of reasonable responses of an employer of similar size and resources. She ensured a guilty verdict second time around by having a friend conduct the process, and by being misleading in the evidence she presented. She showed during the process that she did not believe the allegations, and it was clear from the evidence that she was only pursuing the allegations because the claimant refused to resign.

93. On the dismissal for failing to inform the respondent of her lack of DBS Certificate, I concluded that the respondent changed the disciplinary charge between the allegation and the decision, giving the claimant no opportunity to respond. She failed to have a hearing on this issue and I considered, whilst not characterised as a conduct issue by the respondent, it was necessary to have a hearing or at least to inform the claimant of the disciplinary issue, the failure to inform of the suspension of her DBS certificate. The failure to do so was an unreasonable decision, again bearing in mind the business size and administrative resources. I also concluded that the respondent did not believe that his failure had fundamentally breached trust and confidence. I considered that the respondent added this charge so as to ensure the claimant was dismissed second time around.

94. I also concluded that if this was the respondent's genuine belief that the claimant had irrevocably destroyed the relationship of trust and confidence, that it was not, on the evidence, a reasonable belief. I therefore do not consider that the decision to dismiss for failing to inform of the DBS certificate suspension was a reasonable decision in the circumstances, bearing in mind its size and administrative resources.

95. I next considered, if the dismissal was unfair, would the claimant have been dismissed under a fair process, had one been followed, if so when would she have been dismissed? Alternatively, under a fair process, what was the percentage prospect of the claimant being dismissed at some point? I considered that a fair process would have looked at evidence which pointed

away from the claimant's guilt, including interviewing Lorna Davies and assessing the credibility of the witness evidence – for example the respondent's belief that Ms Steel was an unreliable witness. A fair process would also have considered the claimant's view that Ms Steel had undue influence over some of the witnesses. However I also noted that there was evidence that the claimant had not acted appropriately with children she was looking after. I concluded that Ms Gaunt had referenced in some detail some of the issues involving the claimant, including concerns from other staff. I concluded it was possible that a fair investigation may have shown that Lorna Davies did have concerns about the claimant's conduct. I therefore concluded that there was a 25% prospect that the claimant would have been dismissed under a fair process at some point in the future.

96. As stated, there was evidence that the claimant had conducted herself poorly at work. Ms Gaunt references her not being popular, having made staff cry. There was evidence that she may have behaved inappropriately with babies and young children in her care. I therefore concluded that by her actions the claimant did contribute towards her dismissal, and I estimated this as a 25% contribution to her dismissal. I concluded that it was just and equitable to reduce compensation by this amount.

97. Because the claimant's dismissal was not for gross misconduct, I concluded that the claimant's claim for breach of contract succeeds and she is entitled to notice pay. I concluded that under the provisions of ss.87-88 Employment Rights Act 1996 the claimant was ready and able to work but was provided with no work during what would have been her notice period. The claimant's contractual notice period is 12 weeks, the same as her statutory notice entitlement, and I concluded that the claimant is entitled to normal pay for a 12 week notice period.

98. The respondent disputed the claimant's entitlement to claim for holiday pay for the previous year; 7 days carry-over. The claimant was not told to take leave during the period of suspension, and I concluded that the claimant was entitled to pay for carried-over holiday, and her entitlement was 7 days for 2016 and the untaken holiday in 2017 to date of dismissal, a total of 17 days.

99. I concluded that the claimant was not entitled to a redundancy payment under the provisions of s.147 – 151 ERA, as she was dismissed by the respondent, accordingly s.151(1) ERA applies.

100. The claimant claims wages for the period when she contends her lay-off should have ended, 16 January 2017, to the date of dismissal, 8 June 2017. I found that she was not so entitled. The respondent continued to inform the claimant she was on lay-off, and she received sums which equated to her Statutory Guarantee Payment as there was no role for her to return to, and I accepted that this meant she was not entitled to loss of earnings for this period.

Remedy

101. I concluded that absent the disciplinary process the respondent would have dismissed the claimant for redundancy, and that the respondent's actions were in fact to avoid paying a redundancy payment to the claimant. I concluded that the claimant's claim for lost wages should be limited to the sum she would have received had she been made redundant, less discounts for Polkey and contributory fault.

102. The respondent argued that the claimant should not receive a basic award, because her award was to compensate her for a failure to make a redundancy payment. I did not accept this, because the claimant's award is made under the usual unfair dismissal compensation principles. While the claimant may, had the respondent chosen to do so, have been fairly dismissed for redundancy, I found that the reason for dismissal was unfair and was not on grounds for redundancy, and was instead to avoid making a redundancy payment. The claimant is not entitled to a redundancy payment on lay-off because she was dismissed (s.151(1) ERA applies). I concluded that the wording of s.118(1) ERA applied, and that a Basic Award is payable to the claimant. I concluded that it was reasonable to reduce the Basic Award because of the claimant's actions pre-dismissal, by 25%.

103. The parties calculated the claimant's award which was discussed and agreed in Tribunal. I have noted a discrepancy in the figures, as it appears that the calculation agreed by the parties was based on 19 years' service at one weeks pay. However, the claimant was under 22 when she commenced employment, and accordingly the calculation for a redundancy payment and for loss of earnings (based on what a redundancy award would have been) should be calculated on 18.5 weeks' pay. I have therefore amended the awards on a reconsideration of these figure on my own motion as it is in the interests of justice to do so without a hearing. The amended calculation is as follows:

    a. The claimant was aged 40 at the date of dismissal, her weekly gross pay was £357, her weekly take home pay, £305. Her basic award is calculated as follows: 18.5 weeks x £357 = £6,404.50, less 25% = **£4,803**
    b. Based on the claimant's her age and length of service, she would have received £6,404.50 had she been fairly dismissed on grounds of redundancy. Less 25% Polkey reduction = £4,803. Less 25% contributory fault reduction = **£3,602**
    c. Notice pay: 12 weeks net pay: **£3,670**
    d. Holiday pay: 17 days £1,041 – less £483 (paid) **£558**

    TOTAL: **£12,633**

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EMPLOYMENT JUDGE M EMERY

Dated: 4th January 2018

Judgment sent to the parties
On 27 February 2018

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For the staff of the Tribunal office