EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms Nina Watson	v	**Wickersley Nursery Limited**

PRELIMINARY HEARING

Heard at: **Sheffield** **On:** **02 April 2019 & 12 June 2019**

Before: **Employment Judge T R Smith**

Appearance:

For the Claimant: **Mr Clay (solicitor)**

For the Respondent: **Mr Famutimi (consultant)**

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is well-founded.
2. Pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 there is an uplift in the award to the Claimant of 10%.
3. The Claimant is awarded compensation for unfair dismissal totalling £8650.57.
4. The Recoupment Regulations apply.
5. The Prescribed element is £7610.82.

REASONS

1. **Background.**

   1.1. The Tribunal heard oral evidence from the Claimant and Mr Anthony Coulson, a trade union shop steward.

   1.2. The Tribunal heard oral evidence from the following witnesses for the Respondent: –

   Ms Rebecca Lambert, nursery manager.

   Dr Sipra Deb, controlling director.

1.3. The Tribunal had before it an agreed bundle of documents. The bundle contained 93 paginated pages (subsequently extended to 100).

1.4. Numbers in brackets are a reference to pages in the agreed bundle.

1.5. The Tribunal also viewed the agreed CCTV footage in full.

1.6. The footage was divided into 2 segments and each purported to feature a different incident, both taking place on 24 July 2018.

1.7. The first segment featured a child that it was agreed would be referred to as child A. This segment related to an alleged incident on the morning of 24 July 2018.

1.8. The first segment was of good quality.

1.9. The second segment featured a child that it was agreed would be referred to as child B. This segment related to an alleged incident on the afternoon of 24 July 2018. The second segment showed the Claimant somewhat in the distance. At times her back faced the camera or she was side on to the camera. Visibility was further obstructed by a pagoda pillar and a table and chairs.

Issues

2. The Tribunal agreed with the parties the issues that required determination namely: -

2.1. **Unfair dismissal**

2.1.1. What was the reason for the dismissal? The Respondent asserted that it was a reason relating to conduct which is a potentially fair reason under section 98 (2) of the Employment Rights Act 1996 Act ("ERA96"). It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

2.1.2. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds? Did it act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal having regard to the factors set out in section 98 (4) of ERA96?

2.1.3. Was the decision to dismiss a fair sanction, that is, was it within a reasonable range of responses for a reasonable employer?

2.1.4. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged?

2.1.5. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

2.1.6. Did the ACAS code of practice: disciplinary and grievance procedures 2015 apply?

2.1.7. If so were either party in breach?

2.1.8. If so, was it reasonable to make an adjustment under section 207A of the Trade Union and Labour Relations (Consolidation) act 1992.

2.2. **Non-issues**

2.2.1. The Claimant no longer pursued a claim for wrongful dismissal.

2.2.2. The Tribunal recorded that the claim form was drafted by solicitors and there was no complaint under section 11 or 12 of the Employment Relations Act 1999 and no application to amend. Thus, the Tribunal is not considered the same.

2.2.3. The Respondent, despite its pleaded case, accepted the Claimant had two years continuous employment and thus did not take any jurisdictional point.

3. **The Law**

3.1. **Unfair dismissal.**

3.1.1. The Tribunal applied section 98 (1), 98 (2) and 98 (4) ERA 96 which provides as follows: –

"98 (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 either it is 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 helped.

98 (2) – a reason falls within this subsection if it…….

(b) relates to the conduct of the employee.

98 (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 the whether in the circumstances (including the size and the administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

3.1.2. In **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213** the Court of Appeal held that a reason for dismissal was a set of facts known to the employer or beliefs held by the employer which would cause the employer to dismiss the employee.

3.1.3. The Tribunal had regard to the guidance given in **British Home Stores Ltd -v- Burchall 1978 IRLR 379** having reminded itself that **Burchell** was decided before the alteration of the burden of proof effected by section 6 of the Employment Act 1980.

3.1.4. In that case the first question raised by Mr Justice Arnold: *"did the employer had a genuine belief in the misconduct alleged?"* went to the reason for dismissal. The burden of showing a potentially fair reason rests with the Respondent. However, the second and third questions, the reasonable grounds for the belief based on a reasonable investigation,

go to the question of reasonableness under section 98 (4) of the ERA96 and there the burden is neutral.

3.1.5. The Tribunal had regard to the guidance given at paragraphs 13 to 15 in the case of **Sheffield Health and Social Care NHS Foundation Trust -v- Crabtree UKEAT 0331/09/ZT**.

3.1.6. The approach to fairness and procedure is the standard of a reasonable employer at all three of the **Burchall** stages: - **Sainsbury's Supermarket-v- Hitt 2002 EWCA CIV 1588**.

3.1.7. The Tribunal reminded itself that when considering the objective standard of a reasonable employer the test was the material which was available the Respondent at the time. However, the test goes further as it involves information which would have been available to the Respondent had a proper investigation being conducted and this point was emphasised by His Honour Judge Serota QC in the case of **London Waste Ltd -v-Scrivens UK EAT/0317/09**

3.1.8. Where, as here, any appeal proceeds by way of review and not a rehearing there is no rule that earlier unfairness can only be cured by means of a rehearing. The Tribunal must examine the fairness of the disciplinary procedure as a whole: - **Taylor -v- OCS group Ltd 2006 ICR 1602**

3.1.9. The Tribunal also applied the guidance given in the case of **Iceland Frozen Foods Ltd -v- James 1992 IRLR 439**: –

"The authorities establish that in law the correct approach for an Employment Tribunal to adopt in answering the question posed by section 98 (4) is as follows……

(1) the starting point should always be the words of section 98 (4) themselves.

(2) in applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair.

(3) in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take on you, another quite reasonably take another.

(5) the approach of the Employment Tribunal, as an industrial jury, is to determine whether the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses in which a reasonable employer might have adopted stop if a dismissal falls within the band the dismissal is fair….. If the dismissal falls outside the band it is unfair."

3.1.10. In summary the Tribunal decided it had to ask itself the following questions namely: –

3.1.11. Was there a genuine belief in the alleged misconduct?

3.1.12. Were there reasonable grounds to sustain that belief?

3.1.13. Was there a fair investigation and procedure?

3.1.14. Was dismissal a reasonable sanction open to a reasonable employer?

3.2. **Contributory conduct.**

3.2.1. Section 123 (6) ERA 96 states that *"[W] here the Tribunal finds that the dismissal was to any extent caused all contributed to by any action of the complainant, it shall reduce the….. compensatory award by such proportion as it considers just and equitable having regard to that finding."*

3.2.2. The wording in relation to any deduction from the basic award is set out in section 122(2) and differs from that in section 123 (6) ERA 96.

3.2.3. A reduction for contributory conduct is appropriate according to the Court of Appeal in **Nelson-v- BBC (2) 1980 ICR 110** when three factors are satisfied namely: –

3.2.3.1. The relevant action must be culpable or blameworthy and

3.2.3.2. It must have caused or contributed to the dismissal, and

3.2.3.3. It must be just and equitable to reduce the award by proportion specified

3.2.4. For a deduction to be made a causal link must exist between the employee's conduct and the dismissal. In other words, the conduct must have taken place before the dismissal; the employer must have been aware of the conduct; and the employer must then have dismissed the employee at least partly in consequence of conduct.

3.2.5. A finding of contributory fault does not require that the action of the employee was the sole or principal or operative course of the dismissal: – **Polentarutti -v- Autokraft Limited 1991 IRLR 457.**

3.3. **Polkey Reductions.**

3.3.1. Under Section 123 (1) ERA96 the Tribunal must consider whether it would be "just and equitable" to make a reduction from any compensatory award.

3.3.2. The case of **Polkey -v- AE Dayton Services Ltd 1988 ICR 142** held that a Tribunal must consider whether the unfairly dismissed employee could have been dismissed fairly at a later date.

3.3.3. The Polkey principal applies not only to cases where there is a procedural unfairness but also to substantive unfairness, although in the latter case it may be more difficult to envisage what would have happened in the hypothetical situation of the unfairness not having occurred, see **King -v- Eaton Ltd (2) 1998 IRLR 686.**

3.3.4. The mere fact a Polkey reduction may involve a degree of speculation or is difficult does not mean it should not be undertaken, see **Gover -v- Property Care Ltd 2006 ICR1073**

3.3.5. The burden of proving that an employee would have been dismissed in any event is on the employer. Provided the employee can put forward an arguable case that she would have been retained were it not for the

unfair procedure, the evidential burden shifts to the employer to show that the dismissal might have occurred even if a correct procedure had been followed, see **Britool Ltd -v- Roberts 1993 IRLR 481.**

3.3.6. The Tribunal looked carefully at the guidance given in **Software 2000 Ltd -v- Andrews 2007 ICR 825** on the application of Polkey.

3.3.7. In summary the guidance directs that the Tribunal must assess how long the employee would be employed but for the dismissal. If the employer contends that the employee would or might have ceased to have been employed in any event had a fair procedure been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee. There will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. The Tribunal must have regard to all material reliable evidence even if there are limits to the extent to which it can confidently predict what might have happened. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary namely that the employment would be terminated earlier is so scant that it can effectively be ignored.

4. **Section 207A Trade Union and Labour Relations (Consolidation) act.**

Section 207A of the Trade Union and Labour Relations (Consolidation) Act, which applies to a claim for unfair dismissal, provides that where a relevant code of practice applies and the claim has succeeded and either the employer or employee has failed to comply with a relevant code and the failure was unreasonable an Employment Tribunal may if it considered is it just and equitable increase or decrease any award it makes by no more than 25%.

5. **Submissions**

5.1. The Tribunal mean no disrespect to either party but it has not repeated their submissions.

5.2. Mr Clay relied on a written skeleton which he elaborated on in submissions. A copy is on the Tribunal file. He specifically referred the Tribunal to the case of **Adama -v- Partnerships in Care Ltd UKEAT/0047/14** and provided a transcript.

5.3. Mr Famutimi also relied on a written submission which he amplified upon. A copy is on the Tribunal file. He provided the Tribunal with transcripts of the cases of **Taylor -v- OCS Group Ltd [2006] EWCA Civ 702, Westminster City Council -v- Cabaj [1996] ICR 961** and **Gokce -v- Scottish Ambulance Service UKEATS/0093/06**

5.4. Where relevant the Tribunal has dealt with the principles set out in those cases, and other cases to which it was referred to in the course of submissions. Where relevant factual matters were in dispute, the Tribunal has given reasons for its conclusion.

6. **Findings and reasons**

The findings of fact set out below are not intended to cover each and every factual dispute that existed between the parties. The Tribunal has only adjudicated upon those facts necessary to determine the agreed issues.

6.1. By means of pay slips the Claimant showed she was first paid by the Respondent on 30 April 2016 and was able to demonstrate subsequent monthly payment by means of a mixture of payslips and bank statements. The Claimant gave credible evidence that she started work in April 2016. The Tribunal concluded, given the fact the Respondent no longer pursued its jurisdictional challenge, that on the evidence placed before it the Claimant had established that her continuous employment commenced in April 2016.

6.2. The Claimant was employed as a nursery practitioner by the Respondent.

6.3. The Respondent is a provider of pre-school age child care.

6.4. It is a small employer. It has no HR department.

6.5. The Respondent is effectively controlled by Dr Sipra Deb.

6.6. On 31 July 2018 the Claimant was informed by her line manager, Ms Rebecca Lambert, that she was suspended on full pay as there were allegations about her behaviour towards children. She asked for further details but was not given any.

6.7. Subsequently more precise details for her suspension were set out in a letter delivered to the Claimant on 01 August 2018 (46) namely that on 24 July 2018 she had forcefully restrained a child (the Tribunal observes that the Claimant was later to be accused of forcibly restraining two children) causing it distress.

6.8. The suspension letter made it clear that the Claimant was not to contact or attempt to contact any other employee. The letter did however indicate that if the Claimant could identify an employee who might assist her then the Claimant was to contact the investigating officer.

6.9. On the same day, Wednesday 01 August 2018, by letter, (48) the Claimant was invited to a disciplinary meeting arranged for 3 pm on Friday 03 August 2018.

6.10. In essence the allegations were: –

6.10.1. The Claimant had restrained a child or children causing emotional distress

6.10.2. There were two incidents of concern, the first lasting approximately 10 minutes at 10:40 am on 24 July 2018 and the second incident lasting some six minutes at 14.05 pm on the same day.

6.10.3. The Claimant had failed to follow “company procedures” in the manner she restrained the children.

6.11. The Claimant was provided with two witness statements, one dealing with the first incident, child A and one the later incident, child B and was advised she would be entitled to view the CCTV before the start of the disciplinary hearing.

6.12. The two witness statements were supplied to the Claimant were from Ms Rebecca MacBean, reportedly dated 24 July 2018 (44) which dealt solely with the child A incident.

6.13. The second statement was from Ms Alice Campbell dated 01 August 2018 (50) and dealt solely with the child B incident.

6.14. The disciplinary invitation letter advised the Claimant she could be accompanied by a fellow employee or trade union official.

6.15. This contradicts the Respondent's disciplinary policy which provides that an employee may be accompanied *"by a friend, colleague or trade union representative of their choice"* (42).

6.16. The Tribunal did not accept the Respondent's explanation for the departure from its disciplinary procedure in respect of representation namely that the CCTV showed images of other staff and children and therefore data protection issues arose. It was the Respondent who chose to use the CCTV evidence. It could have relied upon witness evidence only. It could have, if using the CCTV and had genuine concerns, taken steps to pixelate faces. It is further difficult to see on the Respondent's logic how it would not be a breach of data protection legislation to show the CCTV to a trade union official but not a friend of the Claimant. The Tribunal will return to the issue of representation, later in its judgement.

6.17. The Tribunal also noted the very short period of time in which the Claimant had to prepare. In effect she had one clear working day in relation to the statements. For the CCTV the time was even less. She was only to be showed the CCTV just prior to the start of the disciplinary meeting. The Tribunal did accept that it was appropriate that the Respondent retained the CCTV footage but it would have been easy to accommodate the Claimant by arranging an investigatory meeting before the disciplinary meeting so the CCTV could have been shown to the Claimant and her explanation obtained.

6.18. Whilst the Tribunal does not find, in isolation, that the very short gap between the invitation to the Claimant to attend the disciplinary hearing, and also the failure to hold an investigative meeting was such as to render the dismissal unfair they are factors which the Tribunal has taken into account when making, as it must, an holistic judgement on the totality of the fairness of the procedure, including the appeal.

6.19. The Claimant attended the disciplinary meeting on 03 August 2018 accompanied by Mr Anthony Coulson, a shop steward with Unite.

6.20. Ms Lambert showed both the Claimant and Mr Coulson the CCTV footage prior to the commencement of the meeting, having satisfied herself, from a badge Mr Coulson had, that he was a member of Unite and had rights of representation.

6.21. The Tribunal accepted that Mr Coulson introduced himself as a trade union representative. That was true. He was a trade union representative with accredited rights of representation.

6.22. The Tribunal found that not only was he accredited but he also had experience in representing members at disciplinary and grievance hearings.

6.23. Mr Coulson having viewed the footage made a comment, heard by Ms Lambert, that he did not believe from what had been seen that it disclosed the disciplinary offences alleged. The Respondents were therefore on notice that it was likely that a robust defence would be put forward on the Claimant's behalf. This the Tribunal finds was a reason why events developed as they did, so that Mr Coulson was unable to represent the Claimant at the disciplinary hearing.

6.24. Ms Lambert left the room and spoke to Dr Deb. Dr Deb decided to speak to Unite to check on Mr Coulson's credentials. At first Unite indicated Mr Coulson was not an approved representative. That was wrong.

6.25. Mr Coulson was able to provide his membership number whereupon Dr Deb was told by Unite that Mr Coulson was an approved representative and shop steward but worked for Morrisons wholesalers. Before me Mr Coulson was adamant, and this was not challenged, that he never worked for Morrisons wholesalers.

6.26. The Tribunal has some sympathy with Dr Deb as she was given, initially, erroneous information by Unite. Mr Coulson had been able to produce appropriate documentation. Mr Coulson had been proven correct when he said he was an accredited representative and Unite accepted that on been given his membership number. There was no reason for Dr Deb to realistically doubt that he was who he said he was.

6.27. The Tribunal accepted that evidence of Mr Coulson, who gave his evidence in a very straightforward manner, that he volunteered he was a family friend when he was told that the Respondent would not permit him to represent the Claimant as a trade union official. He was clearly aware of the Respondent's disciplinary policy and under that policy was entitled to represent the Claimant as a family friend. It was never disputed before the Tribunal that Mr Coulson was not a family friend of the Claimant and her family. Dr Deb had no reason to doubt Mr Coulson's claim.

6.28. In the Tribunal's judgement the Claimant was entitled to be represented by a representative of her choice, Mr Coulson as a family friend, if not as a trade union official in accordance with the Respondent's own disciplinary procedure.

6.29. Both the Claimant and Mr Coulson were escorted off the premises.

6.30. The disciplinary hearing did not proceed

6.31. By the email sent 11:30 pm on Friday 03 August the Claimant was invited to a rescheduled disciplinary meeting to be held on Monday, 6 August at 3 pm

6.32. The Claimant now faced a further allegation namely she brought an unauthorised person onto the Respondent's premises and had deceived the Respondent. This was a reference to Mr Coulson. This was said to be an act of gross misconduct. Pausing at this juncture there was not a scintilla of evidence before the respondent either at this stage or at the conclusion of the disciplinary proceedings that Mr Coulson was not an authorised person within the meaning of the Respondents disciplinary policy or that the Claimant deceived the Respondent.

6.33. The Claimant was further informed that if she failed to attend the resumed disciplinary hearing without a satisfactory explanation non-attendance would be treated as a separate matter of misconduct.

6.34. On Sunday 05 August 2018 the Claimant emailed the Respondent (55) to say she could not attend 3 pm on Monday afternoon as she needed to speak to her Unite representative, Mr Coulson. By this stage the Claimant had joined Unite although the Tribunal finds as a fact, she was not a member of the union as at the meeting on 03 August 2018.

6.35. On the same day, Sunday 05 August 2018(56) the Claimant was informed by Ms Lambert that the meeting would proceed as scheduled and if she failed to attend the Respondent would proceed in her absence.

6.36. On Monday 06 August 2018 the Claimant indicated in an email (57) that she had spoken to Unite and asked for the meeting to be rearranged for Wednesday 08 August so Mr Coulson, could accompany her to that meeting.

6.37. At 1.49 on Monday 06 August 2018 Ms Lambert contended the Claimant had been given reasonable notice to attend the hearing and to arrange representation. The Claimant was told that failing to attend the hearing would be regarded as an unauthorised absence and misconduct (58).

6.38. It was unfair to expect the Claimant to proceed without the support of her representative particularly given, whatever the Respondent may or may not have been told by Unite, that it was known that Mr Coulson was a family friend and thus under the Respondents disciplinary procedure was entitled to represent the Claimant at the disciplinary hearing. Further the Claimant was by 06 August 2018 a Unite member and Mr Coulson was an approved representative of Unite. She was entitled to be represented by him in his union capacity as well. Further the timeframe was not, despite what Ms Lambert said to the Tribunal, reasonable for the Claimant to arrange another Unite representative to attend in Mr Coulson's place. The Tribunal found the failure to allow the Claimant representation of her choice to be a substantial failing in the disciplinary process.

6.39. The Claimant did not attend the disciplinary hearing and the matter proceeded in her absence.

6.40. She was dismissed

6.41. The Claimant was informed she was summarily dismissed by letter (59 to 60) dated 07 August 2018.

6.42. The Tribunal considers it instructive to quote briefly from the letter of dismissal. It was stated that at approximately 10.40 on 24 July 2018 the Claimant was *"seen on CCTV and by members of staff restraining a child by holding down their body and limbs for approximately 10 minutes"*.

6.43. Similarly, the dismissing officer found: *"you were seen on CCTV and by members of staff restraining a child by holding their body limbs down for approximately 6 minutes"*.

6.44. Both proven allegations were individually regarded as gross misconduct.

6.45. The dismissing officer found that the Claimant had *"fraudulently disclosed a person as being your trade union representative and this was not the case"*, again this was regarded as a gross breakdown of trust and confidence.

6.46. In addition, the dismissing officer found that the alleged restraint of the children was in breach of the Respondents policy and that represented a breakdown of trust and confidence and further the restraint was in breach of the Respondents statutory regulations and amounted to a dereliction of duty for the gross breach of trust.

6.47. Just pausing at this juncture, it is worthwhile looking at what the Respondents policy said in relation to unlawful restraint. Examples given include tripping a child, holding a child face down to the ground or forcing a child's limbs against their joints (38/39). The Tribunal found that the Claimant did not engage in any of the above acts for reasons it will elaborate on in its decision.

6.48. The Tribunal was not satisfied this policy ever been brought to the Claimant's attention.

6.49. Finally, the dismissing officer also found that the failure to attend the disciplinary hearing was an act of misconduct as the Claimant had not provided a valid reason for her non-attendance. The Tribunal interjects here that she had, given the very short notice over a weekend offered by the Respondent, the Claimant could not arrange the attendance of Mr Coulson.

6.50. What the outcome letter did not disclose was that Ms Lambert was not the only decision maker. She discussed matters with the Mr Chappell and took into account his advice as to whether to dismiss the Claimant. In the absence of documentation of this discussion it is not clear what part of the decision represents Mr Chappell's input other than the Tribunal was told that Mr Chappell informed Ms Lambert that he thought the allegations were true. A reasonable employer would not have acted in this manner. This was an example of unfairness.

6.51. The Tribunal also took into account that Ms Lambert did not volunteer the child B was her own child and this only came to light in cross examination. The Tribunal has not discounted that this may consciously or subconsciously influence the way Ms Lambert approached the evidence in relation to child B. Whilst the Tribunal accepts this was a small employer, given the real perception of bias a reasonable employer would have selected another person to deal with the disciplinary hearing. This is an example of unfairness.

6.52. The outcome letter contained a right of appeal.

6.53. It is appropriate at this point that the Tribunal make specific findings as regards the quality of the investigation.

6.54. Ms Lambert was both the investigating officer and dismissing officer. Given this was a small employer, in isolation, the Tribunal would not find this to be an act of procedural unfairness (although this should be read in the light of the Tribunal's finding as to conscious or unconscious bias).

6.55. Ms Lambert spoke to Mr Chappell, senior practitioner, Rachel Shannon, nursery practitioner, Ms MacBean, deputy manager and Ms Campbell, nursery practitioner.

6.56. Although the above four members of staff was spoken to notes were not taken of those meetings and other than the statements of Ms MacBean and Ms Campbell, there was no evidence whatsoever of what the members of staff said and this is important as the Claimant was suspended and forbidden to contact staff directly. Evidence may have been supportive. In an investigation an employer, where the employee is suspended, has to ensure evidence that both favours the employee and discredits the employee is available

6.57. Dealing with the issue of child A Ms Lambert indicated in reaching her decision she had placed reliance on the statement of Ms MacBean and the CCTV footage.

6.58. She accepted in cross examination that at no point in the CCTV footage was Ms MacBean in the same room when the incident took place.

6.59. She did not regard as significant that Ms MacBean, in her statement, said that she had entered the room ("Tod 1") when she saw the Claimant with child A on her lap. It was common ground that the incident with child A did not take place in "Tod 1" and the CCTV did not show Ms MacBean entering the room.

6.60. Given that Ms MacBean stated child A was unable to escape and became distressed, how she formed this conclusion when she was not present is difficult to fathom. What is even more difficult to fathom is that she said she spoke to the Claimant and asked why she was holding child A in the manner she was when the CCTV showed no such interaction. This would all have been clear to Ms Lambert on viewing the CCTV.

6.61. She did not challenge Ms MacBean. She must have known that the evidence of Ms MacBean was inherently unreliable yet still chose to utilise it in her decision-making process.

6.62. When this serious discrepancy was put to Ms Lambert in cross examination, she explained to the Tribunal that she believed that Ms MacBean had seen the incident from outside the room through the glass. However, that is not what Ms MacBean says. It also implies that Ms Lambert has spoken to Ms MacBean about the incident, and if she did, this is not documented. The Tribunal regarded these inconsistencies as being of considerable importance and so would a reasonable employer.

6.63. Ms Lambert did not appear concerned that Ms MacBean apparently first spoke to her about the incident on 30 July but Ms McBain then backdated her statement to 24 July 2017. It was agreed the statement was not written until after Ms MacBean had seen Ms Lambert. Ms Lambert did not consider why, if the matter was so serious, that Ms MacBean had not raised the matter immediately, particularly given she was the deputy manager. This was a further factor that a reasonable employer acting reasonably would have challenged at the decision-making stage.

6.64. Further the Tribunal had the opportunity of viewing the CCTV and has grave doubts, given the location of where the Claimant was sitting, that Ms MacBean could have seen, what she apparently now claims to have seen, through the window.

6.65. Ms Shannon, another employee, appeared in the CCTV in the incident involving child A. Whilst she was not present throughout the entire footage, she was present when the Claimant was interacting with child A.

6.66. Ms Lambert did not give any weight to the fact that Ms Shannon saw nothing that caused her concern.

6.67. She was apparently interviewed but no notes were kept so neither the Tribunal nor the Claimant knew what she did or did not see.

6.68. The Tribunal emphasises again the importance of an investigation where an employee is suspended of producing evidence that both assists the Claimant and also evidence which may not assist the Respondent or make act as mitigation in favour of the employee.

6.69. Of further concern to the Tribunal, and a matter that did not appear to be a concern to Ms Lambert but would have concerned a reasonably employer was that Ms Campbell was clearly seen in the video in relation to child A. Although she was to write a statement that criticised the Claimant it related to child B, she raised no concerns as to the Claimant's handling of child A. It is proper the Tribunal notes that Ms Campbell was not present throughout the entire video footage and that she was in and out of the room during which it was alleged child A was restrained for some 10 minutes.

6.70. Thus, Ms Lambert knew that two experienced members of staff were present, at least during part of the Claimant's interaction with child A but reported nothing of concern. Instead Ms Lambert placed reliance upon a statement of a person, Ms MacBean, that was clearly flawed.

6.71. The Tribunal has not lost sight of the fact that Ms Lambert also viewed the CCTV footage. The difficulty with the CCTV is that whilst it shows a visual image it does not record the verbal interaction between those present. This can be particularly important in the case of children as the manner in which they are spoken to can be extremely relevant. By way of illustration holding a child may appear to be a method of restraint but if it is the child says he is distressed a cuddle may be an appropriate way to proceed, coupled with supportive words.

6.72. When the incident involving child A took place Dr Deb accepted that the ratio of staff to children in the room did not comply with the statutory limits. This is a relevant factor as when the incident involving child A took place the area, she was working in was extremely busy. Neither the dismissing officer nor the appeal officer took this factor into account when analysing the evidence. A reasonable employer would have taken this factor into consideration.

6.73. The above paragraph is subject to a caveat, and an important caveat, the Tribunal is not saying that there were not sufficient staff throughout the nursery to comply with the statutory limits on the day in question.

6.74. In relation to child A there was an image of the Claimant raising her leg. This was said to be unlawful restraint to stop child A entering the room, Tod 2. The Claimant's explanation was perfectly straightforward namely there was a game whereby the children went under leg. This is a complete answer to the Respondent's submission that it was bizarre that the Claimant then let child A into Tod 2.

6.75. It was argued that the Claimant deliberately tripped child A but in the Tribunal's judgement the footage is inconclusive on this point. A factor the points away from a trip is the fact the Claimant then took child A on her knee and sought to comfort him. This is behaviour that would be inconsistent with a person attempting to be cruel or vindictive to a young child.

6.76. Child A is frequently wriggling on the claimant's knee and does slide down off her knee to her feet. Children do wriggle. He then appears to lie flat on a play mat. Dr Deb contended in her evidence that the Claimant had effectively segregated and ostracised child A and this was a factor that caused her concern. With respect the Claimant was not charged with such a matter. This cannot be held against her. Whilst the Tribunal does not say that in disciplinary proceedings allegations must be formulated with the same precision as in a criminal court, given the seriousness of the allegations this Claimant she was entitled to have spelt out exactly what it was said she had done was wrong so she could answer the allegations. The Tribunal is not satisfied that a reasonable employer would find viewing the CCTV evidence that the charges against the Claimant were made out. There is certainly no evidence of 10 minutes of restraint.

6.77. It was also said that the Claimant can be seen breaching the Respondents restraint policy because on occasions she pushes down child A's feet which are kicking in the air. The context was that child A was lying on a mat next to the Claimant. He was clearly fidgeting and annoyed. The Claimant contended child A was damaging the wall display and that was why she pushed his legs down. The CCTV does show a border being dislodged which fully corroborates the Claimant's account. Had the CCTV been reviewed with an unbiased attitude this would have been clear and a factor the points away from the Respondents presumption of unlawful restraint.

6.78. There is no cogent evidence in relation to the whole of the interaction with child A to contradict the Claimant's account that she was counselling him as to his behaviour and also comforting him.

6.79. The CCTV evidence in relation to child B, as the Tribunal has already observed, was far less clear than that in relation to child A. It was taken in the nursery garden. The Tribunal noted Dr Deb stated in cross examination that at one stage that child B bit the Claimant. When the Tribunal raised this with Dr Deb, she first stated the image could be zoomed in but then when challenged further accepted there was no evidence of a bite. The Tribunal recorded this matter as it was an example of conclusions being drawn from indistinct visual evidence.

6.80. The Tribunal also took into account that prior to suspension Dr Deb viewed the CCTV evidence in relation to both child A and child B and recommended to Ms Lambert that the Claimant was suspended and an investigation carried out. Although Dr Deb referred specifically to child A, she raised no concerns as to what she saw at that stage in relation to child B. This point is emphasised by the fact that the suspension letter refers to the Claimant's conduct restraining "a child" and does not use the plural. This is a further factor that the Tribunal found relevant in determining that no reasonable employer would have relied on the CCTV footage in relation

to child B to support the allegations against the Claimant. Dr Deb when she first saw it, saw nothing wrong.

6.81. Ms Lambert did not consider it significant that whilst Ms MacBean was present during the incident allegedly involving child B, she made no criticism of the Claimant's handling of that child.

6.82. Further the statement of Ms Campbell, who was also present during the child B incident, refers to the Claimant *"pulling down"* child B although no clear evidence can be discerned from the CCTV footage with any clarity. What is clear is that child B was on a table. It is not disputed the children were not allowed to climb on tables. The Claimant contended she picked him up of the table and putting down and was seeking to stop child B going back onto the table. This is entirely consistent with the CCTV images. At best child B can be seen sitting on the table and the Claimant picks the child up and puts the child down. Given the safety issues of a child climbing onto a table and falling it is difficult to see how the Respondent can fairly criticise the Claimant for her behaviour.

6.83. The claimant was also criticised for holding child B on her knee which was regarded as a form of restraint.

6.84. It was put to the Claimant in cross examination that she could have de-escalated the matter by taking child B out of the garden. The Claimant's explanation was sound. She could not leave the garden because the number of children with the remaining member of staff would exceed the designated limit.

6.85. The Tribunal noted that Ms Campbell was trained to level 6 which was equivalent to degree level. She saw the Claimant holding child B on her knee and in a statement said she did not know that was not what was done in practice. The Tribunal was not taken to any documents which said nursery practitioners could not have a child sitting on their knee and being held by that practitioner.

6.86. The Tribunal found that the Claimant was not "*fraudulent*" in relation to the arrangements she made as to representation at her disciplinary hearing and no reasonable employer would have so concluded.

6.87. Nor would a reasonable employer find that the failure to attend the disciplinary hearing in the time scales was an act of misconduct particularly as the Claimant gave a reason for non-attendance and sought to re-arrange within a short time frame.

6.88. The Claimant appealed against her dismissal in writing. The Respondent's disciplinary procedure does not require the grounds for the appeal to be set out (43) although the Claimant was heavily criticised for failing to do so. This is not a valid criticism given the Claimant was complying with the Respondents policy. In the light of the policy she was entitled to assume that she would be able to develop her appeal at the hearing.

6.89. By letter dated 10 August 2018 the appeal meeting was arranged and the Claimant was advised she could be represented by a *"fellow employee"* (63). No mention was made of a friend or trade union representative in accordance with the Respondents disciplinary policy. This the Tribunal finds was a deliberate attempt to exclude Mr Coulson.

6.90. An appeal hearing was arranged for the 14 August 2018 but rescheduled to 17 August 2018 at the Claimant's request.

6.91. What took place at the meeting is subject to considerable dispute.

6.92. At the appeal the Claimant pointed out the error in Ms MacBean's statement as regard TOD 1 and when asked why she had children on her knee and whether it was appropriate to hold child like that, indicated she did not know.

6.93. The Claimant was criticised for not completing incident reports in the manner she restrained the children. The Tribunal concluded the Claimant did not complete incident reports because she did not see that she had done anything wrong in having children on her knee with her arms round them. The Tribunal also observed the other experienced practitioners observed the Claimant behaving in this manner and did not even make a statement against the Claimant. Even the practitioners who did provide statements to the Respondent did not complete any incident reports.

6.94. The Claimant contended that Dr Deb was aggressive to her whilst Dr Deb's case was that the Claimant agreed that she just wanted to be paid to the end of the month and would not pursue her appeal.

6.95. Dr Deb herself accepted she was surprised at to the Claimant's apparent change in position. Ms Lambert who was present at the appeal agreed that she was surprised that the Claimant now appeared to accept her dismissal was fair

6.96. What is undeniably agreed was that the Claimant was upset. Dr Deb herself agreed the Claimant was not just upset, in the sense of slightly tearful, but was in tears.

6.97. Dr Deb contended that three times she asked the Claimant if she was steadfast in her decision that she did not wish to proceed with her appeal and that she regarded the dismissal as fair. However, this is not recorded in this detail in the notes and the Tribunal found it inherently unlikely that if the matter had been put to the Claimant three times it would not have been recorded. Dr Deb contended the Claimant was offered an adjournment but this was disputed by the Claimant and the Tribunal noted this again was not recorded in the notes of the appeal. On balance the Tribunal is not satisfied that an adjournment was offered.

6.98. A reasonable employer would adjourn particularly given the Claimant had already been sacked so was not costing the Respondent money and also having regard to the occupation the Claimant was in, given the Respondent was required to make report to external agencies, that the appeal was potentially career ending for the Claimant if she failed.

6.99. By a letter dated 20 August 2018 the Claimant's appeal was rejected (73).

6.100. The Tribunal noted that Dr Deb did not analyse the evidence in rejecting the Claimant's appeal. This is surprising given that Dr Deb accepted in cross examination that she had noted from the CCTV that Ms MacBean was not present as she claimed. Despite this she did not make any further enquiries.

6.101. Dr Deb accepted in cross examination that the decision to prevent Mr Coulson representing the Claimant at the disciplinary hearing contravened the Respondents own procedure but justified the same as it was a safeguarding issue.

6.102. She also accepted that the Claimant had never contended, before she joined Unite that she was Unite member.

6.103. Thus, at the appeal stage Dr Deb was aware of three significant issues none of which she addressed in her outcome letter.

6.104. The appeal was not a rehearing. At best it was a review although the Tribunal accepts that the failure to hold a rehearing does not mean that any errors that may have occurred at a disciplinary hearing cannot be rectified. The task of the Tribunal is to look at the entire process at its conclusion and then make a judgement as to fairness or otherwise.

6.105. However, in this case Dr Deb did not even embark upon a review. She simply dismissed the appeal with no analysis of the evidence or indication of what factors she had taken into account.

6.106. The Respondent contended that if the Claimant was treated as she alleged, she would then have written to Dr Deb to complain but had not done so. This cast doubt on the voracity of her account was the submission. The Tribunal does not accept that. The Claimant decided to pursue matters via the Tribunal as the appeal was the last stage in the Respondents internal procedure. She obtained an ACAS certificate and issued proceedings on 05 November 2018.

6.107. Great reliance was placed by the Respondent, particularly in written submissions on a report from Rotherham Metropolitan Borough Council (88 to 93) referred to by the parties as the LADO report.

6.108. It is appropriate the Tribunal makes a number of observations in respect of that report.

6.109. Firstly, the report was addressing a different issue than the one this Tribunal had to address.

6.110. Secondly the Claimant's account was not sought.

6.111. Thirdly the report itself makes it clear it was looking at procedure not the Claimant's guilt or otherwise.

6.112. The report noted that it appeared to be Mr Coulson's presence that tipped the Respondent's decision towards dismissal.

6.113. The Tribunal determined that whilst the LADO panel had viewed the CCTV evidence, little weight, both in respect of matters that favoured the Respondent and favoured the Claimant should be placed on the report for the above reasons.

7. Conclusion

7.1. The Tribunal is satisfied that the reason the Respondent dismissed the Claimant was for a potentially fair reason namely one of conduct. As the Tribunal has already set out in its judgement the hurdle the Respondent has to surmount at this stage is low. This conduct was in the mind of the respondent and this is evident from the investigation and dismissal letter.

7.2. The Tribunal is not satisfied the Respondent had a genuine reason to sustain that belief because the investigation was flawed for the reasons already set out.

7.3. The Tribunal has counselled itself that it must make its judgement as to what was known or should have been known by the Respondent as at the time of the investigation. There were clear lines of enquiry that the Respondent should have followed, given the obvious discrepancies in the evidence. It did not. Whilst the Respondent is not required to make every possible enquiry the investigation must be reasonable and for the reasons already set out it was not.

7.4. There were in the Tribunal's judgement both procedural and substantive failings by the Respondent.

7.5. Whilst the Tribunal respects the judgement of the Respondent and must not substitute its judgement for that of an employer the Tribunal is satisfied that dismissal in these particular circumstances was outside the band of responses of a reasonable employer. On a careful examination of the evidence there was insufficient evidence to justify the conclusions reached.

7.6. The Tribunal has then moved on to look at the Polkey argument. The burden is upon the Respondent.

7.7. The proper approach when applying the Polkey principle is not to look at what the Respondent would have done if it had not made the errors, rather to look at what would have happened if the correct procedure had been applied

7.8. The Tribunal has concluded that the investigation was so flawed that it cannot make a determination as to what would have happened, had a fair procedure been followed. To do so would have amounted to the Tribunal engaging upon a sea of speculation. In reaching this conclusion the Tribunal has reminded itself that sometimes it must make difficult decisions on the basis of the incomplete evidence but here the facts were so limited that no proper reasoned justification could be made for applying the principles set out in Polkey.

7.9. Did the Claimant cause or contribute to her dismissal? The Tribunal is not so satisfied that the Respondent has discharged the burden upon it in demonstrating the Claimant's conduct was culpable or blameworthy.

7.10. The Tribunal is not satisfied the Respondent has established that the Claimant's behaviour seriously contravened the Respondent's internal procedures and even if it did, that it had been brought Claimant's attention by reasonable means. The Tribunal noted that Ms Campbell was unaware that this behaviour was not approved by the Respondent and she had the equivalent of a degree in childcare. It follows the Tribunal declined to make an adjustment.

7.11. Finally, the Tribunal considered the ACAS code of practice and section 207A.

7.12. The Tribunal found no breaches by the Claimant. Indeed, the Respondent did not contend the Claimant had breached the ACAS code in submissions.

7.13. The ACAS code of practice: disciplinary and grievance procedures (2015) emphasises the right of an employee to be accompanied at a disciplinary meeting (paragraph 14)

7.14. Paragraph 11 emphasises that an employee should be given reasonable time to prepare their case.

7.15. The Tribunal is satisfied that there were breaches of both these provisions for the reasons already given.

7.16. The Tribunal then had to consider whether it would be reasonable to exercise its discretion and decided it would be so reasonable. The difficult question for the Tribunal was what percentage would be just and equitable? 25% must be reserved for the most serious cases. This is not a case where there was complete and utter disregard for the principles set out in the ACAS code of practice. There were elements of compliance. Doing the best, it can on the available information the Tribunal concluded that an upward adjustment in favour of the Claimant of 10% would be reasonable in all the circumstances.

8. **Remedy.**

8.1. The Tribunal then went on to consider remedy.

8.2. The Claimant indicated she was seeking compensation only and did not pursue reinstatement or re-engagement.

8.3. The following additional facts are relevant to the Tribunal's determination on remedy.

8.4. The Claimant was born on 28 February 1998.

8.5. The Claimant commenced employment with the Respondent in April 2016.

8.6. The effective date of termination was 06 August 2018.

8.7. The Claimant was aged 20 at the effective date of termination.

8.8. The Claimant's weeks' pay as defined by ERA96 with the Respondent was £214.84 per week gross and £208.38 net. These figures were agreed by the Respondent.

8.9. It was further agreed that as at the effective date of termination the Claimant had two years complete service and the appropriate multiplier for calculating the Claimant's basic award, given her age, was 1. The Tribunal applied Section 119 of the ERA96 in calculating the basic award.

8.10. The Claimant received a total of £606 by way of Universal Credit. The Employment Protection (recoupment of benefits) Regulations 1998 are therefore applicable.

8.11. The Claimant does not drive. The Tribunal concluded this was a limiting factor on her general employability and also restricted her opportunities to those close to home or reasonably commutable by public transport.

8.12. The Claimant is in good health

8.13. The Claimant left school with GCSE qualifications. She obtained a grade A in Art and Design, grade B in Technology and grade C in English Maths and Science.

8.14. The Claimant obtained a level III qualification in childcare. Much of her short working life has been with children.

8.15. The Claimant has not limited her job search to work with children.

8.16. She is registered with seven agencies including, Hays, Adecco, Indeed for Jobs, Sewell Wallace and the CV library.

8.17. Initially the Claimant obtained employment at Thryberg Day Nursery but when information was received from the Respondent her employment was terminated.

8.18. The Claimant then obtained employment via Adecco on a temporary basis from 18 February 2019 until Friday, 12 April 2019. During this period of time the Claimant's gross and net exceeded that which she earned with the Respondent. The work the Claimant undertook was clerical /administrative. The Tribunal observes the Claimant quickly realised she might have difficulty working with children and thus broadened her job search. This demonstrates she took reasonable steps to mitigate her loss.

8.19. The Claimant subsequently obtained, again via an agency, a job working for the Royal Mail which involves inputting information in relation to pensions. The Claimant does not know how long the job will last. The Claimant obtained that employment as recently as 03 June 2019. The Claimant is paid £10 per hour and is contracted to work 34 hours per week. The Claimant earns more than she did with the Respondent in this employment.

8.20. Not only has the Claimant been registered with seven agencies her positive efforts to obtain employment are illustrated by the fact she that she has attended three interviews, other than for the jobs she secured.

8.21. The Tribunal is satisfied on the evidence before it the Claimant has taken all reasonable steps to mitigate her loss. She was not cross examined with any force on a failure to mitigate.

8.22. It may be that this judgement will assist the Claimant in seeking to resume her career in childcare but equally the production of this judgement might lead a potential employer regarding the Claimant as litigious and thus limit her career opportunities. The Tribunal has concluded that at the moment resuming her career in child care where a reference would be so important and having her last two nursery jobs terminated makes such a resumption unlikely in the short term.

8.23. Turning to the compensatory award the Tribunal must consider whether it is appropriate to make such an award. The objective of a compensatory award is to compensate for the Claimant but not to award a bonus.

8.24. It is appropriate to make an award.

8.25. There were two difficult issues in this case the Tribunal had to resolve.

8.25.1. The first is often described as the rule in **Ging**, which derives from the decision in **Ging -v- Ellwood Lancs 1991 ICR 222.** The "rule" effectively states that all income accrued from the dismissal to the date of assessment by the Tribunal must be taken into account in calculating an employee's loss. The difficulty with this "rule" is that a Claimant may be adversely affected by the random timing of the Tribunal date and is effectively penalised if they obtain better paid

employment. As a result, a number of exceptions have arisen from the decided case law in relation to the "rule".

8.25.2. In **Whelan -v- Richardson 1998 ICR 318** the EAT emphasised the "rule" had a particularly unfortunate effect of discouraging a Claimant to take temporary employment pending a Tribunal. The EAT held that a dismissing employer could not rely on increased earnings to reduce the loss sustained prior to taking the new employment.

8.26. The Tribunal reminded itself that Parliament has directed that it must award compensation that is "just and equitable".

8.27. The Tribunal concluded the Respondent should not obtain a windfall from the fact that the temporary work the Claimant undertook via Adecco was more remunerative than the post for which she was unfairly dismissed. Similarly, the Claimant is not entitled to a windfall. The Tribunal therefore determined that having regard to the intention of Parliament it would be just and equitable to discount the number of weeks that the Claimant worked at Adecco in calculating the loss. This would mean the Respondent did not receive a windfall but similarly was no worse off. The Tribunal also concluded there were powerful public policy reasons for encouraging employees awaiting a Tribunal determination to take employment, even if temporary.

8.28. The second difficult issue related to whether the Claimant's entitlement to compensation should end at 03 June 2019 when the Claimant obtained a new agency post working for the Post Office. It again is more remunerative than the Claimant's employment with the Respondent. Balanced against that there is a risk as to the permanency of the job. The Claimant, in fairness to her, simply did not have any information as to how long the work would go on for and could not obtain that information.

8.29. Clearly the Claimant's agency post is more unstable than if she had secured permanent employment. That said, on the other hand the job may go on for many months and in the interim she may obtain permanent employment. It is always easier to secure new employment if the person is in existing employment.

8.30. The Tribunal determined, doing the best it could on the very limited evidence, that the Claimant's losses ended on 03 June 2019 but it would be appropriate to make a generous award as regards loss of statutory rights to factor in the increased vulnerability the Claimant now faces on the labour market.

9. The Tribunal's award is therefore as follows.

9.1. **Basic award:**

1 x £214.85 = **£214.85**

There is no uplift under section 2017A to the basic award (sections 124A and 118(i)(b) ERA96).

9.2. **Compensatory award:**

06 August 2018 to 03 June 2019 = 42 weeks

Discount full weeks employed via Adecco; 7 weeks

Therefore £208.38 x 35 weeks =£ 7293.30.

Deduct net earnings from Thryberg Day nursery = £373.89

Therefore £7293.30 less £373.89 =£ 6919.41.

Add 10% uplift under section 207A = £691.41

Total £7610.82

Loss of statutory rights £750

10% uplift under section 207A, £75

9.3. Total; Basic award £214.85 plus Compensatory award including loss of statutory rights (£7610.82 +£825) = **£8650.67**

The grand total is £8650.67.

The prescribed element in this case is £7610.82 (that is the loss of wages to the date of assessment).

The none prescribed element is £ 825.

The period of the prescribed element is from 07 August 2018 to 03 June 2019.

The excess of the grand total over the prescribed element is £1039.85.

Employment Judge T R Smith

18 June 2019

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