EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Miss K Turkler	**v**	Storybook Montessori Ascot Limited

Heard at:	Reading	**On:** 10, 11 and 12 June 2019
Before:	Employment Judge Gumbiti-Zimuto Members: Mrs AE Brown and Mr J Appleton	
Appearances		
For the Claimant:	Mr J Coneron (Claimant's partner)	
For the Respondent:	Ms A Francis (HR advisor)	

JUDGMENT having been sent to the parties on **12 July 2019** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

CLAIMS

1. In a claim form presented on 2 January 2018, the claimant complained that she had been subjected to detriment because she made protected disclosure; that she was unfairly dismissed, the reason for her dismissal was that she made a protected disclosure; that she was unfairly dismissed having regard to section 98 (4) of the Employment Rights Act 1996. The claimant also claimed holiday pay. That matter has been resolved by the parties and was withdrawn by the claimant. The claimant's holiday pay claim is dismissed upon withdrawal.

ISSUES

2. The issues that the Tribunal has had to consider in this case were set out in a case management order which was made on 10 August 2018. That order set out the claims and issues which the Tribunal has had to consider. At the beginning of the hearing today, it was confirmed by the parties that the case management order reflected the claim being presented by the claimant and defended by the respondent.

EVIDENCE

3. The Tribunal heard evidence from the claimant and from Ms Mary Brosnan who is the proprietor of the respondent. We were provided with an agreed trial bundle of 200 pages, a transcript of the disciplinary hearing which took place on 16 August 2017 and a transcript of the appeal which took place on 13 November 2017.

FINDINGS OF FACT

4. We can set out the circumstances of this case relatively briefly.

5. In August 2015, the claimant began working for the respondent, a Montessori nursery, as a nursery chef. Initially, the respondent only had a small number of children attending. Over time the numbers grew and by about the summer of 2017, there were in the region of about 80 children attending the nursery.

6. The claimant states that by about the summer of 2017, relations between herself and Mary Brosnan, the proprietor had become strained and there are examples of the claimant making complaints that she felt that Mary Brosnan was looking for any opportunity to get rid of her and that she was looking at her performance in order to identify mistakes. Mary Brosnan stated that whilst her relationship with the claimant had begun well, by about the summer of 2017 there had been increasing difficulties in their relationship.

7. The story for the purposes of our decision can be picked up just before June 2017 when it became apparent that there were things going missing at the nursery. The claimant got permission to install a recording device to film in the kitchen. The kitchen was away from the children and so there were no concern about covert filming. From filming the kitchen area, it was ascertained that the property which had been going missing over a period of time was being stolen by a cleaner who was being accompanied by a young child who was participating in the thefts.

8. The claimant reported the matter to Mary Brosnan, to the police and to the owner of the cleaning company, from whom the claimant demanded compensation for the property that had been stolen. The police carried out some investigation who took action limited to informing the claimant that the safeguarding issue that had been raised by her complaint ought to be reported to the relevant authorities. The police did not take any further action.

9. The nursery is subject to inspection by Ofsted and other bodies. The nursery has to comply with a number of provisions relating to the safeguarding of children. The respondent is required to develop and promulgate a number of policies about safeguarding, health and safety, and other aspects of running a nursery. The claimant, along with other employees of the nursery, was provided with instruction in relation to the respondent's various policies. We were provided with a document which is headed 'Induction Checklist' which sets out a list of, amongst other things, policies which were drawn to the claimant's attention. These included safeguarding policies and a policy about social media. There were also policies which governed the use of

mobile phones and the storage of mobile phones.

10. The respondent's policy on mobile phones required that mobile phones were kept in a locker during working hours.

11. It was a term of the claimant's contract of employment with the respondent that the claimant was to notify the respondent if she wanted to take on any other employment while employed by the respondent. Mary Brosnan evidence was that, subject to it not interfering with the claimant's employment with the respondent or the respondent's business, permission to take on other employment would not be unreasonably refused. The way that Mary Brosnan put it was to say that in principle, this was *"no particular issue"*.

12. In the summer of 2017, a number of matters came to Mary Brosnan's attention which she considered required consideration under the respondent's disciplinary policy. In a letter dated 14 August 2017 from Sue Evans, Head of Safeguarding, the claimant was informed to attend a disciplinary hearing. The disciplinary hearing was to consider three issues. The failure to comply with the respondent's mobile phone and social media policy; failure to comply with the respondent's contract of employment on restriction of employment; and an allegation that the claimant had posted a sign saying 'Miss Sophie is leaving' on a war memorial outside the respondent's premises on the morning of 8 August. The particulars of the allegations were set out in the letter. The claimant was not provided with any other information other than the contents of the letter.

13. The claimant attended the disciplinary hearing on 16 August 2017. The disciplinary hearing was conducted by Sue Evans, also present were: Mary Brosnan, Ingrid Howell, who was present as a notetaker. Somebody called 'Eddie', who provided computer support, also joined the meeting and was asked to provide some information. Accompanying the claimant at the disciplinary hearing was Jenny Taylor who is the claimant's union representative.

14. The decision-maker during the disciplinary hearing was Sue Evans. Mary Brosnan's role in the disciplinary hearing is not clear. She participates in the meeting by providing information from time to time. The presence of Mary Brosnan at the disciplinary hearing is something which Tribunal consider to be problematic.

15. The charges as laid out in the letter of 14 August were discussed at the disciplinary hearing. Sue Evans came to a conclusion on the allegations and wrote to the claimant on 4 September setting out the outcome of the disciplinary hearing.

16. The claimant was dismissed. Sue Evans found the first allegation, failure to comply with the respondent's mobile phone and social media policy, proved. She found that the claimant had failed to comply with the contract of employment in relation to restrictions during employment. She found that both those allegations gross misconduct. Sue Evans also found, in respect of the third allegation, that there was a contravention of a reasonable

management request by the claimant posting a public notice proved. She did not consider this gross misconduct. Mary Brosnan stated that this matter was not taken into account by Sue Evans in her decision to dismiss.

17. In the dismissal letter the claimant is told that she was dismissed without notice. The transcript of the disciplinary hearing shows that neither Sue Evans or Mary Brosnan appeared to know what the consequence of the decision that Sue Evans took was, whether the claimant as dismissed on notice or whether she was dismissed without notice.

18. The dismissal letter of 4 September 2017 also informed the claimant that she had the right to appeal and which could be exercised by writing to Mary Brosnan. The claimant appealled the decision to dismiss her and the appeal took place on 13 November 2017.

19. Present at the appeal was Dave Gilfinan. He is recorded as an HR consultant and Chair. Also present was Mary Brosnan. The claimant was again represented by her trade union representative, Jenny Taylor. There is a contradiction in the evidence which has been given in relation to the role of Mary Brosnan at the appeal. On the one hand, Mary Brosnan suggested that her role was not a decision-maker at the appeal; and then at another time, she suggested that her role was that of a decision-maker at the appeal.

20. The appeal transcript shows that the detail of the allegations, which had been the subject of the disciplinary hearing, were discussed. There was confusion about what the allegations were; there was confusion as to what the role of the pictures - which were the subject of discussion – was. There is no apparent resolution to the appeal.

21. The evidence of Sue Brosnan was that there was no resolution to the claimant's appeal. Sue Brosnan's evidence was that during the course of the appeal, it became clear that the claimant did not want to come back and so there was no resolution of the appeal as such because matters turned to discussing 'ways of compromise in the dispute which had arisen'. There was no agreement reached. It is not the case that any agreement was reached between the claimant and the respondent resolving the claim.

22. On 2 January, the claimant presented her complaint that she had been subjected to a detriment because of making a protected disclosure, unfair dismissal and holiday pay.

23. The Tribunal has to consider the provisions contained in the Employment Rights Act 1996 ("ERA").

24. The question of protected disclosures is governed by the provisions which are contained in Part IVA of the ERA. Section 43A ERA states that protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of the sections 43C to 43H.

25. Section 43B (1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show, among other

matters, that a criminal offence has been committed, is being committed or is likely to be committed.

26. Section 47B provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

27. A worker includes an individual who is an employee and also includes a person who had worked or had been employed so it would include the claimant in relation to matters which occurred after her employment.

28. The claimant may, by virtue of section 48, present a complaint about detriment because of a protected disclosure to an employment tribunal; and by section 103A and 111 a complaint that she was unfairly dismissed because of making a protected disclosure.

29. Section 94 provides that any employee has the right not to be unfairly dismissed. Where an employee has been in continuous employment for a period of two years, section 98 provides that in determining whether dismissal of an employee is fair or unfair, it is for the employee to show the reason or, if there is more than one, the principal reason for the dismissal and that it is a reason which falls within subsection 2. The conduct of an employee is one such reason.

30. What the law requires us to do is to consider first of all whether the employer has proved a potentially fair reason in this case, conduct. Where the employer has shown a potentially fair reason, the determination of the question whether the dismissal is fair or unfair having regard to the reasons shown by the employer 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 this is to be determined in accordance with equity and the substantial merits of the case.

31. The respondent must show that it believed that the employee was guilty of misconduct, that it had reasonable grounds upon which to sustain that belief and at the stage at which it formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances. It is not necessary that the Tribunal itself would have shared the same view of those circumstances.

32. After considering the investigatory and disciplinary process, the Tribunal has to consider the reasonableness of the employer's decision to dismiss and not substituting our own decision as to what was the right course to adopt for that of the employer must decide whether the claimant's dismissal fell within the band of reasonable responses which a reasonable employer might have adopted and if the dismissal falls within the band, the dismissal is fair, if the dismissal falls outside the band, it is unfair. The burden is neutral at this stage and the Tribunal has to make its decision based upon the evidence of the claimant and the respondent with neither having the burden of proving reasonableness.

33. The Tribunal also has to determine whether there are circumstances in which the claimant has contributed to the dismissal by reason of any conduct before the dismissal took place and where the Tribunal finds that there was a procedurally unfair dismissal, the respondent is required to consider whether it is just and equitable to make an award to the claimant in circumstances where the Tribunal concludes that the claimant but for the failure in procedure would in any event have been dismissed and what we are required to do is to determine the chance of the claimant being dismissed had a fair procedure in fact been followed.

34. Having given that explanation of the process that we followed, our conclusions in this case are as follows.

35. The first thing that we have asked ourselves is whether the claimant made a protected disclosure. The list of issues stated that "the claimant will say that she became aware that there were thefts taking place in the workplace which involved a minor". That is not in dispute between the parties. The evidence of both sides appears to have substantiated that point.

36. The list of issues continues, "the claimant informed Mary Brosnan and stated that the matter should be reported to the appropriate authorities." It is the view of the Tribunal that this has been established by the evidence. What happened in this case is that the claimant became aware that there were items going missing and following agreement with Mary Brosnan, she put up a camera which recorded an employee of the cleaning company, together with a child, stealing property. It is also not in dispute that the claimant reported the matter to Mary Brosnan (her employer) and that she also insisted on reporting it to the police and in fact did so.

37. Having regard to the contents of section 43A read together with section 43B, we are satisfied that there was disclosure of information tending to show that a criminal offence had been committed. We are satisfied that this report was made in good faith and was in the public interest. We conclude that the claimant has made a protected disclosure.

38. The list of issues goes on to provide that if the protected disclosures are proved, was the claimant, on the ground of any protected disclosure found, subject to detriment by the employer or another worker in that firstly, the claimant was reported to the safeguarding and debarring service.

39. It is not in dispute that the claimant was reported to the safeguarding and debarring service. However, it is clear from the evidence which has been given to the Tribunal that the reason that the claimant was reported to the safeguarding and debarring service is because the respondent's conclusion following the disciplinary hearing on 16 August, namely that her conduct had given rise to safeguarding concerns. Sue Evans, the respondent's safeguarding and compliance head was of the view that there were matters which needed to be reported to the appropriate safeguarding authorities and she made the report to the disclosure and debarring service. The disclosure and debarring service subsequently investigated and made no debarring order against the claimant.

40. Was that a detriment? A detriment is something that puts an employee at a disadvantage. A detriment exists if a reasonable employee would or might take the view that the action of the employer was in all circumstances her detriment. In this case there is an obligation on the part of the respondent, in an appropriate case, to make a report to the disclosure and debarring service. One such case is where safeguarding issues arises. In this case Sue Evans was of the view that there were safeguarding issues arising relating to the claimant's conduct. In such circumstances we do not consider that there was a detriment. An employee reported to the disclosure and debarring service where there is a genuine concern about a safeguarding issue is in our view not a detriment.

41. If, however there was a detriment, it is the unanimous view of the Tribunal that the claimant was reported to the disclosure and debarring service because she was considered to have been guilty of a matter which gave rise to a safeguarding issue. It was not in any sense related to or because of her making any protected interest disclosure.

42. The second detriment the claimant refers to is that the respondent refused to provide any reference for the claimant even to the extent of refusing to confirm dates of the claimant's employment. The evidence on this has not been established by the claimant. The evidence that we heard was that there were two reference requests received by the respondent: one was a verbal request and in response to that verbal request, a reference was given. We also heard evidence that a recent request for a reference has been made and that recent request resulted in a reference being given.

43. The claimant gave evidence that a request for a reference was made which was not responded to. We were shown a document from the agency concerned who had contacted the claimant to say that they had attempted to contact the respondent for a reference but had not had a response. The agency was asking the claimant to contact the employer to get them to respond to the request for a reference. The claimant did not contact the respondent. Mary Brosnan says that reference request was never received by the respondent. The Tribunal concludes that something may have gone wrong in relation to this reference request. On the face of the request for a response, there is a misspelling of Montessori.

44. In relation to the alleged detriment that the respondent failed to provide a reference, we are not satisfied that the claimant has shown that occurred.

45. The final detriment relied upon is informing the parents of children attending the claimant's cooking school for children that there were safeguarding concerns around the claimant. The claimant has provided no evidence at all to support this. The claimant asks that we draw an inference that because a number of people attended on one occasion and then did not attend on another occasion that this was because of something that the respondent did. There is just no evidence at all from which we could form that conclusion.

46. The conclusion of the Tribunal, in relation to the claimant's complaints that she was subjected to detriment because she made protected disclosures,

is that those complaints are not well-founded and are all dismissed.

47. The next issue that the Tribunal has been concerned with is the question whether the reason, or principal reason, for the claimant's dismissal is that the claimant made a protected disclosure.

48. The claimant's employment had commenced on 3 August 2015 and it came to an end on 29 August 2017. The claimant had over two years of continuous employment with the respondent. Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure?

49. The Tribunal has considered the matters which have been put before us. It is clear to the Tribunal that at the time that the disciplinary process was entered into by the respondent that there were legitimate causes for concern which gave rise to the investigations. We are satisfied that it was not part of any campaign instigated because of the claimant having made protected disclosures. We consider that there is no link between the claimant's dismissal, or being taken through the disciplinary process, and her protected disclosures.

50. The Tribunal therefore dismiss the claimant's complaint that her dismissal was automatically unfair because she made a protected disclosure.

51. We then go on to consider whether the claimant's dismissal was unfair having regard to section 98.

52. What was the reason for the claimant's dismissal? We are satisfied that the reason for the claimant's dismissal was conduct.

53. The evidence given by Mary Brosnan and by the claimant shows that allegations were put to the claimant that she was in breach of the respondent's policies. The allegation was the subject of an enquiry which resulted in Sue Evans' conclusion that the claimant had been guilty of gross misconduct. This was set out in the letter of 4 September as the reason for dismissing the claimant. We are satisfied that the reason for the claimant's dismissal was conduct. Conduct is a potentially fair reason for dismissal.

54. Did the respondent hold a belief in the claimant's misconduct on reasonable grounds? This requires us to look at the matters which gave rise to the investigation into the claimant.

55. The letter of 14 August in relation to the first allegation provided the following detail:

"Your failure to comply with Storybook Montessori's Mobile Phone and Social Media Policy (section of the Child Protection and Safeguarding Policy).

Further to your meeting about this 3rd August with Mary we are not satisfied with the explanation you provided at that time. In addition, since the meeting we have also found evidence on one of the ipads that you sent photos to

yourself which are not the ones we discussed in the meeting. There are a significant number of these, including pictures of children at the nursery which is a clear breach of the policy."

56. This matter was the subject of discussion at the disciplinary hearing. A number of points need to be made about what was being said by the claimant at the disciplinary hearing. The claimant accepted that what happened does appear to have been a breach of the respondent's mobile phone and social media policy. On two occasions the claimant did not store her mobile phone in her locker. On one occasion she kept it in her coat pocket, and on another occasion had left it at reception. The claimant provided an explanation for this.

57. The Tribunal is of the view that the claimant's ability to understand ordinary everyday English is competent. She can at times struggle to express herself in a way which is easily understood. She is not as articulate in expressing herself as somebody who is a native English speaker. However, the Tribunal is of the view that the claimant was able to explain her position in relation to the use of mobile phone. At page 13 of the transcript of the disciplinary hearing Sue Evans was able to understand and summarise the claimant's explanation. We are satisfied that the summary of the claimant's account in the transcript accords with the evidence that the claimant gave.

58. We considered the dismissal letter which sets out the conclusions of Sue Evans.

"In respect of the first matter, you did, by your own admission, and on at least two occasions, leave your mobile phone in your coat pocket and in the reception area. Further to this, you stated at the meeting that prior to the occasions that you failed to follow the policy by leaving your personal mobile phone in locations contrary to the policy and that you had reported to the senior management team other colleagues who had breached the policy. This indicated that you were fully aware of the importance of the policy and its requirements but nevertheless breached the policy.

You stated that you left your phone in your pocket because you were concerned that you would be subject to a bag search (despite offering no real basis for the origin of these concerns). I did not find the reasons you gave for breaching the policy compelling."

59. Sue Evans' conclusions omit a significant feature of what the claimant was saying. The claimant stated that she felt under pressure and that she was being singled out, this was the context in which she gave the explanation about being subject to a bag search. It is clear that the claimant's explanation read in context was that her act was inadvertent. Sue Evans has not concluded that the claimant did this deliberately and therefore rejected the explanation. The fact that it is an inadvertent act when the claimant left the phone in a pocket is in our view significant and a matter that should have been given due consideration by Sue Evans.

60. On one of the occasions, when the claimant left the mobile phone at reception, the claimant explained to Sue Evans that she thought that she

had permission to do so. It is a significant feature of what that the claimant is saying that she believed was permitted. The claimant's explanation is not expressly rejected in this respect, Sue Evans states that she "did not find the reasons you gave for breaching the policy compelling" but she does not explain why it was rejected if it was rejected.

61. The conclusion that the Tribunal has come to in relation to the first allegation is that no reasonable employer could have come to the conclusion that, in the light of the claimant's explanation which was uncontested, that the claimant's conduct was gross misconduct. The Tribunal has considered whether in fact what Sue Evans was rejecting the claimant's explanation and concluded that was not the case. The concern Sue Evans had was the claimant's expressed fear of her bag being searched, but that, in the view of the Tribunal, again is incoherent.

62. It is incoherent because what the claimant was saying was that she decided that she would not be bringing her bag into the workplace because of the anxiety that she felt about being placed under pressure, being singled out and being looked at with particular scrutiny. It was in those circumstances, in which she was not intending to bring her phone at all, which led her to inadvertently leaving the phone in her pocket and leaving the phone at reception, as opposed to keeping the phone in her locker. The Tribunal consider that no reasonable employer would have found the circumstances of the first allegation as amounting to gross misconduct.

63. A peculiarity relating to this allegation is that the allegation as set out in the 14 August letter reference is made to the claimant being sent photographs on her iPad. The transcript of the meeting contains a significant discussion about this. It was the subject of significant discussion in the evidence that we heard. However, in the decision letter there is no reference to that part of that allegation at all. It forms no part of the reason for the claimant's dismissal and the dismissing person does not appear to have regard to it in making the decision to dismiss.

64. We have considered the ACAS Guide on Disciplinary and Grievances at Work. The ACAS Guide on Disciplinary and Grievances at Work is to be distinguished from the ACAS Code of Practice and we recognise that section 207 (2) Trade Union and Labour Relations (Consolidation) Act 1992 does not apply to the guide. The guide gives guidance to employers as to how they could implement the ACAS Code. The guide provides, under the heading 'Why have a disciplinary procedure?'

"A disciplinary procedure is the means by which rules are observed and standards are maintained. The procedure should be used primarily to help and encourage employees to improve rather than just as a way of imposing punishment. It provides a method of dealing with any apparent shortcomings in conduct or performance and can help an employee to become effective again. The procedure should be fair, effective and consistently applied."

65. It seems to the Tribunal that if this employer had followed the spirit of the guide, the employer would not, in the circumstances which underpin the first

allegation, have considered that this was a matter which ought to have been dealt with in the way that it was.

66. The second allegation was the claimant's failure to comply with the respondent's contract of employment in relation to restrictions during employment. The particulars in the charge letter were that:

"I have been made aware that you are currently involved in setting up a business called "Nursery Chef" and that you are advertising this on Facebook using photos that were taken at Storybook. You used photos of yourself on Facebook wearing your Storybook name badge (a printout of this is enclosed). You have not sought to advise Mary of the former or seek permission for the latter."

67. It seems to the Tribunal that this allegation in substance is incontestable by the claimant. The dismissal letter deals with it in this way:

"You did not provide any evidence to support your contention that you had a conversation with your employer about the matter. Further to this, when your employer sent an email (subsequent to alleged conversations you claim had taken place) specifically to ask anyone with additional employment interests to speak to her about them (because colleagues had spoken to your employer about the images and the content of your social media business pages) you still failed to inform her about your self-employed business."

68. Sue Evans rejected the claimant's explanation that she had discussed the fact of the business. That has to be set against the fact that it is not suggested in any sense whatsoever, that anything that the claimant did caused any detriment to the respondent. It is not suggested that had the claimant requested permission that it would have been refused.

69. The evidence which was given by Mary Brosnan was that: *"in principle, it would have been allowed. What we would have wanted to know was simply to ensure that it did not in some way interfere with the legitimate interests of the nursery's business."* In this case, it is not suggested that there was anything in what the claimant did that did so interfere. The only sense in which it might be suggested that there was, was in relation to the use of a photograph which showed the claimant wearing an item of clothing which had a name badge which contained the respondent's logo. It is not the case that the claimant was passing off her business as having a connection with the business of the nursery.

70. In relation to this allegation, the Tribunal considers that a reasonable employer would not have concluded that, set in its proper context in all the circumstances which occurred, this allegation was gross misconduct.

71. The third allegation can be dealt with relatively shortly. This is an allegation that the claimant put up a notice saying that a member of staff was leaving in circumstances when she had been directed not to announce this because this was something which the respondent wished to manage. The claimant denies that she did so. The only evidence that the claimant had anything to

do with this is a statement which was provided by Jodie Powell which had in fact been written by Mary Brosnan. The statement said that the claimant, on 8 August, was witnessed cycling away from the Nursery at about 7.30am.

72. The claimant approached Jodie Powell for a statement for these proceedings. The statement that Jodie Powell provided to the claimant is equivocal, while she does not resile from the statement that she made; all she says is that she remembers the day and that she saw the back of a blonde female on a bicycle. The effect of what Jodie Powell says is to put doubt as to the accuracy of the statement written by Mary Brosnan for her. However, that second statement was not available to Sue Evans when she made the decision. Sue Evans did not consider this was gross misconduct.

73. The Tribunal's conclusion is that the dismissal of the claimant for the reasons which have been provided by the respondent was not reasonable. A reasonable employer would not have dismissed the claimant on those allegations because we do not consider that a reasonable employer would have considered the allegations cumulatively or individually as amounting to gross misconduct. We accept that there is some "conduct" which might be described as misconduct, but the Tribunal's view is that none of the conduct which has been identified in the allegations is such as to justify dismissal of an employee. A reasonable employer would not in the circumstances have dismissed.

74. We consider that there are other reasons why this dismissal is unfair. Whilst the letter of 14 August included one photograph, there were a number of other documents which had been referred to and were used as part of the investigation into the claimant's case which were not provided to the claimant. There were photographs that were referred to at the disciplinary hearing; there were documents which were taken in order to do a comparison of the claimant's handwriting with the handwriting of the sign. None of those documents were provided to the claimant but they should have been provided to the claimant as is made clear by paragraph 9 of the ACAS Code of Practice. The Code of Practice, to be distinguished from the Guide, is admissible in evidence, and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question. The Code of Practice is a matter that we can take into account in deciding whether the claimant was unfairly dismissed.

75. The claimant's appeal was never concluded. That is a breach of paragraph 29 of the ACAS Code of Practice. The Tribunal has considered carefully the comments made by Mary Brosnan as to why there was no resolution to the appeal. We are of the view that there should have been a resolution of the appeal even if the resolution of the appeal.

76. We also note that Mary Brosnan was involved in the disciplinary and despite the confusion in the evidence that appears to be put forward by the respondent as to her involvement in the appeal hearing that she was also involved in the appeal hearing and was part of the decision-making process in the appeal.

77. The Tribunal considers that paragraph 27 of the ACAS Code of Practice has also been breached. In that it provides that the appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case. This is a case where there were other managers in the business who could have been involved in the appeal who had not been involved in this case. Mary Brosnan gave evidence that there was Mr Gilliefan, a nursery manager, Sam Cooper and there was also an acting deputy manager. The view of the Tribunal is that this was not a business where it would have been impossible to find an alternative person to be involved in the decision-making in relation to the appeal.

78. Stepping back, we consider that the evidence that we have heard indicates that the claimant's employment, by about the summer of 2017 was doomed to come to an end. There were a number of factors which lead us to this conclusion. There is the claimant's own evidence about the difficulties in her relationship with Mary Brosnan, the proprietor; there is the evidence of Mary Brosnan about her difficulties with the claimant. There is the fact that an advertisement had been made for the role of the chef and there was, in the evidence, some suggestion that it was necessary to ascertain whether or not there was to be an additional chef or alternatively an assistant placed there but we note that this is set against the fact that Mary Brosnan's evidence that she thought the claimant was unhappy and was perhaps going to leave her in the lurch. We consider the advert was anticipating the claimant leaving and seeking her replacement. Overall, we have formed the view that this was an employment which really was unlikely to continue for that much longer. However, we are also satisfied that there were no reasons in existence at the point that the employment terminated which would have justified a fair dismissal of the claimant on the grounds of conduct.

79. The Tribunal has also considered the question of contributory fault and Polkey.

80. What we have asked ourselves is was there any blameworthy conduct on the part of the claimant which would justify a reduction in the award of compensation because of the claimant's conduct before the dismissal. We have set out above our conclusions on the allegations of misconduct against the claimant. We do not consider that the conduct of the claimant in respect of any of the allegations is sufficiently serious to warrant a reduction in any award of compensation. Such a reduction in our view would not be just and equitable.

81. The allegation relating to the mobile phone was two occasions in breach of the policy. On the first occasion, it was forgetfulness because she was rushed that caused the breach. On the second occasion, she thought she was acting in a way which was permitted. We have come to the conclusion that it would not be just and equitable to reduce the award of compensation in respect of that conduct.

82. In relation to the question whether the claimant left the note on the war memorial, the conclusion of the Tribunal, bearing in mind that for the purposes of determining whether or not she contributed to her dismissal we have to determine whether we conclude that it is something that the claimant

did, we consider that it has not been established that she did do it. We note there was the evidence of Mr Coles and then there was the evidence of Jodie Powell which was undermined, so all that is left is the supposed handwriting evidence. The Tribunal cannot reach the same conclusion as the respondent did as to the similarities of the handwriting on the note and the claimant's handwriting. We are satisfied that the claimant did not put the notice on the war memorial. There was no contributory conduct in that regard.

83. As to failing to report the claimant's business, we are satisfied that there was a clear breach of the policy in this regard. We recognise that there was some suggestion that the claimant did report the business but there is no clear evidence that she did do so and there is certainly no evidence that she was granted permission. However, we are satisfied that having regard to all the circumstances of this case, where had she done so there would have been no question of refusal of the claimant to run her business, that it is not just and equitable to make a reduction in relation to the claimant's compensatory award for the fact that there was that failure. Finally we consider that it simply would not be just and equitable to reduce the award especially in circumstances where had the respondent treated the claimant fairly, we are of the view that she would not have been dismissed for these matters. It is also significant that although Mary Brosnan was aware that the claimant was running the business, she took no steps to ask the claimant directly about it but rather went through the disciplinary process.

84. Finally, we have considered the question of whether it is appropriate for a Polkey reduction to be made. We are satisfied that there was a failure in the procedure that was followed by the respondent. However, it is our view that even if a fair procedure had been followed, there would have been no dismissal and therefore it would not be appropriate to make any sort of Polkey reduction.

85. For those reasons, the claimant was unfairly dismissed and we will go on to consider remedy.

Remedy

86. The claimant lost her job and failed to secure alternative full time employment thereafter. The claimant obtained work through an agency. She has worked as an agency worker since her dismissal and continues to work through an agency.

87. In the period since her dismissal, the claimant has applied for 60+ jobs. There was a period between September 2017 and March 2018 when she made no job applications. However, in this period the claimant continued to work as an agency worker.

88. The respondent contends that this period when the claimant was not applying for permanent jobs suggests that there has been a failure to mitigate her loss by the claimant. The Tribunal disagrees. We bear in mind that it is for the respondent to prove that the claimant has failed to mitigate her loss.

89. We note the fact that before that period, during that period and after that period, the claimant has continued to work as an agency worker. In the period before and the period after the claimant has been looking for permanent work and has failed to find full time work. She has looked for work involving all types of chef jobs. She has produced evidence of all types of chef roles that she has applied for including roles that might not be obviously suitable for her. The claimant explained that in the period when she made no applications, she gave up hope – she little income and going to interviews without success was costing her.

90. We also note that for part of the period, the claimant had no Disclosure and Barring Service (DBS) authorisation. The claimant's DBS authorisation however was reinstated after November 2017. A DBS authorisation would be required for employments in establishments like nursing homes, nursery schools, schools, the health and educational sectors. We note that there are many chef jobs which do not require a DBS and the claimant applied for work as a chef in establishments which did not require DBS authorisation.

91. With those factors in mind, we have reminded ourselves that section 124 ERA generally provides a limit of compensation for a period not exceeding 52 weeks' pay. Having regard to all the circumstances in this case we consider that in making an award of compensation that it is just and equitable that we should provide compensation to the claimant for losses for a period limited to one year. Having regard to all the circumstances in this case such as the fact that the relationship between the claimant and the respondent was poor, and the claimant was seeking opportunities elsewhere, but also recognising that the claimant would not have voluntarily left the respondent's employment without some secure alternative employment. We consider an award of compensation representing one year's loss provides just and equitable compensation attributable to the dismissal.

92. Throughout the period the claimant continued to be in work although working as an agency worker and the amount of work that she was doing was variable and unpredictable.

93. We also took into account that there was a breach of the ACAS Code of Practice. In considering the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, we note that the respondent did follow a process intended to be fair. However, there were defects in both the process at the disciplinary hearing stage and the appeal hearing. The defects particularly in the appeal stage were serious and we note that the notes of the appeal hearing show that the HR advisor to the respondent during the appeal stage was alive to the need to resolve the appeal but still they did not do it.

94. With those factors in mind, we make the following award of compensation.

    94.1 The claimant is entitled to a basic award in the sum of £1,125.00.

    94.2 We make a compensatory award in respect of the loss of statutory rights in the sum of £500.00.

94.3 In calculating loss of earnings, we have taken into account the claimant's earnings in the period of a year, the sum of £10,161.00, giving a monthly income of £846.75.

94.4 The claimant's gross loss was £1,625.00, resulting in a net loss of £778.25 per calendar month.

94.5 We multiply that by 12 to arrive at a figure of £9,339.00 loss of earnings for a period of 12 months.

94.6 The total compensatory award is therefore £9,839.00 (£9,339.00+ £500.00).

94.7 We make an award in respect of section 207A uplift at the rate of 7% on that amount. The award is therefore £ 688.73.

94.8 The total award including the ACAS uplift for compensatory loss is therefore £ 10527.73.

95. The total award for unfair dismissal that the respondent is ordered to pay to the claimant is the sum of 11652.73.

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Employment Judge Gumbiti-Zimuto

Date: 19 September 2019

Reasons sent to the parties on

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For the Tribunal office

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