EMPLOYMENT TRIBUNALS

Claimant Ms A. M. Irwin

Respondent Together For Children Sunderland Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE by CVP ON 29 MARCH –1 APRIL 2021
EMPLOYMENT JUDGE T.M. GARNON
MEMBERS MR. R. DOBSON AND MR. D. CATTELL

Appearances
For Claimant in person
For Respondent Ms A. Rumble of Counsel

JUDGMENT

The unanimous judgment of the tribunal is:

1. The claims of automatic unfair dismissal and subjection to detriment of the ground of having made a protected disclosure are not well founded and are dismissed.

2. The claim of unfair dismissal is well founded. We award compensation of £ 12309.80 being a basic award of £6477 and a compensatory award, inclusive of a 15% uplift for failure to follow the ACAS Code of Practice. of £ 5832.80. The Recoupment Regulations do not apply.

REASONS (bold print is our emphasis, italics are quotations, numbers in brackets are pages in the bundle and children, or people whose names may lead to them being identified, are referred to by letter only)

1. Introduction and Issues

1.1. The claimant, born 26 August 1975, presented a claim on 2 April 2019. She was employed from 23 March 2003 by Sunderland City Council ("the Council") until its children service transferred to the respondent on 1 April 2017. She was summarily dismissed on 8 January 2019. On 6 July 2020 Employment Judge (EJ) Johnson held a private preliminary hearing. It was to be the first of a 4 day hearing of claims of unfair dismissal, automatic unfair dismissal for making protected disclosures and subjection to detriment for that reason, which, due to the Covid pandemic, had to be postponed. The claimant attended in person and the respondent was represented by its solicitor, Mr Forster.

1.2. EJ Johnson extended dates for preparation of the final hearing bundle to 30 September and exchange of witness statements to 30 October 2020. He explained to the claimant the information she provided did not set out what she actually said when making her alleged protected disclosures. He explained a protected disclosure must disclose "information" not just ask for advice.

1.3. A list of Issues slightly amended from that agreed by the parties is:

Unfair dismissal

1.3.1. What was the reason for dismissal and was it a potentially valid one within s.98 of the Employment Rights Act 1996 (the Act)? The respondent says it believed it related to conduct
1.3.2. Did the respondent have reasonable grounds after a reasonable investigation for its belief ?
1.3.3. in all the circumstances , did it act within the range of reasonable responses in treating that reason as a sufficient for dismissal? In particular, was the claimant treated consistently with how the respondent has, or would have, treated others in the same factual circumstances?
1.3.4. Was the claimant's dismissal procedurally fair? In particular, did the investigation and dismissal procedure comply with (a) the respondent's disciplinary policy and/or(b) the ACAS Code of Practice?

Protected disclosures

1.3.5. Did the claimant made any qualifying disclosures under the Act? Was information disclosed to the respondent by her which in her reasonable belief tended to show a relevant failure in particular (a) a miscarriage of justice had occurred, was occurring or was likely to occur (b) the health and safety of an individual had been, was being or was likely to be endangered?
1.3.6. If so, did she reasonably believe it was made in the public interest?
1.3.7. If she made any protected disclosures, was she subjected to a detriment by being suspended, or by any act which did not amount to dismissal, on the ground she made them?

Automatically unfair dismissal

1.3.8. If she made a protected disclosure, was the reason or principal reason for her dismissal the making of that disclosure?

1.4. The claimant submitted a list of further matters she describes as issues but, on examination, most appear to be further detail in support of her case . They are
(a) Why did the respondent deem it necessary to suspend on an 'allegation' without asking for her version of events?
(b) When she was suspended on 7 September 2018 did the respondent keep confidentiality?
(c) Was it acceptable she waited five weeks from suspension with no communication to be told what the 'allegation' entailed?
(d) During the suspension and investigatory procedure did she receive regular reviews and support?
(e) During and after the investigatory meeting on 11 October did the respondent ask for information from witnesses requested by the claimant?
(f) Did the claimant make a disclosure in October 2018 to Jill Colbert and/or Karen Davison when she was contacted by telephone.
(g) Was it fair Ms Davison made the decision to suspend and chaired the disciplinary meeting ?
(g) Was the process as a whole done in an acceptable timescale?
(h) Why did the respondent issue an e-mail to all staff **after** dismissal explaining personal relationships and safeguarding but not whilst the claimant was employed?
(i) Was the time deliberating and deciding the outcome of the disciplinary hearing only 15 minutes or a longer and appropriate timescale to weigh up all the evidence, deliberate and make a decision?
(j) Why did the claimant receive a P45 in the post before the disciplinary hearing? Was the decision to dismiss her already made before the disciplinary hearing?
(k) During the disciplinary hearing, did the claimant disclose a colleague had been accessing the respondent's systems inappropriately? If so, was this person investigated?
(l) The claimant having applied to a "Step Up To Social Work" programme and been invited to attend a second round of interviews in October 2018, did she not get the chance to attend this interview due to her suspension on the ground she made protected disclosures?

(m) Why was new management with social care backgrounds put into place after the dismissal but the claimant only had a line manager she believes was stressed, under pressure and sending her texts saying 'he wanted rid of her'?
(n) Were redundancies and restructure in the organisation since the dismissal relevant ?
(o) The claimant having received documents including personal details in a large 'flimsy' envelope in the post after the disciplinary meeting, some documents having been opened and/or lost was the respondent or Royal Mail to blame and did an investigation take place to find out what happened

1.5. We asked the claimant if she was saying the delay in investigation would have been less and she would not have been subjected to other detriments if she had not asserted the respondent was inefficient in dealing with child protection issues generally and she would not have been dismissed but for being critical of the respondent . She confirmed both were part of her case.

2. Relevant Law

2.1. Section 43A of the Act says a "protected disclosure" is a qualifying disclosure (defined by section 43B) made by a worker in accordance with any of sections 43C-H.

2.2. Section 43B defines "qualifying disclosure" and includes "*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 one or more of the following—*

(a) a criminal offence has been committed, is being committed or is likely to be committed,

(b) a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) the health or safety of any individual has been, is being or is likely to be endangered

(f) information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

2.3. Section 43C says
(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …(a) to his employer,

2.4. Section 43L(3) says "*Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention*."

2.5. A communication by a worker does have to give **information**. Ms Justice Slade (Slade J) said in Cavendish Munro Professional Risks-v-Geduld **simply** voicing a concern, raising an issue or setting out an objection is not disclosing "information". Her example was a nurse saying "*there are health and safety breaches on Ward 10"* (which gives no information) and adding "*because there are sharps lying around and it has not been cleaned for a week*" (which does). Merely expressing an opinion is not enough Goode-v-Marks and Spencer plc EAT 0442/09. In Norbrook Laboratories (GB) Ltd-v-Shaw 2014 ICR 540 Slade J, held two or more communications taken together can amount to a qualifying disclosure, even if each on its own would not. If facts are disclosed to,or drawn to the attention of, the employer, the employee need not spell out how they show which

relevant failure. Many legal obligations can exist, so there is plenty of scope to be mistaken as to which covers a particular situation. A worker will not be deprived of protection because she is wrong about what the law requires. However, that leaves open how specific she must be about the breach of obligation or miscarriage of justice she believes is occurring, or is likely to. In Fincham-v-HM Prison Service EAT 0925/01 Elias J. observed there must be some disclosure which identifies, albeit not in strict legal language, the breach of legal obligation on which she is relying'. In Bolton School-v-Evans 2006 IRLR 500 the EAT held although the employee did not in terms identify any specific legal obligation it would have been obvious , so could be a qualifying disclosure .

2.6. In Blackbay Ventures Ltd-v-Gahir 2014 ICR 747 the EAT said save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified. In Eiger Securities LLP-v-Korshunova 2017 ICR 561 EAT a financial instruments trader who " challenged" her line manager about his practice of logging in to her computer and conducting trades with clients without informing them they were dealing with him instead of her, failed to show a qualifying disclosure. She reasonably believed only her line manager was breaking some industry guidance or rules. In Twist DX Ltd-v-Armes EAT 0030/20, the EAT held Fincham was merely identifying a missing evidential feature in a case where the alleged qualifying disclosures were essentially grumbles about colleagues. The only "rule" is the words of S.43B(1) itself. It is not necessary for the person making the disclosure to have stated explicitly she reasonably believes it tends to show a specific if it is 'obvious' but , in less obvious cases, it might lead a tribunal to conclude the worker was merely setting out a moral or ethical objection

2.7. Geduld, which we believe to be entirely correct on its facts, runs the risk of being misinterpreted as saying allegations cannot be a protected disclosure. A communication, a document, or a series, may contain allegations, concerns **and** information. Information may be couched in the language of allegation, as in Kilrane-v-London Borough of Wandsworth 2018 ICR 1850. Lord Justice Bean (Bean LJ.) in Simpson-v-Cantor Fitzgerald Europe affirmed what is needed is ***"sufficient factual content and specificity such as is capable of tending to show"*** one matter in s.43 B.

2.8. Darnton-v-University of Surrey and Babula-v-Waltham Forest College confirmed the worker making the disclosure does not have to be correct. Her belief must be reasonable. Darnton said whether there was a correct factual basis for the disclosure is "*an important tool in determining whether the worker held the reasonable belief that the disclosure tended to show a relevant failure.*

2.9. The words "*is made in the public interest"* were inserted for disclosures made after 25 June 2013. Before then, if an employee reasonably believed what he was saying tended to show a relevant failure, disclosure could be made in respect of a legal obligation owed only to himself Parkins-v-Sodexho. Parliament intended to require a disclosure to serve some public interest, but it may serve a private one as well. The legislation does not require it to be in the interests of **all** the public, only a significant sector, Chesterton Global-v-Nurmohammad 2018 ICR 731.

2.10. Section 47B includes

(1) 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.
(*2) This section does not apply where—*
(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

2.11. Section 48 adds

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B."

(2) On (such a complaint) *it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

2.12. In s. 47B, one is not looking for the **principal** reason, but an effective cause. Elias LJ said in Fecitt-v-NHS Manchester 2012 ICR 372, "*if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower*", it will be subjection to detriment on that ground and later " *Once the employer has satisfied the tribunal he has acted for a particular reason,… that necessarily discharges the burden of showing the proscribed reason played no part in it. It is only if the tribunal considers the reason given is "false", whether consciously or sub consciously, or the tribunal is being given something less than whole story that it is legitimate to infer discrimination*". In Timis-v-Osipov 2018 EWCA Civ 2321 Lord Justice Underhill discussed the dividing line between a detriment and a dismissal claim. As in this case we find nothing done by the employer was influenced by any protected disclosure we need say no more about it.

2.13. Section 98 of the Act includes:
(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 dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it relates
(a) relates to the capability ..of the employee for performing work of the kind he was employed by the employer to do
(b) relates to the conduct of the employee."
(3) In subsection (2) (a) –
(a)" capability" , in relation to an employee , means his capability assessed by reference to skill, aptitude ,health or any other physical or mental quality.

2.14. Abernethy-v-Mott Hay & Anderson held said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by it which cause it to dismiss the employee. That is what the employer has to show. Sometimes it will "mis-label" the reason. In Abernethy it said the employee was redundant, which he was not. The proper label was found to be capability due to his unwillingness to change, a "mental quality". Misconduct and incapability are sometimes hard to differentiate. Sutton and Gates (Luton) Ltd-v-Boxall held a reason related to capability if the claimant is trying her best and failing, but relates to his conduct if she is failing to exercise to the full such talents as she possesses. Thomson-v-Alloa Motor Company held a reason relates to conduct if, whether inside or outwith the course of employment, it impacts on the employer/employee relationship. The ACAS Code of Practice talks of "the employment implications"of the conduct. Gunn-v-British Waterways held the effect on the employer's reputation was relevant. In ASLEF-v-Brady Elias P said: *Dismissal may be for an unfair reason even where misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that ….. It does not follow, therefore, that whenever there is misconduct which could justify dismissal, a tribunal is bound to find that that was indeed the operative reason, even a potentially fair reason. For example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the reason for the dismissal – the operative cause – will not be the misconduct at all, since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal.*

*Accordingly, once the employee has put in issue with proper evidence a basis for contending the employer **dismissed out of pique or antagonism**, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt, it will not have done so.*

2.15. In Kuzel-v-Roche Products Mummery L.J. the employee argued the given reason was a cloak to hide the real reason which was he had made a protected disclosure:

58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

2.16. Just as in discrimination cases whenever the question is the "reason why" the treatment was afforded, Glasgow City Council-v-Zafar 1998 ICR 120 held unreasonableness does not show the reason why, neither does incompetence, Quereshi-v-London Borough of Newham . In Law Society-v-Bahl, Elias J, as he then was, said

99. That is not to say the fact that an employer has acted unreasonably is of no relevance whatsoever. The fundamental question is why the alleged discriminator acted as he did. If what he does is reasonable then the reason is likely to be non-discriminatory. In general a person has good non-discriminatory reasons for doing what is reasonable…
100. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, that is likely to be a full answer... It need not be, because it is possible he is subconsciously influenced by unlawful discriminatory considerations…
101. The significance of the fact treatment is unreasonable is a tribunal will more readily… reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility.

2.17. Section 103A provides an employee is to be regarded as unfairly dismissed if the principal reason for it is that he made a protected disclosure.Difficult questions of causation arise when a disclosure is preceded, accompanied or followed by behaviour on the part of the employee which is unacceptable to the employer. In Bolton School-v-Evans 2007 ICR 641 a teacher was concerned a new computer system could be hacked into by students. He raised his concerns and the Head of IT agreed the system should be tested. Mr Evans then hacked into the computer to demonstrate its security failings, informed the headteacher but failed to tell IT services, which, on discovering the intrusion, shut down the entire system, causing losses of £1,000. The Court of Appeal held Mr Evans was disciplined for hacking into the system, **not** for informing the school its system was insecure. He had made a protected disclosure, but the principal reason for disciplining him was the belief he had committed an act of misconduct.

2.18. Hadjioannou-v-Coral Casinos contained guidance approved by the Court of Appeal in Paul-v-East Surrey District Health Authority. An argument one employee received no sanction or a lesser one than the claimant is relevant where

(a) there is evidence employees have been led to believe that certain conduct will be overlooked or dealt with by a sanction less than dismissal
(b) where evidence shows the purported reason for dismissal is not the genuine principal reason
(c) where, in truly parallel circumstances it was not reasonable to visit the particular employee's conduct with as severe a sanction as dismissal.
One only gets to that point if the other person has been caught doing something wrong

2.19. Section 98(4) of the Act says:
"*Where an employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in all 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*
(b) shall be determined in accordance with equity and the substantial merits of the case."

2.20. An employer does not have to prove, even on a balance of probabilities, the misconduct it believes took place actually did. It simply has to show a genuine belief. The Tribunal must determine, with a neutral burden of proof, whether it had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable, British Home Stores-v-Burchell as qualified in Boys & Girls Welfare Society-v-McDonald.

2.21. In A-v-B 2003 IRLR 405 the EAT said:
"In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations … where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges. This is particularly so where, as is frequently the situation, the employee is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence .. may lose their reputation, job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an even-handed approach to the .. investigation would not be reasonable in all the circumstances.
Whether an employer has carried out such investigation as is reasonable in all the circumstances also necessarily involves a consideration of any delays. ***In certain circumstances, a delay in the conduct of the investigation might of itself render an otherwise fair dismissal unfair. Where the consequence of the delay is the employee is or might be prejudiced, for example because it has led to a failure to take statements which might otherwise have been taken, or because of the effect of the delay on fading memories,*** *this will provide additional and independent concerns about the investigative process which will support a challenge to the fairness of that process.*
Where the investigation is defective, it is no answer for an employer to say that even if the investigation had been reasonable it would have made no difference to the decision. If the investigation is not reasonable in all the circumstances, then the dismissal is unfair ***and the fact it may have caused no adverse prejudice to the employee goes only to compensation****."*

2.22. In Gogay-v-Hertfordshire County Council, Lady Justice Hale (as she then was) dealt with a case where social services were looking into a very serious allegation involving a child in its care. The issue was whether the Council acted reasonably in suspending the claimant while they investigated the circumstances. The investigation concluded there was no case to answer, but the

claimant suffered as a result of her suspension. H.H. Judge O'Brien held the Council were in breach of contract (1) because they had no reasonable grounds for suspending the claimant and **failed to carry out a proper investigation before suspending her** (2) because they had no reasonable grounds for believing the child was likely to suffer significant harm unless she was suspended.

2.23. Lady Hale cited the Warner Committee (Report of the Committee on Inquiry into the Selection, Development and Management of Staff in Children's Homes, 1992) as of interest, although it did not have statutory force "*When allegations are made against a member of staff, employers have to balance two considerations: the need to protect children and the need to ensure staff are treated fairly. These are difficult to reconcile **given the prevalent perception of staff that suspension from duty implies at least a measure of guilt on behalf of the individual***". Judge O'Brien rejected the argument it was for the Council, rather than the court, to judge it had 'reasonable cause to suspect' the child was at risk, This argument was plainly wrong, there must be objectively reasonable grounds, not simply grounds which the decision-maker thinks sufficient: Castorina-v-Chief Constable of Surrey

2.24. The point was not whether the Council should have conducted some inquiries. Clearly it had to. The point was whether it should have suspended the claimant **in the way it did** simply because such inquiries were being made. The Court held there was no 'reasonable and proper cause' for the Council to act as it did so its actions were indeed in breach of its implied obligation not without reasonable and proper cause to act in a way which seriously damaged the relationship of confidence and trust. Her Ladyship added "*But in reaching this conclusion, I would not want local authorities to feel in any way inhibited in making the inquiries which they feel appropriate to safeguard the children in their care. Nor should there be any doubt that if there is a conflict between the interests of a child in their care and the interests of an employee, the interests of the child should prevail. But the employee is entitled to something better than the **'knee jerk' reaction** which occurred in this case*."

2.25. As a general rule, a person who has been a witness to acts alleged should not hold an enquiry or decide the outcome. In Moyes-v-Hylton Castle Working Mens Club, an incident was observed by two officials of the Club who went on to be involved in the investigation and the disciplinary hearing. The EAT held no reasonable observer would conclude that in view of their dual role justice was, or appeared to be, done. However, suspension is a neutral act and there is no case we know which says a manager who authorises it should not hear the disciplinary case.

2.26. Strouthos-v-London Underground held an employee should only be found guilty of disciplinary offences "charged" in the sense of having a particular allegation put to her so she knows what she has to answer. Pill LJ said *It is a basic proposition, whether in criminal or disciplinary proceedings, the charge against .. the employee facing dismissal should be **precisely framed**, and that evidence should be confined to the particulars given in the charge"* and later an "*employee should be found guilty, … only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged.*

2.27. Even an admission of some misconduct may not bring the decision to dismiss within the band of reasonable responses. The Court of Appeal in Whitbread Plc-v-Hall 2001 IRLR 275 said:
Where misconduct is admitted by the employee, the requirement of reasonableness in s.98(4) .. relates not only to the outcome in terms of the penalty imposed by the employer but also to the process by which the employer arrived at that decision. Accordingly, the employment tribunal should not simply ask whether dismissal fell within the "band of reasonable responses" but should also apply that test to the procedure used in reaching the decision to dismiss. The requirements of s.98(4) and the expressions of principle by the House of Lords in Polkey-v-AE Dayton Services indicate a

procedural as well as substantive element to the band of reasonable responses open to an employer faced with such misconduct.
Although there are some cases of misconduct so heinous that even a large employer well versed in the best employment practices would be justified in taking the view that no explanation or mitigation would make any difference, in the present case the misconduct in question was not so heinous as to admit of only one answer. Dismissal had been decided by the applicant's immediate superior who had a bad relationship with him and had gone into the process with her mind made up. In the circumstances, that method of responding was not among those open to an employer of the size and resources of these employers."

2.28. Ladbroke Racing-v-Arnott held a rule which specifically states certain breaches will result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of fairness is superimposed upon the employer's disciplinary rules and requires an employer to consider all the facts relevant to **the nature and cause** of the breach, including the degree of gravity. Having a rule a specific act will attract a certain penalty without regard to the facts or circumstances other than the breach itself is unfair. If that were a legitimate approach it would follow any breach of rules so framed could constitute gross misconduct irrespective of the manner in which it occurred.

2.29. However, rules are not irrelevant. In Meyer Dunmore International-v-Rodgers,there was a rule against fighting. Phillips P said: *"Employers may wish to have a rule that employees engaged in, what could properly and sensibly be called fighting are going to be summarily dismissed. As far as we can see there is no reason why they should not have a rule, provided – **and this is important –it is plainly adopted, plainly and clearly set out, and great publicity is given to it** so every employee knows beyond any doubt whatever if he gets involved in fighting in that sense, he will be dismissed.*

2.30. When considering sanction, previous good employment record is always relevant. A reasonable employer should always **consider** warning rather than dismissing but Retarded Childrens Aid Society-v-Day held if an employee does not recognise he has done wrong and is "*determined to go his own way*", it may be reasonable for the employer to conclude a warning would be futile.

2.31. In all aspects substantive and procedural Iceland Frozen Foods-v-Jones (approved in HSBC-v-Madden) and Sainsburys-v-Hitt, held we must not substitute our own view for that of the employer unless its view falls outside the band of reasonable responses. In UCATT-v-Brain, it was put thus:
"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not.

2.32. Taylor-v-OCS Group 2006 IRLR 613 held whether an internal appeal is a re-hearing or a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages "*with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness, or lack of it, of the process and the open mindedness (or not) of the decision maker the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.).

2.33. "Gross misconduct" is defined in Laws-v-London Chronicle (Indicator Newspapers) as conduct which shows the employee is fundamentally breaching the employer/employee contract and relationship. An example is wilful failure to obey lawful and reasonable instructions which may be in the form standing orders **made known clearly as essential** for employees to follow. Lord Justice

Elias in Adesokan-v-Sainsbury's Supermarkets Ltd clarified the law. Mr Adesokan had been employed for 26 years before he was summarily dismissed for gross misconduct and was in a very senior position. The case against him was that by his actions, or more accurately his inactions, he undermined what Sainsbury's call the Talkback Procedure (TP) which is deeply engrained in its culture and is a critical part of its strategy for achieving a desirable working environment. The question was whether he had committed gross misconduct and if so, whether it justified summary dismissal. The judge at the trial found although he was not dishonest and had not made a conscious decision not to eliminate the effects of another manager's actions, but his failure to take active steps to remedy the situation amounted to gross misconduct. On appeal his Counsel submitted his conduct was not capable, as a matter of law, of amounting to gross misconduct. For someone with such long and unblemished service who was not even responsible for sending the initial email undermining the TP, it was too harsh to dismiss without notice for a single act of negligent wrongdoing. The neglect was not so serious as to be "gross". On appeal Elias LJ addressed when can misconduct properly be described as "gross"? He cited from earlier cases to show it was a question of fact for the trial judge but gross misconduct was not limited to cases of intentional wrongdoing. His Lordship then said the focus is on the damage to the relationship between the parties. However, a key point was Mr Adesokan's seniority, knowledge and unambiguous understanding of TP.

2.34.Ms Rumble cites Sandwell & West Birmingham Hospitals NHS Trust-v-Westwood EAT/0032/09 (para 113) where the EAT characterised gross misconduct as either gross negligence or a deliberate and wilful contradiction of the contractual terms. This requires a tribunal to consider the conduct and whether it was reasonable for the employer to regard it as having the character of gross misconduct on the facts. She says in the present case it was.

3. Findings of Fact

3.1. For the respondent we heard Susan Margaret Toulson, Karen Jayne Davison, Susan Williams, Stephen George Renwick and Angela Victoria Bremner. We read a statement of Victoria Louise Greensmith who was unable to attend. The claimant gave evidence and called her friend (KS). We had an agreed document bundle.

Background

3.2. The claimant was employed by the Council from March 2003. Its children service, and her employment, transferred to the respondent in April 2017 partly due to it being placed under 'Direction' by the Department of Education. Its vision was '*to ensure that the lives of children and families are kept safe from harm and to ensure they have the opportunity to fulfil their potential*' (490)

3.3. Her close friend, KS, has had custody of X (her granddaughter and the claimant's God-daughter now 9 years old) after X came to physical harm in the care of her mother (L) when X was a baby. KS is the mother of X's father who is no longer with L. KS was given custody of X. L was only allowed supervised visits to X with KS in attendance at KS's home twice a week for two hours each visit.

3.4. L started asking for unsupervised contact to take X out alone from around March 2018. KS was contemplating L having this as she did feel sorry for X not being able to have mother/daughter time like her friends and X was asking more questions about why did she not live with her mother.

3.5. KS asked the claimant as a friend for advice at that time. The claimant told her she was "*caught in the middle as a friend and a professional*" but, if it was herself, she would be against X having alone time with L. KS rang social services and was told '*do it at your own risk'*. She decided against

allowing unsupervised access as she would not be able to forgive herself if anything happened to X whilst in L's care as when L did visit for supervised contact she was always on her mobile phone. The claimant says*" **as a professional** I told her to get further advice from social services to which she said she had contacted them and advice given was 'its at your own risk'. **I did not find** this advice logical or beneficial as my main concern was social services were basically saying she could let biological Mum have unsupervised contact .. but if anything did happen .. the blame was with KS. As a professional I thought to myself 'if KS does let X have unsupervised contact I will have to put in a safeguarding referral' as X could be at risk. I knew deep down KS would not allow this but was 'thinking about it' so I thought I would observe the situation."*

3.6. L began to put more pressure on about having alone time. She was beginning to say to X ' *You are coming to my house to sleep over and I will get you some LOL dolls*'. X was getting confused so KS spoke to the claimant again who gave her a number for the Integrated Contact Referral Team (ICRT) who specialise in safeguarding procedures. This was around June/July 2018. When KS rang ICRT the worker there said '*if L wants more contact she would have to go to court*'. KS rang the claimant saying the woman on the phone was lovely and advised she tell L she would have to take KS to court to get unsupervised contact. KS said she was happy to tell L this. The claimant's version is "*After several weeks passed Biological Mum was still applying pressure on KS and even X. KS had telephoned social services and was given the answer 'you can take it to court'. KS knew this would be costly and did not want this to happen, all she wanted was help, support and advice to know where she stood legally with unsupervised contact"* and later "*Me being professional and a thorough person as soon as I returned to the office* ***I checked*** *to see if my friend had telephoned to which the case note said she had contacted ICRT and was happy with the advice given. As a professional reading this gave me a sense of security and validation that hopefully this issue could be resolved and I felt that it did not need any further intervention at this time i.e a safeguarding referral"*. As part of her role the claimant had access to both the EHM (Early Help electronic recording system) and LCS (Social Care electronic recording system) to enable effective information sharing with Social Care for families Early Help were engaged with who may have a history of social care intervention. Her access was for when it was appropriate to her own professional duties. When she "*checked"* **she accessed X's LCS record though X was not assigned to her as part of her job.**

3.7. KS told L in the next supervised visit she could not have unsupervised access. L replied she had been contacting social services as well and was told she had rights to see X alone. An argument ensued and L walked out. Police became involved as L accused KS of assaulting her. This was an upsetting time for the family. KS felt she had to stop all contact as there was no other option. KS telephoned solicitors for advice, but this was going to cost and she could not afford it. L then sent KS text messages begging to see X. L sounded desperate in these texts. It was always in the back of KS's mind L once said that if contact ever stopped, she would just take X. The claimant knew this.

3.8. On 6 September 2018 KS messaged the claimant on Whatapp to say she received a letter from L's solicitor (399-401) saying L had parental rights. KS believed she had residency, guardianship and "grandparent's rights" but was unsure what that meant. The claimant's initial thought was she could not believe this was ongoing so was going to ask for professional help "***as I believed the help and advice given to both parties was not acceptable. I sent personal messages to KS to say to take extra precautions to safeguard X (409-410) Messages were going back and forth to KS and L and conflicting stories regarding misinformed information regarding rights etc (399-411- mainly 405-406)*** The claimant told KS she would benefit from help and support from a social worker as this problem had gone on too long and as the letter from the solicitor said L had rights to X she could just turn up and take X despite only ever having supervised visits from birth.

3.9. It is very clear from the texts the claimant was "taking KS's side" in any dispute with L. She was a long-standing employee who had made safeguarding referrals previously in relation to children and families in the course of her work. If the claimant or KS were concerned about the advice and support provided by the respondent, a complaints procedure is available and publicised. Whatever the rights and wrongs, an organisation duty bound to act in the best interests of children should not be seen to have a worker acting on what the claimant called "gut instinct" by taking sides . **E.J. Garnon asked her if she did not see what could have happened if that came to light. She said that was a difficult question but she felt X was at risk, so did what she thought was right.**

3.10. When KS was fighting for X as a baby, KS says she " *had a nice social worker who was helpful but once I got custody of X that help and support stopped and when I did try and ask for help and support I never even received a phone call or a home visit from Together for Children*". KS was willing to have a social worker involved to advise the family what outcome was the best for all of them. KS was confused and unclear what next steps to take. The question in her mind was did she have to see a solicitor. Neither KS nor the claimant saw the difference between social services being involved when X had come to harm as a baby, and getting involved in a dispute about contact between two individuals both of whom had "rights". The claimant was critical of workers in social care telling KS it was a "private law" matter. That was correct, even if she and KS did not like it.

3.11. The claimant spoke to Craig Allen, a Social Worker (SW1) whom she thought was experienced for advice, as her own line manager, Mr Paul Wilson, was not in the same building. SW1 said more information about guardianship/residency was needed. She spoke to a newly qualified social worker Bethan Hutchinson (SW2) who said the same. She then telephoned ICRT and asked if KS could have a social worker and if this constituted a safeguarding referral the problem was not getting solved. She thought she was speaking to a social worker but found out later the person, Louise Bell was in business administration and had only weeks of experience. No advice was given so she asked ICRT if they could check the files to see what was in place. The claimant says she was quite vocal to Ms Bell that the respondent had not given KS and X the support they should.

3.12. The claimant says "*I know **as a professional** this is what you do when you have concerns regarding a safeguarding matter and I thought I was speaking to a professional social worker who specialised in safeguarding and risk procedures. I stated to the 'social worker' that this family had been left for several months with no help, support or advice and relayed the whole story to her and said the child could be at risk of **possible harm or abduction** by real mother and asked if a social worker please visit the house of KS. I asked for advice as what the next steps would be as I was familiar with the family as the child was my goddaughter and asked if they could contact me back, or KS, as to what was required by law on residency/guardianship orders. I later found out this 'professional' was in fact only in the job weeks and was actually business admin **who reported me**. This person could not understand my accent and referred to me as 'Mandy' (200-201). No telephone calls are recorded by TFC. **The advice given was to look on the system myself to see what was in place and more advice would to be given and someone would contact me back.** I was so frustrated and felt pressured and helpless as no one was helping and a child could be at risk of possible abduction. **I quickly went on the records as requested by ICRT but I had so much work of my own to do I thought' I shouldn't be doing this, ICRT should be'** I then messaged KS to say I have telephoned for help and advice and someone will call back and assist her (399). In my professional opinion I did not feel that advice and support given over several months from Together For Children was helpful or adequate. "*

3.13. The Safer Working Families policy states there may be occasions and circumstances in which people have to make decisions or take action in the best interest of the child which could contravene guidance where no guidance exists and there was no policy or procedure on safeguarding and

personal relationships. Therefore, she looked on X's record to see if KS had guardianship or residency. She looked for seconds and quickly came out of the records as she had over 20 families to concentrate on. She thought ICRT would step in to help and support KS. She did not herself make a "safeguarding referral". KS knew the claimant worked in the Children Centre but did not expect her to get suspended over "*only giving a number to ring*" for ICRT. That was not why she was suspended. The reason was her looking at X's records.

3.14. We find the claimant's and KS's versions accurate save in two respects. The claimant in cross examination admitted neither SW1 nor SW2 advised her to access records to find out the legal status of X. She initially said Ms Bell did, but when asked by Ms Rumble whether Ms Bell had told her to enter X's records, she replied "***more or less***". We find Ms Bell did not tell her to access the records, and the claimant did not say X was at risk of abduction .This does not mean we think the claimant is "lying" rather with hindsight giving an version of what she wishes had been said by and to her. Unless the case was assigned to her, she should not have accessed the records because of the highly confidential and sensitive nature of the information they contain. We asked Ms Toulson what the claimant **should** have done. Her reply was to advise KS to go to ICRT, and call the claimant back if she was dissatisfied with their response. If she did, the claimant should take it to her manager so he could raise it with ICRT's manager and find a solution.

3.15. We also asked Ms Toulson whether the respondent may have been required to provide a report on the question of unsupervised access and, if so, how it would look if it were discovered the claimant had been accessing records to advise KS. Her reply was normally the court appoint a welfare officer from CAFCASS not the respondent, but it may be asked to contribute and would look bad.

3.16. These events spanned 3-6 September. The claimant accepts she had a supervision with Mr Wilson on 5 September but did not bring any concerns up with him as it was only on 6 September she received the more worrying messages. KS told us **after March 2019** the case about contact had gone to Court and L was awarded two evenings unsupervised access and one "sleep over". It therefore appears L is not as "dangerous" as KS and the claimant thought. This decision followed a CAFCASS report, KS's appointment for which had clashed with the claimant's appeal hearing on 1 March 2019. Ms Rumble put to KS that if it had come to light an employee of the respondent had been giving information or advice **to L** from X's confidential records, she would be furious and rightly so. She agreed. KS and the claimant say, and we completely accept, the claimant did not in fact give KS information from the records , but it could have appeared she did.

Suspension and Investigation

3.17. Ms Davison is Director of the Early Help Directorate which gives early help to families **who have not reached the point of statutory intervention**. She has been a qualified teacher for 33 years and was a Headteacher for 6 years. She then worked as a Local Authority School Improvement Officer in 2008, then Assistant Director for family services in 2012. She has experience of disciplinary hearings. Before the investigation in 2018, her direct knowledge of the claimant was limited to her being a Grade 3 Early Help Worker in the team covering Washington and North Sunderland.

3.18. Ms Davison received an e-mail from Ms. Laura Brennan (a Manager in ICRT) on 6 September 2018 alleging the claimant had accessed the social care records of X and there was a concern this may have been for reasons other than undertaking her professional role. **When the claimant had rung Ms Bell she told her** she knew X and KS who had stopped L's contact with X and received a letter demanding it. **The claimant was not hiding her connection with the family**. The advice KS had been given was it "private law" and she should seek legal advice. Ms. Brennan had done a limited investigation with the ICT service which showed the claimant had accessed X's social care

record on 6 September 2018 and on 4 July. Ms. Brennan asked the matter be looked into (180-182). **All employees have an obligation to identify and report data breaches.**

3.19. Ms. Brennan's e-mail suggested she had accessed X's social care records to give advice to her friend. **That does not necessarily conflict with her duty to protect a child at risk, but needed to be looked at**. No reasonable employer could think it needed suspension without **some** enquiry.

3.20. Ms Davison spoke to Ms Victoria Greensmith (Senior HR Adviser to the Early Help directorate) who said suspension was **an option**. Ms Davison decided on 7 September 2018 on what she calls "*the limited information that was known and the degree of concern this raised for multiple reasons, such as data protection, confidentiality, unauthorised access for personal purposes*" to suspend. She did not consider it necessary for anyone to ask the claimant prior to suspending her why she had done it as she had no reason to doubt the accuracy of the information from ICT. She could not identify a role the claimant could reasonably undertake without accessing EHM and LCS so wanted her out of the workplace as a precaution.

3.21. The suspension was implemented by Mr Paul Wilson who, accompanied by Ms Greensmith, was waiting for the claimant at Bunnyhill Children's Centre at 8.15 am though he was based at the Rainbow Centre. Work colleagues were there when he asked the claimant to a small office and knew there was something wrong by the look on his face. He told her HR was waiting near the cafe area as there was an "allegation"" against her. She was frightened shocked and could not comprehend what it could be. He told her to collect her belongings in front of colleagues and took her to a little room where Ms Greensmith was waiting and handed a letter from Ms Davison (138-139) which said she was suspended in relation to "***allegations that you inappropriately accessed client records.*** She read it and replied "*is this about the safeguarding matter yesterday'*. Neither responded. She was given no chance to explain but asked to hand over her work badge and laptop which was at home. They said someone would be in touch to retrieve the laptop. When she asked if she could telephone Unison they replied '*in your own time'*. She was asked to leave by the main entrance and not to talk to colleagues or enter the building, which was humiliating. We accept the suspension could have been handled more confidentially and less insensitively. The question for us is whether this was due to any disclosure made to Ms Bell or simply adherence to policy. We find it was the latter.

3.22. Ms Davison was firmly of the opinion the matter needed to be investigated quickly so either the suspension could be lifted or the matter progressed to whatever outcome might be appropriate. We agree but, as said in Gogay, and in accordance with the ACAS Code, it should have been progressed "*without unreasonable delay*" and, according to the respondent's own policy, reviewed regularly, which there is no evidence it was . She appointed Ms. Susan Toulson (Locality Service Manager in the Early Help Service) to undertake an investigation on 7 September 2018 supported by Ms. Greensmith. She had no further involvement until she chaired the disciplinary hearing, other than to take a phone call from the claimant to respond to her query as to how much longer the investigation was going to take. This was around the end of October 2018. Ms Davison told her it should be another two weeks or so before she heard anything. We will return to that.

3.23. Ms Toulson had been a Locality Service Manager of one of two Locality Teams in the Early Help Service since April 2017. She has overall management responsibility for a large group of staff and volunteers directly managed by Team managers. She is a qualified social worker and as such had worked for the Council since 1995 in teams providing social work intervention including Child Protection. She had held management positions since 2005 and had experience of undertaking disciplinary investigations. She had no professional involvement with, or knowledge of, the claimant as she managed the team East and West of the City and the claimant was based in the North.

3.24. Ms Toulson has a good understanding of the Early Help Worker role which is to assess, plan and provide interventions to vulnerable children and families who are subject of Early Help plans. They are required to record their work on EHM. They also have access to LCS to enable effective information sharing between Early Help and Social Care for families open to Early Help who may have had a history of social care intervention. They contain highly personal and confidential information relating to service users. Staff are not authorised to access records for the benefit of unauthorised third parties. On 6 September 2018 the e-mail from Ms. Brennan to Ms. Davison was copied to her as Ms. Brennan wrongly thought she was the responsible Service Manager. Ms. Jane Eland was, so Ms Toulson left it for Ms. Davison to respond. When she was appointed investigating officer she was given no specific brief **but was told the claimant had been suspended**.

3.25. Ms Greensmith commenced with the Council in 2008 and worked in HR roles from 2010. She had no previous knowledge of the claimant. On 6 September 2018, she was asked by her line manager Ms. Susan Williams (then Assistant HR Manager) to assist Mr. Wilson with the suspension the next day and Ms. Toulson with the investigation. Ms. Toulson's normal workload is very busy. She contacted Ms. Greensmith on 10 September. They met on 13 September 2018 to identify individuals and documents that might be relevant but without asking for any input from the claimant. **Had SW1 and SW2 been identified (which they would have been had the claimant been given some indication of the facts alleged against her and opportunity to comment when suspended) what was said to and by them between 3 and 6 September would have been fresh in their minds . The claimant could not approach them people as she was barred from speaking to anyone. Weeks went by before Ms Bell was spoken to and months before the claimant's union asked SW1 or SW2 what they could recall.** Invitation letters to attend investigatory meetings were sent to Ms Bell, Mr Wilson, Ms Linda Krager and the claimant on 13 September. Ms Greensmith was due to commence annual leave on 21 September 2018, returning on 4 October 2018. To ensure her availability the interviews were set for 11 October 2018. This is not a small organisation. Any HR officer could have filled during Ms Greensmith's holiday The claimant was on suspension charged with a potentially career ending disciplinary offence and for progress to be delayed by other work Ms Greensmith and Ms Toulson had to do is not remotely reasonable.

3.26. Ms Donna Walton was the claimant's " contact officer". Whilst on suspension the claimant received a letter(140) asking her to bring the laptop and the PIN for her work phone to the civic centre. The room Ms Walton booked was filled with office furniture, so they sat in a public area. No mention was made of her well being . Whenever the claimant asked Ms Walton for information she said she could not tell her anything. The claimant says"*I was not allowed talk to anyone regarding my suspension. I had to lie to people asking why I was not at work. It was an awful, dreadful time. I did telephone TFC around November to say I was struggling and asked if they could signpost me to a counsellor. I had my first meeting the week after I was dismissed (respondents could not find letter) but was not allowed to attend due to not working for the company any more*." Her hair started falling so she saw her GP on 11 October (477) who diagnosed stress related illness (482-483).

3.27. Prior to the interviews Ms Toulson reviewed X's records to establish her current situation, understand the context in which the claimant may have accessed the records and identify if X and her family had had any Early Help Intervention. She had not. If the claimant's laptop or work phone (140) were searched as her desk was nothing incriminating was found.

3.28. On 11 October 2018, Ms Toulson interviewed Louise Bell, Ms Linda Krager (Early Help Worker based in the East and West) and the claimant, who was accompanied by Ms. Lisa Foot of Unison. Mrs. Krager was interviewed because X's records provided by ICT, showed she had accessed the

record on 10 May 2018. She had a legitimate professional reason to do so because she was working with another member of the same extended family.The claimant's meeting lasted about one hour.

3.29. On 26 October 2018, Ms Toulson interviewed Mr Wilson. Handwritten notes of all interviews were made by Mrs. Greensmith (141-145 and 148-157) who typed them up. They were not verbatim, and were sent to the interviewees for and amendment and/or approval. The typed notes, with amendments are 200-201(Ms.Bell), 202-211(the claimant),212-215(Mr.Wilson) 146-147 (Ms. Krager).

3.30. The claimant returned the typed notes with significant amendments and four additional pages. Ms Toulson does not believe the amendments are an accurate representation of what she said and commented at paragraph 6.18 of her report "*AI has submitted an extensively amended set of notes in respect of her investigative interview. Many of the additions AI makes in her notes are not in line with the recollection of the Investigating Officer. Rather they appear to demonstrate, to the Investigating Officer, reflection at a later date on the questions asked during interview. Regardless of this the amendments do not offer any further significant additional information that would alter the findings of the investigation*" (174). Not for the only time in this case there are no times recorded on the notes but the original typed version, well spaced , and with preambles removed, covers five pages which on Ms Toulson's evidence record a meeting on one hour. Little wonder the claimant added to that.

3.31. Having received approved notes from interviewees, it took a couple of weeks to consider them, reach conclusions and write the investigation report which was finalised in early December 2018 (163-317). The allegation was the claimant "On 4 July 2018 and 6 September 2018. **inappropriately** accessed the record of young person X". Ms Toulson recorded her concerns (175), as: -

"*7.0 During the investigation interview AI initially stated that she had not accessed the records of [X], AI did then acknowledge that she has accessed the records of this child on 6 September 2018. AI did not advise that she had accessed the records on the 4 July, however when advised that records showed she had accessed the 4 July, AI agreed that this had been the case. AI advised that her motivation to access the child's record on both occasions was because of her view that the child was at risk and that her actions were to safeguard the child. In relation to her accessing the records on 4 July AI indicated that this was because of the same concerns she had on 6 September, that is, concerns around the child's contact with her mother. However, there is no evidence in the recording to indicate that contact with mother was a cause for concern in July 2018. It is the view of the investigating officer that AI has been unable to identify how, in accessing this child's records on both occasions AI's actions have safeguarded the child.*

7.1 It has been established that the two dates when AI had accessed the child's records (4 July 2018 and 6 September 2018) were preceded by contact and recording by Social Care. It has also been established that AI had no reason to access the records in her role as Early Help Worker. This may indicate that AI was inappropriately seeking out information regarding these events.

7.2 It is a matter of concern throughout the investigative interview AI expressed confusion about her responsibilities in regard to accessing client records. The investigating officer does not find this credible given that AI has been provided all relevant policies and procedures relating to staff conduct and completed safeguarding training. AI has also worked as an Early Help worker for 18 months.

7.3 It is concerning AI has not completed mandatory GDPR training despite this being a requirement for all TFC staff.

7.4 During investigative interview AI provided a confusing account of her actions and motivations in the matter under investigation. ***AI advised that she knew she shouldn't access the records however on the other hand stated she felt she had done the right thing, had acted to safeguard the child and would do the same in respect of any child she had concerns for.***

7.5 This investigation established AI did access the records of child [X] furthermore it has been established that AI had no reason to access the records in her role as Early Help Worker. Whilst asserting that she had safeguarding concerns for the child AI has in the view of the investigating officer not offered a credible account of how her actions could have safeguarded this child. Therefore, ***the investigation finds that AI has inappropriately accessed the records of child [X] and in doing so breached the confidentiality of this child*****."**

3.32. Many of Ms Toulson's conclusions are due to the way the claimant expressed herself and others due to the poor way in which questions were asked. Ms Greensmith was at the interview on 11 October 2018 and also says the claimant's initial response was to deny she had accessed the records of X, then she admitted she had, albeit briefly, and knew she should not have done so. The claimant did not **deny** accessing the records. The question was "*Can you please confirm if you have accessed the records of X*". Answer "*No*". Question "*You have never accessed these records*?" Answer "*I went in quickly and came out because I thought I shouldn't be doing it* ". The first answer was her way of saying she could not "confirm" what she did 5 weeks earlier and the second her way of saying someone else, in ICRT, should be doing the job rather than her. EJ Garnon took care to establish this was what the claimant meant. She also confirmed she still did not think she had done anything wrong by accessing X's records as she was concerned for her. The striking point is the style of Ms Toulson's findings implying the claimant was dishonest about what she had done and why. In oral evidence Ms Toulson did not come across as implying the claimant was acting out of anything but a well intentioned , if misplaced, view of risk to X.

3.33. We accept Mr Wilson was in a different office over 4 miles away (213), did not answer e-mails, phone calls or texts efficiently and one-one meetings with him always resulted in him just asking where the claimant was up to in her paperwork and record keeping (214) as he was aware she was behind with it (214). He is in poor physical health, suffers severe back pain and takes medication He once said he was '*getting in the neck*" from Ms Davison for not managing effectively. No "1 to 1s" were signed by the claimant (298-315) nor were they all typed up and the wording on some was "*just squiggles*". The claimant was concerned for Mr Wilson and told his line manager who said he was ok. In one text he said wanted rid of the claimant (442) but we agree the tone and context suggests this was said in jest. Ms Davison knew he was not managing his team efficiently. He asked the claimant not to go to her because it may be bad for him. We asked the claimant if she was protecting Mr Wilson and she admitted she was because "*he is a nice man*". In failing to go over his head to someone with her genuine concerns about X and taking it upon herself to do things she thought were right by accessing X's records she created a problem for herself.

3.34. Ms Toulson concluded her report by recommending the claimant be "*invited to a disciplinary hearing to give consideration to the allegation and findings within this report*" (175). We asked again if the claimant believed there was a risk of X coming to harm if L had unsupervised access what she should have done. **Ms Toulson answered "escalate" her concerns through the line of management and, if all else failed use the whistleblowing policy. The claimant did neither.**

3.35. Ms Toulson said to us the multiple policies and guidance documents are sufficiently clear to provide any employee with sufficient knowledge and understanding of what is expected of them in relation to, amongst other things, personal relationships and safeguarding but "*the policies and*

guidance documents do not provide an immediate answer to all issues that might arise. ***As such there is an expectation every employee will apply both common sense and their informed knowledge to raise matters of concern with appropriate individuals****. For example, paragraph 2.4 of the Code of Conduct "Responsibility is placed on every employee to disclose to an appropriate manager any potential conflict of interest which may affect them in their job role" (228). If the claimant had any concerns about not knowing what to do in a situation where she believed there was a safeguarding concern that may overlap with her personal relationships the expectation would be she would address the matter with "an appropriate manager". She did not do so before accessing confidential records of X. Likewise, the Guidance for Safer Working Practice for People Who Work with Children and Vulnerable Adults includes, "People who work with children and vulnerable adults are responsible for their own actions and behaviour and should avoid any conduct which could lead any reasonable person to question their motivation and intentions".* **This is a very important passage which we deal with in our conclusions referring to the law in 2.28 -2.29 above.**

3.36. Ms Toulson said the claimant was expressly instructed to undertake mandatory training prior to the implementation of the GDPR, in common with every other employee of the organisation. An e-mail was sent to everyone (87-104). Not completing that training was a failure on her part to comply with a valid instruction from her employer. **That is clearly so, but she was not charged with that offence.**The claimant had said Mr Wilson "did not understand the system". After hearing the explanations for her actions, and interpretation of safeguarding issues, Ms Toulson said it was not Mr Wilson but the claimant who did not. As for risk to X Ms Toulson said she was **"***unable to determine what degree of risk may realistically have existed. But it was not appropriately addressed by the claimant acting in the way that she did*" **and "***her contact to ICRT does not indicate she was providing information regarding safeguarding risks to X rather she was seeking information from ICRT to provide to KS. By her own account she did not make a safeguarding referral or make any professional aware her view was X at risk of immediate and significant harm.* Ms Toulson said had she made a safeguarding referral it may have been evidence she held a genuine concern of imminent risk.

3.37. Ms Toulson also said she had done several investigations over the years and none were done much quicker. We find the process was lamentably slow but no slower because the claimant had made any protected disclosures**.**The investigation took thirteen weeks from suspension to the invitation letter of 7 December 2018 for a disciplinary hearing on 8 January 2019. Our criticisms of the investigation are (a) the inordinate time it took and (b) the length of the report and appendicies was so great that any reader, including the claimant, would have difficulty understanding exactly what was said to be " inappropriate" about a person looking at a record of a case not assigned to her.

3.38. The claimant contacted the Chief Executive Ms Jill Colbert by telephone in October 2018. Her PA said someone would ring her back but no-one did. There is no written record but the claimant spoke by telephone to Ms Davison asking why she had been suspended for safeguarding a child. Ms Davison merely referred her to the suspension letter. She asked how long she would have to wait for any news from the investigatory meeting and Ms Davison replied 'a couple of weeks'. The claimant says she then told Ms Davison it was disgusting the way she had been treated, she should be commended and it is always better to be safe than sorry in safeguarding situations and if the media was aware she had been suspended for safeguarding a child it would be bad for TFC as they already had an inadequate Ofsted rating for failing to protect children. She added she had no management support and it was everyone's responsibility to protect any individual. Ms Davison denies any such things were said by the claimant. We find this tirade of criticism of the respondent to Ms Davison was not spoken. The claimant is not a dishonest witness but has a tendency to say things were said by her and others which were in her mind but not articulated. This was so with her

call to Ms Bell in ICRT. We find it likely that had the claimant told Ms Davison what she claims she did, it would have been added to the allegations against her, not denied.

3.39. Ms Greensmith was contacted by the claimant by telephone on 6 December 2018 asking for an update on the investigation. She confirmed the report had been concluded and was to be issued the next day by recorded delivery. The claimant asked the hearing not be chaired by Ms. Davison (320). Ms Greensmith forwarded this to her manager, Ms. Susan Williams who responded in an e-mail on 13 December 2018 (441) rejecting the request and confirming Ms. Davison was considered to be impartial and the appropriate person to chair the disciplinary hearing. We will return to that point.

3.40. The claimant's e-mail of 12 December 2018 also requested a number of witnesses attend the disciplinary hearing. Ms Greensmith agreed to invite them but needed to clarify some details (318-320). She contacted a number to request their attendance (323-338). An invitation letter was prepared for KS (339-340). She cannot recall if this letter was sent, but does recall some debate as to whether the respondent should be inviting her rather than the claimant. Ms Greensmith was contacted by Ms Foot of Unison by telephone on 19 December 2018 saying she had agreed with the claimant the witnesses need not attend but each had been e-mailed a set of questions and their written responses would be used as evidence. An example of the questions is at 346.

3.41. When Ms Toulson interviewed the claimant on 11 October 2018, she did not say she had raised a whistleblowing issue directly or indirectly to Ms Bell on 6 September and it was not mentioned by her trade union representatives at any time. We find KS and the claimant believed there was a risk L would "snatch" X, as she had previously threatened to do. However, there is no evidence she **said that** to anyone. For a protected disclosure, a worker must not only have a whistle, she must blow it. A worker need not use a given procedure to make her disclosure count as protected , but the claimant despite expressing to SW1, SW2 and LB she was not impressed with the respondent's advice to and support of KS she did not communicate any facts about her fears for X or make a safeguarding referral to ICRT. Rather she **decided what she thought the appropriate steps were and took them.** The claimant says there were no policies on 'personal relationships and safeguarding' or 'conflicts of interest and safeguarding' and points out the Code of Conduct (235) states at 15.1 '*safeguarding and promoting the welfare of children is* ***everyone's*** *responsibility'* This is a selective reading . It does not say in doing so any worker can do **whatever she thinks fit** without involving a senior manager. Other bullet points on the same page say she must involve a higher manager.

3.42. On the time it all took, the claimant's perspective was *I finally received a report and letter on December 18th 2018 (161-162) inviting me to attend a disciplinary hearing on January 8th 2019 after contacting TFC and waiting what seemed like a lifetime and me growing extremely irritated, anxious, scared and isolated (435-437).* The claimant had no opportunity to say anything in her own defence or speak to any colleagues for 5 weeks. Ms Toulson had finished her interviews, there being only four, by 26 October. it took another 6 weeks to write the report. It was nearly 5 more weeks until the disciplinary hearing. That final period was over the Christmas and New Year. The overall period was 18 weeks. The notes of the investigation meetings are not verbatim and the interviews were not audio recorded. The claimant said frequently they should be and the respondent answered it was not their practice then though it may become so. The key elements are of the investigation report are 17 pages of interviews and a few pertinent emails. It is astonishing the respondent could generate a report and appendicies over 150 pages long which took weeks to prepare. For this hearing, we were provided with six respondent witness statements all full of repetition, three from HR officers. The obvious reason for delay is the respondent's tendency to write reams, actually saying very little.

3.43. The disciplinary hearing was set to accommodate the availability of those who needed to attend and to provide the claimant with appropriate period of notice. It was better to notify the claimant of the date as far in advance as possible rather than, leaving her without knowledge of the outcome of the investigation when it had been completed and then providing her with shorter notice of the date for the disciplinary hearing. **We accept the last point but the only real excuse the respondent provides for the delay prior to that is that everyone had other things to do.**

Disciplinary Hearing

3.44. Susan Williams was employed from 6 October 1986 by the Council and, since 1 April 2017, by the respondent. She worked in a number of human resources roles for the Council. Since transferring she has been a Senior HR Adviser, Assistant HR Manager and, currently one of two HR Managers. She manages a team of seven employees. She did not have any prior knowledge of or involvement with the claimant. She allocated Ms.Greensmith to assist Ms. Toulson despite her having leave booked. Ms Williams first direct involvement was in December 2018 when she rejected the claimant's request her disciplinary hearing was not chaired by Ms. Davison "*as she is the one who made the decision to suspend me and I want an individual who is impartial to the whole case*" (439). She responded Ms. Davison "*is an impartial chair, who has had no involvement in the investigation of the allegation. You are correct Ms Davison would have made the decision to suspend you from the workplace during the period of the investigation, however this decision follows the company's scheme of delegation whereby a Director must make the decision to suspend any employee from the workplace on the basis of the allegation presented ..*" (441). No objection was raised at the hearing about it being chaired by Ms. Davison, by the claimant or the trade union representative. In the absence of any evidence Ms Davison was biased, we find this stance reasonable.

3.45. The disciplinary hearing was on 8 January 2019 at Sunderland Civic Centre. Ms Davison was advised at it by Ms. Williams. It was attended by the claimant her trade union representative, Ms. Lisa Foot, Ms. Toulson to present her report, Ms. Greensmith, as support to Ms. Toulson and Ms. Melissa Burn, as notetaker. The notes (347-350) are brief, not verbatim, **and inaccurate** in that times of adjournments are either not recorded, or must be wrong.

3.46. The allegation was "*on 4 July 2018 and 6 September 2018 the claimant inappropriately accessed the record of X*" (161). There was no charge of overstepping her authority or involving herself in a private law dispute. Ms Davison had read the Investigation Report prior to the hearing. She saw the claimant had admitted accessing X's record after an initial denial (we do not find it was but can see that as a reasonable interpretation of what was written). It stated she had done so for a friend who could not afford to pay for advice from a Solicitor. Ms. Toulson went on to state the claimant had misused her position to access the information of X. It was now for Ms Davison to decide if that was so, not simply accept Ms Toulson's report as the correct conclusion.

3.47. A few questions were put to Ms. Toulson by Ms Davison and Ms Foot. In particular, Ms Foot suggested the claimant's motives for accessing the records of X had not been made clear and queried why Ms Toulson had not interviewed others in her investigation. Ms Toulson responded she did not consider it appropriate or necessary to interview others to ***establish the facts***. She did not appear to realise others, like SW1 and SW 2, could (as per A-v-B above) provide evidence pointing toward the claimant at least having genuine motives for her actions. Like Ms Davison she appeared to think if part the claimant's motivation was to give advice to KS that was automatically gross misconduct even if she was also trying to safeguard X. Both motivations can co-exist.

3.48. Ms. Foot provided written statements and screen shots of messages between the claimant and KS (399-419). As Ms Davison had not seen these, she adjourned to consider them. **They clearly**

show KS was concerned about X being harmed and told the claimant who agreed with her saying L was "*dangerous*". The notes show the hearing started at 10 am and this break was 10.30 to 11.

3.49. The claimant said there was "*a risk the mother would take*" X (348) but gave no facts in support of that view. She said Mr Wilson would not have been of assistance if she raised it with him and she did not want to bother him "*because of his health*". There may be many reasons a particular line manager is not available, but we find that does not excuse an Early Help worker making judgments without asking another manager.

3.50. Ms Davison asked the claimant whether she had ever raised safeguarding concerns. She said "now and again" (348). This seemed vague and made Ms Davison concerned the claimant "*may have an unsatisfactory comprehension of safeguarding issues*".

3.51. Ms Davison asked her if she knew "*what to do with thresholds/safeguarding concerns*", a term she explains in 3.63. below. The claimant clearly did not understand it. Her answer was that in July she had given information to KS to make appropriate contact and was checking KS had done so (348). Ms Davison says this did not address the issue and was concerning in suggesting she felt it appropriate to access X's records to check what her friend had done. Ms Davison asked the claimant why, if there was a safeguarding concern, there was no referral to the ICRT in September 2018. The answer was KS "*was 100% protecting*" X "*and that's why no referral*" (349). She went on "*I would have made a referral if (KS) had agreed to let the mother have more contact*". She said other employees accessed the system when dealing with new birth visits and she believed employees were not clear when they should access the system. Other responses suggested she sought to blame her manager for her not following clear instructions to undertake training.

3.52. Ms. Williams asked questions, in response to which the claimant justified her decision-making saying she had contacted social workers which was as good as a manager. She also said her accent was so strong as to prevent the ICRT officer from understanding what she had been trying to communicate. This was based on Ms Bell writing the claimant's name as Mandy. **She told us if she had her old manager, who was always present, she would have gone to her. This is not the point. The claimant does not accept, even in hindsight, she should have approached a manager with her concerns, if not Mr Wilson, someone else, not two social workers.**

3.53. Summing up, Ms Toulson stated "*Evidence does not change findings* (349). This is a curious statement but a clue to the mindset of Ms Toulson and more so Ms Davison. The view is accessing records which a worker has no professional reason to access in connection with a family not assigned to them is gross misconduct regardless of why it was done, save perhaps for a medical reason. Ms Toulson's response to the claimant's statement in her ET1 (12) "*We had our Early Help system and social care system and were told by management if we had any safeguarding concerns that's what this system was for*" is that is **either a fundamental misunderstanding or misrepresentation of whatever comment may have been made by management**. That is a key point. If the claimant misunderstood the limits on her role, it is less likely to be misconduct, still less gross misconduct, rather a matter of capability.

3.54. Ms Foot made representations on behalf of the claimant saying (i) she had not completed GDPR training or read or refreshed herself on the procedures (ii) was struggling with case load, time management and training issues (iii) admitted accessing X's records (348). Ms. Foot suggested her actions **were** within scope of the respondent's policies in that it was recognised there may be occasions when decisions need to be made or action taken in the best interests of a child which would be otherwise in contravention of policy or guidance. **Ms. Foot went on to say the claimant's**

actions were of a person trying to help a situation and her actions were with the best of intentions. Ms. Foot concluded "*This is more a training issue rather than a disciplinary*".

3.55. Ms. Davison adjourned. We do not have a record of when, or for how long she deliberated, but the notes say she gave her decision at 11.50. She says she took sufficient time to consider the facts and lists some: -

(a) the information available through the investigation report.
(b) the Claimant's responses and the information provided by her, both in the course of the investigation and the disciplinary hearing, including the additional screen shots of text messages.
*(c) the facts of the case in light of **my** professional knowledge, experience and expertise.*
(d) the allegation and whether or not I believed it was proven as misconduct.

3.56. Ms. Davison found the allegation proved. She noted: -

The case of X was not one that had been open to the Claimant in her professional capacity.
(a) After an initial denial, the Claimant had admitted that she had accessed the records of X.
*(b) I considered the Claimant's assertion that she had been motivated to do so as she had safeguarding concerns for X. I determined that I **did not consider this motivation to be credible** nor did I believe it to be consistent with the Respondent's safeguarding procedures.*
*(c) The Claimant made no safeguarding referral. The Claimant did not do so despite her training **and understanding of the Respondent's safeguarding and threshold processes.***
(d) I noted that the Claimant did not raise her concerns with her manager or any other manager within the Respondent.
*(e) I determined the Claimant's accessing of X's records **had a personal motivation**. I considered her doing so to be in breach of the Respondent's Code of Conduct and its data protection guidance.*
*(f) I was satisfied the Claimant **knew or ought to have known** that what she did was inappropriate.*

No reasonable employer could view the claimant's stated motivation not to be "credible" or her to have understood safeguarding and threshold processes**.** "Misguided" in the sense of thinking she could by-pass line management, would be a fair view, but that was not the charge against her.

3.57. Ms. Davison says she believed the claimant's actions amounted to a serious breach of trust and confidence and gross misconduct. In her oral evidence she appeared to view any "data protection" breach as gross misconduct in itself regardless of why it was done.

3.58. Ms. Davison next considered what sanction to impose. Ms. Williams set out options open to her, including warnings and dismissal with notice. What Ms. Davison deemed relevant included: -

(a) The claimant's explanations of and mitigation for her actions;
(b) disciplinary record.
(c) length of service, position and grade.
(d) standards should and can reasonably be expected of employees generally and, in particular, with access to the information the claimant admitted she had accessed.
*(e)The training undertaken **or that should have been** undertaken by the Claimant.*
(f)The claimant's supervision records and access issues between the Claimant and her manager.

3.59.Ms. Davison chose summary dismissal. She says *"The Claimant claims that I took only 15 minutes to consider all of this and come to my conclusion. I refute this. I gave the matter ample and careful consideration."* The only way we could agree with that is to find the notes **are a very poor record of what happened. What happened in the 30 minutes before the 10.30 adjournment covers a page of the typewritten note. From return at 11am to an adjournment to consider covers two pages. Ms Davison delivered the outcome at 11 50 according to the note.We find**

Ms Davison went into the hearing with her mind made up and reached an outcome swiftly based on the fact of accessing the records, regardless of why that was done.

3.60. Ms. Davison read out to the claimant according to the notes what she says she handwrote during the adjournment. Unlike Ms Greensmith's manuscript note of the investigation interviews that note is not in the bundle . The typed note reads : -
"*This case was of a child who was **not open to you as a case**, nor had been previously. I reflected that you had admitted accessing the records, citing as motivation your safeguarding concerns for the child. I advised you that having considered this evidence I did not find this motivation to be creditable or consistent with the Company's safeguarding procedures as you did not make any safeguarding referral, despite your training and understanding of the Company's safegarding and threshold processes. It is of concern that you did not raise your concerns with your line manager or any other manager in the Company. I concluded therefore your motivation for accessing the file was **personal** and in direct breach of the Company's Code of Conduct and that you had also contravened data protection guidance. I advised you your assertion that you had received no recent training was immaterial as the Code of Conduct has in essence contained the same guidance in that respect since before and after the inception of the Company in 2017. You had been employed by the Council in a similar role since 2012. I advised you that this was a serious breach of trust and confidence in you and in **your continued ability** to perform your role as an Early Help Worker. I advised you that I found your actions constituted gross misconduct."*

3.61. Ms Davison was assisted in producing the outcome letter dated 11 January 2019 (356-364) by Ms.Williams. The above paragraph appears in the letter too. On 9 January 2019, Ms Davison sent an all-staff e-mail to personnel in the Early Help Directorate to remind them of the policies and procedures around family connections and case-work (351-352). She says she did this was a 'lessons learnt' exercise following the disciplinary hearing as the claimant had stated she believed other staff were unsure about the boundaries. There was no evidence to suggest that, but it seemed prudent to issue a reminder. She adds it should be noted **all policies and procedures are sent out annually for staff to read and are available on the TfC Hub at all times for reference.**

3.62.Ms. Davison is now aware the claimant sent e-mails to Ms. Colbert on 10 January 2019 (353-355) saying (a) she was dismissed for acting to protect a child and did so in a professional manner having sought help from professionals and she raised this in the disciplinary hearing (b) she asked what she should have done differently if the child was a stranger rather than someone she knew. Ms Colbert refused, quite rightly, to comment because there was still a right of appeal.

3.63. At paragraph 60 of a very repetitive statement Ms Davison says
*It may assist the Tribunal to understand the training the Claimant had received **or should have undertaken by July 2018**. The Claimant's training record is set at pages 77 and 219 to 223 of the bundle. The Claimant had undertaken threshold training on 15th December 2017 and safeguarding training on 12th July 2017, both being less than a year prior to the first occasion on which AI accessed X's records. Both safeguarding and threshold training are of fundamental importance to what the Respondent organisation does.Threshold training is designed to ensure that all professionals working with children, including TfC employees, are able to distinguish between an urgent and high-risk safeguarding issue which requires a statutory social work response (including a child protection referral or a call to the Police) and a less urgent, lower-risk issue which can be met by an Early Help or universal services response. Safeguarding training is more focused on child protection and recognising the different categories of abuse. Employees who are not designated safeguarding leads, who would normally be managers in the organisation, undertake refresher safeguarding training every three years. The safeguarding training undertaken by all Early Help staff was delivered as face*

to face training by me and Ms. Melanie Soutar, a trainer from South Tyneside Council. There is an online learning module (Level 1) to be completed prior to the face to face training session (Level 2). The online training is commissioned by the Sunderland Safeguarding Children Board from an online college. The Level 1 training is very basic and is irrelevant once the Level 2 training has been completed. The Level 2 training is a full day of face to face training. The training took place from 9.00am to 4.30pm at Bede Tower, Ashbrooke, Sunderland. The Claimant attended the Level 2 training session. The entry recording this fact is only made on page 77/219 once the training had been undertaken. It is confirmed in the Claimant's one to one record from 2nd August 2017 that the Claimant had undertaken the training (please refer to page 300 of the bundle). The Claimant attended the training session on 12th July 2017, but had she not done so she would have been sent to a session run by the South Tyneside Safeguarding Children Board to undertake the training as any other individual was who did not attend. This process was followed to ensure that we had whole staff coverage. Having attended both sessions of training, staff are equipped to recognise different types of child abuse, child neglect and child mistreatment and to know when an identified issue meets the 'threshold' for single agency support (such as a referral to a community organisation for a food parcel), for Early Help support (such as support through parenting classes or direct support in the home with routines and boundaries) or for a child protection referral (for instances of sexual or physical abuse, for example). It is clear to anyone having attended both training sessions that an issue of child contact, as in the case of the Claimant's friend's grandchild, is not one which merits a safeguarding (child protection) referral.

3.64.1. Ms Davison agreed a child at risk of being "snatched" by a mother in whose care the child had been injured does merit a safeguarding referral. It is plain the claimant had not undertaken all the training she should and not understood properly that which she had received . She appeared blasé about the need to take training and policies into account in any child care case, a point we deal with in out conclusions as it has a profound effect on remedy.

3.64.2. The claimant's Updated Schedule of Loss says we should take account her being unable to progress through the **Step Up to Social Work** programme (45). Ms Davison's statement says that programme was organised through the Open University. The claimant was one of seven candidates notified of her selection in August 2018 for consideration for three courses. She was required to provide the Open University with documentation, including proof of her qualifications by 30 August 2018. There was a question around her qualifications in English and mathematics, not being at the requisite level.The Open University offered her an interview in Leeds 10 October 2018. Unsurprisingly, she did not attend. The University offered her a second chance at interview on 29 November 2018. She did not attend this interview. She did not speak to HR about the offers of interview. We accept the respondent did not direct or seek to influence her not to attend.

3.64.3.With no disrespect to the claimant, no reasonable employer could think she had the level of understanding Ms Davison attributes to her of matters written in paragraph 3.63. At no time did Ms Davison seem to see any difference between what the claimant **did** know or **ought to have** known if she had read every policy and email available to her and understood them all. We will deal with that further in our conclusions

3.65. The claimant does not believe the true reason for dismissal was accessing X's file. Rather it was she had made protected disclosure. Her further particulars set out her alleged whistleblowing complaint and the detriments she attributes to it (39- 42). Ms Davison comments (a) the Ofsted report is acknowledged but the claimant did not escalate any concern around the support offered to KS to any manager in Early Help or Social Care (b) **the "*crux of this matter*" is the claimant was not accessing X's records "*as a professional*"** (39), as she had no professional involvement with X

and should not access the files of child with whom she had no professional involvement (c) she can provide any advice she sees fit in her capacity as a friend but issues of contact and visitation rights, where there is no social worker involvement, are matters of private law (d) if her manager did not support her it is not justification for her accessing X's records as there were other managers from whom she could have sought advice (e) SW1 was not an **experienced** social worker but in his first 'assisted and supported year " and his statement presented by the claimant at her disciplinary and appeal did not support her claim she was making a protected disclosure (f) SW2 had finished her social work degree , did not want to go into social work, was working for as an Early Help Worker and her statement did not support the claimant was making a protected disclosure (g) the suggestion she was making a safeguarding referral by contacting ICRT is not what Ms Bell who took the call said (h) safeguarding referrals cannot be made over the telephone, Urgent Child Protection referrals can but must always be followed by a written referral and none was made (i) if the claimant had significant concerns for X, there would be no reason to check if KS had "guardianship or residency" (j) the claimant says her "*opinion and complaint about lack of support and inadequate advice on 7 September 2018 constituted a qualifying disclosure*" and she "*made vocal that I had a safeguarding concern*" (41), but Ms Davison does not believe she gave any information, though she was vocal KS was in need of support in respect of the visitation rights of L (k) in any event, she was not dismissed for that (l) Ms Davison does not accept the claimant believed the health and safety of X was "likely to have been endangered" (40) as she also said "*I knew KS really well she was 100% protecting child and that's why no referral*" and "*I would have made a referral if KS had agreed to let the mother have more contact – friend or no friend*" (349)

3.66. Ms Davison's statement deals with some miscellaneous points. She acknowledges she spoke with the claimant by telephone in October 2018, on behalf of Ms. Colbert when the claimant asked why she had been suspended and Ms Davison reiterated the suspension letter. She made clear she could not discuss the matter with her in any more detail because an investigation was ongoing and, due to her position, she would potentially have direct involvement at a later date. Ms Davison also said the best information she had from HR at that time was the investigation may take a couple of weeks more. It took longer. The claimant says her manager "*wanted rid of me*" (41). Ms Davison has considered the texts (442) and believed the exchange to be light-hearted. There is no evidence of Mr Wilson taking any steps to seek the claimant's removal. Ms Davison adds "*The Claimant appears to wish to look for reasons to criticise others rather than accepting her own highly inappropriate actions*".

3.67. Ms Davison accepts, as the claimant says "*there was new management appointed who had experience in a social work background*" (42). There is no requirement, or best practice advice, managers in Early Help services should be social work qualified. A new Service Manager was appointed to replace one who had left in October 2018, after the suspension but before dismissal. Service and Team Managers were then moved to balance out the background experience of the teams. There have been redundancies since the dismissal as part of a restructure of the Early Help Service, on 1 June 2019, one Early Help Service Manager Grade 11, two Early Help Workers Grade 3 and three Children's Centre Activity Workers Grade 2 took voluntary redundancy.

3.68. Ms Williams comments on the Further Particulars of Claim (39-42) are the claimant did not follow safeguarding procedures to instigate a referral to ICRT. She was a long-standing employee who has acknowledged instigating safeguarding referrals previously in relation to other children and families in the course of her work. If the claimant or KS were concerned about the advice and support provided by the respondent, a complaints procedure is available and publicised. They did not use it.

3.69. We find Ms Davison believes any comparatively junior member of staff like the claimant must follow the rules to the letter. If they do not, they are guilty of gross misconduct irrespective of why

they failed to and have no place in the respondent. She and Ms Williams think if she has had the opportunity for training and has access to online policies and procedures she is deemed to understand them. Whether she does or not is immaterial.

3.70. The claimant wrote to Ms. Colbert on 10 January 2019 (353-355) asking, "*why I have been dismissed … for trying to protect a child who could have been at risk from possible harm*". Ms. Colbert stated she did not "*intend to answer your question … I believe that you had the opportunity to address all of your questions through the HR process and there is nothing further I can add to that*", The claimant would receive a letter confirming the dismissal "*and I'm sure Susan will be happy to talk you through that if it is helpful*". The claimant responded she "*did ask the question in the disciplinary and never received an answer*" and she "*asked what procedure should I have followed if the child was a stranger or someone I had been familiar with but again I received no answer*".

Appeal Hearing

3.71. The claimant appealed (428) followed with detailed grounds of appeal (430- 434). The appeal hearing was arranged for 1 March 2019. Ms Davison liaised with Ms. Williams to produce a report which set out her response to each grounds of appeal (374-387). Appended to the report were documents considered to be relevant (388-453).

3.72. Ms Greensmith received an e-mail from the claimant on 25 February 2019 as one she sent to Ms. Williams had received an out of office reply requesting KS be "*asked as a witness on Friday for my appeal*". She responded the claimant arrange for KS to attend the Civic Centre on the day of the appeal from 10:00am onwards (464). She did not consider it to be the respondent's responsibility to contact her witnesses. She was quite right. The appeal hearing took place before a panel Mr. Steve Renwick (Director of Finance) and Mr. Mike Dillon (Non-Executive Director). The claimant attended with Mr.Conor McArdle (Regional Organiser for Unison). Ms Davison attended with Ms. Williams as support. Ms. Angela Bremner provided HR advice to the panel. Ms. Jackie Liddle took notes.

3.73. Mr Renwick has been Director of Finance since 4 June 2018. He has experience of chairing disciplinary and appeal hearings. He had, prior to the appeal, never met or been aware of the claimant. He and Mr. Dillon, were provided a report which set out background information on the claimant's employment history, the concerns that arose in September 2018, the investigation, the disciplinary hearing and its outcome, her grounds for the appeal and the response to them. There were many appendices. He read it all in time for the appeal listed for 1 March 2019. The minutes (465- 471) are not verbatim but accurate.

3.74. He opened by asking the claimant if she had brought any witnesses. She said her witnesses could not attend as they were still employees. Arrangements to facilitate a witness attending in support of the claimant could have been made if she or her trade union had asked. No such request was made. If they were not employees it was for the claimant to ensure they were able to attend.

3.75. The hearing was a review of the decision at the disciplinary hearing. Had it been a full re-hearing, the panel would have considered afresh the evidence presented by the investigating officer and the claimant's response as if no disciplinary hearing had taken place. As it was a review, the panel heard Ms. Davison present her report (374-387). On ten points of appeal raised, Ms. Davison's response (466) was given verbally to the panel. The claimant interjected to ask if she could "*tell the story*", Mr Renwick said the panel had read the detailed explanation of events in the papers provided which recorded her version of events, but she was allowed to explain (468). She set out the ten grounds for her appeal. Once, Mr Renwick interrupted when the manner in which she made a point

he felt was unhelpful. She continued to present the remainder of her points (468-469).

3.76. When given the opportunity to ask Ms Davison questions, the claimant simply stated she questioned the points she had made but was not specific. Mr Renwick asked if she had any questions rather than making assertions (at this hearing the claimant did the same but that is common when people represent themselves). Mr. McArdle also asked her if she wished to ask any questions. Once it was clear she did not, Mr. McArdle raised issues with Ms. Davison (466-467) putting pertinent questions which Ms Davison answered (466-467). She was asked by Mr. Renwick to provide clarification around safeguarding referrals and did (467). Mr Renwick asked the claimant why her witnesses had been stood down. She said it was "*Advice from UNISON – it would have been better paper written*" (470). The claimant said before us the panel were simply going through the motions of an appeal. We do not agree, if anything, we find she was, as she half accepted.

3.77. When the claimant presented "the story" and addressed her ten points of appeal, **the most important point she made, by far, (point 3 page 468) was that had SW1 SW2 and Linda Bell from ICRT been identified earlier (which they would have been had the claimant been given some indication of and opportunity to comment when suspended), matters would have been fresh in their minds . The claimant could not approach them as she was barred from speaking to anyone.** Ms Davison was given the opportunity to ask questions but did not (469).

3.78. The Panel invited the parties to sum up. Ms Davison did so reiterating she could see no professional reason for the claimant to have accessed X's records. Mr. McArdle summed up very well with the same basic points as Ms Foot had made, that the claimant had good intentions, a poor manager and had not been properly trained, even though she had not taken opportunities to be trained. The claimant confirmed she had "*said everything I wanted to say*" (471).

3.79. Mr. Renwick said the Panel would provide the outcome within five working days. Following the hearing he and Mr. Dillon discussed the ten grounds of appeal and determined: -

<u>Ground 1 – "The investigation process was too long"</u>
The investigation took 13 weeks which they did not consider excessive. To arrange the disciplinary hearing for one month after the report in light of the need to give adequate notice and the difficulty of scheduling the hearing around the Christmas period, was not excessive either.

<u>Ground 2 – "The minutes of the investigatory meeting report were incorrect"</u>
The version she had amended was in the investigating officer's report and considered by the panel.

<u>Ground 3 – "I requested that witnesses were to be interviewed but this request was not carried out"</u>
The claimant had not made a request for any specified witnesses be interviewed as part of the investigation. She confirmed during the appeal hearing that she had withdrawn her request for witnesses to attend the disciplinary hearing on advice from her union. She confirmed at the start of the appeal hearing she was not calling witnesses as they could not attend.

<u>Ground 4 – "I requested a different chair person but this action was not carried out"</u>
Under the respondent's Scheme of Delegation a Director makes a decision to suspend. They were unable to identify any guidance that a Director who made the decision to suspend was thereafter prevented from hearing a subsequent disciplinary. The claimant had said she did not want Ms. Davison but there was no evidence she had dealt with matters unfairly.

Ground 5 – "I had a legitimate safeguarding concern and was trying to post the individual to the appropriate place"
They focused not on whether or not she had a legitimate safeguarding concern but on whether her decision to access X's records was appropriate in context of her concerns. It was clear she was aware of the steps to take in making a referral to Children's Social Care and she did not do so. They did not consider it appropriate for her to access X's records.

Ground 6 – "I did not feel adequately supported by my Line Manager"
She was based at a different location to her manager, may not have had formal supervision, appraisals as frequently as she should but did have a formal supervision with her manager the day before she accessed X's records. There was no evidence she shared any safeguarding concerns with him during that meeting or sought guidance from him or any manager. She would have had regular e-mail and/or telephone contact but did not raise any issues or concerns. No lack of support from her manager she may have perceived could reasonably justify her actions.

Ground 7 – "I received a P45 in the post before my disciplinary hearing"
She acknowledged the P45 she received from the Council in January 2019 related to electoral duties

Ground 8 – "I did not complete any GDPR training nor got asked to complete any training"
She had been instructed to undertake GDPR training, as was mandatory for all employees. She appeared not to have undertaken the requisite training, but it was her decision not to act upon the instruction given to her to undertake the training.

Ground 9 – "My friend was not contacted for any advice or support"
The panel did not consider this to be a matter for their consideration

Ground 10 – "I have received no disciplinary sanctions in any past employment"
This was accepted

3.80. The panel upheld the decision to dismiss on grounds of gross misconduct. **They recognised the claimant's actions arose from her wish to help KS and X but she inappropriately accessed records to do so which was not acceptable.** Ms Bremner has been Service Manager for HR & Transformation since 15 April 2019 and was HR Manager from 26 June 2018 before which she was employed for 13 years in senior HR roles at Durham County Council including in Children and Young People's Services. She has significant experience of advising at disciplinary and appeal hearings.

3.81. She confirms Mr Renwick's account of what occurred. **As for outcome she advised the panel to consider whether the evidence and mitigation heard in the Appeal warranted upholding or not the previous decision to dismiss.** Ms. Bremner produced a letter recording the outcome, findings and decisions. After the panel approved the letter it was sent to the claimant (472-475). Ms Davison received verbal confirmation from Ms Bremner at the same time as the claimant was informed in writing the Appeals Panel upheld the decision to dismiss.

3.82. The letter mentions (i) the Whistleblowing Policy (78- 86) is readily accessible by all employees but **she did not follow it** (ii) the e-mail of 15 May 2018 showed the claimant and all employees were notified of the need to complete GDPR online training by 24 May 2018 (87-104) in anticipation of the imminent implementation of the General Data Protection Regulations, around which there was much publicity. Two training sessions were available and it said "*Both sessions must be completed by all staff*". Nothing raised by the claimant at appeal or in the documents she submitted led the panel to

understand she contended she had "whistleblown", whether in relation to X's safety, the lack of support for KS or anything else. Mr. McArdle a very senior union official and did not say so .

3.83. **Mr Renwick did not come across to us, in his oral evidence or in the outcome letter as questioning the claimant credibility, genuine concern or motivation. What she had done was wrong but more as a result of misunderstanding than defiance. The panel were effectively saying she should have "whistleblown" about Mr Wilson's inability due to his own health to give her the support she needed and any perceived failure by social services to spot a safeguarding risk. She was culpable in not taking up all training opportunities and ensuring she understood the limits of her role. Her motivation was not "personal" in the sense of self serving . EJ Garnon specifically asked Mr Renwick if he accepted the claimant's "** ***heart was in the right place*****", and he unequivocally did.**

3.84. Only during the appeal did the claimant name the employee she stated had accessed records for personal reasons. Ms Toulson was requested by Ms. Davison to conduct a fact-finding interview with her, and undertook a sample review of her access history to the ICT system, finding no evidence of inappropriate access. The claimant now says she could have named the family whose record was accessed , but she did not at the time so Ms Toulson could only do a sample search . We find the claimant did not want to be an informer. Two wrongs do not make a right anyway.

3.85. Since the claimant was suspended and dismissed, five other employees have been suspended while an investigation was carried out into allegations they inappropriately accessed confidential records. The outcomes were:

a. Resignation prior to hearing;
b. Final written warning due to medical mitigation of actions;
c. Resignation prior to hearing;
d. Summary dismissal;
e. Case currently under investigation (October 2020).

3.86. The claimant's Subject Access Request, received on 15 January 2019 (365-366) was responded to by the Council on behalf of the respondent. The claimant did receive a P45 in early January 2019 (443- 446), prior to her dismissal, but that P45 did not relate to her role as Early Help Worker rather to work she had undertaken for the Council in relation to election work because from time to time the Council's Payroll department clear such employees from its records.

3.87. **The claimant does not help herself by obscuring good points by many bad ones.** By e-mail on 7 February 2019 at 11.13 am she said the envelope in which her appeal hearing invitation letter and appeal report had been sent had been received in a damaged condition. She asked why the envelope had been "*sent out inappropriately sealed and not signed for*" (454-456). Ms Williams spoke with her by telephone and explained the envelope had been sent by recorded delivery. The claimant sent a further e-mail in which she said it had not and requested the tracking number (457) which was sent (458). A Royal Mail search on that number shows it was signed for at 12.15 pm by someone with a different name at an address over 3 miles away, so it cannot be the correct tracking number. The claimant provided photographs of the envelope (484-489) which was made of brown paper. The respondent uses the Council's post room to send out its letters. The respondent cannot be held responsible any errors in that post room or for any mishandling of the envelope by the Royal Mail that may have caused it damage in transit. In her List of Issues she says some documents "*were opened and lost during post*", but until this hearing did not clarify pages were missing, though she could not say which. It is clear something went wrong somewhere but it provides no material from which we can infer anything to support the claimant's case or adverse to the respondent's.

3.88. Another example is:
I got dismissed for gross misconduct TFC disciplinary policy- a list of reasons of gross misconduct is on page 196 not one reason is on this page why I was dismissed. No list of examples of gross misconduct in exhaustive and this one says it is not. Moreover, the claimant agrees inappropriate access to records should be visited with dismissal unless there are mitigating circumstances. She says there were by asserting *"Reason's for my dismissal from TFC included I looked on the system for 'personal reasons'. If this was personal reasons why contact numerous social workers and ICRT and be so vocal about it? .. In fact evidence suggests there was a concerns around child -X from as early as March 2018 (182) Page 182 shows numerous contacts accessed the system including an Early Help Worker from another Team (182 and 146-147) but this person is still employed by TFC and judging by the 'meeting notes' she had no concerns around X and it was her client asked her to find out who she is allowed to see.* That person was Ms Krager and she **did** have a professional reason to access the records to better advice the family assigned to her.

3.89. The claimant alleges "*The director who suspended me has been reprimanded in the past by the general teaching council for 'serious concerns around management'*. After the appeal the claimant disclosed a newspaper report about Ms Davison from 2008 (75-76) of her attending a hearing of the General Teaching Council ("GTC") in early 2007 due to having signed returns to the Local Authority which had been altered. The GTC was clear she had signed these returns ignorant of the fact they had been altered, but in her position as Headteacher she ought to have known. She received a reprimand, which remained on her record for two years. She declared this reprimand to Sunderland City Council when applying for the post of Director of Early Help in 2016. We agree the claimant raises it now to deflect from the real issue of her own actions.

3.90. The claimant requested the Ofsted inspection report (105-137) be included in the bundle. It records the Children's Services provision is inadequate. In her ET1, the claimant says she "*was aware Together for Children also had an inadequate Ofsted rating for 'children in need of help and protection are not adequately protected and do not receive services that meet their needs at the right time'*" and "***That's why I helped out in case this case became a serious case review***". The report was published on 25 July 2018 after the first occasion she accessed the records of X on 4 July 2018. We accept there may have been earlier unfavourable ones. It does not authorise her to take matters into her own hands. Attack is rarely the best method of defence and in this case actually makes the claimant's position worse. As we discuss in our conclusions, any failings by the respondent in the past would be addressed by greater vigilance over Early Help Workers and Social Workers acting without appropriate managerial control and accountability by taking steps of their own initiative on what the claimant calls "gut instinct" rather the multi agency case conferences.

4. Conclusions

4.1. The claimant's statement says her "*opinion and complaint" about lack of support and inadequate advice on 6 September 2018 constituted a qualifying disclosure. The fact a family was not given appropriate advice, help and support meant the health and safety of X was likely to be endangered and X could have been at risk of abduction from an individual who was not allowed unsupervised contact with her*" and later "*I made the first disclosure in good faith to what I thought were three social workers but as a result of doing this I was subject to a detriment which constituted in suspension. TFC whistleblowing policy states 'when workers raise any concerns in good faith and reasonably believe them to be true they will be protected from reprisals or victimisation*' In this hearing it became clear she was saying her conversation with Ms Davison in October was also a protected disclosure

4.2. In our judgment she did not communicate to anyone information X was at risk of being abducted. She expressed her opinion to SW1 SW2 Ms Bell and possibly Ms Davison the respondent had not

been supportive of the family. As in Cavendish Munro Professional Risks-v-Geduld **she was simply** voicing a concern, raising an issue or setting out an objection. As Bean LJ. said in Simpson-v-Cantor Fitzgerald what is needed is ***"sufficient factual content and specificity such as is capable of tending to show"*** one of the matters in s.43 B. What was said does not pass that test.

4.3. Even if it did, she was not dismissed for doing so, or "safeguarding a child", but for actions separable from any disclosure, and wrong, as in Bolton School-v-Evans.

4.4. The detriment short of dismissal she relies on is suspension without being given a chance to comment then the length of time taken. The respondent's witnesses believe both were appropriate considering the background, the need to meet "*multiple*" individuals, the time in preparation notes and obtaining approval for them, giving consideration to the issues, preparing the report and seeking confirmation the matter was to progress to a disciplinary hearing. We totally disagree based on how little had actually been necessary or was done. However, that is how the respondent always deals with matters. It was commonplace, outside the band of reasonableness but in no way whatsoever done on the ground she had been "vocal" in criticism of the respondent.

4.5. The facts known to and beliefs held by Ms Davison which were the reason for dismissal were the claimant had accessed the record of X on two occasions for "personal reasons" to help out by trying to obtain support and advice for her friend. Ms Rumble submits this is correctly classified as a conduct issue, not capability, and moreover gross misconduct.

4.6. The claimant says "*An e-mail went out regarding personal relationships and safeguarding the day after I got dismissed and new managers from social care backgrounds were appointed*" and "*I feel this has been unfair and I have been made an example of*". Being made an example of **is not of itself unfair. Making someone a scapegoat or using an event as an excuse to get rid of her is. We find neither occurred.** She equates "personal" with "gaining personal advantage" when what the respondent means by the phrase is any reason outside her assigned work which could benefit someone she knows.

4.7. We accept the claimant's role was fundamentally underpinned by trust. She had access to sensitive and confidential information of children only as an Early Help Worker. We do not accept Ms Rumble's submission this was "**made clear**" throughout, via the IT system, the Code of Conduct, policies and procedures and training". The claimant accepts Early Help Workers "have no right" to access files not related to their assigned families as "a nosy". The difficulty for her, and doubtless others, are the "exceptions to the rule" when safeguarding concerns exist. Ms Davison's refusal to accept she held valid concerns and **only** wanted to assist her friend in a dispute over contact was not based on any reasonable grounds. She accepted when EJ Garnon asked her, if there was a risk based on what L had said in the past, that L might "snatch" X , there clearly was a valid concern.

4.8. The claimant's problem is no safeguarding referral was made and she did not raise safeguarding concerns with Mr Wilson in their meeting on 5 September 2018 or any appropriate manager at any time, instead taking it upon herself to speak to SW1, SW2 and whoever answered the telephone at ICRT. She was aware of the Code of Conduct but did not consider it. She did not take GDPR training in May 2018. She blames Mr Wilson for not chasing her to do so, but she has her own responsibility.. The claimant admitted her actions but disagreed as to why she did them. The respondent had reasonable grounds for the belief she was guilty of a breach of trust, misuse of its resources and had not worked within policies, standards and the Code of Conduct. Ms Rumble submits this is "per the gross misconduct policy (196)". We see why Ms Davison found misconduct but not gross misconduct for reasons we come to later. On the Boxall test, it was more capability but serious nonetheless.

4.9. The respondent's problems are fairness under s 98(4). Before the disciplinary hearing , the steps taken were well outside the band of reasonableness. Starting with the suspension the parallels with Gogay are striking. Suspension without a chance to explain is the norm in this respondent. Had the claimant resigned and claimed constructive dismissal she may have succeeded. It was made worse by delay as said in A-v-B. The damage done was that memories of the claimant and others eg SW1 SW2 and Ms Bell of exactly what was said only a day or two before deteriorated. The respondent maintained the whole process usually takes up to 3 months with their target being to conclude within 4 months. That is not in line with the ACAS Code nor is it within the band of a reasonable procedure.

4.10. Next comes the Strouthos points. The charge against her places great strain on the word "inappropriately". Was made it "inappropriate by (a) the mere fact X was not assigned to the Early Help team (b) her failure to liase with her manager and/or (c) her personal friendship with KS and X.

4.11.1. Starting with (a) the respondent's approach is contrary to Ladbroke Racing-v-Arnott and Meyer Dunmore -v-Rodgers. The claimant quoted the Safer Working families policy which says there may be "*occasions and circumstances in which people have to make decisions or take action in the best interest of a child which could contravene the guidance or where no guidance exists (253-5)"* and says there was no policy or procedure on safeguarding and personal relationships. There were other policies. If all Early Help Workers took the time necessary to read the plethora of policies guidance and codes of practice to find the appropriate boundaries of what they could and could not do, it would take hours. Even if they read them, where is the line to be drawn as to when a worker can access the records of a child not specifically assigned to her, as Ms Krager did? The law frequently makes illegal an activity irrespective of what the offender intended or the consequences which flow from it. **That must be done unambiguously**. Early Help Workers have access to ERM and LSC. If there is a rule they may only access records of people in families assigned to them or into whose records a manager has authorised them to look it could be plainly set out, in as few words, so that every worker knows breach of it will lead to sanction. The combination of documents falls far short of the clarity Mr Justice Phillips spoke of in Rodgers.

4.11.2. The unreasonableness of viewing all accessing of records as equally serious was best shown by one of Mr Cattell's questions to the appeal manager Mr Renwick. A person may access a record to leak something to the press or feed information to a third party to help that person sway the outcome of a custody dispute in Court. That is very serious and undoubtedly gross misconduct meriting summary dismissal, as the claimant herself agreed. Overstepping her remit for misconceived good reasons is **less** serious. Mr Renwick and Ms Toulson accepted the claimant's heart was in the right place. Ms Davison came across to us as viewing that as irrelevant, **even to sanction**.

4.11.3. A common consequence of putting a charge in terms which appear to regard the worker's motivation and understanding as irrelevant is the worker will advance "two wrongs make a right" arguments and "lash out" with counter allegations. The claimant says when Unison represented her they told her the respondent had suspended and reprimanded a lot of people since OFSTED gave a bad report over ***every little incident, mistake or complaint.*** This is from a little incident or mistake and on examination the claimant did not say it was. She says the respondent, especially Ms Davison is known for dismissing too readily and getting rid of staff she does not like because they do not do what they are told. She would not help herself by raising that. Her union were right to advise her to focus on why she had done what she did, not what others had. However, in good part it was due to the vagueness of the charge against her that she did stray into unhelpful points .

4.12. To an extent (b) and (c) overlap. Mr Wilson's ill health and remote location led the claimant to take decisions for which she was not adequately trained or qualified. Repeatedly she referred to

herself as “a professional” as if that meant **whatever she thought** was in the best interests of X in fact was. The claimant took it upon herself to do things because in her view, others were not doing their jobs properly. That is a recipe for chaos in an organisation like the respondent.

4.13. She mentioned in passing before us Victoria Climbié, Jasmine Beckford and “Baby P”. A common element of those tragic cases was failure of social services and other agencies to share information and individuals doing exactly what the claimant did by relying on “gut instinct” rather than evidence to decide it was in the best interests of a child not to being taken into care. Valid points of **why** it was wrong to overstep her authority were never clearly put to the claimant . When we did in this hearing, she showed no sign of recognising how dangerous such a view was. In the investigation and disciplinary the case against her was that she had accessed the record when she was not assigned to the case thereby breaching data protection. Her reasons for doing so were dismissed as not “credible” and “personal”. No reasonable employer could have reached that conclusion even on the basis of the imperfect investigation it had done.

4.14. Sunderland has a large population and the need for bodies like the respondent and the Council to protect children is demanding. The respondent should not involve itself uninvited in a dispute over contact. An individual it employs should avoid taking sides in such a dispute especially where one party to it is a very close friend. The Early Help Worker role is to provide help to vulnerable children and families who are subject of Early Help plans but have not reached the point of statutory intervention . They have access to LCS to enable effective information sharing with Social Care for families open to Early Help who may have had a history of Social Care intervention. Early Help Workers are not qualified Social Workers hence the programme “Step **Up** to Social Work”.The boundaries between cases where children need statutory intervention up to the point of being taken away from their parents and disputes between parents and others who have rights in relation to the child (“private law”) are matters which require a great deal of knowledge and careful handling. At the disciplinary hearing she did not see **why** what she had done was so wrong. Ms Toulson and Ms Davison even guided by HR officers expected people in the claimant’s position to work out for themselves what is and is not permissible even with limited line manager guidance. As in Whitbread-v-Hall, Ms Davison went into the disciplinary hearing with her mind made up. Her view was the offence being proved and the claimant having done something she **should** have known was wrong she could move seamlessly to summary dismissal. The claimant’s estimate of the time her deliberations took is far closer to what we believe to be the truth than hers.

4.15. An appeal was provided but it was such a constrained review it could not cure what had gone before. As for reasonableness of sanction the question is not whether the tribunal would itself have chosen to dismiss the employee but whether the decision to dismiss fell within band of reasonable responses open to a reasonable employer. Mr Renwick gave the clear impression he could see why the claimant had done as she did, and had he not been conducting only a review of what Ms Davison had done, he may still have dismissed, but not for summarily for gross misconduct.

4.16. We have no doubt the dismissal procedure taken as a whole was unfair. and the question is would the claimant have been fairly dismissed if a fair procedure had been followed. That has a profound effect of remedy. In Polkey-v-AE Dayton Lord Bridge of Harwich said of employers who say the employee could not do his job properly or was guilty of misconduct
But an employer having prima facia grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as “procedural” which are necessary in the circumstances of the case to justify that course of action.

If an employer has failed to take the appropriate procedural steps in any particular case, the one question the tribunal is not permitted to ask in applying the test of reasonableness ..is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction .. this question is simply irrelevant. In such a case the test of reasonableness under section 98(4) is not satisfied … but if the likely effect of the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation as Browne-Wilkinson J puts it in Sillifant's case "There is no need for an "all or nothing" decision. If the Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment".

4.17. Software 2000 -v-Andrews 2007 ICR 825 updated for legislative changes , held .
1 The evidence from the employer may be so unreliable the exercise of seeking to reconstruct what might have been is too uncertain to make any prediction, though the mere fact an element of speculation is involved is not a reason for refusing to have regard to the evidence.
*2.**The employer may show that if fair procedures had been complied with, the dismissal would have occurred when it did in any event.** …*
3.The Tribunal may decide there was a chance of dismissal … in which case compensation should be reduced.
4.The Tribunal may decide the employment would have been continued but only for a limited period.
5.The Tribunal may decide the employment would have continued indefinitely because the evidence that it might have terminated earlier is so scant it can effectively be ignored.

4.18. A tribunal may take into account the chance of events occurring. Where the chance of a future event is very high, or very low, we may treat the chance as 100% or 0% Timothy James Consulting Ltd-v-Wilton UKEAT/0082/14). **Scope-v-Thornett held though speculation is involved, a Tribunal should try to predict what may have happened. To be fair to both sides if this results in findings adverse to the claimant our award must reflect them.**

4.19. Had the claimant had more precisely framed charges put to her and been given an early opportunity to answer then she would have done as she did before us and shown no recognition she had done wrong or given any assurance she would not do the same again. In general people are more likely to understand and obey rules if they are told why the rules are in place and the possible consequences to others of them not being followed. We accept the claimant was well intentioned but her acting on "gut instinct" poses a risk of harm to those she is trying to help. Now L has more, but still limited, contact with X who has come to no harm. Had the claimant interfered any more, and L found out, she may have used it to her own advantage. Decisions of what is in the best interests of a child are difficult and need to be made by experts with the best shared information available. There is no place for "gut instinct". The claimant's role can be likened to a nurse practitioner who is expected to use her knowledge and initiative to help her patients but subject always to never taking a decision only a doctor is qualified to take. We explained to her not only that she had overstepped her authority but how she had and why it could have had serious consequences for X . She still said, if she did not have a good manager available she would do the same again. As said in Retarded Children's Aid Society-v-Day where someone does not recognise she has done wrong and is determined to go her own way, warning her is futile. Giving her more training would only help if she was willing and able to learn from it and the likely conclusion of a fair procedure would have been with her track record she would or could not. She would then have been fairly dismissed.

4.20. However, no reasonable employer could rank that as gross misconduct. Unlike Mr Adesokan the claimant was not in a senior position and the policies were not clear. On the definition in Westwood her conduct cannot be described as gross negligence or a deliberate and wilful contradiction of the contractual terms. The claimant was doing her best to achieve what **she believed** her role entailed. **That her employer disagreed, as we do, she "got it right" does not come close to "gross misconduct".**

4.21.There are two elements to unfair dismissal compensation: the basic award which is an arithmetic calculation based on age and length of service set out in s 122, and the compensatory award explained in s 123 which as far as relevant says:
(1) Subject to the provisions of this section and sections 124 and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(6) Where a tribunal finds that the dismissal was to any extent caused or 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 .

4.22. Section 123(6) as explained in Nelson-v-BBC empowers a Tribunal to reduce a compensatory award if the claimant's culpable and blameworthy conduct caused or contributed to the dismissal. This can be done in addition to a Polkey reduction (Rao-v-Civil Aviation Authority). Section 122(2) empowers a Tribunal to reduce the basic award on account of the conduct of the claimant before the dismissal. In Steen-v-ASP Packaging Ltd the EAT held a tribunal must consider four questions (a) what conduct is said to give rise to possible contributory fault(b) was that conduct objectively blameworthy, irrespective of the employer's view on the matter (c) if so, did it cause or contribute to the dismissal (d) **If so, to what extent would it be just and equitable to reduce the award** ?

4.23. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended (TULRCA) includes
(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,
the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

4.24. This case caused us concern. A large public body seems to think all the lessons from Gogay, the ACAS Code and the case law we have quoted at length do not apply to it because its personnel are busy . Even with three HR officers of various ranks advising they appeared to act as a " law unto themselves" in the procedure they adopted. It would not be just and equitable to reduce the basic or compensatory awards under s122 and 123 as well as the major limitation of her award made under the Polkey principle as that would "whitewash" these serious procedural failings . As for s 207A of TULCRA, we were tempted to make a higher increase but thought 15 % was right .

4.25. Subsection 4 is subject to the important qualification first made in Norton Tool Co Ltd -v- Tewson and affirmed in Burlo-v-Langley that sums earned in mitigation during the notice period do not fall to be deducted from loss. Since changes by HMRC to the taxation of post employment Notice pay we now award a gross figure.

4.26. The actual Effective Date of Termination (EDT) is for calculation of basic award purposes extended by the statutory notice period of 12 weeks so deemed as 2 April 2019. At that point the claimant had 16 years continuous employment during the last two of which she was over 41 years old Her basic award is 17 weeks gross pay of £ 381 = £ 6477. The ACAS uplift does not apply to that element. Her 12 weeks notice pay is £ 4572. We award loss of statutory rights of £500 and a 15 % uplift £5832.80.

Employment Judge T.M. Garnon
Judgment authorised by the Employment Judge on 6 April 2021