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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103415/2020

Held by Cloud Based Video Platform (CVP) on 15, 16 and 22 March 2021

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Employment Judge Neilson

Miss S Flynn

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Claimant
Represented by:
Mr T Merck,
Solicitor

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Tender Loving Child Care Centre Limited

Respondent
Represented by:
Mr C Edward,
Advocate

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that the claimant was unfairly dismissed by the respondent in terms of section 98 of the Employment Rights Act 1996 and the Employment Tribunal orders that the respondent shall pay to the claimant a monetary award of **Five Thousand and Seventy Four Pounds and Eighty Three Pence (£5,074.83)**. The prescribed element is **£4,171.08** and relates to the period from 24 March 2020 to 23 March 2021. The monetary award exceeds the prescribed element by **£903.75**.

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REASONS

1. At the Hearing on 15, 16 and 22 March 2021 by Cloud Video Platform (CVP) the claimant was represented by Mr Terence Merck, Solicitor ("Mr Merck").
5 The respondent was represented by Mr Colin Edward, Advocate ("Mr Edward").
2. The Tribunal was provided with a Bundle of Productions that had been agreed jointly between the parties ("the Bundle). The claimant produced a Schedule of Loss. Mr Edward confirmed to the Tribunal that the figures for
10 earnings contained in the Schedule of Loss were agreed.
3. Evidence was provided on behalf of the respondent by Kathrine Clark, Nursery Manager ("Ms Clark"); Sharon Wilson, Director ("Ms Wilson"); Mary Deighan, Director ("Ms Deighan") and William Templeton, Solicitor ("Mr Templeton"). Evidence was provided on behalf of the claimant by the
15 claimant.
4. At the commencement of the hearing Employment Judge Neilson made Mr Edward aware that he and Mr Merck had until recently worked together on a Law Society of Scotland Committee on employment law. Employment Judge Neilson did not consider this to be any impediment to proceeding but invited
20 comment from Mr Edward. Mr Edward confirmed he was happy to proceed.
5. There were a number of documents in the Bundle that related to a grievance that had been lodged by the claimant in February 2020 about the conduct of Ms Clark. Mr Merck confirmed that he did not intend to attach any significance to that grievance process and in fact there was no evidence led
25 by the claimant or the respondent with regard to that process.

Issues

6. The claimant had brought a claim for unfair dismissal under section 94 of the Employment Rights Act 1996 ("the ERA"). The respondent admitted that
30 the claimant had been dismissed but maintained that dismissal was for a

fair reason, namely misconduct. The issues to be determined were as follows:-

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- 6.1 Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of section 98(1) or (2) of the Employment Rights Act 1996 (the ERA)?
- 6.2 Was the claimant's dismissal for that reason fair in all the circumstances, in terms of section 98(4) ERA?
- 6.3 If the claimant's dismissal was unfair, what compensation should be awarded?

10 **Findings in Fact**

7. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
8. The respondent operates a nursery business in Kirkintilloch catering for children from the age of 0 to 12 years of age ("the Nursery").
- 15 9. The respondent operates within a highly regulated environment. They are required to comply with regulations at a local authority level and with regulations from the Care Inspectorate and the Scottish Social Services Council ("SSSC"). The respondent is registered with the Care Inspectorate. All employees require to be registered with the SSSC.
- 20 10. The claimant was employed with the respondent as a Team Leader in the baby room of the Nursery. She had been employed by the respondent since 4 September 2008.
11. The claimant was responsible for managing the baby room at the Nursery. The baby room catered for children from approximately 6 weeks old to 2
- 25 years old. As Team Leader the claimant was responsible for a team of qualified and trainee staff working in the baby room. Her responsibilities included managing the staff in the baby room; creating weekly rotas of staff; ensuring appropriate ratios of staff to children; carrying out staff reviews etc.

The claimant was also responsible for ensuring the children get appropriate physical activity each day and for ensuring reports are available for parents. In addition the claimant would provide hands on care for the children in the baby room. The claimant reported to Ms Clark.

5 12. Prior to the events referred to below the claimant had not been the subject of any formal disciplinary action by the respondent.

13. Ms Clark was employed by the respondent to manage the Nursery. She works 4 days a week and does not work on a Friday.

10 14. Ms Clark reports to Ms Wilson a director and co-owner of the business. The other director and co-owner of the business is Ms Deighan. Ms Deighan is the mother of Ms Wilson. Ms Deighan no longer worked full time in the Nursery but had been the manager of the Nursery until Ms Clark was appointed approximately 3 years ago.

15 15. The respondent have a number of policies that set out their approach to behaviour with regard to children. Specifically, they have a Promoting Positive Behaviour Policy (document 7 in the Bundle). This stipulates "We require all staff, volunteers and students to provide a positive role model of behaviour by treating children, parents/carers and one and other with friendliness, care and courtesy."

20 16. The following staff worked under the supervision of the claimant in the baby room in the period from September 2019 to March 2020:- Laura McLauchlan (experienced early years practitioner) ("LM"); Jennifer Gemmill (recently qualified early years practitioner) ("JG"); Lynsay Blair ("LB") and Shannon McLaughlin ("SM"). SM was an early years modern apprentice who had started with the respondent in or around September 2019.

25 17. In October 2019 the Claimant placed LM on a performance improvement plan ("PIP"). This was done following consultation with Ms Clark. The PIP lasted until mid-December 2019. After further discussion between the claimant and Ms Clark it was agreed to place LM on a second PIP. Whilst there had been some improvement during the course of the first PIP both

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the claimant and Ms Clark believed that it was appropriate to place LM on a further PIP. The second PIP commenced in or around mid-January 2020. There was no formal outcome to the second PIP.

- 5 18. On Thursday 30 January 2020 LM approached Ms Clark in her office to discuss a situation concerning the claimant. LM was upset. Ms Clark asked LM to go home and write down a statement and to provide that to her on the following Monday.
19. On Monday 3 February 2020 LM provided a six page written statement to Ms Clark (document 16 in the Bundle).
- 10 20. The written statement from LM contained a number of allegations concerning events that had taken place involving the staff in the baby room. There were allegations concerning name calling specifically LM alleging she was called "gay" on 3 October 2019 by the claimant and an allegation of both LM and JG being called a "hun" on previous occasions (although it was not specified whether it was the claimant who said this). These alleged
15 comments were stated to have arisen out of a conversation regarding football teams (these alleged comments will be referred to as "the football incident"). There were two allegations in the written statement that involved children in the baby room. Firstly an allegation that on 4 October 2019 the
20 claimant "was encouraging the children to walk about saying smelly Laura as she was annoyed that one of the children could say my name first." ("the 4 October incident"). Secondly an allegation that "on the 18th October 2019 Siobhan [the claimant] encouraged the children to walk around trying to kick me by showing them how to and lifting her feet to me repeatedly was not
25 hard but shouldn't have been done in front of children or staff Jennifer was present." ("the 18 October incident") There were further allegations in the written statement concerning interference into the personal life of LM by the claimant and LB. These further allegations centred around a relationship that LM was having. These further allegations took up approximately 4
30 pages of the written statement ("the personal life incidents").

21. Ms Clark was shocked by the allegations contained in the written statement - specifically those relating to the children. Ms Clark showed the written statement to Ms Wilson and they discussed it. Ms Wilson was also shocked by the allegations. They agreed that they should investigate the allegations.
5 The investigation was carried out by both Ms Clark and Ms Wilson.
22. On Monday 3 February 2020 Ms Clark and Ms Wilson met separately in the course of the morning with LM; JG; the claimant; LB and SM. The meetings took place in that order. A further meeting took place with LB on the afternoon of 3 February 2020 and a further meeting took place with SM on
10 Tuesday 4 February 2020.
23. Ms Clark took notes of the investigation meetings held with LM (document 11 in the Bundle); the claimant (document 15 in the Bundle); JG (document 12 in the Bundle); SM (document 14 in the Bundle) and LB (document 13 in the Bundle). These notes are not verbatim but are a broadly accurate
15 reflection of what was discussed in each meeting and have been signed as such by each of the participants.
24. At the investigatory meeting on Monday 3 February 2020 Ms Clark asked JG if she would be willing to write a statement "detailing anything you can remember about what you have witnessed". JG agreed to do so and
20 provided a hand written statement dated 4 February 2020 to Ms Clark.
25. None of the other witnesses were asked to provide a written statement.
26. In the course of her investigatory meeting LM told Ms Clark and Ms Wilson, when specifically asked about the 18 October incident that the claimant had started to encourage the children, namely child A and child K, to kick Laura's
25 legs and that the claimant was showing the children how to kick Laura's legs and saying over and over again to the children "kick Laura", kick Laura". LM confirmed that JG had been in the room at the time.
27. When asked about the 4 October incident LM told Ms Clark and Ms Wilson that the claimant had been annoyed that child K had started to say Laura's
30 name and the claimant had then encouraged child A and child K to say

5 "smelly Laura" over and over again and had continued to encourage the children to repeat this throughout the rest of the day. LM stated that both JG and SM were present when this took place. When asked what she did in response to this LM said that she laughed it off but it was not what she would have expected to see from any child care worker.

28. In the investigatory meeting with JG when she was asked about the 4 October incident JG stated that the claimant was crouched down telling the children to say to LM that she smells. JG reported that this occurred before Christmas and she thought it was a Friday because child A and child K were both in attendance and LB and SM are both off on a Friday. JG also stated that LM and the claimant both laughed about it. She stated that she felt it was done as a joke.

29. In the investigatory meeting when asked whether she knew anything about the 18 October incident involving the claimant showing the children how to kick LM JG said "Yes, it was possibly a Friday because it was just the three staff, it was at the patio door area and the claimant was encouraging the children to kick Laura. The children were copying the claimant and lifting their legs (child K and child A)."

30. In her investigatory meeting LB stated that the allegations concerning the personal life incidents were lies. When asked about the football incident LB said she did not know anything about that. With regard to the 4 October incident or the 18 October incident LB explained that she knew nothing about either incident.

31. Ms Clark and Ms Wilson called LB back to a further meeting on the afternoon of 3 February 2020. At that meeting the personal life incidents were raised with LB. Ms Wilson then asked LM to attend the meeting. LM stated that LB sent her a facebook profile from LB's phone. LB denied this.

32. In her investigation meeting SM was not specifically asked about the 18 October incident or the 4 October incident. She was asked if she had noticed anything within the baby room that would have concerned her or

whether any staff has said something that would have upset them. She stated no, nothing at all.

33. SM was called back to a further meeting with Ms Clark and Ms Wilson on Tuesday 4 February 2020. Ms Clark asked specifically about the football incident. SM said she could not remember such a conversation.

34. In her written statement dated 4 February 2020 (document 17 in the Bundle) JG stated:-

"Kicking

I remember Siobhan [the claimant] telling children; I think it was [A] and [K] as they are older and very good at talking and copying things, to kick Laura. I believe this happened around the area just outside the nappy room near the turf tray. I don't remember what had happened previously to this although both Laura and Siobhan were laughing and smiling with Siobhan saying to kick Laura and Laura replying with don't kick Laura. I believe this happened on a Friday as that is a day [A] and [K] are in together and we are quieter on a Friday. I didn't see any child kick Laura and I don't remember them fully repeating what was said. Both children can say all of the baby room's staff names or make an attempt. I got the impression that this incident was a bit of a joke as all I saw the girls do was place their leg out and both Laura and Siobhan were smiling.

Name Calling

I have heard Siobhan encourage the children to call Laura smelly. I don't remember exactly when or if she encouraged them to say anything else about other staff including myself. These children were [A] and maybe [K] as they are the best talkers in the room. I also don't remember who else was in the room or what happened prior to the incident. Although I can't remember the month I am certain this was a Friday as both these children attend a Friday. Also Lynsay and Shannon are off on a Friday."

35. In her investigatory interview the claimant was asked about five different allegations.
36. Firstly the claimant was asked if she had said to other staff that "Everything is a drama to Laura" when Laura said she was really cold in the baby room.
5 The claimant denied this.
37. Secondly the claimant was asked about the football incident and in particular whether she called LM "gay". The claimant denied calling LM "gay".
38. Thirdly the claimant was asked about the 4 October incident and specifically she was asked by Ms Clark "Another allegation concerns you encouraging
10 children to say "smelly Laura"; you repeatedly said this to the children to upset Laura?" to which the claimant replied "I did not say that, she's a liar".
39. Fourthly Ms Clark also asked "Another serious allegation has been made regarding you physically showing the children how to kick Laura on the leg and then encouraging the children to copy you, and kick Laura. Have you?"
15 to which the claimant replied "No, I have never done that she's lying."
40. Finally the claimant was asked whether she was constantly going on about LM's male friend John, asking her questions all the time. The claimant denied that and said LM was a liar.
41. The investigatory meeting with the claimant was short – no longer than 5 to
20 10 minutes. The claimant exhibited little emotion during this meeting and simply answered briefly the specific questions put to her. The claimant did not offer any broader explanation as to what had occurred nor did Ms Clark or Ms Wilson ask any additional questions beyond those set out in the note. The notes of that meeting with one slight amendment from the claimant are
25 broadly accurate reflection of what was discussed (document 15 from the Bundle).
42. By written note of 6 February 2020 the claimant asked the respondent to provide the staff rotas for week commencing 30/9/19; 14/10/19; 18/11/19

and 20/1/20. These were provided by Ms Clark to the claimant the same day.

43. The claimant was not suspended at any stage by the respondent but she was absent from work on the grounds of ill health from the 11 February 2020.

44. The claimant was invited to a disciplinary hearing by letter of 5 February 2020 from Ms Clark (document 25 in the Bundle). The disciplinary hearing was to take place on Monday 10 February 2020. Three allegations against the claimant were set out in that letter:-

(a) *"On the 3rd October 2019 you instigated a conversation within the baby room about football and which team each member supported, when LM indicated she did not care about football you stepped forward and said into her face "Your Gay". You have also been over heard referring to both Laura and Jennifer as being "A Hun".*

(b) *On the 4th October 2019 you were encouraging children in the baby room to say "Smelly Laura" to baby staff member LM by repeating this phrase several times.*

(c) *On the 18th October 2019 you were encouraging children to kick LM, by you lifting your leg and physically showing the children how to kick Laura's legs"*

45. The claimant was given the right to be accompanied at the disciplinary hearing by a work colleague or trade union official.

46. The claimant was unable to attend the disciplinary hearing on 10 February and was invited to a disciplinary hearing on 26 February 2020 by a letter of 12 February 2020 (document 26 in the Bundle). The letter of 12 February is in identical terms to the letter of 5 February save for the dates.

47. The claimant did not receive with the letters of 5 February and 12 February 2020 the notes from the investigatory meetings with LM, JG and herself (documents 11, 12 and 15 in the Bundle). She did receive the other documents referenced in those letters.

48. The claimant raised a grievance against Ms Clark by letter of 21 February 2020. The grievance was not upheld.
49. The claimant was unable to attend the disciplinary hearing scheduled for 26 February as her union representative was unavailable. The disciplinary hearing was reconvened for Wednesday 11 March 2020.
50. On Wednesday 11 March 2020 Ms Deighan conducted the disciplinary hearing for the respondent. Ms Wilson attended to take the minutes. The claimant was accompanied at the disciplinary hearing by John Lewis, her trade union representative.
51. Document 29 in the Bundle contains the minutes of the disciplinary hearing – as amended by the claimant. They are a broadly accurate reflection of what was discussed at the disciplinary hearing.
52. The respondent did not pursue with the claimant the first allegation contained in the letters of 5 and 12 February 2020 at the disciplinary hearing. The allegations previously raised by LM concerning interference in her private life were not put to the claimant in the disciplinary hearing. These issues were referred to by Ms Deighan in the disciplinary hearing where she stated:-
- "It appears that there is a catalogue of different events about Laura's private life, boyfriend, issues going on in the room, paints a picture – unhealthy interest of Laura's personal life. Jennifer has confirmed that this was going. She has said that you would leave the room so that you could find out information about Jennifer's personal life. These issues are concerning but are not to me to be of real concern. The real issues as an owner are the issues involving the children."*
53. The only issues put to the claimant at the disciplinary hearing were the 4 October incident and the 18 October incident.
54. At the disciplinary hearing in response to the allegation concerning the 18 October incident the claimant stated that she had got the children to do a kicking legs in the air activity. In response to the allegation concerning the 4 October incident the claimant denied that this occurred.

55. In the course of the disciplinary hearing the claimant and her representative were provided with copies of the written interview notes with LM and JG. The claimant and her representative were given an opportunity to review them.

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56. The disciplinary hearing was adjourned for 5 minutes to allow Ms Deighan to speak to Ms Clark on the issue of whether or not SM had been present in the baby room on Friday 4 October. Ms Clark notified Ms Deighan that she was 100% sure that SM had not been present.

10 57. In arriving at her decision Ms Deighan did place reliance upon the issues concerning the alleged broader treatment of LM by the claimant. Ms Deighan specifically stated "I can't completely ignore the other issues as it paints a picture of an ongoing situation of the bullying of a member of staff". The other issues that Ms Deighan considered related to the claimant involving herself in the private life of LM as set out by LM in her hand written statement of 31 January 2020 and as referenced at paragraph 52 above.

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58. Ms Deighan considered there to be harassment over a prolonged period of time of a member of staff, LM, – by the claimant. Ms Deighan accepted that the 4 October and 18 October incidents had occurred as described by LM and JG and that they were part of a broader campaign of harassment by the claimant against LM. In coming to this conclusion Ms Deighan placed reliance upon the statements of LM and JG contained in both the investigation notes and their hand written statements.

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59. Prior to the disciplinary hearing Ms Deighan had spoken with Ms Wilson and Ms Clark and had reviewed the notes of the investigations meetings and the two written statements from LM and JG. Ms Deighan relied upon the information supplied to her that had been obtained during the investigation process. Ms Deighan did not consider that it was necessary in these circumstances to speak to any of the witnesses herself.

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60. Following the disciplinary hearing Ms Deighan did discuss her decision with both Ms Clark and Ms Wilson and there was a consensus that there was no option but to dismiss the claimant. The final decision to dismiss was Ms Deighan's.

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61. In arriving at her decision to dismiss Ms Deighan did consider that the claimant had, in using the children as part of her campaign of harassment, committed a serious offence. Ms Deighan was very concerned about the treatment of the children and the impact this might have on the reputation of the Nursery. Ms Deighan did not consider that what had occurred with the children was simply a "joke". She considered it to be passive aggressive behaviour by the claimant.

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62. Ms Deighan considered what sanction to apply to the claimant. She gave consideration to a sanction other than dismissal. However she concluded that the incidents and the context within which they had occurred were so serious as to merit dismissal for gross misconduct.

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63. By letter of 24 March 2020 the respondent notified the claimant that she had been dismissed with immediate effect. That letter was received by the claimant on 26 March 2020. 26 March 2020 was the effective date of dismissal.

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64. The reason for dismissal was misconduct. In the letter of 24 March 2020 Ms Deighan stated that the respondent was satisfied that on or around 4th October 2019 the claimant had encouraged children in the baby room to say "smelly Laura" to baby staff member, LM, by repeating this phrase several times and that on or around 18 October 2019 the claimant encouraged children to kick LM, by the claimant lifting her leg and physically showing the children how to kick Laura's legs.

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65. The claimant was provided with a right of appeal and was given the right to be accompanied at the appeal. The claimant appealed by letter of 1 April 2020.
66. The appeal was heard by Mr Templeton of RPL Employment Law. RPL Employment Law provide employment law advice services to the respondent from time to time. Mr Templeton had provided advice to Ms Deighan earlier in the process regarding the question of whether or not the respondent should proceed with a disciplinary hearing whilst the claimant was signed off sick.
67. Prior to the appeal Mr Templeton had sight of the minutes of the investigatory meetings with the witnesses; the two hand written witness statements; the note of the disciplinary hearing with the claimants comments and the letter of appeal with added notes (document 31 to 31.5 of the Bundle).
68. The appeal by the claimant was heard by video conference on 30 April 2020. The appeal was not a complete re-hearing of the case. During the appeal Mr Templeton dealt with a number of specific points raised by the claimant.
69. After the appeal hearing on 30 April but before issuing his decision Mr Templeton received from the claimant e mails on 4 May with attachments (document 35 of the Bundle).
70. By letter of 11 May 2020 Mr Templeton notified the claimant that her appeal was unsuccessful. Mr Templeton's reasons for rejecting the appeal are as set out in his letter of 11 May (document 36 of the Bundle).
71. The claimant had a gross weekly wage with the respondents of £414.38. She had a net weekly wage of £337.96. There was an employer's weekly pension contribution of £8.83. The Claimant commenced employment on 18 January 2021 with East Dunbartonshire Council. The claimant is earning £730.61 net per month in her new employment.

72. The claimant has been in receipt of jobseekers allowance.

Submissions

Submissions for the respondent

5 73. On behalf of the respondent Mr Edward submitted that the reason for dismissal was misconduct, a potentially fair reason under section 98 ERA and that the respondent acted reasonably as treating that as a fair reason under section 98(4) ERA.

10 74. Mr Edward made reference to the test in *British Home Stores Ltd v Burchell [1978] IRLR 379* and submitted that the evidence established that the three tests from that case had been made out.

15 75. Specifically on the issue of whether or not the respondent had a genuine belief that the misconduct occurred and that there were reasonable grounds upon which to sustain that belief Mr Edward referred to the four witnesses that the respondent spoke to; that Ms Clark had no grounds for believing that LM was lying; that with regard to the second PIP no action had been taken to advance that so revenge by LM would seem improbable; that JG was described by Ms Deighan as an honest young woman and there had been no reason put forward as to why JG would lie; that SM had also been interviewed and the evidence before Ms Deighan was that SM had not been present on 4th October; that LB had been interviewed but saw nothing. In summary there were grounds for the respondent to come to the view that the misconduct occurred and reasonable grounds to support that genuine belief.

25 76. On the issue of investigation Mr Edward pointed out that that must be reasonable investigation in the circumstances. Here the fact that the investigation may have been carried out by both Ms Wilson and Ms Clark was irrelevant. They spoke to all relevant witnesses. The claimant had every opportunity to respond. Her explanation was simple and she had the opportunity at the investigatory stage, the disciplinary stage and the appeal stage to put forward her case. The claimant has not suggested what further

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investigation could have been carried out. On the issue of the time sheets – the suggestion that these showed that LM was not in the baby room at the time of the alleged incident was explained by Ms Clark who explained that whilst LM was down to work in After Care – there were fewer children there because of school holidays she had moved over to the baby room – that was the position explained to Ms Deighan and it was for her to decide.

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77. In terms of the process overall Mr Edward noted that Ms Clark stepped away from the process after the investigatory stage and Mr Templeton was brought in to provide a fair appeal. It was quite common to bring in an external third party at an appeal stage – there was no conflict and Mr Templeton made his position clear that he would not be involved unless he was independent. Lastly in relation to process Mr Edward pointed to the issue of the statements not being provided to the claimant prior to the disciplinary hearing. His position on that was even if that was correct the claimant did have them at the disciplinary hearing and there was sufficient time for her and her representative to study them and point out four alleged inconsistencies.

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78. With regard to the appeal process there was no allegation that Mr Templeton was not impartial. It was not a complete re-hearing but the appeal did consider some additional evidence – the rotas and the texts. There was an opportunity for the claimant and her representative to put forward any arguments and they did submit a lengthy written appeal document.

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79. In summary Mr Edward explained that Ms Deighan had a genuine belief that the misconduct occurred, there was no pre-determination. The claimant has not pointed to any ulterior motive for her dismissal. She had been there for 11 years – why would the respondent wish to dismiss her? It was clear that for Ms Deighan the involvement of the children was the prime reason for dismissal – the rest was background as to why it occurred.

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80. On the issue of sanction Mr Edward submitted that Mr Templeton was clear that both the claimant and her representative accepted at the appeal that the

kicking allegation, if true, would merit summary dismissal. The claimant in cross examination had either accepted or come close to accepting that the kicking allegation would merit dismissal. The claimant accepted there would be damage to the reputation of the nursery and that it would not be encouraging positive behaviour in children for an employee to behave like that. The test on sanction was whether it fell within the range of reasonable responses and Mr Edward submitted that it did.

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81. Mr Edward also submitted that even if the dismissal was unfair on procedural grounds then the Tribunal should conclude (applying *Polkey –v- A.E. Dayton Services 1987 IRLR 503*) that it was 100% likely the claimant would have been dismissed in any event. There were two witnesses and it is difficult to see what other outcome there could have been.

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82. Lastly Mr Edward submitted that in any event there should be a reduction in any award to take account of the conduct of the claimant. This however related to the conduct of the claimant in the process – that she was uncooperative and had no assisted in the process. It did not relate to the substantive issue regarding the allegations.

83. Mr Edward confirmed he had no issue with the Schedule of Loss.

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Submissions for the Claimant

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84. On behalf of the claimant Mr Merck submitted that the *Burchell* tests are applicable to this case and that he challenged the overall fairness of the process under section 98(4). He did not dispute that misconduct was the potentially fair reason for dismissal. However to simply reference misconduct was not sufficient – you had to look at the facts and circumstances. The misconduct could be simply the verbal act of encouraging children to say things and pick their feet up – that is what is referenced in the letter of dismissal. On the other hand it could be a long standing campaign of sadistic and selfish behaviour and conduct involving young children to harass a member of staff – that is what comes from Ms Deighan's evidence. The proper determination of what that misconduct is

impacts upon the required investigation and on the sanction. It is for the respondent to establish the reason but the claimant's position is that the real reason appears to be that stated by Ms Deighan – sadistic or selfish conduct to harass a member of staff.

5 85. With regard to the issue of reasonable investigation Mr Merck submitted that whilst all the witnesses had been interviewed only two had been asked to submit written statements – LM and JG. During the entire investigatory process there was, Mr Merck submitted, only one question asked of the claimant – did it happen or not? The claimant had no time to consider her
10 position. The respondent did not look into the background or the context. The respondent did not explore the motivation or purpose behind the alleged comments - these questions were not put to the claimant. All these were reasonable elements that should have been part of the investigation. To be a reasonable investigation the respondent needed to explore context
15 and purpose and motivation. If the true reason for dismissal goes wider than the comment or act itself then the investigation must go wider. One important piece of evidence before the respondent was JG's statement – it referenced that both the claimant and LM were laughing and smiling – there was no evidence of malice or ill will.

20 86. Mr Merck highlighted that the investigatory meeting with the claimant lasted no more than 5 minutes – it was conducted as an interrogation and was contrary to a real spirit of genuine enquiry.

87. In response to the respondent's submission that the claimant was uncooperative Mr Templeton had accepted in cross examination that there
25 was no suggestion of that during the appeal.

88. The claimant had not been given any opportunity to improve – there had been no suspension of the claimant pending the outcome of the process – so no perceived threat to the children.

89. Mr Merck submitted that the evidence showed the respondent had a pre-determined view as to the guilt of the claimant and as to the sanction to be
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applied. The involvement of Mr Templeton at appeal did not take away from that pre-determination.

- 5 90. On the overall approach to the investigation Mr Merck submitted that the evidence established that the respondent put the onus on the claimant to establish her innocence; that they did not carry out sufficient investigation and their views were predetermined. Mr Merck drew particular attention to Ms Clark's disregard of JG's comments about the incident being treated as a joke and about the failure to attach sufficient regard to the claimant's denial.
- 10 91. Mr Merck referred to the case of *Uddin –v- London Borough of Ealing UKEAT/0165/19* in support of his proposition that the failure of the investigating officer to share an essential fact with the disciplining manager can be relevant to the fairness of the dismissal under section 98(4) ERA. Specifically he referenced in this case the failure by the investigators to share with Ms Deighan the essential character of the allegations – and that specifically the JG statement which differed from that of LM as regards motive. As regards Ms Deighan Mr Merck submitted that she simply accepted the two statements, she failed to look for further evidence and her view that the behaviour was sadistic was not based on the evidence.
- 15 92. In summary Mr Merck submitted that if the reason for dismissal is simply the physical acts and the comments without more then no reasonable employer could dismiss. However if the reason was sadistic selfish conduct and behaviour then he would accept that dismissal may be a reasonable sanction but he would question if there were reasonable grounds for the belief and a reasonable investigation.
- 20 93. As regards the appeal Mr Merck submitted that it did not cure any defects up to that date. If anything defects were compounded by treating the views of the investigators as evidence - that their views should be preferred - when they were not present.
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94. If the Tribunal is with the claimant then any award should be as set out in the Schedule of Loss.

95. On contributory fault it is not appropriate to make any findings re the substantive issues.

5 96. Had a proper investigation been carried out the claimant would not have been dismissed.

The Law

97. Section 94 of the ERA provides for the right of an employee not to be unfairly dismissed by his employer.

10 98. Section 98 provides:-

15 *“(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 reasons) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held.*

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

20 *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

(b) relates to the conduct of an employee,

25 *(c) is that the employee was redundant, or*

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under an enactment.

30 *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

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

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

- 5 99. In terms of Section 98(1) it is for the employer to establish the reason for dismissal. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).
- 10 100. The Tribunal should first examine the facts known to the employer at the time of the dismissal and ignore facts discovered later. In a misconduct case if facts emerge after the dismissal which show that the employee was innocent of the suspected misconduct after all that does not make the dismissal unfair.
- 15 101. The Tribunal must then ask whether in all the circumstances the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The onus of proof is no longer on the employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).
- 20 102. Each case must turn on its own facts. The Tribunal must not substitute its view for that of the employer (***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*** and ***Foley v Post Office 2000 IRLR 827*** and ***HSBC Bank v Madden [2000] ICR 1283***). The question is whether the dismissal fell within the band of reasonable responses which a reasonable employer might have adopted in response to the employee’s conduct, not whether the Tribunal itself would have dismissed in these circumstances.
- 25 103. In misconduct cases it is appropriate to address the tests for misconduct dismissals in ***British Home Stores Ltd v Burchell [1978] IRLR 379***:-
- 30 104. “First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on

those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”

Discussion & Decision

5 105. In considering the evidence the Tribunal is satisfied that the evidence put forward by all of the witnesses was for the most part credible testimony.

106. It is for the respondent to establish the reason for the dismissal. It is not disputed by the claimant that the reason is misconduct (although there is a dispute about the exact nature of that misconduct). The requirements of
10 section 98(1) and (2) are accordingly satisfied.

107. It is in turning to consider section 98(4) that the Tribunal must have regard to the tests set out in ***British Home Stores Ltd v Burchell [1978] IRLR 379*** and whether or not the sanction of dismissal falls within the band of reasonable responses.

15

108. The first issue is whether or not the employer did believe that the misconduct took place. The Tribunal is satisfied on the evidence that the Ms Deighan who dealt with the disciplinary hearing did believe that the misconduct took place. Specifically she did believe that on or around 4th
20 October 2019 the claimant had encouraged children in the baby room to say "smelly Laura" to baby staff member, LM, by repeating this phrase several times and that on or around 18 October 2019 the claimant encouraged children to kick LM, by the claimant lifting her leg and physically showing the children how to kick Laura's legs. However it was also clear to the Tribunal
25 that Ms Deighan did believe that both of these incidents were part of a campaign of harassment by the claimant against LM and not simply isolated incidents – a point we will return to.

109. The second issue is whether or not the respondent had reasonable grounds to sustain that belief – being the belief that the 4 October and 18 October

incidents occurred and that these were part of a campaign of harassment. There were witness statements from both LM and JG to support the view that the 4 October and 18 October incidents had occurred. The claimant denied the incident on 4 October and as regards the incident on 18 October the claimant alleged that there had been a kicking exercise carried out by the children. Whilst the claimant sought to rely upon rotas to show that the respondents evidence as to who had been in attendance and who had not been in attendance was subject to challenge the Tribunal was not satisfied that anything turned on this. The issue of the rotas was not put to the respondents witnesses and in any event the issue had been raised both at the disciplinary hearing and at the appeal and the Tribunal was satisfied that there was sufficient evidence for the respondent to conclude that it was more likely than not that the 4 October and 18 October incidents had occurred as the witnesses JG and LM stated it had. On the issue of these incidents being part of a campaign of harassment the Tribunal did not consider that there were reasonable grounds for the respondent to sustain that belief as explained below.

110. The third issue is whether or not the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The Tribunal is not satisfied that the respondent did carry out sufficient investigation. In giving her evidence before the Tribunal Ms Deighan made it clear that she did place reliance upon the other issues that had been contained in LM's written statement. These issues being the alleged interference into LM's personal life and the issues going on in the baby room (other than the 4 October and 18 October incidents). Whilst it is clear that Ms Deighan considered the two incidents to be very serious it was also clear that her view of these incidents was to a large extent coloured by the context of what she described as a campaign of harassment. Although Mr Edward referred to the other matters as "background" the Tribunal was not satisfied based on the evidence that the other matters were simply background. In the disciplinary hearing Ms Deighan stated "I can't

completely ignore the other issues as it paints a picture of an ongoing situation of the bullying of a member of staff." In giving evidence in chief Ms Deighan explained that she did not want someone in her nursery "who behaved in such a sadistic and selfish manner to involve two little babies in her campaign." With regard to the evidence of LM Ms Deighan said in evidence in chief that she had no reason to believe that LM was lying "she was extremely upset, this had been going on for months, it was a bit of a hate campaign, real harassment" and was not something LM would just make up. Under cross examination Ms Deighan had confirmed that this was not just about children being abused but was also about harassment over a prolonged period of time and that she considered that the claimants actions in respect of the two incidents had been motivated by a desire to harass LM. There was evidence from both LM and JG that with both incidents the claimant and LM had appeared to treat both as a joke. However Ms Deighan still considered the incidents serious because it was part of a campaign and wholly inappropriate conduct. The background context against which these events occurred clearly played a large part in the decision to dismiss. Under cross examination Ms Clark when asked about the incidents being a "joke" stated that there had been a catalogue of incidents and allegations over a period of time that she would say were definite bully tactics. Ms Wilson under cross examination when asked about the conduct of the claimant in the investigatory meeting stated that she truly believed the claimant was guilty for the way she treated LM throughout the whole period at work. Ms Deighan consulted with both Ms Clark and Ms Wilson before coming to her decision and relied upon the information that they provided to her. She did not separately speak to any of the witnesses. It was clear to the Tribunal that Ms Deighan had formed the view prior to the disciplinary hearing proceeding that there was a campaign of harassment of LM by the claimant taking place. A total of five allegations were put to the claimant in the investigatory interview. At the disciplinary hearing the only allegation put to the claimant related to the 4 October and 18 October incidents. The allegation about the football incident was dropped and the claimant was not given an opportunity to respond in relation to an allegation concerning a

campaign of harassment of which these incidents formed a part. In circumstances where it was clear that the decision of the respondent to dismiss was based upon the 4 October and 18 October incidents being part of a campaign of harassment rather than isolated incidents the Tribunal would have expected that the claimant should have been given an opportunity to respond to these other allegations and specifically to the allegation that the incidents were part of a wider campaign. It does appear to the Tribunal that Ms Deighan had concluded that there was an ongoing campaign of bullying of LM by the claimant without that allegation being put to the claimant. In these circumstances the Tribunal is satisfied that there was a failure by the respondent to fully investigate whether or not there was a campaign of harassment/bullying and there was a failure to put that allegation of a wider campaign to the claimant. This failure was not addressed as part of the appeal process. The appeal process dealt with a number of different issues but it was not a full re-hearing and did not provide the claimant with an opportunity to address the other incidents apart from the 4 October and 18 October incident. It is a fundamental principle of natural justice that a claimant must know the case against them and have an opportunity to respond. Where, as here, it was clear that the background context of a campaign of harassment/bullying was highly relevant to the decision to dismiss then those broader allegations should have been put to the claimant.

111. The Tribunal did not consider that the omission to provide the claimant with the written interview notes with LM and JG until the disciplinary hearing itself had any impact upon the fairness of the process. The claimant and her representative had time to consider the notes and an opportunity at appeal to address any issues.

112. Whilst the Tribunal concludes that because of the failure to properly investigate the allegation of a campaign of harassment and the failure to put that issue to the claimant that the decision to dismiss was unfair under section 98(4) the Tribunal has also to consider whether or not, as submitted by the Respondent, such a failure would, applying *Polkey –v- A.E. Dayton*

Services 1987 IRLR 503, have made no difference to the extent that a 100% reduction in compensation is appropriate.

113. It was clear to the Tribunal that the respondent did have grounds for considering that the 4 October and 18 October incidents did take place as
5 alleged by the witnesses LM and JG. The respondent treats child welfare issues as matters of serious concern. The respondent operates within a highly regulated environment. There were serious concerns regarding both child welfare and reputation that the respondent had to consider. The claimant was the senior person in the baby room at the Nursery. She had a
10 responsibility for the welfare of the children in her care and a responsibility to set an example to the employees who reported to her. The claimant throughout the investigation, the disciplinary hearing and the appeal did not offer any evidence other than denying that the incidents took place and stating that with regard to the 18 October incident the children were carrying
15 out a kicking exercise. The incidents themselves were serious, even if they had occurred as isolated incidents and not as part of an alleged campaign of harassment. In all these circumstances it does appear to the Tribunal that there is a high level of likelihood that the claimant would have been dismissed in any event. However, the Tribunal is not satisfied that this is a
20 case where it can be said with 100% certainty that dismissal would have occurred. In the absence of a campaign of harassment/bullying and treating the two incidents as isolated incidents it is not clear to the Tribunal that an employer, such as the respondent, acting reasonably would have dismissed. The context in which the two incidents took place would be critical to any
25 determination as to how an employer might respond to these incidents. If it was done as a joke that would still be serious but not as serious as if it was done as part of an ongoing campaign of bullying/harassment. Accordingly, the Tribunal considers that a Polkey deduction of 75% is appropriate to reflect both the likelihood of a dismissal based solely on the two incidents
30 alone and the likelihood that potentially there was a wider campaign of bullying/harassment.

114. With regard to any reduction for conduct the Tribunal does not consider that it is appropriate to make any reduction for conduct. Mr Edward submitted there should be a reduction for conduct in light of the manner in which the claimant conducted herself throughout the process. The Tribunal does not
5 consider that the manner in which the claimant conducted herself can be said to be blameworthy. The claimant may not have been as co-operative as the respondent would have liked and she may have said little during the investigatory meeting but the Tribunal does not consider that to be blameworthy or to have contributed to her dismissal. The Tribunal also notes
10 that Mr Templeton noted the claimant as being co-operative during the appeal.

115. The Basic Award was agreed by the parties in the sum of £3,315.01. The Compensatory Award was agreed in the sum of £16,984.30 (with loss of statutory rights agreed at £300 and included in this). The Compensatory
15 award covered losses from 24 March 200 through to 23 March 2021. On the basis that there was a 75% likelihood that the claimant would have been dismissed in any event had a fair process under section 98(4) been followed the Tribunal assesses the compensation due as Basic Award of £828.75 and a Compensatory award of £4,246.08.

20 116. The monetary award is £5,074.83. The prescribed element in accordance with the Employment Protection (Recoupment of Benefits) Regulations 1996 is £4,171.08. The prescribed element is attributable to the period from 24 March 2020 to 23 March 2021.

25 Employment Judge: S Neilson
Date of Judgement: 19 April 2021
Entered in register: 30 April 2021
and copied to parties