EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Cleathero	**v**	Peterborough Regional College (Inspire Education Group)

Heard at: Cambridge **On**: 6, 7 and 8 September 2021

Before: Employment Judge Tynan

Appearances
For the Claimant: Mr Cleathero, Lay Representative
For the Respondent: Mr Martin Bloom, Solicitor

JUDGMENT

JUDGMENT having been sent to the parties on 30 September 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 12 November 2018, following Early Conciliation through Acas between 15 October 2018 and 30 October 2018, the Claimant pursues a complaint against the Respondent that she was constructively unfairly dismissed. The claim is resisted by the Respondent.

2. I heard evidence from the Claimant in support of her claim. Her written statement is lengthy, running to some 264 paragraphs over many pages. I read the statement carefully before the Hearing commenced and in coming to this Judgment, I have re-read it.

3. For the Respondent I heard evidence from: Ms Adele Moore, who is employed as the Manager of the Respondent's Nursery and was the Claimant's Line Manager; Ms Debbie Barker, who is employed by the Respondent as Acting Faculty Manager - Ms Barker undertook an investigation in relation to events on 2 May 2018 which I shall come back to; and Mr Peter Walker, who is Deputy Principal at the Respondent - Mr Walker heard the Claimant's Appeal against the outcome to her June 2018 Grievance. The Claimant resigned before she received his decision, as I shall come back to. There was also a written statement by Ms Sandra Winskill, who is employed by the Respondent as an HR Business Partner; Ms Winskill was unable to give evidence as I am told she has been placed at risk of redundancy and is currently absent from work with ill health. I have read and take into account the contents of her statement but in terms of the weight to be attached to it take into account that she did not attend Tribunal to give evidence and was not cross examined.

4. There was a single agreed Bundle of documents which runs to some 597 pages.

5. The Claimant and Ms Moore were each, in their own way, somewhat unsatisfactory witnesses. There were various elements of the Claimant's case that did not stand up under cross examination and indeed I have to observe that many of her responses to the questions put to her, were monosyllabic. Ms Moore was not eloquent in her evidence, albeit that ineloquence is not to be equated with dishonesty.

6. One of the features of the Claimant's case is that she approaches differences of opinion, differences of perception and differences of recollection as evidencing dishonesty. In my long experience as a Solicitor and now as an Employment Judge, people's perceptions often vary and recollections may differ, but that does not mean that someone is lying or colluding or behaving dishonestly. The fact that the Claimant has taken such a position only serves to impact her own credibility and means that I have had to approach aspects of her evidence with a degree of care.

FINDINGS of FACT

7. The basic facts in this case are not in dispute. The Claimant was the Room Leader of the 'Baby Room' at the Respondent's on site Nursery. She had approximately 15 years' experience as a Nursery Nurse at the time of the incident that is at the heart of these proceedings. She had lead responsibility for the Baby Room though this did not include line management responsibility for the other Nursery Nurse staff. However, she was more senior to them.

8. On 2 May 2018, a child, referred to throughout these proceedings as 'Baby W', was fed porridge that was contrary to his documented dietary special requirements. Baby W was just a few months old at the time of the

incident. It was, according to the Claimant, his second day at the Nursery and the Claimant was his designated Key Worker.

9. In accordance with the Respondent's documented and comprehensive nursery procedures, (at pages 115 – 174 of the Hearing Bundle), the Claimant was responsible for either recording Baby W's attendance at the Nursery in the daily attendance register or ensuring that his attendance was recorded by another staff member. Baby W's attendance was not initially recorded on 2 May 2018 and the Respondent had concerns as to whether this may have been a contributory factor in the feeding error, something the Claimant disputes.

10. As Key Worker for Baby W, the Claimant would have been expected to have a sound understanding of his needs. It seems to me that this would have been particularly important as he was settling in at the Nursery, a view that is supported by Ms Barker's evidence to the Tribunal.

11. Baby W is lactose intolerant. He was fed approximately six spoonfuls of porridge by the Claimant which had been prepared by another experienced Nursery Nurse, Emma Child. There is an issue as to whether it was prepared under the Claimant's direction. In her evidence at Tribunal, the Claimant emphasised the difference between an intolerance and an allergy, the latter being potentially more serious. However, towards the end of her disciplinary hearing on 12 June 2018 chaired by Mr Cox, the College's Vice Principal, the Claimant was asked by Mr Cox what she thought would be the implications if Baby W continued to be fed contrary to his special dietary requirements. The Claimant replied,

> *"Yes, horrific, it could be life threatening"*

The Claimant went on to say,

> *"It would be dismissal as it is not acceptable practice".*

12. A constant theme in the period leading up to the Claimant's resignation and throughout these proceedings was that the Claimant felt that she had been treated inconsistently in relation to others. In the course of her evidence, she referred to other incidents, where children were alleged to have been fed contrary to their documented dietary special requirements, as having been swept under the carpet. Taken literally, that might imply she considered that the events in relation to Baby W should equally have been swept under the carpet. Whilst I am satisfied that is not what she meant; it does beg the question what is the basis of her complaint that the Respondent invoked its formal disciplinary procedure in relation to her. The answer is that at the heart of her complaints in this case, are allegations that she was bullied by Ms Moore. However, in response to a question from me, the Claimant acknowledged that Ms Moore's motives in reporting issues of concern would not in themselves be a reason why those issues should not be investigated, or if appropriate, why disciplinary action should not follow. As I shall return to, the incident in relation to

Baby W did not in fact come to the Respondent's attention because Ms Moore acted vindictively in the matter.

13. Mr Cleathero questioned Ms Moore about an incident in or around 2016 when a staff member's child, Baby O, had eaten a foodstuff not intended for him and he had become sufficiently poorly that the staff member had sought medical attention for him. Ms Joanne Hather-Dennis, the Investigating Officer at the first stage of the Claimant's Grievance, interviewed the staff member concerned who said that the matter had been investigated at the time by Ms Moore. The interview notes record that the staff member said that she had not known at the time that Ms Hather-Dennis had not been informed about the incident, notwithstanding she was Executive Director.

14. Mr Cleathero made a legitimate point in contrasting the way in which this incident was handled with his wife's experience in 2018 when there was no suggestion that Baby W had become ill, let alone that he had required medical attention. However, the two incidents were approximately two years apart and I accept Ms Moore's explanation that practices at the Nursery had evolved in the intervening period, including greater HR involvement where potential concerns arose. Ms Rainy, said the same to Ms Hather-Dennis.

15. In any event, the fact, as the Claimant would maintain, that the 'Baby O' incident was not formally investigated or reported as it should have been, does not ultimately assist the Claimant's case. Two wrongs, as they say, do not make a right.

16. The Claimant relies upon what she says are other wrongs, including the Respondent's response to concerns around staff practices regarding medication. On that specific issue I accept Ms Moore's evidence, at paragraph 42 of her witness statement, namely that several members of staff had been giving a child 'Infacol' which was not prescribed and where there was no documented evidence from the parents or midwife to support the practice. It was then alleged that the Claimant had administered paracetamol to the child via a feeding tube without first checking the position with the Community Nursery Nurse at the Respondent. Although signed copies are not in the Hearing Bundle, I find that the template letter at page 95a of the Bundle was issued to Nursery staff who were asked to sign the letter to evidence they had received it, and, that Ms Moore had forwarded the signed letters to HR. The letter itself was prepared with HR input. It may well be, as the letter evidences, that the issues of concern were addressed by way of an informal discussion rather than via a formal disciplinary investigation, but the issues were certainly not swept under the carpet. Action points were identified and communicated, including up to date training where required. Insofar as the Claimant seeks to contrast how this matter was dealt with, with the Respondent's response to the Baby W incident two months or so later, then she was the beneficiary of the earlier more informal approach since she was one of the staff who may not have been following best practice regarding administering medication.

17. Furthermore and in any event, the letter at page 95a of the Hearing Bundle indicates that the Respondent recognised on that occasion that its procedures were potentially unclear.

18. It was suggested to Ms Moore that she had only involved HR in the Baby W matter because of some personal feelings or animosity towards Mr Cleathero, possibly as a result of some unwelcome interactions between them in March 2018 in the aftermath of the February 2018 medication episode. Ms Rainy told Ms Hather-Dennis that there had been some "umming and arring" (as she described it) as to what to do. She said,

> *"We asked Sandra from HR over to give advice. I think because Adele's scared of Barry, she didn't want to address it directly with Sam and didn't want to do anything that would bring him into it. It was when [Sandra] said that it was negligence that it was moved forward".*

19. According to Ms Rainy therefore, she and Ms Moore had jointly sought HR advice. That somewhat undermines the Claimant's case that Ms Moore was singling her out or acting vindictively. As to Ms Moore's stated concerns in relation to Mr Cleathero, it is not necessary that I make any findings as to whether or not Mr Cleathero had contacted Ms Moore numerous times, as alleged, or whether she had any other reason to avoid contact with him. Even if the concerns relayed by Ms Rainy were unfounded, her comments to Ms Hather-Dennis do not support that Ms Moore was singling the Claimant out for treatment or acting in bad faith. Finally, Ms Rainy's comments confirm, as I find, that it was not Ms Moore's decision to progress the matter as a potential disciplinary issue, instead that Ms Hather-Dennis decided in conjunction with the Respondent's HR team, that the concerns in relation to Baby W should be formally investigated.

20. I refer to paragraph 35 of the Claimant's witness statement and reiterate the observation I have already made, namely that the Claimant's mindset is that where there is some identified difference in recollection or explanation, that is interpreted by the Claimant as Ms Hather-Dennis covering for Adele and someone not being truthful in the matter.

21. The disciplinary investigation was led by Ms Barker. I accept that Ms Moore had no hand in drafting the letter to the Claimant dated 4 May 2018 in which she advised that as an alternative to suspension, the Claimant would be relieved of her Key Worker responsibilities in relation to Baby W. It was a curious decision in so far as the Claimant continued to work in the Baby Room and to be in contact with Baby W and indeed might even be involved in feeding him and providing other care for him. She also retained her Key Worker responsibilities in relation to other children. It suggests to me that the move was intended to reassure Baby W's parents and maintain their confidence, but that the Respondent did not otherwise have significant concerns in relation to the Claimant that she might pose any ongoing risk to the children.

22. On reflection, Ms Moore expressed the view that the Claimant might have been relieved of her food preparation responsibilities more generally, certainly at least pending the outcome of the disciplinary investigation. However, this was not Ms Moore's decision and neither Ms Hather-Dennis nor Ms Winskill, the relevant HR Business Partner concerned, were available to give evidence to the Tribunal as to why they had proceeded as they had.

23. The Claimant is also critical in particular of the fourth paragraph of the letter of 4 May 2018. The wording is a little clumsy, but ultimately I find it says no more than that gross negligence which causes or may cause unacceptable loss, damage or injury constitutes gross misconduct under the Respondent's disciplinary rules (which indeed it does - see in that regard page 44 of the Hearing Bundle) and in the event the Claimant was found guilty of such misconduct this could result in formal disciplinary action up to and including dismissal. That is a standard form warning frequently given to employees where an employer is investigating conduct that potentially constitutes gross misconduct under the employer's disciplinary rules. I consider it an unexceptional reference. It did not indicate that the Respondent already considered the Claimant to be guilty of gross misconduct and of course, in the event, the Claimant was issued with a final written warning. She was not dismissed, an outcome she accepted under cross examination was potentially lenient in the circumstances.

24. The Claimant's other two principal criticisms are that Emma Child was treated from the outset as a witness, rather than someone who was potentially involved in the matter as the person who had prepared the food that was given to Baby W. As far as I can identify, this is an issue that has only been identified as a procedural shortcoming in the course of these proceedings. I cannot see any reference to it in the disciplinary hearing minutes, in Mr Cox's comprehensive decision letter in which he meticulously summarised the Claimant's concerns, nor is it referred to in the Claimant's Grounds of Appeal at page 252 of the Hearing Bundle. As such, I find that it was not a factor operating in the Claimant's mind when she resigned her employment and there is no need, therefore, for me to make any further findings in relation to the matter.

25. The second principal criticism is that certain potential witnesses did not attend the Claimant's disciplinary hearing on 12 June 2018. Firstly, I accept Ms Barker's explanation as to why she had not felt it necessary to interview more witnesses, namely, that the Claimant and Ms Child had given similar accounts of the events. The Respondent's Disciplinary Policy does not state that employees have the right to bring, or compel the attendance, of witnesses (see pages 38 and 39 of the Hearing Bundle). In any event, when Mr Cox questioned the relevance of witness evidence in the course of the hearing, the minutes record that the Claimant said,

> *"Okay, I won't call them".*

26. Beyond those points, the Claimant did not take issue with how the disciplinary investigation or hearing had been handled. In the case of Ms Barker, she accepted that it was appropriate for Ms Barker to submit a report and that in presenting her report, Ms Barker had avoided making any recommendations, leaving the matter entirely to Mr Cox, as the Disciplining Officer to determine whether there was a case to answer and subsequently, whether the Claimant was guilty of misconduct and thereafter what disciplinary sanctions should be imposed.

27. For completeness, it seems to me that Ms Barker's report cannot be faulted. Indeed, she is to be commended in terms of how the report is presented and laid out, summarising as it does in balanced but thorough terms the evidence collated in the course of the investigation. It concluded with an overview of the issues Mr Cox might wish to consider and explore further at any hearing.

28. Mr Cox's conduct of the disciplinary process is equally beyond reproach. The hearing minutes extend over four pages (see pages 236a-d of the Hearing Bundle). I have referred already to the Claimant's concluding remarks as to the potentially serious consequences for Baby W of being fed contrary to his dietary requirements and her acceptance under cross examination that she had potentially been treated leniently. She could not initially offer any explanation, when asked by Mr Bloom, as to the purpose of her appeal, except that "*it is what one does"*.

29. She then went on to say that her voice had not been heard, or that anything she said had been listened to. That was at odds with her other responses to Mr Bloom's questions. In any event, Ms Barker's investigation report and the disciplinary hearing minutes evidence to the contrary that the Claimant's voice was heard, and, that Ms Barker and Mr Cox each listened most carefully and respectfully to what she had to say.

30. The Disciplinary Appeal was put on hold, with the Claimant's agreement and indeed at her request, while the Respondent dealt with her Grievance and subsequently her Grievance Appeal. She resigned very shortly before the Grievance Appeal Outcome was notified and accordingly, the Respondent was denied the opportunity to hear and determine her Disciplinary Appeal.

31. My findings and observations in relation to the Grievance process echo those I have made already in relation to the disciplinary investigation and hearing. I can find no proper basis to criticise Ms Hather-Dennis or Mr Walker's conduct respectively of the Grievance and Grievance Appeal process. Mr Walker was a particularly impressive witness, and it is testament to his measured and pragmatic approach that he took in his stride the fact that the Claimant not only covertly recorded the Grievance Appeal hearings themselves, but also covertly recorded his private conversations with Emma Richmond of the Respondent's HR team during the breaks in the proceedings. Many employers would not be so forgiving

and would rightly regard such conduct as wholly inconsistent with essential trust and confidence.

32. In my judgement, the Claimant's actions in covertly recording meetings were unjustified and represented an unwarranted and highly unattractive intrusion into Mr Walker and Ms Richmond's privacy and the confidentiality of their discussions. I reject without hesitation her explanation that she simply wanted to keep a record of the meeting to assist her at a time when she was struggling with her mental health. She could simply have asked Mr Walker to keep a recording. I share Mr Walker's view that she was looking to catch people out.

33. I find further support for that conclusion in the fact that the Claimant has misrepresented comments made by Mr Walker, for example, seeking to suggest that he was being disingenuous, or even dishonest, in telling Ms Richmond during a break in the proceedings that there should not be a further adjournment in the proceedings. His comments in fact reflected his frustration with the Respondent in having failed to provide the Claimant with the relevant evidence ahead of the first Hearing. He was not saying that the Claimant would not be offered breaks in the proceedings should she need these. The Claimant's misrepresentation of his comments speaks to her mindset alone and ultimately her credibility as a witness. Mr Walker's honesty and integrity are not in doubt in my mind

34. I refer at this point to the Claimant's resignation letter at page 488 of the Hearing Bundle and note her comments, which I find were entirely without foundation, namely that the Senior Management Team condoned Ms Moore's actions and bought into similar practices; i.e. bullying. I do not uphold, as she goes on to say, that throughout the grievance process the College acted in a manner to deliberately obstruct and withhold information that she was entitled to or that it made false representations in regard to their existence and availability. I reject entirely that Mr Walker and Ms Richmond were*,*

> *"evasive and played mind games in order to obstruct me in obtaining this information, humiliating me and making me feel like a performing monkey…"*

35. The Grievance itself concerned the Claimant alleged treatment by Ms Moore, specifically that she had been bullied by her. Whatever her concerns may have been, they are not detailed in her witness statement save in so far as she alleges that she was treated inconsistently by Ms Moore in terms of how she responded to the Baby W situation. I have already dealt with the circumstances in which Ms Rainy and Ms Moore jointly escalated the matter to HR and Ms Hather-Dennis. Even on the Claimant's own case, the matter was escalated because of Ms Moore's personal feelings towards Mr Cleathero rather than any animosity towards the Claimant personally.

36. Mr Bloom made the highly pertinent observation in closing that Mr Cleathero did not question Ms Moore at all about any alleged bullying by her. In closing, Mr Cleathero accepted that the Claimant had not put evidence before the Tribunal regarding alleged bullying. Whilst that may stem from a misunderstanding of the Tribunal process and rules of evidence, I explained at the outset of the Hearing that the Claimant has the burden of establishing facts on the balance of probabilities from which the Tribunal might conclude the Respondent had acted in fundamental breach of its obligations to her. Quite simply there is no evidence before me from which I might properly make findings on the balance of probabilities that Ms Moore bullied the Claimant in the months or years leading up to the Baby W incident.

37. The only two specific matters that were briefly referred to and, even then in the context of the conduct of the Grievance Investigation, concerned the removal or otherwise the 'water play' and the alleged reallocation of sessions promised to a child's parents to another child's parents. Both of these alleged matters had occurred some 12 to 18 months beforehand. In the circumstances, the bullying allegation simply does not get off the ground.

38. Returning to the grievance process itself, the Claimant relies upon Ms Hather-Dennis' alleged conduct during the meeting on 9 October 2018 as the last straw which caused her to resign. Though Mr Cleathero did not say so explicitly in his closing submissions, Mr Walker's decision following the Appeal Hearing could not have been a factor in the Claimant's resignation as she had communicated her resignation in a letter to Ms Hall (Executive Director, HR) dated 15 October 2018, albeit emailed to Ms Hall at 22:28 on 14 October 2018, before she was in receipt of Mr Walker's detailed letter of 12 October 2018 setting out his decision on her Grievance Appeal. She accepted that she had received that letter on either 15 or 16 October 2018. Having resigned late on 14 October 2018, the Claimant commenced a new job on reduced pay on 15 October 2018. References had been taken up by her new employer, Brookside Pre-Nursery, with the Respondent on 11 September 2018. The Claimant's evidence, which I accept, is that she had still not committed by that date to join Brookside Pre-Nursery, rather she was still hoping that matters could be resolved at the Respondent and that she might remain there. However, I find that she had resolved, by no later than 7 October 2018, to leave the Respondent's employment, albeit she hoped this might be under the terms of a settlement agreement involving some form of financial settlement. In an email dated 7 October 2018, the Claimant asked Ms Richmond to escalate her request for a settlement as a matter of urgency. I find that was because she wished to start at Brookside Pre-Nursery as soon as possible.

39. Notwithstanding the Claimant's letter of 15 October 2018 to Ms Hall, I find that the meeting on 9 October 2018 was not a factor in the Claimant's decision to resign her employment. In any event, I prefer Mr Walker's account of that meeting, specifically in relation to Ms Hather-Dennis' conduct on that occasion. In particular, I accept his evidence that the Claimant sought to provoke Ms Hather-Dennis when she quite properly sought to understand whether the Claimant was aware that Mr Cleathero had covertly recorded one or more conversations with the Respondent's staff in a nursery setting. The transcript of the meeting, which is at pages 475 onwards of the Hearing Bundle, speaks for itself.

40. The Claimant was initially defensive and then in turns aggressive when the matter of covert recording was raised with her. I reject the Claimant's evidence that Ms Hather-Dennis was standing over her shouting at her. The trigger for voices to be raised was instead the Claimant saying, *"nah nah nah nah"* and seemingly showing aggression to Mr Walker when he sought to restore equilibrium and bring the meeting to a conclusion. The Claimant persisted, leading to a further exchange with Ms Hather-Dennis. This exchange, during which the Claimant suggested, somewhat illogically it seems to me, that she could not have been aware of her husband's actions if she had not been present when the recording was made, can only be seen in the context that she was of course covertly recording this further interaction with a view, as I have found already, to catching people out. She was defensive and aggressive in response to entirely legitimate concerns, which as I say, many employers would regard as inconsistent with trust and confidence. The Claimant sought to take the high ground, or at least to challenge Ms Hather-Dennis, when she knew she was herself engaged in covert recording. The Claimant's criticisms of Ms Hather-Dennis are without merit. I find they are an attempt to deflect attention from her own poor conduct.

41. There are two further matters that I must make findings in relation to, namely the Respondent's decision to request the Claimant's child to be removed from the Nursery and secondly, whether the Respondent managed the Claimant's sickness absence in accordance with its documented Attendance Management Policy and Procedure.

42. I will deal with the child's removal from the Nursery first.

43. In or around March 2018, Mr Cleathero had been requested by the Respondent not to have any further contact with its staff, except for legitimate contact in connection with his child's place at the Nursery. That letter is at page 96 of the Hearing Bundle. There is some dispute as to whether in fact Mr Cleathero received the letter.

44. On 31 July 2018, Mr Cleathero sent a lengthy WhatsApp message to Ms Child and her sister, both of whom had made statements in the disciplinary

proceedings (which I note were still outstanding at that point in time). Amongst other things, he wrote

> *"I am really sad that people she trusted and respected would sell her out for their own gain and watch her world crumble"*

His message concluded,

> *"I pray every day that Sam doesn't act on her dark thoughts"*

45. The clear implication, as I find, was that they might have some personal responsibility in the matter.

46. I can understand why Ms Moore reported on 1 August 2018 that to say they were very upset was an understatement. Later in the day Mr Cox texted Mr and Mrs Cleathero to say that their child must be removed from the Nursery with immediate effect in order that there should be no further contact. This was also confirmed in a letter to them the same day (page 322 of the Hearing Bundle).

47. Regardless of Mr Cleathero's conduct on this occasion, I raise an eyebrow at the thought that any organisation focused on the care and needs of children, let alone one with an 'Outstanding' Ofsted rating, might communicate such a decision by text without affording the parents any advance opportunity to make representations in the matter. I also think there is weight to what the Claimant wrote in her email of 3 August 2018, and subsequently, specifically whether the Respondent's concerns might have been addressed in a different and less impactful way which might have enabled the child to remain in the Nursery.

48. However, it is also important to note that the arrangements under which the child attended the Nursery were not pursuant to or a benefit of the employment relationship. The Cleatheros paid the same Nursery fees as others, they did not enjoy a discounted rate or other favourable or preferential treatment by virtue of the Claimant's employment at the College. It was an arm's length commercial arrangement that sat outside the employment relationship.

49. Turning finally to the Respondent's interactions with the Claimant during her sickness absence.

50. The Claimant went sick on or around 16 May 2018. She emailed Ms Hather-Dennis that day to request that Ms Moore, Ms Rainy and the other Deputy Nursery Manager Sarah, should have no contact with her whether this be welfare calls or regarding her return to work. She requested instead that Ms Hather-Dennis liaise with her, or else nominate someone else in that regard. Ms Hather-Dennis' immediate response was supportive, acknowledging that investigations can be a difficult time for those involved and reminding the Claimant both of the availability of counselling provision and what she referred to as ECG representatives. I

believe that may be a reference to external employee assistance and support. She also offered an Occupational Health review if the Claimant felt this would be beneficial. Finally, she asked the Claimant to keep her updated and left it open that this might be by phone or email and confirmed that they should meet on the Claimant's return to work to explore whether there was additional support that could be offered.

51. The Claimant immediately ruled out counselling. Her comments that the Respondent had shown no concern or acknowledgement of her feelings, at page 202 of the Hearing Bundle, seem to me to be wide of the mark. She referred to the root cause, namely bullying and harassment by Ms Moore and said,

> *"without this being addressed, this situation will never be resolved".*

That is significant, as I shall return to.

52. The Claimant was also critical that Occupational Health support might not be available until the following month and inexplicably suggested that her sickness absence should be reported on the Respondent's Accident Reporting Form.

53. On 21 May 2018, Ms Hather-Dennis asked to meet with the Claimant, albeit noting that she did not want the Claimant to feel that she had to meet her when she was off unwell. She also offered to arrange an appointment for the Claimant with the on-site Counsellor pending any Occupational Health referral the following month and she reminded the Claimant again that the Employee Assistance Helpline was already available to her.

54. The Claimant responded the following day to say that she had been signed off for two weeks and would be in contact the following week. It seems to me that she was looking to find fault and that when support was offered, she did not take it up. Ms Hather-Dennis left matters on the clearly stated basis that the Claimant would contact her.

55. In the meantime, the Disciplinary Hearing went ahead on 12 June 2018 and a decision was issued on 15 June 2018.

56. The Claimant notified her Formal Grievance at 13:17 on 19 June 2018. On Friday 22 June 2018, Mr Cleathero telephoned Ms Winskill. She in turn reported in an email to Mr Terry Jones that Mr Cleathero had advised her that the Claimant was suicidal and that he had implored the College for help. Ms Winskill immediate response was to tell Mr Cleathero that she could not discuss the Claimant with him as she did not have her permission to do so. I find that a surprising response to what she had just been told and in any event it would not have prevented the Respondent from making a welfare call to the Claimant, or even contacting her by email to see how she was and whether it could offer any immediate support.

57. Even if matters had been left in May on the basis that the Claimant would contact Ms Hather-Dennis, and regardless of the fact the Claimant was unfairly critical of the Respondent at this time, I find it inexplicable that the Respondent did not reach out to the Claimant following Mr Cleathero's call. Ms Winskill considered that he was emotive, but she also said he was not rude or abusive. It is difficult for me to identify from the Hearing Bundle the point at which the Respondent engaged with the Claimant from a welfare perspective. However, a further Occupational Health Assessment appears to have been offered, as I can see from the Claimant's email to Ms Winskill of 2 July 2018, in which she declined the offer. She went on to say,

> *"I am currently seeking support from my Doctor and coupled with the trust and support issues I currently have with the College at this time, I will continue to obtain support directly from my GP."*

58. The Respondent then received a letter dated 3 July 2018 from the Claimant's GP which referred to the Claimant feeling very low, tearful all the time and crying daily, as well as having difficulty sleeping. Whilst there was no reference to suicidal ideation, the Claimant's GP confirmed, (page 265 of the Hearing Bundle), that anti-depressant medication had been discussed, albeit this had not been prescribed as the Claimant was breast feeding her child. The GP asked that the process be expedited.

59. I am unclear whether the Claimant hand delivered this letter to the College. Her Grievance Meeting with Ms Hather-Dennis took place the same day. Ms Hather-Dennis met with Ms Moore and Ms Rainy on 10 July 2018 and issued a detailed decision letter on 13 July 2018. It seems to me therefore, that in so far as Ms Hather-Dennis may have seen the letter from the GP, she had heeded the GP's encouragement to expedite the process.

60. I note that in addition to stating that she would have a further meeting with Ms Moore to feedback the Claimant's concerns and recommending a joint mediation session facilitated by a Mediator to get the relationship back on track, Ms Hather-Dennis directly addressed the Claimant's welfare in her letter of 13 July 2018, noting that the Claimant had twice declined Occupational Health Assessments. She wrote,

> *"I do need you to attend an appointment when further clinic dates are available".*

61. At 05:45 on 19 July 2018, Ms Cleathero emailed Ms Winskill referring to their conversation on 22 May 2108 and complaining that there had been no contact from anyone at the College or any offer of support over the best part of 12 weeks. That is not quite correct for the reasons already set out, though it is correct that no one seemingly contacted the Claimant in the week following Mr Cleathero's call to Ms Winskill. Mr Cleathero was also wrong to categorise the Respondent's responses, including its encouragement to take up an Occupational Health referral as token

gestures. His email overlooks that his wife had said on 2 July 2018 that her issues with the college meant that she was obtaining support from her GP. As with his WhatsApp messages two weeks later to Emma and Charlotte Child, his email concluded,

> *"I have raised this verbally and now I am putting it in writing for my own evidential purposes to demonstrate I have done all I can do."*

In other words, that Ms Winskill and / or the Respondent would be responsible in the matter.

62. Expressed in those terms, it would have been an unwelcome email for Ms Winskill to have received. Nevertheless, it did not prompt the Respondent to make contact with the Claimant. I contrast the Respondent's inaction with how it responded when Emma and Charlotte Child were reported to be upset following Mr Cleathero's WhatsApp messages to them. Within hours of that message being reported to Mr Cox, he had texted and written to say that the Cleathero's child should be removed from the Nursery,

> *"In order to remove any contact with College staff".*

In other words, Mr Cox wanted to protect staff wellbeing. He also authorised a complaint to be made to the Police regarding Mr Cleathero's conduct. This stands in stark contrast to failing to reach out to the Claimant when she was reported to be experiencing suicidal ideation in June 2018, when her GP reported on 3 July 2018 that she may be depressed, but unable to take anti-depressant medication and in circumstances where Mr Cleathero had written at 04:54 on 19 July 2018 that the Claimant had only just gone to sleep after several hours of crying.

63. Ms Hall of the Respondent only finally picked up the baton in a letter to the Claimant dated 30 July 2018, though referred the matter to Ms Hather-Dennis to take forward. Ms Hather-Dennis emailed the Claimant in somewhat impersonal terms on 8 August 2018. Whilst she again encouraged her to take up the Occupational Health referral, she did not express any particular concern for the Claimant or suggest a welfare call or visit. It was only on 20 August 2018 that Ms Hall grasped the nettle and got matters back on track. That email is at page 342 of the Hearing Bundle. It was a sensible and entirely appropriate communication, yet it provoked an angry response (page 345 of the Hearing Bundle), in which the Claimant closed the door to any further welfare interactions, albeit she did subsequently attend an Occupational Health Assessment on 20 September 2018, which recommended amongst other things that the Respondent maintain welfare contact with her.

64. Ms Hather-Dennis followed this up immediately on 25 September 2018 in an email to the Claimant asking to meet to discuss its contents. That meeting took place by agreement on 5 October 2018. Ms Hather-Dennis' email of 5 October 2018 immediately following that meeting, at page 456 of the Hearing Bundle, evidences an entirely appropriate welfare

discussion. Yet it provoked an inexplicably angry response in which the Claimant claimed that Ms Hather-Dennis' actions were merely lip service with no sincerity and that Ms Hather-Dennis had treated her with contempt. She accused Ms Hather-Dennis and / or the Respondent of having done nothing over the previous five months. That is not correct.

65. Ms Hather-Dennis was not unreasonably taken aback to receive that email and expressed to others in her team that she had had enough. Thereafter, as I have addressed already, the reconvened Grievance Hearing went ahead on 9 October 2018 with the Claimant resigning her employment on the evening of 14 October 2018 ahead of receiving Mr Walker's decision on the Grievance Appeal.

LAW AND CONCLUSIONS

66. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by her employer - Section 49 of the Employment Rights Act 1996.

67. Dismissal for these purposes includes where the employee terminates a contract under which she is employed, with or without notice, in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct - Section 95(1)(c) of the Employment Rights Act 1996.

68. The Claimant claims that she resigned by reason of the Respondent's conduct. It is not every breach of contract that will justify an employee resigning their employment without notice. The breach must be sufficiently fundamental that it goes to the heart of the continued employment relationship. Even then the employee must actually resign in response to the breach and not delay unduly in relying upon the breach in bringing the employment relationship to an end.

69. Section 95 of the 1996 Act recognises that an employee may elect to resign on notice. What is important is that the employer's conduct must be such as to warrant summary termination.

70. In resigning, and I refer in this regard to page 487 of the Hearing Bundle, the Claimant relied upon alleged breaches of the Disciplinary Grievance and Managing Absence Policies and Procedures. However, none of these policies were incorporated into the Claimant's terms and conditions of employment, even if she was expected to adhere to the Disciplinary Rules. To the extent, therefore, that the Claimant seeks to rely upon breaches of the Policies and Procedures, in my judgement she can only do so as a potential breach of the implied duty of trust and confidence.

71. It is an implied term of all contracts of employment that the parties will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the essential trust and

confidence of the employment relationship. This stems from the well known decision of Malik v Bank of Credit and Commerce International SA [1997].

72. Picking up on an exchange that I had with Mr Bloom during the course of his closing submissions, I consider that Mr Bloom potentially formulated the duty of trust and confidence in overly onerous terms, and as such that he may have set the bar too high in terms of his client's duties and obligations in relation to the Claimant. I refer for example to the Court of Appeal's ruling in Leach v The Office of Communications (Ofcom) [2012], that employers should not rely on the break down of trust and confidence as a reason for dismissal without careful consideration of their true reasons and whether these are sufficient to justify dismissal. The break down of trust and confidence is not a mantra that can be relied upon whenever an employer is faced with difficulties in establishing more conventional reasons for dismissal. It is not a convenient label to be placed on any situation. In Frenkel Topping Limited v Ms G King UKEAT/0106/15, a case in which an employer was found to have discussed with an employee's son, without her knowledge, her performance and ability to do the job, the EAT emphasised the high threshold that is required to establish a breach of trust and confidence. The test the EAT said was demanding and stringent.

73. In my judgement, the Respondent did not act in breach of trust and confidence in escalating the concerns in relation to Baby W and investigating them as a potential disciplinary matter, or in taking the matter to a disciplinary hearing, or in terms of the outcome of the hearing. Whether or not as Mr Bloom suggested, it was an implied term of the contractual relationship that the disciplinary process would be conducted fairly (whether as a stand alone term or within the ambit of the duty of trust and confidence), the Respondent did not in my judgement conduct the disciplinary process unfairly. For all the reasons I have set out in some detail in my findings already, with the exception of the potentially inconsistent approach in relation to Emma Child, which I have found was not a factor in the Claimant's decision to resign, the Respondent implemented and followed a fair and thorough process and is not to be criticised because the Claimant resigned before her Disciplinary Appeal could go forward.

74. For the same reasons, the Respondent did not act in breach of trust and confidence in how it handled the Grievance and Grievance Appeal. I briefly mention two decisions in relation to how grievances are dealt with. In WA Gould (Pearmak) Limited v McConnell & Anor [1995] IRLR 516 EAT, the Employment Appeal Tribunal held it was an implied term of a contract of employment that the employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have. That was then subsequently followed in Hamilton v Tandberg Television Limited [2002] UKEAT, in which the EAT suggested that the Gould case might be of limited scope because the Gould case had involved circumstances where no procedure had been

made available to employees, whereas in Hamilton the criticism was of the quality of the employer's investigation. In any event, I am more than satisfied that the Respondent undertook a fair and reasonable Grievance and Grievance Appeal process.

75. As to the removal of the Cleathero's child from the Nursery, that decision was taken outside the ambit of the Claimant's employment relationship with the Respondent and instead in its capacity as the owner or Manager of the Nursery. Even if the decision may have had a knock-on effect in terms of the Claimant's ability to work her contracted hours, it was a decision taken in response to Mr Cleathero's alleged actions rather than any actions of the Claimant as an employee, in the course of her employment. In those circumstances it does not, in my judgement, fall within the ambit of the implied term of trust and confidence.

76. Finally, viewed objectively, I consider that the Respondent's failure to contact the Claimant in response to the concerns initially expressed by Mr Cleathero on 22 June 2018 and his further concerns on 19 July 2018, was conduct that was likely to destroy or seriously damage the essential trust and confidence of the employment relationship. By its actions, or essentially its two periods of silence in respect to the concerns that had been raised, the Respondent communicated a lack of concern for the Claimant's wellbeing at a time of personal crisis on or around 22 June 2018 and over the following week, and again in the two to three week period following Mr Cleathero's email of 19 July 2018. I do not doubt it was a difficult situation for the Respondent to manage and that a number of the Claimant's interactions and comments were counter-productive. Even so, in my Judgement, it acted (or failed to act) in the matter without reasonable and proper cause.

77. An employee will be regarded as having accepted an employer's repudiation only if their resignation has been caused by the breach of contract in question. I have accepted that the Claimant did not leave the Respondent's employment voluntarily. She began searching for a new position only because she perceived that she was being bullied by Ms Moore and eventually left because she believed, incorrectly in many respects, that the Respondent had acted in breach of trust and confidence.

78. Where an employee leaves a job as a result of a number of actions by the employer, not all of which amount to a breach of contract, she can nevertheless claim constructive dismissal providing the resignation is partly in response to a fundamental breach. That was made clear by the Court of Appeal in the case of Meikle v Nottinghamshire County Council [2005]. According to the Court of Appeal, once an employer's repudiation of the contract has been established, it is for the Tribunal to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end.

79. The fact that an employee has objected to other actions or inactions by the employer, that did not amount to breaches of the contract, does not vitiate the acceptance of the repudiation. It is enough that the employee resigns in response, at least in part, to the employer's fundamental breach of contract. Which is what happened here. I refer to the letter of resignation in that regard.

80. The further question then is whether the Claimant may have waited too long after that breach of contract before she resigned and whether she might be taken to have affirmed the contract. Mr Bloom drew my attention to Western Excavating (ECC) Limited v Sharp [1978] IRLR 27, in which the House of Lords said that an employee must make up their mind soon after the conduct about which they complain and that if they continue in employment for any length of time without leaving they may lose the right to treat themself as dismissed.

81. The issue is principally one of conduct rather than passage of time. I draw support in that regard from the decision of the Employment Appeal Tribunal in Chindove v William Morrisons Supermarket Plc [2016] UKSC. According to Mr Justice Langstaff what matters is whether in all the circumstances the employee's conduct has shown an intention to continue in employment rather than resign and that the employee's situation must be considered as part of the overall circumstances. The more serious the consequences for an employee, the longer they may need to take before reaching a decision. According to Mr Justice Langstaff, another important fact is whether the employee was actually at work in the interim. Where an employee is on sick leave at the relevant time, it may not be so easy to infer that they have decided not to exercise their right to resign.

82. The Claimant was of course on sick leave through to her resignation and her correspondence up to and including her resignation evidences that she continued to be dissatisfied with how her absence had been managed from a welfare perspective, even if her concerns were not entirely justified. Whilst in my judgement she can have no complaint beyond 20 August 2018, my ultimate judgement is that she did not affirm the contract or waive her right to resign.

83. In the circumstances, I conclude and it is my Judgment that the Claimant was dismissed for the purposes of Section 95(1)(c) of the Employment Rights Act 1996. There was no reason for the Respondent to treat her as it did, certainly no reason within the ambit of Section 98(2) of the 1996 Act. In the circumstances, I conclude that she was unfairly dismissed.

84. Pursuant to Section 123(1) of the Employment Rights Act 1996, where a Tribunal upholds a complaint of unfair dismissal, it may award such compensation as it considers just and equitable in the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal. In accordance with the well established principles in Polkey v AE Dayton Services Limited [1998], the Tribunal may make a just and equitable reduction in any compensatory award under Section 123(1) to

reflect the likelihood that the employee's employment would still have terminated in any event.

85. This is a case in which it is not in my judgement too speculative an exercise to determine what would or could have happened. On the contrary, I am certain, having regard to the entirety of the Claimant's correspondence and evidence, and also drawing upon common sense, experience and justice in the matter, that the Claimant would have resigned her employment with the Respondent even had it shown greater concern for her welfare.

86. The principal reason why the Claimant resigned was her perception as to how she had been treated by Ms Moore and the Respondent's failure to uphold her Grievance about the matter.

87. The Claimant was on record that there had been a fundamental breakdown of trust and although she had some desire to return to work, she continued to state that it would effectively be impossible for her to return to her job. She refused to engage in mediation which I think is highly significant here. In my judgement she had no interest in mending bridges with Ms Moore or making the situation work.

88. I have to make clear that the Claimant's required outcomes, including disciplinary action against Ms Moore, were wholly unrealistic and could never have been met. Her desired outcomes, which are repeated in the Schedule of Loss, have been adopted throughout these proceedings and she continued to maintain them through to the conclusion of this Hearing. They support, in my judgement, that the Claimant would inevitably have resigned her employment at the conclusion of the grievance appeal process. Perhaps expressing it thus, it was her way or the highway.

89. The Claimant was emphatic that Ms Moore was a bully and a liar, a view she has effectively held to throughout these proceedings. She was so entrenched in her views as to what had happened, that in my judgement, it is inconceivable that she would have contemplated returning to work at the College as long as Ms Moore continued to work there and in this regard I return again to what she wrote at page 202 of the Hearing Bundle. Given it was in my judgement inevitable the Claimant would resign her employment, even though on the balance of probabilities she has not established a case that Ms Moore gave her cause to do so, it would not in my judgement be just or equitable to make a compensatory award under Section 123 of the Employment Rights Act 1996.

90. It should also be clear from my comprehensive findings that I am critical of aspects of the Claimant's conduct in this matter. This is a case in which I consider that the Claimant's conduct before her constructive dismissal and her resignation in reliance upon matters that were not in fact breaches of the duty of trust and confidence, was such that it would be just and equitable to reduce the amount of the basic award in accordance with Section 122(2) of the 1996 Act. Having regard to all the circumstances,

including the Claimant's unwarranted and unpleasant attacks upon various individuals at the Respondent, calling into question their character and integrity, and her frankly disgraceful actions in covertly recording the grievance appeal meetings, I consider that the appropriate reduction is 100%.

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Employment Judge Tynan

Date: 14 October 2021

Sent to the parties on:

19 November 2021

For the Tribunal Office