Case No. 2307951/2020

EMPLOYMENT TRIBUNALS

Claimant: Ms M. Wilson

Respondent: Rubadubs Nursery Limited

Heard at: London South (By CVP) **On:** 16 March 2022

Before: Employment Judge Carney (sitting alone)

Representation

For the Claimant: Mr Beyebenwo (solicitor)

For Respondent: Mr Bennison (in house counsel)

RESERVED JUDGMENT ON LIABILITY

1. The claimant's claim for unfair dismissal is upheld.
2. The claimant would have been dismissed in any event if the respondent had followed a fair procedure, and in those circumstances the compensatory award is limited to two weeks' wages.
3. The claimant was dismissed in breach of contract.
4. The respondent is ordered by consent to pay the claimant £118.80 gross (less any tax and national insurance deductions) in respect of 13.3 hours unpaid holiday entitlement.
5. The claim shall be listed for a remedy hearing with a time estimate of two hours.

REASONS

Claims and issues

1. By a claim form presented on 2 December 2020 the claimant complained of unfair dismissal, breach of contract, unlawful deduction of wages and a failure to

pay holiday pay. By a response form dated 27 January 2021, the respondent resisted the complaints.

2. At a preliminary hearing on 2 February 2022 the tribunal found that the claimant had been dismissed by the respondent and that the claimant presented her claims within time.
3. The issues to be determined by the tribunal were identified at a case management hearing on 2 February 2022 and confirmed by the parties at the outset of the hearing as follows:

Unfair dismissal

3.1. What was the reason or principal reason for dismissal? (The respondent confirmed they were relying on the following potentially fair reasons set out in: (i) s.98(2)((d) Employment Rights Act 1996 ('ERA') (contravention of an enactment); (ii) s.98(1)(b) 'some other substantial reason of a kind justifying the dismissal of an employee holding the position the employee held'; and (iii) s.98(2)(b) ERA (the claimant's conduct).)

3.2. Was it a potentially fair reason?

3.3. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Notice pay

3.4. What was the claimant's notice period?

3.5. Was the claimant paid for that notice period?

3.6. If not, was the claimant guilty of gross misconduct or did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Holiday Pay (Working Time Regulations 1998)

3.7. The issued to be determined were confirmed as those identified in the case management hearing. The respondent conceded in this hearing that pay in lieu of accrued holiday was owing and the parties agreed the amount.

4. At the case management hearing on 2 February 2022, orders were made for disclosure of relevant documents by 21 February 2022 and for a bundle of relevant documents for the hearing to be agreed and sent to the tribunal by 14 March.

Procedure, documents and evidence heard

5. The tribunal heard evidence from the claimant and from Mrs Colette Short, the respondent's business manager, on behalf of the respondent. There was a tribunal bundle of approximately 98 pages. The tribunal informed the parties that unless it was taken to a document in the bundle, it would not be read.
6. In addition, the parties' representatives made closing oral submissions.
7. The respondent conceded in the hearing that the claimant was entitled to holiday pay of £118.80 for 13.3 hours accrued holiday for the period of employment from 1 July 2020 until the termination date. The claimant's representative agreed this was the correct amount of unpaid holiday owing and that an order should be made for this amount by consent.

8. The respondent's representative made an application after its witness Mrs Short had finished giving her evidence and been released to admit a new document into evidence: a 'staff suitability declaration form', mentioned at paragraph 20 of Mrs Short's witness statement. The respondent submitted that the late application was justified because of the weight the claimant's representative was giving it in cross examination of Mrs Short. The claimant's representative objected to the lateness of the application. The document was emailed to the claimant's representative and the tribunal. After consideration of the tribunal's powers under rules 29 and 41 to regulate its own procedure without undue formality with regard to the overriding objective, the tribunal refused to admit the document as not being in the interests of justice. It noted that it was in breach of the case management order made at the hearing on 2 February 2022. It was the respondent that had raised the issue of the form and mentioned it in their witness statement but had chosen not to include it in the bundle. Mrs Short's evidence had finished and the claimant's representative had not had an opportunity to see the document before cross examining her. Mrs Short would need to be recalled if the claimant's representative wanted to ask her further questions after seeing the document, which would cause delay. This might result in going part-heard which would cause delay, further expense and would not be just to the claimant who had submitted the claim well over a year ago.

Fact-findings

9. Except where indicated otherwise, the facts are uncontested.
10. The respondent is a childcare provider based in South East London, providing early years childcare and nursery provision for children aged 0 to 5 years old.
11. The claimant was employed by the respondent from 13 April 2015, initially as a Kitchen Assistant and then as a House Assistant.
12. At a preliminary hearing on 2 February 2022 the employment tribunal found that the claimant's employment was terminated by the respondent and that the claimant's claims were brought within time. The parties agreed that the termination date was found at the preliminary hearing to be 7 September 2020. The parties accepted that no notice or pay in lieu of notice had been given and that the claimant was entitled under her contract of employment to five weeks' notice, unless dismissed for gross misconduct (p. 32 of the bundle (all future page numbers are references to bundle page numbers)).
13. The respondent had no issues with the claimant's employment until July 2020. On 2 July 2020 the claimant called the respondent and told the nursery manager (Carlene Facey) that a serious incident had taken place at her house on 27 June involving her children and that social services were involved and her children had been removed from her care ('the 27 June 2020 incident'). The claimant provided social services contact details to the respondent.
14. The claimant's children were made subject to an interim child protection order on 1 July 2020 which was subsequently made permanent. It is still in force.
15. In the call with the claimant on 2 July, the nursery manager asked her to provide further information and said that there may have to be an investigation before the claimant could return to work, given the services involved. The nursery manager followed this up with an email to the claimant on 3 July 2020 (p. 77).
16. The claimant replied to that email on 15 July 2020 saying that she would like to return to work as soon as possible. She did not provide any further details as requested by the respondent then or at any time. She confirmed that she was

currently homeless but said the respondent should 'feel free to make contact with me via email or phone, should you require further information' (p. 79).

17. The respondent followed up the claimant's notification of the 27 June 2020 incident with their regulator, Ofsted, by telephone and email. The respondent also contacted their Local Authority Designated Officer ('LADO'). Around 22 July 2020, Nicola Connolly of Ofsted informed the nursery manager that the claimant was classed as 'disqualified' under the Childcare Act 2006 and could not work for the respondent again until she had obtained a 'waiver' from Ofsted (pp. 80–82).
18. On 23 July 2020, the nursery manager emailed the claimant to inform her that she was disqualified from working in childcare under s. 75 of the Childcare Act 2006 and the Childcare Disqualification Regulations (2018) unless she obtained a waiver from Ofsted to be allowed to continue working with or around children. The email set out that the waiver application must be made by the employee not the employer, would be considered on its merits, and it contained a link for more information on how to apply for a waiver. It said that if she chose not to apply for a waiver she would remain disqualified (pp.83-84). Under s. 76 Childcare Act 2006, a person who employs a disqualified person is guilty of an offence (pp. 85–86).
19. There was no contact between the claimant and the respondent until the claimant called the respondent on 20 August 2020 to ask what the situation was and could she return to work. She spoke to the nursery manager. The nursery manager did not attend the tribunal to give evidence; notes of the call are at p. 89 of the bundle. According to the notes of the call, the nursery manager told her that she was unlikely to be able to return to work and that she could not work without a waiver and that there would also probably have to be an internal investigation. The claimant said in her evidence before the tribunal that she accepts the nursery manager told her of the need to apply for a waiver in this call but she denied that she had received the email of 23 July which set out the need to apply for a waiver. She also alleges that the nursery manager told her in this call that she should resign.
20. The claimant had not applied for a waiver by 20 August 2020. She did not do so before the termination of her employment and had still not done so by the date of this hearing.
21. There was no further contact between the claimant and the respondent until the claimant emailed the respondent's business manager, Mrs Short, on Friday 4 September 2020 at 21:32 to ask what was happening about her outstanding holiday entitlement. Mrs Short replied on Monday 7 September 2020 with details about holiday entitlement and said she had sent the claimant her P45 by separate email that day.
22. Mrs Short's witness statement at paragraph 4 said that the claimant's employment came to an end on 31 August 2020 as a result of her being banned from working with children by Ofsted, the regulator, and not having applied for a waiver. The claimant's witness statement at paragraph 4 said that she was dismissed on or after 31 August 2020. 31 August 2020 is the leaving date on the claimant's P45 (p. 43). Nonetheless, both representatives accepted during the hearing that the claimant's date of termination found at the preliminary hearing was 7 September 2020 when the claimant received the email informing her that her P45 had been sent. Given this finding at the preliminary hearing, this tribunal does not have to make a finding but, if it had been required to do so, it would also

have found that the claimant was dismissed by the respondent on 7 September 2020 by the email from Mrs Short informing her that she had been sent her P45.

23. The respondent's disciplinary procedure is set out in its employee handbook (at pp. 59–62). The procedure provides that an employee suspected of misconduct will be given as much information as possible regarding the allegations before a disciplinary hearing is held to consider potential disciplinary action. Except in the case of gross misconduct, the procedure provides for a series of warnings to be given before dismissal. Gross misconduct 'will result in summary dismissal, which means you lose your right to notice or pay in lieu of notice' (p. 61).
24. In Mrs Short's witness statement, she said that the claimant's behaviour amounted to gross misconduct entitling the respondent to terminate employment without notice. Examples of gross misconduct set out in the staff handbook (pp. 61–62) and alleged against the claimant were that the claimant is alleged to have deliberately falsified records (in particular, had lied on a 'staff suitability declaration form'), to have committed behaviour liable to bring the respondent into disrepute and to have failed to comply with the rules of the respondent including those covering … health and safety, safeguarding [and] …the duty of candour'.
25. Mrs Short accepted in cross examination that no disciplinary investigation had been done and that the respondent had not followed its disciplinary procedure in respect of the claimant's alleged misconduct. The claimant was not offered an opportunity to appeal against the decision to terminate employment. Mrs Short's evidence, which the tribunal accepts, was that she would have invited the claimant to a disciplinary investigation meeting before she recommenced work if she had applied for and been granted the waiver.
26. Mrs Short's evidence to the tribunal in the hearing and accepted by the tribunal was that the reason she sent the claimant her P45 was that the claimant had not confirmed that she had applied to Ofsted for a waiver to enable the claimant to resume working with children. She had not given her notice or paid her in lieu of notice because her belief was that the claimant was not entitled to notice because she could not work for the Respondent whilst she was disqualified under the Childcare Act 2006.
27. In Mrs Short's witness statement she said that the respondent had not wanted to lose the claimant from the team (paragraph 15) and that the respondent had wanted her to apply for the waiver (paragraphs 21 and 29) but that they had had no choice as she was barred from working for them and had not applied for the waiver. This is inconsistent with a claim that the respondent wished to dismiss the claimant for gross misconduct.
28. The claimant's evidence was that she had not applied for the waiver because she had not seen the email of 23 July 2020 which informed her she could not work until she had obtained one. She claimed it was not usual for the respondent to communicate with her by email and as she was homeless it was not practicable for her to check emails. The tribunal does not accept that it was unusual or somehow not expected for the respondent to contact the claimant by email. The claimant had previously invited the respondent to contact her by email or phone in her own email of 15 July, even though she was already homeless by this point. Furthermore, the claimant on her own initiative emailed the respondent on 4 September 2020 to ask a question about holiday pay (p. 44). However, the tribunal accepts the claimant's evidence that she did not see the email of 23 July 2020 until after her telephone call with the nursery manager on 20 August 2020.

29. The claimant claimed in the hearing that if she had been aware of the requirement to apply for a waiver before August, she would have done so. The tribunal does not accept this evidence, as the claimant did not apply after the conversation on 20 August 2020 and still has not applied for a waiver by the date of this hearing.
30. The bundle contained notes of two multi-agency 'Allegations against Staff and Volunteers' meetings (29 July 2020 and 2 September 2020) held between the police, local authority social workers, LADO, the respondent's owner and Ms Facey, the respondent's nursery manager regarding the 27 June 2020 incident (pp. 90–94).
31. The claimant's representative put it to Mrs Short that the notes of the 29 July 2020 meeting indicate that the claimant had already been dismissed by the time of this meeting, or that a decision had been taken to dismiss the claimant by this date, as they refer to the claimant already having been dismissed. Mrs Short was not present at the meeting and suggested that Ms Facey may have meant the claimant was not currently allowed back into the workplace rather than that she had been dismissed. Mrs Short was, of course, only speculating and Ms Facey did not attend the hearing to give evidence and clarify what she meant. It is clear, however, and found as a fact by the preliminary hearing, that the claimant had not already been dismissed at this date.
32. The claimant also alleged that she was asked to resign in the telephone conversation with Ms Facey of 20 August 2020. Again, Ms Facey was not present at the hearing to give evidence about this conversation. The tribunal did have Ms Facey's notes of her telephone call with the claimant of 20 August 2020 (p. 89) which make no mention of asking the claimant to resign. When considering these notes, the tribunal gave consideration to rule 41 of the Tribunal rules of procedure and the tribunal's flexibility to conduct the hearing and not be bound by any rule of law regarding the admissibility of evidence. The tribunal gives less weight to Ms Facey's note than it would otherwise, as she was not present to be cross examined on it, nevertheless, the tribunal does not accept that the claimant was told to resign in this phone call. It is clear from Mrs Short's evidence that the respondent believed it had grounds for dismissal and therefore did not need to request the claimant to resign. Ms Facey's note makes it clear that she was contemplating a further investigation into the claimant's conduct before she could return to work if the claimant was granted a waiver.
33. The claimant claimed during cross examination that she was not working with children when employed by the respondent, as her work principally involved working in the kitchen, and that she was not therefore covered by the Childcare Act 2006. This was not consistent with the claimant's witness statement which says at paragraph 5 that 'my employment with the respondent involved working with younger children at the nursery'. Given this contradiction, the tribunal prefers the version of events set out in the claimant's witness statement (in other words, that she did work with children), as the claimant did not try to raise this argument at any point in proceedings until under cross examination. Furthermore, the evidence of Mrs Short was that the claimant's employment was covered by the Childcare Act 2006 and this was also supported by the email from Ofsted (p. 81) and notes of the multi-agency meetings included in the bundle (pp. 90–94).
34. The tribunal accepts that the respondent had grounds for serious safeguarding concerns regarding the children in its care if the claimant returned to work. The notes of the multi-agency meetings make it clear that the 27 June 2020 incident

was regarded by the participants as a very serious incident. On a scale of 0 to 10, where 0 means it is too unsafe for the claimant's children to stay at home and 10 means the children are safe enough, it was rated '1' or '0'. The notes of the meeting also make it clear that the claimant was deemed responsible due to lack of supervision of the children (pp. 91 and 94). The claimant accepted under cross-examination that it was a very serious incident.

35. Mrs Short's evidence to the tribunal was that the respondent had not been aware before the 27 June 2020 incident and resulting contact with social services that the claimant's children had previously been subject to a child protection order ('CPO') and that this had implications for its own safeguarding procedures. The claimant did not deny this in her evidence. The claimant's evidence was that even if the respondent did not know about the CPO, it was aware in a general sense that 'social services were involved' in the claimant's life. The respondent's case was that it was not aware specifically of the CPO and that the claimant had been dishonest when asked about whether she was disqualified from caring for children because her children were subject to a CPO, which was an act of gross misconduct under its disciplinary policy (p. 61).

Law

36. The law relevant to these claims is as follows:

Unfair dismissal

37. The law relating to the right not to be unfairly dismissed, is set out in s. 98 Employment Rights Act 1996 (ERA):

S. 98 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(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 the employee,
(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 that of his employer) of a duty or restriction imposed by or under an enactment.

[…]

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on 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.

Wrongful dismissal

38. Wrongful dismissal is a common law claim for breach of contract for failure to give adequate contractual notice of termination. An employee is entitled to the notice of termination set out in the contract of employment (or, if greater, statutory minimum notice set out in s. 86 ERA) unless the employee commits a repudiatory breach of contract justifying summary dismissal (*Laws v London Chronicle (Indicator Newspapers) Ltd* 1959 1 WLR 698, CA). Such a breach must be accepted by the employer before it is taken to terminate the employment relationship (*Geys v Société Générale, London Branch* 2013 ICR 117, SC).
39. More recent cases have described a repudiatory breach by an employee as one which 'so undermine[s] the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment' (*Neary v Dean of Westminster* 1998 12 WLUK 202, approved by the Court of Appeal in *Briscoe v Lubrizol Ltd* 2002 IRLR 607).

Conclusions

Reason for dismissal

40. The tribunal accepts Mrs Short's evidence that the reason for the dismissal was that the respondent had been informed by its regulator, Ofsted, that the claimant could not work with children unless she was granted a waiver and that the claimant had not applied for a waiver. Accordingly, the respondent reasonably believed that for the claimant to perform work for the respondent would have been a breach of an enactment. This was potentially a fair ground for dismissal under s. 98(1)(b) ERA (some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the employee held (SOSR)) or s.98(2)(d) ERA (a dismissal because of a statutory ban).
41. The tribunal accepts Mrs Short's evidence (which was not disputed by the claimant) that the respondent was not aware that the claimant's children had been subject to a CPO and that the claimant had not been honest with the respondent about this fact. The tribunal accepts the claimant's evidence that the respondent was aware of 'social services involvement' in her life but finds this a very vague statement potentially encompassing a multitude of matters and, as such, significantly different from being specifically aware of the existence of a CPO. This lack of honesty by the claimant regarding a serious matter was sufficiently serious to be potential grounds for dismissing for gross misconduct.
42. The tribunal finds however, that although there may have been grounds for a misconduct dismissal for dishonesty, that was not the reason given by Mrs Short for her decision to email the claimant with her P45. Furthermore, Mrs Short's evidence to the tribunal was that the respondent did not want to lose the claimant and wanted the claimant to apply for a waiver, which indicates that the respondent's trust and confidence in the claimant had not as a matter of fact been undermined to the extent that the respondent intended at that date to dismiss the claimant for gross misconduct.

Equity and the substantial merits of the case

43. As regards procedure, the uncontested evidence was that the respondent did not follow its own disciplinary procedure or the ACAS code of practice on disciplinary

and grievance procedures. In fact, it did not follow any procedure at all (whether for a dismissal for misconduct, a dismissal for SOSR under s. 98(1)(b) or a dismissal because of a statutory ban under s. 98(2)(d) ERA). The respondent did not hold a meeting with the claimant, the claimant had no opportunity to put her side of the story, to make representations or to argue against dismissal and the respondent did not offer the claimant any opportunity to appeal the decision to dismiss.

44. The tribunal finds that this failure to conduct any sort of fair procedure means the employer did not act reasonably in treating the reason for dismissal as a sufficient reason for dismissal, accordingly, the dismissal was unfair.

Polkey/contributory fault

45. S. 123(1) ERA requires the tribunal to award such compensation as is just and equitable to compensate the claimant for losses resulting from her unfair dismissal. The House of Lords established in the case of *Polkey v AE Dayton Services Ltd* [1988] ICR 142, HL that the tribunal should indulge in a degree of speculation about what would have happened if the respondent had acted fairly when considering how much compensation to award.

46. The claimant's representative invited us to find that this was one of the very rare cases identified in the House of Lords decision of *Polkey* where carrying out a fair procedure would have been utterly futile and accordingly the tribunal should find the dismissal was fair. The tribunal does not accept this contention. That exceptional case identified in *Polkey* is one where the tribunal can conclude that the employer itself, at the time of dismissal, acted reasonably in taking the view that in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile (*per* Lord Bridge of Harwich). There was no evidence before the tribunal that the respondent considered taking certain procedural steps but then rejected them on the grounds of futility. The facts of this case seem to fall squarely within those contemplated by the court in *Polkey,* in that, when looking at what the employer actually did on the date of the dismissal, it did not act reasonably in treating the reason as sufficient to dismiss the employee on that date. But that the claimant would nonetheless have been dismissed even if the respondent had followed a fair procedure. The claimant may therefore still be entitled to compensation for the period which should have been spent on a fair procedure (subject to evidence on mitigation and loss).

47. The tribunal finds on the balance of probabilities that the likelihood of the respondent dismissing the claimant fairly following a fair procedure to have been one hundred per cent. In reaching this conclusion, the tribunal has had regard to the following:

    47.1. That the respondent is an early years childcare provider, regulated by Ofsted, with statutory and common law duties to safeguard the safety and wellbeing of the vulnerable children in its care;

    47.2. That the respondent would be guilty of an offence if it employed anyone disqualified from registration in connection with the provision of early years or later years provision under s. 76(3) of the Childcare Act 2006;

    47.3. That the 27 June 2020 incident was regarded as very serious by the local authority and LADO and that they held the claimant responsible for a lack of supervision. And that because of that incident the claimant's children were made subject to a care order which still subsists;

    47.4. That the claimant was not able to work for the respondent unless she was granted a waiver by Ofsted;

47.5. That there was no certainty that a waiver would be granted if the claimant did apply but, even more significantly, the tribunal is satisfied that the claimant would not have applied for a waiver, as she did not apply for one when invited to do so and had still not applied for one by the date of the tribunal;

47.6. That the claimant had not cooperated with the respondent when it tried to investigate the 27 June 2020 incident – when the respondent wrote to the claimant requesting further information to enable it to consider the 27 June 2020 incident and the impact on its business as a regulated nursery, the claimant did not at any point provide the information requested; and

47.7. That the claimant had not been fully honest with the respondent about her previous history with social services.

48. Accordingly, the tribunal finds that the claimant would not have obtained a waiver from Ofsted and that it would have taken the respondent two weeks to follow a fair procedure, following which the claimant would have been fairly dismissed for SOSR in any event.

49. The respondent's representative further urged the tribunal to find the claimant had caused or contributed to her dismissal. Given the tribunal's findings in paragraphs 40 to 48 above, the tribunal declines to accept this submission. As the respondent did not follow any disciplinary or dismissal procedure at all, and did not accept any purported repudiatory breach of contract by the claimant, it would not be just and equitable to find that the claimant's conduct caused or contributed to her dismissal.

Wrongful dismissal

50. Given the tribunal's findings in paragraph 42 above, that the reason for terminating the claimant's employment was not her misconduct, the tribunal finds that, even if the claimant did commit a breach of contract, the respondent did not accept the repudiatory breach of contract and terminate in response to it, as required by the Supreme Court decision of *Geys v Société Générale.*

51. Accordingly, the dismissal without notice was in breach of contract.

Remedy hearing

52. The claim shall be listed for a two-hour remedy hearing.

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Employment Judge Carney

Date 31 March 2022