EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Millie Davey	**v**	Swans Day Nurseries Ltd

Heard at: Watford **On**: 17, 18 and 19 April 2023

Before: Employment Judge Andrew Clarke KC

Appearances
For the Claimant: In person
For the Respondent: Mr Rajan Luthra (Director)

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The claimant is entitled to a basic award of £1,215.00.

3. The claimant is entitled to a compensatory award of £3,807.00.

4. The sums awarded to the claimant are to be uplifted by 25% pursuant to s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

5. The total sum payable by the respondent to the claimant is £5,325.75.

REASONS

Introduction and background

1. The claimant was employed by the respondent, latterly as a Senior Nursery Practitioner. She accepts that she was employed by Swans Day Nurseries Ltd which trades as Eilmar Montessori School and Day Nursery. The name of the respondent is accordingly amended to reflect that.

2. The claimant brings a claim for unfair dismissal. She limits her claim to sums she would have earned in the balance of her notice period but seeks an uplift to reflect the failure to follow the Acas Code of Practice.

3. The claimant says that she commenced employment on 27 August 2018. The respondent in its ET3 asserts that she started in September 2018. The respondent has not produced any document which supports that contention

and, on balance, I would accept the claimant's evidence. However, nothing appears to me to turn on that distinction.

4. There is no dispute that the claimant gave notice to terminate her employment on 20 September 2021. Her notice period was three months and her last day of work was said in her letter to be 20 December 2021. However, it appears that this was extended by agreement to 22 December 2021, the date quoted by the respondent when it acknowledged her notice.

5. In the event she was summarily dismissed before she had completed her notice period. That dismissal took place on 15 October 2021. The circumstances of and reasons for that dismissal are hotly disputed. In particular, what was said to the claimant at a meeting on that date and who was present are disputed.

6. This case was listed on receipt of the ET3. It was given a three-day hearing slot and standard form directions were sent to the parties on 10 April 2022. These provided for the disclosure of documents relevant to the claim, agreement of a bundle, its production by the respondent and the exchange of witness statements.

7. On 14 July 2022 the respondent wrote to the tribunal asking, in effect, for details of the orders made to be sent to it. The respondent chased the tribunal on 25 July and the orders were then resent to the respondent on 10 August.

8. The respondent did not produce any bundle in response to that order. Some documents were attached to the ET3. Mr Luthra, a Director of the respondent, told me that he had sent a bundle to the tribunal on 14 July 2022, a few hours after he sent the email of that date referred to above. The tribunal has no record of this and I note that it would have been sent at a time when the respondent was asking the tribunal for details of the orders made. The respondent resent the bundle on the first morning of this hearing. It turned out to consist of the ET3 together with its attachments and correspondence with a perspective employer which the claimant had disclosed to the respondent.

9. The respondent did not provide any witness statement. Mr Luthra told me that he was to be the only witness and that he regarded the letter of 27 January 2022 which was attached to the ET3, and set out the respondent's factual response to the claimant's case, to be his witness statement. He also told me that he wished to rely on two written statements both said to be from Ms Sumera, the Nursery Manager and signed by her and by another employee, Ms Ami. He said that he did not intend to call either of these ladies to give evidence due to staffing ratios and that one was anyway on holiday.

10. One of Ms Sumera's statements contains an account written in the first person said to be from a parent raising concerns about the accuracy of information provided to that parent by the claimant regarding the feeding of a child. I was told that the parent had made the complaint on the

respondent's app and that the relevant entries had been deleted some time ago. The parent had, I was told, initially been willing to be identified and had signed the statement from Ms Sumera, as Ms Ami had done, but later requested anonymity so that her signature and name were tippexed out.

11. According to this witness statement the provision of incorrect information happened on several occasions and the parent spoke to Ms Sumera each time. Ms Sumera's second statement records her as having spoken to the claimant after "many parents" told her of mistakes by the claimant regarding information on the respondent's app. I was not shown any documents relating to these complaints save in so far as they are reflected in the statements of Ms Sumera and save for one document to which I shall refer below.

12. The claimant did provide a witness statement in accordance with the tribunal's order. Her mother and a former colleague at the nursery each also provided written and signed statements. The claimant and her mother both gave oral evidence.

13. Mr Luthra gave evidence for the respondent. He sought to rely also on the two statements from Miss Sumera signed also by Ms Ami and the claimant relied on the short statement from a former employee to which I have referred above. Only the three persons already identified gave oral evidence to the tribunal. None of the evidence contained within the written statements was, therefore, the subject of any cross examination and, in determining the outcome of matters of controversy, I did not find any of those statements to be of particular assistance.

Findings of fact

14. The claimant appears to have been a valued member of the nursery staff. She was latterly working from 8am to 6pm with an unpaid one-hour lunch break. I accept the evidence of the claimant and her mother to that effect. I was particularly struck in that regard by their detailed descriptions of the claimant's leaving routine as they each observed it from the moment when the last child (usually twins) was collected at around 6pm.

15. The claimant maintained that shortly after her promotion to be in charge of one of the three rooms at the nursery she was given a further pay rise to £9.50 per hour. She accepted that she had no written evidence of this and that the one pay record in evidence which showed an hourly rate (relating to August 2022) said that the rate was £9 per hour. She suggested that she had not properly checked her payslips and that this rate was in error. Her evidence of the conversation when the rate was said to have been increased was vague. In all the circumstances she has failed to satisfy me that a binding agreement to increase the rate from some particular date had been reach and, hence, I proceed on the basis that her rate of pay was £9 per hour.

16. On 6 October 2021, being about two weeks into her notice period, she was told that she should no longer respond to parental comments made on the

respondent's app. That had previously been part of her job. She was also told that she should no longer answer the telephone.

17. No reasons were given for these instructions. In particular, the claimant was not told that there had been any parental complaints about her, and she had not seen the complaints on the app to which the respondent referred. Having heard her oral evidence and that Mr Luthra and having regard to the lack of any contemporaneous evidence (other than the written statements and employee concerns forms which I shall deal with below) I am not persuaded that any parent did complain in the ways alleged. Had this happened I consider that this would have been raised with the claimant and I am satisfied that it was not.

18. On 15 October 2021 the claimant was asked to meet with Mr Luthra in his office. Although the note of this meeting which he and Ms Sumera signed suggests that Ms Sumera was also present, I am satisfied that she was not. She had asked the claimant to attend the meeting saying that she would cover for the claimant while the meeting took place and that is what happened.

19. The alleged note of the meeting suggests that Mr Luthra began by referring to the claimant being under the influence of alcohol. Indeed, Ms Sumera's statements suggests that the claimant smelt strongly of alcohol, had slurred speech and had appeared confused earlier in the day.

20. The note of the meeting on 15 October suggests that there had been multiple reports regarding the claimant making false claims on the app regarding her feeding of children and that she herself had advised staff to make false claims to Ofsted and had made inappropriate comments to other members of staff in front of the children. In that note, there then follows a brief exchange of questions and answers in which the claimant is alleged to have:

    20.1 First admitted to having had one or two alcoholic drinks that day.

    20.2 Admitted that the allegations against her were true.

    20.3 Said that her heart was no longer in the job.

    20.4 Been summarily dismissed for gross misconduct.

    20.5 Been offered the opportunity to appeal and to have declined it.

21. At 6.23 that evening Mr Luthra sent an email to the claimant. It terminated her employment within immediate effect for gross misconduct and identified "the following areas" of misconduct:

> "1. Not feeding milk to children and writing this down on the family app that you have.
>
> 2. Make false allegations and advising other team members to report the Nursery and Practitioners to Ofsted.

3. Discussing about non-nursery related matters in front of children (Cygnets Room)."

22. At the start of the first day of the hearing I enquired about the lack of a bundle and witness statements from the respondent. In the course of that enquiry I considered with Mr Luthra what documents had been disclosed. It was then that he told me that the parental complaint on the app had been deleted. He also said that Ms Sumera had made notes in handwriting at the meeting on 15 October from which he had typed up the note to which I have referred above. He also said that the statements signed by Ms Ami and Ms Sumera and also the parent had been compiled from written notes, He said that these were available but that he himself would have to go to the respondent's archive records (held at the Nursey) to retrieve them. I adjourned the hearing until 10am the following day which he agreed would enable him to locate those documents and provide copies to the claimant and to the tribunal.

23. That evening the respondent sent an email to the claimant and to the tribunal which attached a number of documents including the following:

    23.1 A handwritten version of Ms Sumera's first statement. This is said to have been written by Ms Ami. As in the typed version, which both Ms Sumera and Ms Ami signed, the incident concerning the parent is written in the first person as if composed by the parent. I have seen no statement from the parent, or any other note of what that parent said. I have seen no note of any complaint by any other parent, save as set out below.

    23.2 Three Employee Concern Forms, two completed by Ms Sumera and one by a Ms Sofia. Although to my non-expert eye the handwriting in respect of all three looks remarkably similar, I have ignored this in reaching my conclusions. Those forms relate to the parental complaints and the language used in front of children which I have referred to already. The also refer to an incident said to have taken place on 27 September 2021 when the claimant is said to have been sent home early in the morning, dizzy, drowsy and under the influence of alcohol.

    23.3 A handwritten version of the note of 15 October the contents of which are almost identical to the typed version. The handwriting is said to be that of Ms Sumera but it appears significantly different from that appearing on the Employee Concern Forms. I am conscious that I have not heard from Ms Sumera and that it could be that this document is in her handwriting and that the others were written by someone else. I also recognise that I am not a handwriting expert and that Mr Luthra asserts that all were written by Ms Sumera. I have not reached a conclusion about who wrote the purported note of 15 October meeting. Hence, I do not regard the existence of the handwritten notes as supporting the respondent's assertions that Miss Sumera was present and that the notes summarise what was discussed.

24. The claimant's account of the meeting of 15 October is very different from that given by Mr Luthra. She says that there was no mention of alcohol, or of complaints by parents, or of her discussing non-nursery related and inappropriate matters in front of children. She says that Mr Luthra referred only to his having three written statements from staff saying that she had said that she was going to report the nursery (apparently to Ofsted). In the meeting she denied that she had said any such thing. It is her case that she did in that meeting refer to having concerns about the lack of Personal Protective Equipment and to her view that if Ofsted came to inspect the nursery and found this to be the case, they would also be concerned. She also expressed the view that whilst she liked nursery work, she was no longer happy doing it at this particular nursery. She says that she was not shown any statements and that the apparent authors of the three statements were not identified. She says that Mr Luthra said to her that as she was unhappy, she might as well go home and went on to say that she should hand back her fob and take her things with her and not come back on Monday.

25. I prefer the claimant's account of the meeting to that of Mr Luthra. Her account was clear and consistent. I found his evidence far less so. She was able to give a detailed and credible account of the conduct of the meeting. Mr Luthra's account was to me far less convincing. She appeared to me to be recalling a meeting a picture of which she had retained in her memory. He, by contrast, seemed to me to be seeking to embellish the note of the meeting in ways that might assist the respondent's case without any recollection of an actual meeting which took place. He did this, for example, by recalling that at the start of the meeting he had offered her the opportunity to be accompanied which she had declined. He accepted that this does not appear in the note and would have taken place before she knew what the meeting was about.

26. In addition to my assessment of the claimant and Mr Luthra as witnesses and my views on the handwritten notes, I have also been influenced in my decision to accept the claimant's version of the meeting by the following:

    26.1 The dismissal email makes no reference whatsoever to the claimant's apparently attending for work with very young children whilst under the influence of alcohol, nor is this mentioned in the subsequent email of 21 October referred to below. It does of course feature in the notes of the meeting.

    26.2 Ms Sumera's witness statement says that she reported the claimant being under the influence of alcohol, smelling of alcohol, having slurred speech and being confused to Mr Luthra at about 11 o clock in the morning on 15 October. He accepted that. It is agreed that the meeting of 15 October was the first occasion when he and the claimant met thereafter and it took place at about 16:30 in the afternoon.

    26.3 Mr Luthra accepted that the claimant working with children when intoxicated raised very serious safeguarding issues. He identified

this in his oral evidence as by far the most significant point dealt with at the meeting and said that once the claimant had admitted drinking there could only really be one outcome. This was, he said, his principal reason for dismissing her and yet he was completely unable to explain why he had done nothing between 11 o'clock in the morning when the matter was first reported to him and 4.30 in the afternoon, and why he had done nothing when the claimant was allegedly sent home because she was intoxicated on 27 September of that year.

26.4 The claimant emailed several times asking for a copy of the Employee Handbook to which Mr Luthra referred in his dismissal letter. The first three emails were not answered. When Mr Luthra did respond, on 21 October, he did not provide a copy of the handbook. Instead, he explained the lack of any disciplinary process on the basis that this was not appropriate in circumstances of gross misconduct. What he did not say was that she had admitted three specific instances of gross misconduct and admitted being intoxicated when he put these matters to her at the meeting.

26.5 Indeed, the email of 21 October from Mr Luthra refers to only one alleged instance of gross misconduct, namely using "unprofessional" language "in front of minors". I also note that this appears to me a rather odd way of summarising an allegation which (looking at Ms Sumera's witness statements) is that she had discussed her sex life in front of the children. If, as Mr Luthra maintains, the claimant admitted this allegation at the meeting on 15 October, it seems to me that he would have set that out in this email when summarising the one matter out of several which he chose to refer to,

26.6 The claimant appealed against her dismissal by an email sent at 16.55 on 21 October. The respondent's email of the same date, discussed above, was sent some 23 minutes later. Although Mr Luthra told me that this was intended to be a response to her application to appeal, that alleged response makes no reference to the claimant's appeal and the appeal email appears to me never to have been answered. Yet, if the respondent's version of events is accurate, the claimant had already been offered and declined an appeal against the background of her admitting the allegations made against her. I note that her appeal referred to the three matters listed in the dismissal email, she made no reference to alcohol. If that had really been the key matter, as Mr Luthra now says, I am satisfied that he would have responded making the position clear.

27. I do not consider that the claimant had been drinking on 15 October. She did not smell strongly of alcohol when Mr Luthra interviewed her, nor was her speech slurred and she did not appear to him confused. He stated those matters in oral evidence in response to questions from me.

28. I am driven to the conclusion that this allegation with regard to alcohol was later fabricated by the respondent. That explains why nothing was done for

five and a half hours after the alleged initial report of her being intoxicated and why no mention of this matter appears in the dismissal email or the email of 21 October. I can find no other credible explanation for those matters.

29. I accept that there will from time to time have been concerns raised by parents about information put on the respondent's app. Whether any related to the claimant, or if they did were justified complaints, are irrelevant because I consider the respondent simply seized on this possibility to provide some justification for the claimant's dismissal. The same is, in my view, the case regarding the allegation about inappropriate language or conversations. There may have been instances of staff using inappropriate language in front of children, but no one ever criticised the claimant for this. Again, it is my finding that the respondent seized on this in order to try to justify the claimant's dismissal.

30. I accept the claimant's evidence that she weas never shown the Employee Concern Forms and that, even though she was in charge of one of the three rooms at the nursery and therefore of the staff working in that room, she was unaware of the existence of such forms or the need to complete them in circumstances of complaints or concerns being raised.

31. There seemed to me likely to have been concerns by the claimant about the respondent nursery running low on gloves and I accept that she had raised concerns about having to re-use PPE. She had never suggested reporting the respondent to Ofsted. At the time of her dismissal, I do not believe that the respondent had any statements in writing from anyone to suggest that she had. I consider it likely that the statements from Ms Ami and Ms Sumera were produced after the event. Had they existed at the time of the meeting Mr Luthra would have shown them to the claimant, or (at least) taken her through them. He did neither.

32. The respondent repeated the allegations of misconduct against the claimant in references given to at least one other nursery. This led to a job offer being withdrawn. The respondent has not disclosed these references, but Mr Luthra accepted that they did contain those allegations.

The law

33. Before hearing final submissions, I took the parties through the principles of law set out below. Neither side made any submissions on the applicable law but confined themselves to submissions on the facts and, in the case of Mr Luthra, to an assertion that even if there had been errors in procedure, the outcome would necessarily have been the same had a correct procedure been followed. The parties' respective contentions on matters of disputed fact appear sufficiently in my findings of fact.

34. The burden is on the respondent to show what was the reason for the claimant's dismissal. That dismissal can only be fair if the reason, or principal reason if there was more than one, is one of the statutorily permissible reasons found in s.98 of the Employment Rights Act 1996.

35. If the respondent can show that there was a statutorily permissible reason for the dismissal then I must go on to consider whether the dismissal was fair in all the circumstances, applying the approach set out in s.98(4) of the 1996 Act.

36. In that regard, this being a dismissal allegedly for misconduct, I would then need to keep in mind the approach set out in the well-known Burchell decision, namely I would need to consider:

    36.1 Whether the respondent reasonably believed the claimant to be guilty of misconduct.

    36.2 Whether the respondent had reasonable grounds for holding that belief.

    36.3 Whether that belief was arrived at after the conducting of a reasonable investigation.

37. It is not for me to substitute my own view as to how an appropriate investigation ought to be conducted, or as to what an appropriate disciplinary penalty would be in the particular circumstances established. It is sufficient for me to be satisfied that the investigation conducted by the employer was of a kind which a reasonable employer could have conducted in these circumstances and that the disciplinary penalty was one which fell within the band of reasonable responses available to an employer in these circumstances.

38. The claimant accepts that the compensation she seeks in this case is limited by her having already given notice. She would be entitled, therefore, as any person would be if found to be unfairly dismissed to both a basic award and a compensatory award.

39. Although I summarised the law to the parties it is not necessary, given my findings of fact, for me to consider the law as it relates to contributory fault or the principles set out in the well-known decision of the House of Lords in Polkey.

40. The claimant seeks and uplift on any award by reference to the provisions of s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992. I have reminded myself (and I reminded the parties) of the four-fold approach suggested by the EAT in Rentplus UK Ltd v Coulson in 2022. That four-fold approach is as follows:

    40.1 Is the claim one which raises a matter to which the Acas Code applies? Here is it Code of Practice number 1, the code relating to dismissal and grievance procedures.

    40.2 Has there been a failure to comply with the code?

    40.3 Was the failure unreasonable?

40.4 Is it just and equitable to uplift the award? If so, by what percentage up to 25%.

Applying the law to the facts

41. The respondent has not persuaded me that the reason, or principal reason, for dismissal in this case was misconduct, or that any other statutorily permissible reason is applicable. It may be that the respondent decided that, as the claimant had given notice and appeared to be unhappy, she should leave as soon as possible, but I need make no finding on that. Certainly, the respondent withdrew parts of her job from her, but she still came to work. The allegation that she had threatened to report the nursery to Ofsted and the other allegations said to have been made against her at the meeting on 15 October and which were contained in subsequent correspondence, do not, in my view, provide the true reason for her dismissal. In particular, I refer to my finings with regard to the allegation concerning the consumption of alcohol. That was alleged to be the principal reason for dismissal. I find that it was not the principal reason and, indeed, it was neither put to the claimant nor relied on in the subsequent correspondence in October 2021. The respondent having failed to satisfy me that it had a statutorily permissible reason for dismissal, this dismissal must be found to be unfair.

42. It follows from my findings of fact that the respondent could not satisfy the Burchell tests, but as no permissible reason for dismissal has been established, I need not deal with them. However, for completeness (and having regard to the claim for an Acas uplift), I summarise my views. The respondent had no belief in the claimant's misconduct and had not carried out any sufficient investigation. Indeed, the allegations had not been put to the claimant save as regards the suggestion that she was threatening to report the nursery to Ofsted. Save for that, she was not even told what the allegations against her were, even in general terms, until the dismissal email which followed some hours after 15 October meeting, Even that email omitted what Mr Luthra now contends to have been the principal reason for dismissal.

43. There is no question here of contributory fault or the application of the principles in Polkey. The alleged principal reason (and indeed the other alleged reasons) for dismissal were, I find, a contrivance.

44. Hence, the claimant is entitled to a basic and compensatory award.

45. Turing first to the basic award. This is calculated in accordance with the principles set out in s.119 of the Employment Rights Act. She had 3 complete years' service. Given her age the multiplier is 1. She is entitled to 3 weeks' pay as a basic award. Her week consisted of 45 hours at £9, giving a total of £1,215.00

46. Turning to the compensatory award, it is as the claimant herself accepted limited to the remaining 47 days of her notice at 9 hours per day at £9 per hour which gives a total of £3,807.00.

47. I find that there is no tax to be deducted in this case in order to arrive at the compensatory award. The pay records which I have seen indicate that she either earned too little to pay tax or had already overpaid tax and National Insurance such that the sums paid to her by the respondent equated to her gross wage. There is no prescribed element in this case as the claimant made no relevant claim.

48. I turn then to the Acas uplift and to the questions suggested in Rentplus.

49. This is a case in which an applicable Code of Practice does apply, hence, I answer the first question in the affirmative.

50. There clearly has been a failure to comply with the Code of Practice. None of the allegations now relied upon by respondent were properly put to the claimant and investigated. The only one that was raised with her related to the suggestion that she had threatened to report the nursery to Ofsted. Even so far as that allegation is concerned, the claimant was unaware of it until she went into the meeting on 15 October, a meeting the purpose of which had not been communicated to her in advance. Hence, there is a clear failure to comply with the Code in this case.

51. I turn then to the question of whether the failure was unreasonable. The respondent did not comply with the Code in any way. This is because the reasons now advanced for dismissal were, in my view, in the main, ones which were not even considered with her prior to her dismissal. I do not consider that those matters had been properly investigated. Hence, the respondent did not establish the facts; it did not inform the employee of the problems; it did not investigate the matter; it did not tell her of her right to be accompanied. Indeed, she was not even told of the nature of the meeting prior to its commencement. Her request to appeal was ignored.

52. In those circumstances I consider it to be just and equitable to uplift the award. I take into account that the making of these allegations which the claimant had been given no opportunity in the main to answer, meant that at least one job opportunity was lost to her. Had a proper procedure been followed either these allegations would never have been put forward or the claimant would have been given the opportunity to refute them and would have done so. Hence, in those circumstances, I considerate it appropriate to uplift the award by 25%. That means that the total award is a sum of £5,325.75.

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Employment Judge Andrew Clarke KC

Date:19/4/2023
Sent to the parties on:18/5/2023
N Gotecha - For the Tribunal Office