



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103958/2024

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Held in Glasgow on 8 and 9 July 2024

Employment Judge L Wiseman

10 **Ms R Asghar**

**Claimant
Represented by:
Dr A Asghar -
Father**

15 **Technotots Childcare Ltd**

**Respondent
Represented by:
Mr A McCormack -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 29
25 February 2024 alleging she had been unfairly dismissed.
2. The respondent entered a response admitting the claimant had been dismissed for reasons of conduct, but denying the dismissal had been unfair.
3. The tribunal heard evidence from Ms Angela McMillan, Deputy Manager, who took the decision to dismiss; Ms Jayne Godard, Owner/Manager, who carried
30 out the investigation; the claimant and Ms Shelley McGovern, Childcare Practitioner.
4. The tribunal was also referred to a jointly produced folder of documents.

5. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

Findings of fact

- 5 6. The respondent is a childcare facility providing early years care for 0 – 5 year olds. The respondent employs 25 employees.
7. Ms Jayne Goddard is the Owner/Manager of the respondent; Ms Angela McMillan is the Deputy Manager and Ms Dawn McCorkindale is the Senior Supervisor. They form the management team.
- 10 8. The claimant commenced employment with the respondent on the 23 March 2021. She was employed as a Nursery Practitioner and the Written Statement of Employment Particulars was produced at page 58.
9. The claimant worked with Ms Shelley McGovern in the toddler area, caring for 2 – 3 year olds.
- 15 10. The claimant received a verbal warning which was confirmed in writing on the 4 July 2022 (page 61). The letter confirmed the warning would remain on the claimant's personal file for 3 months and that the respondent wished to see an improvement in her conduct insofar as there should be no more slamming of doors or raising her voice at colleagues or management.
- 20 11. The claimant received a final written warning in February 2023 (page 65) for aggressive and confrontational conduct towards management; conduct towards staff and general conduct within the workplace. The final written warning was to remain on the claimant's personal file for 1 year.
- 25 12. Ms Goddard was approached by a member of staff (referred to as "the whistleblower") on 22 September 2023 who informed her that she had been told by another member of staff that the claimant had shouted at a child whilst putting her to sleep.
13. Ms Goddard prepared an Investigation Plan (page 66) setting out how she intended to investigate the matter. She then met with the whistleblower and

Ms McGovern to obtain their statements (page 74 and 75 respectively). Ms McGovern was initially referred to as “Person A” but it was not possible to maintain anonymity in circumstances where Ms McGovern referred in her statement, to herself and the claimant working in the toddler room.

- 5 14. Ms Goddard asked the claimant to attend the office to meet with herself and Ms McCorkindale. Ms McMillan was present in the office working but took no part in the meeting. Ms Goddard told the claimant that it had been brought to her attention that the claimant had “shouted at a wee girl on Wednesday when she was trying to put her down for a sleep”. She asked the claimant if this was true. The claimant responded “yes”. Ms Goddard informed the claimant that she would be suspended on full pay pending an investigation. The claimant responded to ask why she was being spoken to when everyone else did it. Ms McCorkindale asked the claimant who else did it, but the claimant left the meeting.
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- 15 15. Ms Goddard met with the staff in the nursery to ask if they had ever shouted at a child or heard anyone do this: no-one had.
16. Ms Goddard wrote to the claimant on 22 September (page 72) to confirm she had been suspended on full pay pending an investigation and inviting her to attend a disciplinary hearing on Monday 25 September.
- 20 17. The disciplinary hearing on 25 September did not proceed because the claimant complained that she did not have sufficient time to prepare and she had not received any documentation from the respondent. The claimant had also asked for the hearing to take place remotely, but this request was refused by Ms Goddard.
- 25 18. The claimant also contacted Ms Goddard (page 77) to confirm she had not made an admission to the allegation on 22 September, but had replied “yes” to putting the child to sleep. The claimant confirmed she had not shouted at the child and that the allegation was false.
19. The claimant was advised the disciplinary hearing would be re-arranged for Friday 29 September (page 78).
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20. The claimant sent a lengthy email to Ms Goddard on 27 September (page 79) in which she alleged breaches of the ACAS Code of Practice, confirmed she was making arrangements for a colleague to accompany her to the hearing and asking if Ms Goddard would be chairing the hearing.
- 5 21. The claimant was, by email of 28 September (page 82) sent copies of the statements, the investigation plan, the investigation report and the letter from Ms Goddard.
22. The disciplinary hearing arranged for 29 September was cancelled in order to give the claimant time to read the documents which had been sent to her. The
10 disciplinary hearing was re-arranged for 5 October (page 84).
23. The claimant was advised that the witness referred to as Person A was Shelley McGovern. The claimant was surprised to learn this because Ms McGovern had initially agreed to accompany the claimant to the disciplinary hearing arranged for 25 September.
- 15 24. The claimant emailed Ms McMillan on 5 October (page 86) to advise that she was not prepared to attend the hearing without a colleague and she requested more time to arrange this.
25. Ms McMillan replied to confirm that the disciplinary hearing had been rescheduled to 12 October (page 87). Ms McMillan asked the claimant to
20 confirm who was accompanying her.
26. The claimant emailed Ms McMillan on 10 October (page 88) confirm the name of the colleague and requesting the disciplinary hearing be re-arranged because the colleague was currently absent on sick leave. The claimant also asked for a response to the issues she had raised in an earlier email.
- 25 27. Ms McMillan responded on 10 October (page 89) to confirm she had spoken to the claimant's colleague who confirmed she would be in attendance at the hearing. Ms McMillan confirmed the hearing would accordingly proceed.

28. The claimant emailed Ms McMillan on 11 October (page 90) asking for confirmation of the role of the colleague, who would be in attendance at the hearing and seeking a response to her earlier email.
29. Ms McMillan responded (page 91) to confirm she would be chairing the hearing with Ms Goddard present as note-taker. Ms McMillan also confirmed the role of the colleague and confirmed Ms McGovern would not be in attendance at the hearing.
30. The claimant emailed later on 11 October (page 92) raising various issues regarding the presence of Ms Goddard and the absence of Ms McGovern. The claimant further asserted she did not consider the respondent had complied with the ACAS Code of Practice in carrying out the investigation.
31. Ms McMillan responded to this email. The claimant emailed again at 22.08 that day (page 94) reiterating concerns regarding the presence of Ms Goddard and asking for an independent investigation to take place.
32. Ms McMillan emailed on 12 October (page 96) to say that if the claimant unreasonably refused to attend the hearing, she would proceed in her absence. Ms McMillan confirmed she wished to hear the claimant's version of what happened on the day in question.
33. The claimant emailed on 12 October (page 98) to say that in the absence of a response to the points she had raised, she was seeking a postponement of the hearing.
34. The claimant provided Ms McMillan with a list of questions to be put to Ms McGovern and Ms McCorkindale. The questions were given to them but they each refused to answer them and confirmed they relied on their statements.
35. Ms Goddard emailed the claimant on 27 October (page 140) to respond to all of the points she had raised. The email also confirmed that the disciplinary hearing arranged for 12 October, which had been postponed, was re-arranged for 2 November. Ms McMillan was to chair the hearing with Ms McCorkindale present to take notes. The claimant was advised that the hearing would proceed in her absence if she unreasonably refused to attend.

36. The claimant emailed on 1 November (page 143) to provide a statement of her version of events.
37. The claimant emailed Ms McMillan on 2 November (page 148) confirming her colleague was now unable to attend the hearing and that she was not comfortable attending by herself.
38. Ms McMillan replied to say that if the claimant wished to choose another colleague, she (Ms McMillan) would try to facilitate this. The claimant did not pursue this and confirmed she was not comfortable attending by herself.
39. Ms McMillan considered all of the documentation (investigation report, previous warnings and disciplinary paperwork, statements, timeline and policies) and had regard to the fact (i) there had been several attempts to schedule a face to face meeting; (ii) the incidents involved different people; (iii) her belief that the claimant had understood the allegation and replied “yes” to it; (iv) the final written warning and the need to achieve and maintain an acceptable level of performance and behaviour and (v) all of the incidents involved anger/aggression.
40. Ms McMillan concluded the claimant had shouted/raised her voice at the child. Ms McMillan decided to dismiss the claimant with two weeks payment in lieu of notice. This was confirmed in writing to the claimant by letter of 9 November (page 103).
41. The claimant was advised of her right to appeal against the decision to dismiss. She did not do so.
42. The respondent informed the SSSC of the dismissal and the reason for the dismissal.
43. The claimant has, since dismissal, been in receipt of Universal Credit. The claimant found alternative employment which started on 10 June 2024. The claimant earns £12 per hour.

Respondent's submissions

44. Mr McCormack noted there was little dispute as to the facts in this case. The reason for the dismissal was conduct. The respondent carried out a reasonable investigation on 22 September by speaking to the relevant people and gathering statements. Ms Goddard met with the claimant to put the allegation to her, and in response to which the claimant had answered "yes". It was submitted the claimant must have understood the allegation because she questioned why she was being spoken to when everyone else did the same thing.
45. Mr McCormack referred to the case of ***British Home Stores Ltd v Burchell 1980 ICR 303*** and also invited the tribunal to have regard to the size and administrative resources of the respondent. There were only three members of the management team.
46. Ms McMillan had reasonable grounds to conclude the alleged misconduct had occurred. The claimant admitted the misconduct and, having regard to the final written warning which was live and had been given for the same type of conduct, the decision to dismiss was reasonable.
47. The claimant argued there had been breaches of the ACAS code. It was submitted that by the time of the disciplinary hearing on the 2 November, all/any failures by the respondent had been remedied.
48. Mr McCormack invited the tribunal to dismiss the claim. However, if the tribunal found the dismissal to have been unfair, it was submitted that compensation should be reduced by 100% having regard to ***Polkey*** and contributory conduct.

Claimant's submissions

49. Dr Asghar submitted the claimant had not admitted shouting at the child. The incident had been witnessed by Ms McGovern, and she was not a credible witness because she had also agreed to be the claimant's companion at the first disciplinary hearing and then refused to answer the claimant's questions regarding her statement.

50. Dr Asghar submitted Ms Goddard and Ms McMillan were not fair and impartial because they had been involved in previous incidents.

51. There had been breaches of the ACAS Code. The investigation and the procedure followed by the respondent had been unfair and this rendered the dismissal unfair.

Discussion and Decision

52. The tribunal had regard to the terms of section 98 Employment Rights Act which sets out how a tribunal should approach the question of whether a dismissal is fair. There are normally two stages:

- first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2), and
- second, if the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair under section 98(4). This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

53. The respondent accepted it had dismissed the claimant and asserted the reason for the dismissal was misconduct. The claimant did not argue there had been another reason for dismissal. The tribunal decided, having regard to this and what is set out below, that the respondent had shown the reason for the dismissal was conduct, which is a potentially fair reason for dismissal in terms of section 98(2)(b).

54. The tribunal also had regard to the case of ***British Home Stores Ltd v Burchell*** (above) where it was said that the employer must show that:

- it believed the employee guilty of the misconduct;
- it had in mind reasonable grounds upon which to sustain that belief and
- at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances. This means the employer need not have conclusive

direct proof of the employee's misconduct; only a genuine and reasonable belief, reasonably tested.

55. The tribunal noted there was little dispute regarding the material facts in this case insofar as Ms Goddard was informed the claimant had shouted at a child whilst putting her to sleep. Ms Goddard acted on that information by speaking to the member of staff (Ms McGovern) who had been working with the claimant in the toddler's room at the time of the incident. Ms McGovern confirmed the claimant had shouted at a child whilst putting the child to sleep. Ms McGovern then met with the claimant to inform her of the allegation and get her response. The discussion was short and to the point (page 69): Ms Goddard told the claimant of the allegation and asked her if it was true and the claimant replied "yes".
56. The onus on the respondent is to carry out an investigation to establish the facts of the case. The investigation must be reasonable in the circumstances. The tribunal noted Ms Goddard prepared an Investigation Plan to format what she required to do to investigate the matter and who she needed to speak to. The tribunal further noted Ms Goddard interviewed the relevant people (being the person who informed her of the allegation and Ms McGovern and the claimant). Ms Goddard went beyond this and spoke to all members of staff to ascertain whether, as asserted by the claimant, they shouted, or had heard others, shout at children.
57. The tribunal noted there was no argument that Ms Goddard should have interviewed others. The claimant was critical of the investigation carried out by the respondent for two reasons: firstly, because it was said Ms Goddard was not impartial and secondly, because Ms Goddard did not meet with the claimant again to interview her about the allegation.
58. There was no dispute regarding the fact that as Owner of the respondent company and the Manager, who is present and actively involved in the business, Ms Goddard was aware of the previous incidents involving the claimant. She was aware not only of the fact of the verbal warning and final written warning, but also the circumstances leading to those warnings. The

claimant argued this made Ms Goddard impartial. The tribunal could not accept that knowledge of an employee's disciplinary record automatically renders a person impartial. The tribunal noted there was no suggestion of ill-will by Ms Goddard towards the claimant. The tribunal concluded, in the circumstances, and having regard to the size of the respondent, that Ms Goddard was a suitable and appropriate person to carry out the investigation.

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59. There was no dispute regarding the fact Ms Goddard did not call the claimant to an investigatory meeting following her suspension. The tribunal, as noted above, accepted Ms Goddard had met with the claimant to inform her of the allegation and had given her an opportunity to respond. The tribunal further accepted that one of the purposes of the disciplinary hearing was to hear the claimant's version of events after having had an opportunity to review the information gathered by the respondent.

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60. The tribunal was satisfied, having regard to the above points, that the respondent carried out a reasonable investigation in the circumstances of this case. The purpose of an investigation is to gather the facts and that is what Ms Goddard did. The fact Ms Goddard did not meet with the claimant again to interview her was not a breach of the ACAS code, and did not impact on the fairness of the procedure followed by the respondent because the claimant had already had an opportunity to be informed of the allegation against her and to respond to it in circumstances where she would have another opportunity to state her case at the disciplinary hearing.

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61. The tribunal next asked whether the respondent believed the claimant guilty of the alleged misconduct and whether they had reasonable grounds upon which to sustain that belief. Ms Goddard had originally intended to chair the disciplinary hearing but given the concerns raised by the claimant she made the decision to stand down and appoint Ms McMillan to chair the hearing.

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62. Ms McMillan told the tribunal that before taking the decision to dismiss, she reviewed all of the information available to her and this included the investigation plan, the investigation report, the statement of the person who informed Ms Goddard of the allegation, the statement of Ms McGovern and

the claimant's explanation of what had happened, in which she denied shouting at the child and explained that her response of "yes" to the allegation and in fact been a response to putting the child to sleep.

5 63. Ms McMillan, having regard to the statements of the members of staff and the fact the claimant, when asked if the allegation was true, had replied "yes", believed the claimant had acted as alleged. Ms McMillan did not accept the claimant's explanation for why she had said "yes", because the claimant had gone on to question why she was being spoken to for shouting when everyone else did it. Ms McMillan considered this demonstrated the claimant had understood the allegation and had responded "yes" to confirm it was true.

10 64. The tribunal, having regard to the above paragraph, concluded Ms McMillan had reasonable grounds, based on the investigation, to sustain her belief in the claimant's guilt. Ms McMillan believed the claimant had shouted at a child whilst putting her to sleep and she took the decision to dismiss.

15 65. The tribunal next turned to consider the fairness of the dismissal for this reason. The claimant challenged the procedure followed by the respondent when dismissing her and asserted there had been breaches of the ACAS code. The tribunal considered it important to note that the ACAS Code provides guidance for employers and it is not a case that a breach of the Code would automatically render a dismissal unfair: everything must be considered

20 in the context of reasonableness. Further, the key principles of the Code, in accordance with natural justice, are that the employee should know the case against them and have an opportunity to respond.

25 66. The claimant initially complained that the disciplinary hearing arranged for the 25 September left her with little time to prepare and she had not received any documentation from the respondent. The respondent responded to that by cancelling the disciplinary hearing and re-arranging it for 29 September. The respondent also, on 28 September, provided the claimant with a copy of the investigation plan, the investigation report and the witness statements.

30 67. The claimant complained that she had insufficient time to consider the documentation sent the day before the hearing. The respondent accepted this

and cancelled the hearing arranged for 29 September and re-arranged it for 5 October.

5 68. The claimant next complained that Ms McGovern, who had agreed to be her companion at the disciplinary hearing, had changed her mind and the claimant needed time to find another companion. The claimant also asserted there had been a “breach of confidentiality” by being informed that “Person A” was Ms McGovern. The claimant was unable to explain at the hearing what she meant by a breach of confidentiality and was unable to explain why this may have been a disadvantage to her. In any event, the hearing arranged for 5 October
10 was cancelled and rearranged to 12 October.

15 69. The claimant continued to raise issues regarding time to prepare, having a companion at the hearing and having questions answered by the witnesses. The respondent re-arranged the disciplinary hearings in order to accommodate the claimant on numerous occasions, until, in advance of the hearing on 2 November, the claimant was advised that the hearing would proceed in her absence if she failed to attend.

20 70. The tribunal concluded that by the time of the disciplinary hearing arranged for 2 November, the respondent had provided the claimant with all of the relevant documentation and had given her ample time to read it and prepare what she wanted to say. This was not a case where there was a significant amount of documentation to read through. The claimant knew the allegation against her, knew what the witnesses had said, and had time to prepare her response. The tribunal acknowledged the right of the claimant to have someone accompany her to the hearing, and she had been given time to
25 make the necessary arrangements. Ms McMillan took the step of contacting the claimant’s companion and also offering to contact someone else if the claimant confirmed who she wished to have accompany her, but the claimant did not respond to this.

30 71. The claimant was advised that if she failed to attend the disciplinary hearing on 2 November, it would proceed in her absence. The tribunal considered that in the circumstances, given the number of times the hearing had been re-

arranged at the claimant's request and given the claimant knew it would proceed if she did not attend, the tribunal concluded the actions of the employer in proceeding with the hearing fell within the band of reasonable responses which a reasonable employer might adopt.

5 72. The claimant also challenged the fairness of Ms McMillan chairing the hearing because Ms McMillan had given the claimant the final written warning. The tribunal noted the claimant had signed the final written warning and did not appeal against it. It was further noted there was no suggestion that Ms McMillan bore the claimant ill-will. The claimant's argument simply appeared
10 to be that given the involvement in the final written warning, Ms McMillan was not impartial.

73. The tribunal could not accept the claimant's argument in circumstances where mere involvement in a previous disciplinary matter is insufficient to support an argument of impartiality, particularly when the warning has not been
15 challenged on appeal.

74. The claimant was also critical of Ms McMillan's involvement because she had been present in the office when Ms Goddard spoke to the claimant to put the allegation to her, and heard the claimant say "yes". There was no dispute regarding the fact Ms McMillan was present in the office at the time: she was
20 working and was not part of the meeting with the claimant. The fact Ms McMillan heard this exchange was of no consequence to the fairness of the process in circumstances where Ms McMillan would have learned this in any event from the record of the discussion which was produced in the documentation for the hearing.

25 75. The claimant also argued that someone other than Ms McMillan and Ms Goddard should have carried out the investigation and the disciplinary hearing. The tribunal acknowledged the guidance given in the ACAS Code regarding the different stages of the process being carried out by different people, but this was achieved by the respondent having Ms Goddard carry
30 out the investigation and Ms McMillan chairing the disciplinary hearing. The

tribunal accepted there was a small management team of three people and in those circumstances the respondent was limited to who could be involved.

76. The tribunal had regard to the case **of Iceland Frozen Foods Ltd v Jones 1983 ICR 17** where the EAT emphasised that the correct approach for a tribunal when considering the fairness of a dismissal in terms of section 98(4) Employment Rights Act, is for the tribunal to determine whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might adopt. The tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.
77. The tribunal, in considering the fairness of the decision to dismiss, had regard to the evidence of Ms McMillan when she told the tribunal that in reaching her decision she had had regard to the investigation report, the statements, the emails from the claimant setting out her response to the allegation and the fact the claimant was on a final written warning.
78. There was no dispute regarding the fact the claimant received a final written warning on 10 February 2023. The warning was given for aggressive and confrontational conduct towards management. There was no suggestion by the claimant that the final written warning had been issued in bad faith and there was no suggestion the respondent had not been entitled to rely on this final written warning when reaching the decision to dismiss.
79. The tribunal, having regard to the case of **Wincanton Group plc v Stone 2013 ICR 96** noted that a final written warning implies that any subsequent misconduct of whatever nature will usually be met with dismissal, and only exceptionally will dismissal not occur. The tribunal noted the claimant was aware of this because it was stated in the final written warning which she signed.
80. The tribunal, having had regard to the conclusion that the respondent carried out a reasonable investigation and Ms McMillan had reasonable grounds upon which to sustain her belief the claimant acted as alleged, and having regard to the fact the claimant was on a live final written warning, decided the

decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted.

81. The dismissal of the claimant was fair and the tribunal decided to dismiss the claim.

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Employment Judge: L Wiseman
Date of Judgment: 15 July 2024
Entered in register: 16 July 2024
and copied to parties

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