EMPLOYMENT TRIBUNALS

Claimant: **Ms M Cole**

Respondent: **RB Active Care Ltd**

Heard at: **Birmingham Employment Tribunal (VIA CVP)**
On: **25 and 26 January 2024**

Before: **Employment Judge Noons**

Representation
Claimant: Ms Harty - Counsel
Respondent: Ms Niaz-Dickinson - Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's complaints relating to allegations of unpaid annual leave are dismissed upon withdrawal:

2. The claimant's claim for unfair dismissal is well founded, the claimant was unfairly dismissed.

REASONS

The Hearing

1. At the outset of the hearing I agreed the issues with both representatives. I also had the benefit of an agreed bundle which ran to 183 pages, witness statements from the claimant and from Ms M Guy, Mr R Bradley and Ms S Hancox on behalf of the respondent. I heard evidence from all the witnesses and took into account the documents I was referred to.

2. I have made my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. I have not made findings

about every matter raised in evidence but only those matters which I found to be relevant to my determination of the issues.

The Issues

3. The claimant withdraw her claim for unpaid annual leave at the start of the hearing and therefore I did not have to consider this claim further. In relation to the complaint of unfair dismissal this is a case where the respondent admits dismissal. The respondent says that the principal reason for dismissal was misconduct or some other substantial reason such as to justify dismissal in that they had lost trust and confidence in the claimant.

4. I agreed with the parties that although I would not hear evidence or submissions as to the quantum of any damages if the claimant were to succeed, I would consider the issue of whether any damages should be reduced by reason of the claimant's contributory fault and/or a *Polkey* reduction if I find that the claimant was unfairly dismissed.

Findings of Facts

5. The claimant started working for the respondent on 25 February 2019. She was initially employed as a play worker and was promoted to play worker manager in around September 2020. The claimant had trained in college as a teaching assistant.

6. The respondent is a childcare provider and are registered with Ofsted. They provide before and after school childcare in schools and run holiday camps. The respondent employs about 17 members of staff. The claimant was based at Blackheath primary school, at the time of her dismissal she was the manager of the before and after school club. She worked with two colleagues who she was responsible for supervising. The claimant is an experienced childcare professional and has undergone relevant training in this regard including safeguarding training. The respondent being a small organisation does not have its own HR department but relies upon outsourced HR support and advice.

7. On the 1 July 2023 the respondent received an e-mail from a parent of a child who attended the before and after school club. This e-mail raised several complaints about the claimant. The first complaint was that on numerous occasions the claimant had been on her mobile phone and not actually watching the children. The second complaint related to how the claimant dealt with an issue when the parent's son had brought a toy in and the claimant had confiscated it. The next complaint was that on a morning when the parent was running late the parent, contrary to the respondent's policy, had not in fact walked the child up to the door but had waited on the other side of some grass while their child ran to the door. The parent believed that the claimant was not going to answer the door to her child and the parent said "I'm pretty sure if I hadn't been there she would have in fact left him outside and not granted entry because of your policy". Finally the parent also said that her son did not like the breakfast club because of the claimant and that according to her son the claimant

regularly shouted but the parent did make clear that she had not witnessed the claimant shouting herself.

8. The respondent then received a telephone call from the co-head teacher of the school relating to concerns about the claimant's conduct. Mr Bradley who is a director of the respondent spoke to the co-head teacher. This was followed up by an e-mail to Mr Bradley on 5th July 2023. This e-mail set out that the co-head teacher her and her staff had concerns about the following issues: that the claimant was often on the phone, the co-head teacher went on to say that a member of her staff had addressed this with the claimant who had said that on one occasion she was emailing a parent and that the other staff member was finding out relevant contact information on their phone because the tablet that should have been used was running an update.

9. The next allegation was that a child was heard asking the claimant if she (the child) could massage the claimant again at the after school club.

10. The email also said that the girls would sometimes style the claimant's hair. The co-head also raised a more general concern that when Ofsted were in the provision looked different in terms of the amount of interaction the staff had with children and the activities that were done whereas the teaching staff had observed on most days that members of staff had little interaction with the children. The co-headteacher also went on to say that one child had said the claimant was unkind to him that he had didn't elaborate this and he's just said he didn't really enjoy the club.

11. The co-head teacher further said that it had been reported to her that the claimant had spat on a child's head but that when the co-head teacher had spoken to the children including the alleged "victim" it turned out that the claimant had put her hair on the child's head and then pretended to spit. The child was clear that the claimant was joking around. The co-head teacher made it clear that she did not have safeguarding concerns but did have concerns around professionalism. The co-head teacher was not able to provide dates or times of those incidents.

12. The respondent suspended the claimant on full pay on the 5 July 2023 in order to allow an investigation to be carried out. The investigation was conducted by Ms Guy who is a senior manager for the respondent. She had not carried out an investigation before nor had she received any training in relation to carrying out a disciplinary investigation however, she did have support from an external HR provided to the respondent.

13. The claimant was not told the details of the allegations against her prior to her investigation meeting. The respondent wrote to the claimant by way of letter dated 7 July 2023 confirming her suspension however the reason given for her suspension was only stated as "allegations". The claimant was invited to attend an investigation meeting on the 14 July 2023.

14. Ms Guy conducted the investigation meeting. At this meeting a copy of the emails of complaint from the parent and the e-mail detailing the concerns from the head teacher where available and on the table.

15. Ms Guy started the meeting by setting out the process for the meeting and introducing Ms Baker who was the note taker. She also made it clear that she would not be responsible for deciding whether or not there was a case to answer in relation to the disciplinary allegations.

16. During the investigation meeting the claimant was asked if she used her mobile phone whilst she was at work. She admitted that she had. First she said it had been in relation to when her nan was ill and then secondly when her daughter was home on her own. She admitted she used her mobile phone to check that her daughter was OK. The claimant accepted that she knew that the respondent's policies and procedures were that her personal mobile phone should have been kept in a locked box whilst she was at work.

17. The respondent's procedure provides that personal mobile phones belonging to members of staff are to be kept locked away during working hours. If a member of staff needs to make an urgent personal call, they can make a personal call from their mobile phone with the door closed. If a member of staff has a family emergency or similar, and needs to keep their mobile phone to hand, prior permission must be sought from the coordinator. Under no circumstances may staff use their personal mobile phones to take photographs or to look for information on the Internet at work during working hours.

18. In relation to the specific allegation from the parent that the claimant would not be watching children while she was on her phone the claimant said she would move away from the children when she used her phone and that she would turn her back on the children. She said this was when she would use her phone to check on her daughter. The claimant did not say she had permission to use her phone to check on her daughter at home.

19. The claimant clearly understood that the respondent's policy was that she should not use her personal mobile phone at work unless she had prior permission or it was an emergency.

20. Ms Guy went on to ask the claimant about the allegation that she had confiscated a toy off a child. Initially the claimant did not remember the incident but then with further questioning she recalled that it had related to a bouncy toy. The claimant was clear that she had not accused the child of lying but rather she had said she would keep the toy safe until she spoke to the child's mum.

21. The claimant was then asked about what she would do if a parent was not at the door to drop a child off. The respondent's policy is that they ask parents to bring the child to the door when dropping them off in order to sign the child in. In response to this question the claimant said she did not allow the child to come in if the parent was not there and she would ring the first contact to explain that children could not just be dropped off. She was then asked what would happen if she could see the parent further in the school grounds but the claimant said she would not be able to see a parent unless she stepped outside of the door.

22. Ms Guy specifically asked the claimant if she would let the child in to which the claimant said no but that she would step outside with the child.

She would call the emergency contact and that she would ensure the child was outside with a member of staff so they were safe until the parent could be contacted.

23. The claimant accepted that there could be safeguarding issues if a child was not allowed in and she gave an example that they could have walked to school alone with no one with them. Ms Guy clarified that the parent was specifically complaining about the claimant and the claimant confirmed that she was with another member of staff at all times.

24. Ms Guy then asked the claimant about the allegation that she shouted at children, the claimant said she had never shouted at a child in her care. She said that the only time she raised her voice was if the room as a whole was noisy but that she had not raised her voice or shouted at a child individually.

25. The claimant was then asked about the allegation that children wanted to massage her and she was specifically asked if she allowed the children to massage her. She responded to this by saying no but that if a child was touching her it was not inappropriate but it would be inappropriate if they had asked her to touch them. The claimant accepted that she did allow the children to touch her hair and practise hairstyles on her long hair.

26. The claimant was further asked about allegations that there was little interaction with the children which she denied. She explained that the staff did interact with the children but of course the children have their own friends and often want to play in their own groups.

27. The claimant was then asked about the incident where she laid her long hair on a child's head and pretended to spit on them. The claimant said that she remembered putting her hair on the child's head, she said she had brushed her hair across the child's hair. At the time her hair was pink and she was pretending the child’s hair was pink. She made it clear that she did not spit.

28. The claimant was asked if she understood why these concerns were serious to which she replied that she did. She also accepted that the impact on the respondent to these type of concerns being received on a regular basis was not good and the impact could be as serious as less custom for the respondent.

29. Before the meeting ended the claimant was asked if there was anything further that she wished to add, at that point she raised issues about the school and she felt that the room (where they had the before and after school club) was being used as a dumping ground by the school. However, she did not add anything further to the information that she had already provided to the respondent in response to the allegations put to her.

30. At no point during the investigation meeting did the respondent seek to clarify how often the claimant used her mobile phone to contact her daughter. However the claimant accepts that she used her mobile phone at least 2 days a week every week to check her daughter had got home from school.

31. The respondent did not explore with the claimant whether there was any reason why the child who had made a complaint to its mother about the toy being confiscated might want to make up an allegation against the claimant that would cause trouble for her.

32. It was specifically put to Ms Guy in cross examination that she had asked the claimant general questions about what she would have done if a child had arrived without a parent to drop them off and not specifics in relation to the alleged incident. However, I note that the allegation from the parent was not that her child was not let in but rather that she did not think the claimant would have let her child in but for the fact of the children already in the club were pointing out that she, the parent, was there. Ms Guy therefore asked appropriate questions in the investigation.

33. Ms Guy reasonably in response to a question in cross examination accepted that given she had not asked the claimant about whether or not there was any reason why the child would lie or make up things in relation to the claimant that she did not investigate this point thoroughly.

34. The respondent did not ask the claimant how often children would touch her or want to massage her nor did they ask her how long or where the children would touch her if they were giving her a massage. The respondent's consistent evidence was that given the claimant had admitted she let the children touch her it was irrelevant for how long they massaged her or styled her hair. The claimant accepts that on several occasions the children styled her hair and on one occasion when the children were talking about their parents having been to a spa she allowed them to massage her. These were more than fleeting touches. The respondent are clear that they do not allow the children to touch members of staff.

35. Whilst the respondent's witnesses accepted that children would sometimes touch or try to touch a member of staff they were clear that in those circumstances the staff member must distance themselves, ask the child not to touch them and encourage the child into another activity.

36. The respondent does not explicitly state in any policy that staff members should not let children touch them. Ms Guy made the point that if a child attempted to touch her, to give a massage in a childcare setting she would say firmly to the child "please don't touch me" and ask the child to go and do something else.

37. The respondent's consistent evidence was that at the outset of training when starting working with children it is always made very clear that you do not allow the children to touch you. I accept the respondent's evidence.

38. The claimant before working for the respondent had trained at college as a teaching assistant and she had undertaken safeguarding training. The claimant's evidence is that there was nothing wrong in letting the children style her hair or brush her hair over a child's head. She views this as creative play and the parents were pleased that their children had practiced new hairstyles.

39. The claimant also makes clear that in relation to being given a massage this was because the children had been talking about their parents going to a spa and again she viewed this as creative play.

40. The claimant also maintains that she has never been told in any training whether at college or with the respondent that she should not allow children to touch her. She says that all her training made clear was that she should not touch the children. On this point I do not accept the claimant's evidence. It is implausible that when being trained to work with children and in particular when undertaking safeguarding training it only covered staff not touching the children. Common sense would also suggest that for all the reasons it is not appropriate for an adult to touch a child it is also not appropriate for a child to touch an adult. I also note that the claimant accepts she draped her hair over a child which is clearly an example of her initiating physical contact with a child.

41. The claimant maintains this was all creative play but no creative play plan or program had been put together to cover this type of play.

42. It was clear that Ms Guy asked the questions she had been given by the HR support the respondents have. She did not however expand on these questions or go into further detail.

43. The claimant had never left a child outside if a parent was not with them to sign them in. However, in her investigation meeting with the respondent she made it very clear that if a child is not with its parent when it arrived she or another member of staff would remain outside with the child who would not be let in whilst the first emergency contact was telephoned. The respondent's policy in relation to arrivals says that "our staff will greet each child warmly on their arrival".

44. The claimant maintains she was told that she should not allow the child in but she never advised the respondent of the person who she said told her this was the policy. Even before me she did not name the individual who is alleged to have told her this.

45. Following on from the investigation meeting, with external HR support, Ms Guy pulled together an investigation report. Ms Guy did not speak to the other member of staff that worked with the claimant. She put together with the investigation report, the emails received, the relevant policies, the notes of the meetings.

46. The respondent wrote to the claimant by way of letter dated 17 July 2023 inviting her to a disciplinary hearing. This letter set out the following allegations:

    1 inappropriate use of a mobile phone, in direct breach from mobile phone use policy;

    2 lack of professional behaviour with children in our care;

    3 placing a child at risk by not allowing entrance to the setting;

    4 breach of safeguarding and welfare policy;

5 breach of behaviour management policy;

6 breach for arrivals and departure policy;

7 risking damage to the respondent's reputation; and

8 "you have acted in a manner that is wholly inappropriate for an employee of the company and as such the company has lost trust and confidence in you as an employee"

47. This letter enclosed a copy of the investigation report, the notes and evidence from the investigation along with the respondent's disciplinary policy. It also made clear that one potential outcome of the disciplinary hearing was the claimant's dismissal. She was advised that she was entitled to have a work colleague or trade union representative with her.

48. The disciplinary hearing was chaired by Mr Bradley, a director of the respondent and took place on the 19 July 2023. The claimant was accompanied by her colleague JC. JC is a playworker who reported into the claimant and worked with her.

49. At the outset of the disciplinary hearing Mr Bradley set out the eight allegations. The claimant explained that she had received permission to use her mobile phone when her nan was poorly. She confirmed that she also used her mobile phone when checking that her daughter had got home safely.

50. She also acknowledged it was not acceptable to turn her back on the children as she was using her phone. She said that in fact she would move into the hallway with JC's permission or into the kitchen.

51. She denied ever having confronted a parent and in particular in relation to the specific allegation regarding confiscation of a child's toy she said that she had made it clear that it was for safekeeping.

52. The claimant denied accusing the child of lying and said that the conversation had taken place with the parent in front of JC. The claimant said that she felt targeted and JC also confirmed that she thought the claimant was being targeted.

53. The claimant denied shouting at any individual child but she did explain that she would raise her voice to keep control within the room of the whole group.

54. The claimant again accepted that she had allowed children to massage her on one occasion but that she did not think that was unprofessional, she saw that as creative play. She also confirmed that she believed allowing the children to practise hairstyles on her hair was creative play. JC confirmed that they did not stop the children practising on the claimant's hair because it was creative play. The claimant did not however point to any planner to show that the creative play had been planned in any formal way.

55. In relation to the interaction with children when Ofsted were there again the claimant denied this and explained how she would interact with the children but did recognise that sometimes the children wanted to be independent and they would give them some space.

56. The claimant felt she was being targeted by the parent and lies were being put forward by one particular child. Although she did accept that she had allowed children to do her hair and give her a massage.

57. The claimant said if a child was there without a parent at drop off a member of staff would stay with the child and that she had always been told parent isn't there she was not let them in. she made very clear that she had never left a child outside.

58. In the disciplinary meeting the claimant made it clear she could not think of any reason why any of the children would be scared or not want to come into the club because of her.

59. After the claimant's disciplinary meeting Mr Bradley spoke with the claimant's companion JC who was the other member of staff who normally worked with the claimant. In this meeting JC was given the opportunity to say anything she wanted in relation to the allegations against claimant and anything she had witnessed. JC made it clear that she felt the allegations were targeted at the claimant and that the children were not scared of the claimant.

60. The respondents wrote to the claimant by way of letter dated 21st July 2023 with the outcome of the disciplinary hearing.

61. In relation to each of the allegations the respondents found as follows:
    1 the claimant admitted using her mobile phone to check her daughter was home safely in breach of the respondent's policy. They respondent also concluded that the permission the claimant had for using the phone in relation to her nan did not extend to her use of mobile phones for other reasons. Mr Bradley concluded that the claimant's use of her phone was in clear direct breach of their policy and that the reasons given by her for use of her phone were not acceptable.
    2 Lack of professional behaviour in relation to the children. Mr Bradley concluded that although the claimant said she had not confronted the parent and had behaved in a unprofessional manner that there was something in the way that she conducted herself that was not appropriate and was causing children to feel this way. He also identified that when discussing one child in particular at the disciplinary hearing he could feel the annoyance and in places dislike of the child coming from the claimant which he concluded was not OK. Altogether he concluded that there was something not right in how the claimant was conducting herself with the children in her care. Mr Bradley was very clear that allowing children to massage her and do her hair could not be deemed to be creative play and that it was not appropriate. He was clear the claimant should not have been doing this and the activity had never been issued as one that should be carried out. He concluded this

admitted behaviour was inappropriate and more than that the respondent was worried that the claimant did not see that there was any issue with this behaviour.

3 Placing a child at risk by not allowing entrance to the setting. Mr Bradley recorded that both during the investigation and disciplinary hearing the claimant had admitted that she had not let the child in, however, this was not what the claimant had admitted. In both meetings she had made it clear that if there was not a parent present she would not let the child in but she did not say she had not let this particular child in. More to the point the allegation from the parent was not that the child had been left outside. The allegation was that the parent felt the child was not going to be let in but then they were. This conclusion by Mr Bradley was clearly incorrect.

4 Breaches safeguarding and welfare policy. The respondent was clear that they did not believe the claimant was unsafe with the children but they were concerned about the impact of the claimant's behaviours on the children's welfare as they believed children had said they were scared of the claimant and they did not want to come to the breakfast club because of the claimant. This conclusion was incorrect to the extent that it relates to multiple children. The complaint was from one particular child.

5 Mr Bradley concluded the incidents above were breaches of the respondent's behaviour management policy.

6 Mr Bradley concluded that by not allowing a child entry the claimant had breached the respondent's arrivals and departures policy. However Mr Bradley's conclusion that the claimant had not let a child in was unreasonable given there was no complaint that the claimant had ever refused entry to a child nor had the claimant admitted this. Mr Bradley seems to have mixed up the claimant's answers to the hypothetical question as to what she would do with what had actually happened.

7 The respondent concluded the claimant's actions risked damage to their reputation. They concluded that they did not accept the claimant's case that she was targeted given the complaints came from more than one place/ child. Mr Bradley made it clear that he could see no reason why multiple children in the school should work together to come up with a lie and raised multiple issues some of which the claimant had admitted to as part of a vendetta against her. He made it clear that due to the number of concerns raised and the number of which the claimant had admitted they did not accept that these other issues were lies or were part of a vendetta. However Mr Bradley's conclusion that it related to multiple children complaining was incorrect.

8 Breaches of policy and procedure. Mr Bradley concluded that as admitted the claimant had directly breached their mobile phone policy. He also concluded she had breached the behaviour management policy, the arrivals policy and risked damaging the

respondents reputation and therefore the respondent had lost trust and confidence in the claimant as an employee and manager.

62. The respondent therefore dismissed the claimant for a case of serious misconduct which had resulted in the company losing trust and confidence in the claimant. The respondent also considered alternatives to dismissal but they viewed this as a pattern of misconduct and in their view the claimant's inability to see the problems with the issues at hand caused them great concern and therefore a demotion was not appropriate. The claimant was dismissed with notice on the basis that the respondent did not conclude she was guilty of gross misconduct.

63. The claimant appealed by way of e-mail dated 27 July 2023. The first ground appeal was that she did not believe a fair investigation had been conducted in that there are no statements from staff members or the parents. Only one statement had been received from one parent and one statement from the school.

64. The second issue she raised was the impact the suspension had had on her and the fact she did not believe she had been given sufficient time to defend herself.

65. The third issue she raised in relation to the allegations was that she said they had not been proven in that she believed they were in relation to a complaint from one child who staff had heard him saying he was doing it just because he didn't like her. She also made clear that the shouting allegation was not correct but that sometimes she said she had no choice but to raise her voice to be able to get that many children to hear her.

66. The claimant also clarified again that in fact she had not left the child out side. She made clear that in fact other members of staff were working on the door receiving children on the day in question.

67. She also appealed that the outcome sanction was too harsh given there are no warnings or current disciplinaries on her file and her length of service.

68. The appeal hearing was chaired by Samantha Hancock, programme manager for the respondent along with Peter Collins from Ellipse HR the respondent's external HR support. During the hearing, which was a review rather than a rehearing, Mr. Collins asked all of the questions.

69. The claimant made clear in her appeal meeting that she felt the lack of witness statements from any other staff members was a failure in the investigation. The claimant clarified that JC should have been spoken to because they worked together on a permanent basis. Mr Bradley had in fact spoken to JC but the claimant was not aware of this. The respondent had not made the claimant aware.

70. The claimant made clear that JC would be a witness in relation to the issue of confiscating the toy off child and also the issue of the child outside as JC was working that day. The claimant confirmed only JC needed to be spoken to.

71. She also raised that she did not feel she had had enough time to defend herself given she was only made aware of the details of the allegations in the investigation meeting.

72. She also said that it was unfair to rely on the word of one child who she said had behavioural difficulties.

73. The claimant made it clear that she would be willing to take demotion as part of the outcome of the appeal.

74. In the appeal outcome letter Ms Hancock makes it clear that her role was to determine whether the original process was fundamentally reasonable or not and whether the outcome was one that a reasonable person could have made on the basis of the evidence the facts that they had at the time. She made it clear that her role was not substitute the original decision with that of her own but to determine if the original decision was reasonable or not.

75. Ms Hancock did not uphold the claimant's appeal. Although she did accept that the claimant had not in fact left a child outside. In particular she noted that the claimant did not appeal the other allegations that had been found against her including shouting, making children afraid of her, allowing the children to touch and massage her. Ms Hancock concluded that those areas were not challenged on the basis that the claimant was aware that she behaved wholly inappropriately. She also noted that the claimant had shown no contrition or acceptance that her behaviours were concerning and that she believed that the claimant's behaviours were likely to be repeated.

76. Overall therefore she concluded that Mr Bradley's decision was reasonable in the circumstances and the dismissal stood.

77. The claimant throughout her evidence to this tribunal maintained that it was appropriate for her to allow children to touch her, to give her a massage and also to allow them to practice styles on her hair. She appeared to have no insight into why this might not be appropriate in a childcare setting.

78. The claimant maintained she had never in any of the training she had received (whether with the respondent or prior) been told it was not appropriate to allow a child to touch her. She was clear it was not appropriate for her to touch a child. In this regard I do not accept the claimant's evidence. It is not credible for someone of her experience with all the training and safeguarding training she had undertaken for her to never have been told she should not allow children to touch her. More over it is implausible that the claimant herself did not realise as a matter of common sense that she should not allow children to touch her.

79. The claimant also accepted in her evidence that given she maintained her actions were appropriate the respondent was right to be concerned that her actions would be repeated.

80. The Claimant in response to questions from me said that it had never been raised with her in any safeguarding training that it was inappropriate

for children to touch staff. She went on to say that as far as she was concerned "a child was allowed to initiate contact with members of staff".

81. Despite knowing that one of the reasons for dismissal was allowing physical contact by children the claimant never raised in her appeal letter or meeting that she had never been told or trained that it wasn't appropriate her position then as it was before this Tribunal was that the hair styling and massage was creative play.

82. The claimant had trained as a teaching assistant in college and then worked for the respondent as a play worker and then play worker manager. She clearly had considerable training and experience in the childcare quasi educational sector. Implausible that it was never made clear to her that physical contact with children even if initiated by them was to be avoided and kept to a minimum.

Law

83. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within 95(1)(a) of the 1996 Act) on 18 August 2023.

84. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First the employer must show that it had a potentially fair reason for dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal the tribunal must consider whether the respondent acted fairly or unfairly in dismissing for that reason.

85. In this case it is not in dispute that the respondent dismissed the claimant because it believed she was guilty of misconduct or some other substantial reason such as to justify dismissal. Misconduct and SOSR are potentially fair reasons for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

86. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, (having regard to the reason shown by the employer) shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

87. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions of *Burchell* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the tribunal must decide whether the employer held such genuine belief on

reasonable grounds and after carrying out a reasonable investigation. If the Tribunal is satisfied of the employer's fair conduct of the dismissal in those respects it must then go on to decide whether the dismissal of the claimant was a reasonable response to the misconduct.

88. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4) the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods ltd v Jones* 1982 IRLR 439, *Sainsbury's Supermarkets ltd v Hitt* 2003 IRLR 23 and *London Ambulance Service NHS v Small* 2009 IRLR 563).

89. I therefore have to determine what was the principal reason for dismissal. Did the respondent genuinely believe that the claimant had committed an act of misconduct and did the respondent act reasonably in all the circumstances in treating the misconduct as sufficient reason to dismiss the claimant.

90. I have to consider whether there were reasonable grounds for that belief and at the time that the belief was formed had the respondent carried out a reasonable investigation. I also have to consider whether generally the respondent had acted in a procedurally fair manner and finally whether the dismissal was within the band of reasonable responses open to the respondent.

91. If I find that the dismissal was unfair I then have to consider whether any reduction should be made to the basic and compensatory award. When considering whether to make a reduction to the basic award on the basis of contributory conduct, the issue is whether there was any conduct prior to the claimant's dismissal such that it would be just and equitable to reduce the amount of the basic award to any extent. If there was the tribunal shall reduce the amount accordingly, section 122(2) ERA1996.

92. When considering whether to make a reduction to any compensatory award if the dismissal was, to any extent, caused or contributed to by any action of the claimant the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding, section 123 (6) ERA 1996.

93. I also have to consider whether under section 123(1) ERA 1996 it would be just and equitable if I find the dismissal to be unfair, to reduce the amount of compensation on the basis that the claimant would have been fairly dismissed at a later date or if a proper procedure had been followed. *Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL.

94. Counsel for claimant says that respondent should have set out the details of the allegations ahead of the investigation meeting and that the invitation to the disciplinary hearing should have set out the allegations in more detail. However the claimant does accept she knew the allegations she was having to face at the disciplinary hearing.

95. She also points out that Respondent did not establish how long or where on the body the claimant had received a massage. The respondent's point on this in cross examination is that it doesn't matter the touching was not appropriate, irrelevant whether it was the arm, shoulder or back. The claimant admitted to more than fleeting contact.

96. The claimant representative also submitted that because the claimant and JC saw hairstyling as creative play the respondent needed a specific policy to forbid it otherwise it is reasonable for it to be assume to be allowed. The respondent's representative submitted that as JC reported into the claimant she would be guided by the claimant as to what was appropriate or not. She also pointed out that the claimant never created a session plan or creative play plan which showed hairstyling as the activity. I do not accept the respondent's submission on this. As set out above I find it implausible that the claimant had never been told that she should not allow children to touch her. I accept the respondent's evidence that it is well known in the childcare sector that you do not allow children to touch you and on that basis there was no need for the respondents to specifically say in a creative play policy that staff must not allow children to style their hair.

97. Respondent did nothing to try to establish if there was any reason why the child who had complained might have been lying or targeting the claimant. In their evidence the respondent made clear this was because not only would not have been appropriate for them to question child but also they had consistent information from the school as well. The problem with this though is that it might well have been the same child raising issues about the claimant to the school and the respondent did not explore that. However I do accept that it would not have been appropriate for the respondent to ask the children directly.

Conclusions

98. The principal reason for dismissal was misconduct and this is a potentially fair reason for dismissal. In relation to the investigation carried out there were flaws in this process in that follow up questions were not asked of the claimant nor JC.

99. Furthermore the respondent incorrectly categorises the issue around a child potentially not be allowed in without a parent present as a denial of entry when in fact it is common ground the claimant never refused to let a child into the premises. This was an unreasonable conclusion on the part of the respondent. However, this was rectified on appeal when Ms Hancock accepted that the claimant had never refused entry to a child.

100. In relation to the investigation more generally the claimant admits that in breach of the company policy she repeatedly used her mobile

phone to ensure her daughter was ok when she got home from school. She also admitted to allowing children to practice hairstyles on her hair and to draping her hair over a child's head. I note that the claimant admits and understands that she should not initiate physical contact with the children and on this basis I do not understand why she thought it was acceptable for her to initiate such contact by draping her hair over a child's head. The respondent was reasonable in determining given this admission the claimant was guilty of misconduct.

101. She also admits to raising her voice generally to the children. She also admits that on one occasion she allowed children to massage her when they were talking about their parents having been to a spa.

102. When considering whether the respondent acted reasonably in respect of these allegations the respondent's conducted a reasonable investigation. They did not need further investigations given the admissions. I therefore find that the respondent had a genuine and reasonable belief that the claimant had done these things given the claimant's admissions.

103. The respondent's investigation into the other allegations is lacking as they do not explore to any extent whether the complaints about the claimant's behaviour came from more than one child. A reasonable employer would at least have gone back to the co-head teacher to try to establish whether these complaints related to more than one child. However, a reasonable employer would not have tried to speak to the children and I accept the respondent's evidence that this would not have been appropriate.

104. I do not find that not telling the claimant of the detail of the allegations before the investigation meeting was a fundamental flaw. The claimant was made aware during the investigation meeting of all the allegations and she had ample opportunity to put forward her defence to them at both the disciplinary and appeal stages.

105. However, overall the respondent's investigation was not within the band of reasonable responses, a reasonable employer would have carried out more investigations into the non-admitted allegations. The respondent's belief in the claimant's misconduct in relation to the non-admitted allegations is not based on a reasonable investigation.

106. Furthermore in not supplying the claimant with the details of the meeting with JC the respondent's conduct of the disciplinary process was not reasonable. I note that the respondent's are a small employer but they had external HR resource which they were using.

107. I find that the claimant's dismissal was unfair. The respondent's belief of the claimant's guilt in relation to the non-admitted allegations was not reasonable given the flaws in the investigation. However, given the admitted allegations I find that had a reasonable investigation been carried out a reasonable employer would have dismissed the claimant. She admitted to breaches of policy in relation to mobile phone usage. She allowed children to touch her (style her hair) on multiple occasions including allowing them to massage her on one occasion. She admitted to

initiating physical contact with a child by draping her hair over his head. I do not accept the claimant's evidence that this was acceptable creative play. I do not accept that she had never been told not to allow children to touch her. A reasonable employer would have dismissed the claimant for these allegations.

108. Conducting a more detailed investigation by speaking with the co-head teacher again would have taken, at most, a week longer than the actual investigation. In terms of loss of earnings applying the *Polkey* principles I limit this to 1 week's pay as I find that had a more detailed investigation been carried out a reasonable employer would still have dismissed the claimant and the additional investigation would only have taken 1 week. A reasonable employer would not have given any lesser sanction on the basis that the claimant maintained and in fact still maintains that her behaviour was entirely appropriate. The respondent's concerns that the behaviours would be repeated were entirely reasonable.

109. I have also considered whether any basic award should be reduced and also whether the compensatory award should be further reduced for contributory fault. By allowing children to touch her and by using her mobile phone the claimant's behaviour was both culpable and blameworthy. Given this I have determined it would be just and equitable to reduce the claimant's basic award by 80% given the serious nature of her behaviour which directly led to her dismissal. In relation to the compensatory award given the significant limit on the amount of loss of earnings for the "Polkey" reduction it would not be just and equitable to reduce it further.

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Employment Judge Noons

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Date 19 April 2024