Case No: 2404435/2023

EMPLOYMENT TRIBUNALS

Claimant: Ms S Lindley

Respondent: Kidzrus Nursery Ltd

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under Rule 69, the judgment sent to the parties on 22 January 2025, is corrected as set out in block type in the name of the respondent as recorded in the heading of the corrected judgment.

Employment Judge Phil Allen

Date: 31 January 2025

SENT TO THE PARTIES ON

13 February 2025

FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for asking for written reasons, applying for reconsideration or appealing against the judgment are not changed by this certificate of correction and corrected judgment. These time limits still run from the date the original judgment or reasons were sent, as explained in the letter that sent the original judgment.

Case No: 2404435/2023

EMPLOYMENT TRIBUNALS

Claimant: Ms S Lindley

Respondent: Kidzrus Nursery Ltd

Heard at: Manchester **On:** 16-17 December 2024

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: Mr D Campion, counsel
Respondent: Mrs A O'Sullivan, acting managing director

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. It is just and equitable to reduce the basic award payable to the claimant by 20% because of the claimant's conduct before the dismissal.

3. The claimant caused or contributed to the dismissal by blameworthy conduct and it is just and equitable to reduce the contributory award payable to the claimant by 20%.

4. The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures and, as a result, the compensatory award should be increased by 10%.

5. The claimant did not unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures.

6. The respondent shall pay to the claimant the following sums (to which the adjustments determined at 2, 3 and 4 have already been applied):

    a. A basic award of £1,254.

    b. A compensatory award of £283.

7. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply:

a. The total monetary award (the compensatory award plus basic award) payable to the claimant for unfair dismissal is £1,537.

b. The prescribed element is £283.

c. The period of the prescribed element is from 9 December 2022 until 27 December 2022.

d. The difference between (a) and (b) is £1,254.

REASONS

Introduction

1. The claimant was employed by the respondent as a part-time, term-time, level three childcare practitioner working in one of the respondent's nurseries. She was employed from 15 March 2016 until 9 December 2022. She was dismissed (shortly after she resigned) and she claimed unfair dismissal. The respondent contended that the dismissal was fair by reason conduct.

Claims and Issues

2. A preliminary hearing took place on 12 June 2024. In the case management order made following that hearing, the issues were set out. At the start of this hearing, I agreed with the parties that the issues which I needed to determine were those set out in that case management order.

3. The list of issues is as set out at paragraphs 5-6. It was agreed at the start of the hearing that I would hear and decide both liability and remedy issues at the same time.

4. It was agreed that the Claimant was employed by the Respondent and had the required two years of qualifying service. Although other dates had been referenced in the proceedings, the relevant dates of employment were agreed as having been 15 March 2016 to 9 December 2022.

5. Unfair Dismissal – Liability:

1. Is the Respondent able to prove that the Claimant was dismissed for a potentially fair reason, namely misconduct?

2. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

   i. The respondent genuinely believed the claimant had committed misconduct and there were reasonable grounds for that belief and

   ii. at the time the belief was formed the respondent had carried out a reasonable investigation;

iii. the respondent followed a reasonably fair procedure;

iv. the decision to dismiss the Claimant was within the band of reasonable responses open to the Respondent.

6. Unfair Dismissal – Remedy:

1. The Claimant does not seek reinstatement-engagement.

2. What are the Claimant's losses between 10th December 2022 and 27th December 2022?

3. Is the Claimant entitled to a loss of statutory rights figure?

4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

5. If so, should the claimant's compensation be reduced? By how much?

6. If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

7. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

8. What basic award is payable to the claimant, if any?

9. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

7. During submissions, the claimant's counsel argued that I should also consider whether the respondent unreasonably failed to comply with the ACAS code of practice on disciplinary and grievance procedures and whether any award should be uplifted as a result. He submitted that I was required to consider that argument even though it had not been pleaded or included in the schedule of loss or the list of issues, under the provisions of section 207A of the Trade union and Labour Relations (Consolidation) Act 1992. In her submissions, the respondent's representative also argued that the claimant had unreasonably failed to comply with the same ACAS code and that her award should be reduced accordingly. As both parties agreed that those issues should be considered, I did consider those issues even though they were not included in the list of issues.

Procedure

8. The claimant was represented at the hearing by Mr Campion, counsel. The respondent was represented by its acting managing director. The respondent's representative emphasised that the respondent was acting as a litigant in person and that her only experience of acting in a Tribunal hearing was in one other case in which she had represented the respondent.

9. The hearing was conducted in-person with both parties and all witnesses attending at Manchester Employment Tribunal.

10. An agreed bundle of documents was prepared in advance of the hearing. The agreed bundle ran to 684 pages. There was also a supplementary bundle (of 41 pages) and a remedy bundle (with 146 indexed pages and also a few additional unnumbered pages added to the end). Where a number is referred to in brackets in this Judgment, that is a reference to the page number in the bundle (with it being prefaced by an S or an R if a reference to the supplementary or remedy bundle). I read only the documents in the bundles to which I was referred.

11. I was also provided with a number of witness statements. On the first morning, after an initial discussion with the parties, I read the witness statements, the documents referred to in them, and some specific documents in the bundle which I was asked to read.

12. The respondent called the following three witnesses who attended and gave evidence in-person at the hearing. They were each cross-examined, I asked questions (where required) and they were re-examined. Their evidence lasted from late morning until the end of the first day. The three witnesses were:

1. Mrs Karly Grainger, business and finance manager, and the dismissing manager;

2. Miss Kaomi James, nursery manager at the relevant time, who is no longer an employee of the respondent; and

3. Miss Courtney Pears, nursery manager.

13. The respondent also provided me with witness statements for five other witnesses. It was confirmed at the start of the hearing that where a witness did not attend, their evidence would be given less weight. It had been the respondent's intention to have called the first two of these witnesses in-person, but a decision was made not to do so during the first day of hearing as a result of matters which had arisen at the nurseries regarding safeguarding. The five witnesses, whose statements I read but who did not attend the hearing in-person, were:

1. Ms Debbie Moss, nursery manager and the investigating manager;

2. Ms Natalie Jones, nursery manager and the appeals manager;

3. Mrs Nicola Fleury MBE, founding director and chief executive officer;

4. Mr Paul Fleury, proprietor and shareholder; and

5. Ms Nicola Orwin, childcare practitioner.

14. I heard evidence from the claimant on the second day of the hearing. She had prepared a witness statement (which I had read on the first day). She was cross examined by the respondent's representative. I asked her questions, and she was re-examined.

15. After the evidence was heard, each of the parties was given the opportunity to make submissions. They each made their submissions partly in writing and partly orally. The respondent's representative initially requested a forty-five minute break between the end of the evidence and submissions. The parties were given from the end of the evidence at approximately 12.05 pm until after lunch on the second day to prepare submissions, with the written submissions provided by email at 1.45 pm. As a result of a request from the respondent's representative for a little more time, submissions were heard at 2.30 pm. The submissions lasted until 4.10 pm (with a short break having been taken during the respondent's submissions at the respondent's representative's request).

16. I reserved my Judgment there being no time remaining during the time allocated for the hearing and, accordingly, this document provides my Judgment and the reasons for it.

Facts

17. The claimant first worked for the respondent from 2010 until 2015. She left. She returned to employment in March 2016. She was employed as a part-time term-time nursery practitioner. The claimant worked five days a week during term time and five and a half hours per day. She worked twenty-seven and a half hours per week. I was told that her annual leave entitlement was required to be taken by her during the period outside term time when she did not work, and it appeared that she was paid for annual leave on a monthly basis, not when the days of annual leave were taken.

18. The respondent is a family-owned business. It is a consortium of five independent day nurseries. It employs between one hundred and one hundred and thirty employees, with the number varying depending upon the number of children (which were stated, in submissions, to be between five and six hundred). The respondent described itself in the proceedings as a small business. The claimant's counsel contended it was medium-sized. It has no HR function and does not currently use a provider of HR advice. It had previously used Croners for advice, but no longer does so. Reference was made during the evidence to a solicitor from whom advice had been taken on an occasion, but the respondent was represented at the hearing by its managing director and there was no document which evidenced the taking of legal advice.

19. I was provided with a copy of the respondent's employee handbook. That contained policies and procedures, including a lengthy disciplinary procedure. I was, perhaps surprisingly, not referred to any specific policies or elements of any policies or procedures during the hearing. Neither party placed any reliance upon anything said in the procedure about what constituted gross misconduct.

20. For approximately three years, the claimant took a ten-minute break during each shift she worked. The claimant worked a shift of five and a half hours in a room with no windows. The respondent asserted that the break was a cigarette break. The claimant said that the break was used to make a cup of tea, use the toilet, or look at her phone. In June 2022, the claimant was informed that she could no longer have a break and would need to complete her full five-and-a-half-hour shift without a break. The claimant and one

other part-time employee had routinely been taking the ten-minute break. A colleague, who also worked part-time, was not taking the break, and complained that it was unfair. The respondent's response was to stop the break. Due to the length of the claimant's shift, it was not a statutory entitlement. In the Tribunal hearing, the claimant accepted the respondent's reason for reaching the decision. It was not in dispute that the claimant was given a month's notice before she was no longer able to take a break.

21. In autumn 2022, the claimant attended a staff away day. The staff received a presentation on mental health. The presenter mentioned that if people needed a break they should ask. The claimant decided, as a result, to ask for her break to be reinstated, because she had found it difficult working for her entire shift without a break as was then required. The claimant attended two meetings in September 2022, after she informed the respondent that she felt that her mental health was being affected by needing to work her shift without the break. The claimant asked for the break to be reinstated. The respondent refused. Miss Pears suggested some alternative options (one of which was to work a longer shift so that the claimant would be legally entitled to a break, another was to work a shorter week). She also told the claimant to put it in writing.

22. On 30 September 2022, the claimant made a written request to shorten her working week and to no longer work Fridays, because of her mental health and because she wanted time to focus on a business venture. The claimant's evidence was that she considered Friday to be a quieter day. The request was refused. It was the respondent's evidence that not working a Friday could not be accommodated because the claimant was the only level three working in the baby unit on a Friday, because the other level three member of staff did not.

23. The claimant overlooked a day when the school her daughter attended was due to be closed, outside of the usual holidays. The school was closed on Friday 21 October, in addition to the usual half term holiday the following week (when the claimant was not due to work). The respondent usually requires four weeks' notice of holiday requests, which enables planning for staff and staff ratios. The claimant did not provide that length of notice on this occasion, because she overlooked the date of the school closure. The claimant had no alternative childcare available and therefore she needed to take the day off to care for her child.

24. On 17 October 2022 the claimant told Miss James that she needed to take Friday 21 October 2022 off, as the school was closed that day and she had no other childcare for her daughter. Miss James did not have the power to authorise the request. She escalated the request to Ms Fletcher. It was Miss James' evidence that the claimant would have known that, without it being authorised, she could not take the leave. In the initial discussion, the claimant commented that without the leave she might need to bring her daughter into nursery, which I accepted was not her making a genuine request to do so.

25. There was a difference in evidence between the parties about whether the claimant repeated her request that week or not. There appeared to be no dispute that the respondent did not formally respond to the claimant. The claimant did not make a request in writing. The claimant said that she asked

Miss James again on the Tuesday, Wednesday and Thursday. The respondent denied that she did.

26. The last shift which the claimant worked that week was Thursday 20 October. It was Miss James' evidence that, as the claimant left the shift that day, the claimant said to Miss James "*don't forget, I'm not in tomorrow*". Miss James, in her witness statement, described it as a blatant act of defiance. From her oral evidence, it was clear that she was unhappy that the claimant spoke to her about it in that way in front of other staff, when she thought that any such conversation should have happened in the privacy of the office. Miss James' oral evidence was that she replied by reminding the claimant that her presence in work was expected and required.

27. On Friday 21 October, the claimant did not attend work. Miss James telephoned the claimant once and left a message on her voice mail enquiring about her. Miss James emphasised the importance of staff ratios and the essential need to have the number of required staff in each unit, with one person being at level three or above. It was Miss James' evidence, that she proceeded to organise staff cover in the claimant's absence, so that the staff ratios in the relevant room were correct that day. She escalated the matter to a more senior manager.

28. The claimant was signed off from work on ill-health grounds from 31 October to 30 November 2022. A fit note dated 31 October 2022 covered that period (395). On the fit note the claimant was recorded as not fit for work. The reason given was "*Stress at work*".

29. On 9 November, the claimant was invited to a disciplinary investigation meeting (403). That letter set out a number of allegations, many of which arose from or related to the non-attendance at work on 21 October and some which did not. It was a lengthy nine-page letter sent by Ms Moss. I will not reproduce the content of the letter in this Judgment. In summary, the very lengthy allegations included (as I was able to understand them) were as follows:

1. That the claimant had failed to comply with various aspects of the respondent's policies and procedures;

2. That the claimant failed to adhere to and/or comply with the annual leave policy and procedure by not submitting a formal application, an application at least four weeks in advance, and/or had sought leave in circumstances which were not unexpected or unforeseen where school dates were published in advance, for the leave on 21 October;

3. That the claimant had not complied with the absence and sickness absence policy by not reporting her absence and/or not answering or responding to the message left, for/on 21 October;

4. Taking the day's absence on 21 October even though it had not been confirmed;

5. Breach of the contract of employment by failing to, or neglecting to, report for duty on 21 October;

6. Failure to, and neglecting to, report for duty on 21 October;

7. Breach of the duty of fidelity by deliberately and intentionally taking sick leave;

8. Failing and neglecting to maintain her duty of fidelity by consulting her GP to assert work-related stress;

9. Failure to maintain a duty of fidelity by pursuing a personal agenda;

10. Breaching the duty of fidelity by not informing her GP that she operated a business and in some other ways in which information was/was not provided to the GP;

11. Breach of the duty of fidelity in not answering questions about her business; and

12. Breach of the duty of fidelity regarding access to medical records.

30. The claimant informed the respondent she would not be attending the disciplinary investigation meeting due to her health. She told it that she had a sick note, was not well, and did not feel mentally strong enough (429). The claimant provided a detailed email account of what had occurred on 21 October (431). Ms Moss acknowledged that account in her email of 10 November (430). She made no reference to it, or to having considered it, in her witness statement for the Tribunal hearing.

31. The investigatory meeting was rescheduled for 14 November, which the claimant also did not attend for the same reason. Ms Moss offered the claimant the opportunity to be accompanied at that meeting. She offered fully expensed transportation to take her to the meeting. She offered to hold the meeting at an alternative venue. The claimant asked Miss Moss to allow her time to get better and to rearrange the meeting for after her sick note would run out.

32. In her witness statement, Ms Moss described the situation as follows:

"*I recall Shauna attempted to hide behind her medically certified status as being a plausible reasons to prevent her from being required to participate within the formal disciplinary investigation process, or indeed to exempt her from such participation, which is a misconception & myth, which Shauna Lindley could easily have found out & ascertained had she herself consulted ACAS or indeed her own Trade Union Representative, at Unison, whom undoubtedly would have set her straight & advised her of her duty towards continuing to participating within the formal disciplinary investigation process.*

I assert that had Shauna not chosen to totally ignore me & resist engaging in the formal disciplinary investigation process, then the outcome may have been entirely different"

33. Ms Moss' evidence was that the realm of her investigation was based upon an interview with Ms James. I was not provided with any notes or documentation that recorded any such interview or what was said. I was also not provided with any document completed by the investigating officer

which reported on her investigation, or which recorded any recommendation that the case should proceed to a disciplinary hearing, or why that was.

34. Mrs Fleury endeavoured to contact the claimant. The claimant did not answer her telephone calls but did respond to some of her emails. I do not need to reproduce all the correspondence provided, in this decision. It was the respondent's submission that Mrs Fleury endeavoured to contact the claimant to support her during her sickness absence. The emails provided included the following from Mrs Fleury to the claimant in an email of 21 November (452):

"*By way of clarity, any defamatory, and/or libellous, and/or slanderous comments, and/or remarks, of which are entirely unfounded & without merit whatsoever, made by either you, and/or your respective Trade Union & its' appointed Representatives will not be tolerated & civil litigation proceedings will be initiated without hesitation to protect both my personal & professional reputations"*

35. On 29 November 2022 the claimant resigned on four weeks' notice, requesting that her resignation took effect on 27 December 2022 (459). The claimant informed the respondent that she would not be returning to work due to ill health, as she had been certified as not fit for the remaining period of employment. That resignation was accepted.

36. The claimant obtained alternative employment to start after her employment with the respondent had ended. A reference was requested by that new employer.

37. A second fit note was obtained by the claimant and provided to the respondent. That was dated 29 November 2022 and stated that the claimant was not fit for work from 29 November 2022 to 1 January 2023 (457). There was some dispute about what the GP recorded on the fit note. The original note provided recorded the reason as being "*Stress at work at Kid R Us Nursery*". Mrs Fleury made a complaint to the GP practice about what was said on the fit note. I was shown a letter of 8 February 2023 from Dr Singh to Mrs Fleury (619) in which he accepted that, in hindsight, he appreciated that citing a specific employer on a fit note was unnecessary and he would be mindful of this in the future. He apologised to Mrs Fleury and informed her that the practice had instituted a new policy.

38. On 2 December, in a letter from Ms Moss, the claimant was invited to a disciplinary meeting on 5 December 2022 (545). The claimant was told that the meeting would proceed in the claimant's absence and, despite the claimant being certified as unfit for work, it was highly likely that the meeting would proceed to enable a formal disciplinary process to proceed.

39. The disciplinary meeting took place on 9 December 2022. The claimant did not attend due to her health and as she was absent on ill-health grounds. Mrs Grainger conducted the hearing. She spoke to Mrs Fleury about her decision and discussed the decision-letter with her. I was not provided with any notes of that discussion.

40. It was Mrs Grainger's evidence that the series of acts for which the claimant was dismissed were the claimant's non-attendance at work on 21 October and the other things which she said also occurred on that date. She agreed with the claimant's counsel, that not attending work on 21 October in and of

itself would not have been dismissible and the appropriate sanction would have been a warning for not following policy or procedure. She however said that the other matters found meant that the misconduct went beyond that simple absence.

41. On 9 December 2022 the claimant received a letter informing her of the outcome of the disciplinary process and that she had been summarily dismissed (573). What was provided consisted of a three-page letter and a lengthy attached document (556) which detailed the allegations and provided (in red) the response or finding in respect of each. Ms Grainger was clear in her evidence that neither questions about the claimant's fit note/sickness, nor questions about the claimant undertaking other work whilst employed by the respondent, were part of her decision to dismiss. Based upon the evidence of Mrs Grainger, the document also included her conclusions on various matters which did not form part of her reasons for dismissing the claimant (every single one of the allegations included being stated to be either upheld or partially upheld, with an explanation for each)

42. In a paragraph in the dismissal letter, Mrs Grainger said (574):

"*Whilst it is accepted that whilst* ***none*** *of* ***the misconduct*** *at hand amounts to* ***gross misconduct individually****; collectively, given the catalogue & series of* ***misconduct*** *at hand, the cumulative effect of* ***the several acts of misconduct*** *is sufficient & proportionate to warrant* ***the decision to summarily dismiss you, i.e without notice, and/or without payment in lieu of notice****"*

43. On 15 December (578) the claimant appealed. She suggested an appeal hearing date of 11 January 2023. The appeal hearing instead took place on 20 December. The claimant did not attend. The appeal was not upheld. A decision letter of 20 December written by Ms Jones was sent (597).

44. Many of the documents in this case were written in a slightly unusual style. They used a certain type of language and had elements in bold. That was true of the disciplinary decision letter, the appeal decision letter, correspondence from Ms Fleury, and the grounds of response (which Ms Grainger was clear she did not write). Ms Grainger's evidence was that the documents she used, including the decision letter, were based upon templates prepared for her, but it was her evidence that she inserted the relevant parts of the decision letter herself and that the decision was hers.

45. The sums claimed and the respondent's response regarding remedy, changed during the hearing. It was not the same as the position set out in the documents prepared in advance of the hearing.

46. The parties agreed that the appropriate basic award (if a full basic award was awarded and such an award was made) was £1,567.50.

47. The claimant accepted in evidence that, had she not been dismissed, she would have received statutory sick pay only for the remainder of her employment. It was her counsel's submission that her losses for the period should be paid at full pay. However, if sick pay only was awarded as loss for the purposes of the compensatory award, he said the losses were 58% of £497.28. The respondent, in submissions, calculated (as best as it was able) that the claimant's losses for the period from the date of dismissal to the date when her resignation would otherwise have taken effect, applying

the rate of statutory sick pay payable, was £289.85, plus the figure of £31.54 for holiday pay which would also have been accrued and paid had the claimant remained in employment for that period (making a total of £321.39).

48. Mrs Fleury provided a witness statement. It was lengthy. It was highly critical of the claimant. I did not hear from Mrs Fleury. The claimant's representative suggested that all relevant decisions regarding the claimant were in fact made by Mrs Fleury personally and he highlighted the terminology and style of the documents in support of that contention. The respondent denied that the dismissal had been Mrs Fleury's decision.

49. I was provided a witness statement from Mr Fleury. Mr Fleury's evidence was that he had spent a short-term period of incarceration within an HMP facility some significant years ago for a contempt of Court matter, which he said was a civil litigation matter and not a criminal prosecution. Therefore, whilst he had been incarcerated, he did not have a criminal record and had a clear and enhanced DBS check. It was Mr Fleury's evidence that, on at least five occasions, Ofsted had received anonymous (and inaccurate) reports notifying them that Mr Fleury was a convicted criminal. He said that, whilst there was no evidence that the claimant was one of the whistleblowers to Ofsted, he asserted that he believed on balance she was. There was no evidence to support that assertion.

50. Mr Fleury had no involvement in the decision to dismiss the claimant, and he did not say that he had. He proffered his opinion on the fairness of the dismissal. He offered an unfailing negative portrayal of the claimant in his witness statement. He did not attend the Tribunal hearing. Miss Pears' evidence was that the claimant had spoken to her about Mr Fleury when they both worked together as nursery practitioners. The claimant agreed that she had spoken about him, as she said it was a topic of conversation at the nursery. Miss Pears' and the claimant's evidence differed in terms of the frequency about which the claimant had spoken about him. As the claimant was not contending that she was dismissed because she criticised Mr Fleury, and as Mr Fleury did not evidence that he was a decision-maker in her dismissal, the evidence I heard had no relevance to the decision which I needed to reach.

51. This was a case in which I was provided with a considerable quantity of evidence, much of which was not relevant to the decision which I needed to reach. This Judgment does not seek to address every point about which I heard or about which the parties disagreed. It only includes the points which I considered relevant to the issues which I needed to consider in order to decide if the claims succeeded or failed. If I have not mentioned a particular point, it does not mean that I have overlooked it, but rather I have not considered it relevant to the issues I needed to determine.

The Law

52. An unfair dismissal claim is brought under section 94 of the Employment Rights Act 1996. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade me that it dismissed her for that reason, the dismissal will be unfair.

53. If the respondent does persuade me that it did dismiss the claimant for that reason, the dismissal is only potentially fair. I must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. That is to be determined in accordance with equity and the substantial merits of the case. The burden of proof on that question is neutral.

54. In conduct cases, when considering the question of reasonableness, I am required to have regard to the test outlined in the well-known case of **British Home Stores v Burchell** [1980] ICR 303. The three elements of the test are:

    (1) Did the employer have a genuine belief that the employee was guilty of misconduct?

    (2) Did the employer have reasonable grounds for that belief?

    (3) Did the employer carry out a reasonable investigation in all the circumstances?

55. The additional question I need to determine, is whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach?

56. I must not substitute my own view for that of the respondent. I must not slip into what is sometimes called the substitution mindset. It is not for me to decide whether the claimant committed the misconduct alleged or whether the respondent has proved that she did so. I also must not decide whether I would have dismissed the claimant had I conducted the disciplinary hearing and considered the evidence which was in front of the decision-maker.

57. In considering the investigation undertaken, the relevant question for me to decide is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted (**Sainsbury Supermarkets Ltd v Hitt** [2003] ICR 111). The claimant submitted that if an investigation fell outside the range of reasonable responses the dismissal was unfair, relying upon **A v B** [2003] IRLR 405 in which it was said "*If the investigation is not reasonable in all the circumstances then the dismissal is unfair*". The claimant also relied upon that case as establishing that the standard of reasonableness required in respect of an investigation will always be high where the employee faces the loss of her employment. When I am considering fairness, it is important that I look at the process followed as a whole, including the appeal.

58. I am also required to have regard to the ACAS code of practice on disciplinary and grievance procedures. I will not reproduce the code in this Judgment, however I did note that that the code says that for misconduct it is usual to give the employee a warning, with some acts being so serious in themselves or having such serious consequences that they may call for dismissal without notice for the first offence. It says that employees and

employers should make every effort to attend meetings. On investigations, the code said that "*Employers should carry out any necessary investigations, to establish the facts of the case*" and, in a more detailed section:

"*It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing"*

59. The claimant relied upon what was said in the ACAS guidance on discipline and grievances at work. That is a document which was issued to supplement the statutory code, but it does not have the same legal force as the code of practice itself. What the claimant's representative highlighted was that it said:

"*When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against"*

60. In the dismissal letter and in its response to the Tribunal claim, the respondent placed particular emphasis upon the decision of the Employment Appeal Tribunal in **Mbubaegbu v Homerton University Hospital NHS Foundation Trust** UKEAT/0218/17. I was provided with a copy of that Judgment in the bundle and so reminded myself of what was said in that decision about unfair dismissal. That was a case which looked at whether a finding, or single act, of gross misconduct was required for dismissal to be fair, where there had been no previous warnings in force. The Employment Appeal Tribunal decided that it was not. Choudhury HHJ said:

"In my Judgment, the Tribunal's approach to the acts of misconduct relied upon was not erroneous. Whether or not the label of gross misconduct is applied to such conduct is not determinative. It is quite possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee. That may even be so even if the employer is unable to point to any particular act and identify that alone as amounting to gross misconduct. There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely upon a series of acts, none of which would, by themselves, justify summary dismissal. As stated in ***Neary****, conduct amounting to gross misconduct is conduct such as to undermine the trust and confidence inherent in the relationship of employment. Such conduct could comprise a single act or several acts over a period of time"*

61. In her submissions, the respondent's representative also relied upon **Gallacher v Abellio Scotrail Ltd** [2020] 2 WLUK 691 as a case in which the relationship between an employee and her supervisor had utterly broken down and following a fair procedure would not have served any purpose because the employee had no desire to remain within the organisation. I did not find that case assisted me in my decision, as it was one which made a

finding on the process for a dismissal for some other substantial reason following an irretrievable breakdown in trust and confidence, when the case I was considering was one where the respondent's pleaded case was that the dismissal was fair by reason of conduct.

62. At two points in her submissions, the respondent's representative contended that it was highly unlikely that a trade union representative would have "*wrongly*" advised a trade union member not to engage or participate in a disciplinary process, "*as it is well known that a Claimant is required to demonstrate how they have mitigated their losses, or not contributed towards their own downfall or towards the outcome of any employment issue*". I asked her if she was relying upon any particular case or law when making that submission, and she confirmed she was not. As I have already highlighted from the ACAS code, an employee should make every effort to attend a disciplinary meeting. It would be correct to say that an employee is expected to engage in a disciplinary process and to attend a meeting where possible, or at least to otherwise take part as they are able in the process (such as, for example, providing information in writing). I also agreed with the respondent's position that a fit note which says that an individual is not fit for work, does not preclude an employee from engaging in a process or attending meetings where they are fit enough to do so. However, I do not consider that there is any legal authority for the proposition (if that is what it was) that somebody unfit for work due to stress (or a related mental health condition) is legally obliged to attend an investigatory hearing, disciplinary hearing, or appeal hearing, where their health will be adversely impacted by such attendance, failing which their dismissal will be fair. The fairness of the dismissal under section 98(4) is to be considered in all the circumstances of the case.

63. The basic award for unfair dismissal and how it is to be calculated is set out in section 119 of the Employment Rights Act 1996.

64. Section 122(2) says:

"*Where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the award accordingly"*

65. The compensatory award for unfair dismissal and how it is to be calculated is set out in section 123 of the Employment Rights Act 1996. In particular, subsection one says:

"*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"*

66. Section 123(6) says:

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of any compensatory award by such proportion as it considers just and equitable having regard to that finding"*

67. In his argument regarding remedy, the claimant's counsel place reliance upon section 88(1)(b) of the Employment Rights Act 1996. That provides that, where an employee has normal working hours under their contract during the period of notice and during those working hours that employee is incapable of work because of sickness or injury, the employer is liable to pay the employee for the normal working hours at the average hourly rate, where the employer has given notice to the employee. That provision is within part IX of the Employment Rights Act 1996 and applies to minimum periods of notice. I accepted that the provision would apply to notice given by an employer. However, I did not accept that the provision addressed the claimant's losses arising from her dismissal where she had already given notice and was receiving sick pay only for that notice period. I found that the loss arising from the unfair dismissal in those circumstances, was the lost statutory sick pay which would otherwise have been received by the claimant (not the sums which might have been payable in other different circumstances).

68. An amount is usually included as part of a compensatory award for loss of statutory rights. It is an amount awarded to reflect the fact that an individual will have to work for two years in fresh employment before reaching the qualifying period required to claim unfair dismissal. The claimant's representative relied upon what was said in the case of **Wolff v Kingston upon Hull City Council** UKEAT/0631/06, which was:

"*the compensatory award is to be such sum as the Tribunal considers just and equitable in all the circumstances. It has to have regard to the loss sustained by the Complainant but it is no means limited to that which can be demonstrated to be financial loss. Indeed, the conventional award of a relatively modest sum in respect of this particular head of compensation rather reflects the fact that it is not necessarily the result of any precise arithmetical calculation"*

69. I noted that **Wolff** was a decision in a case where the argument arose because the claimant had gone on to obtain new employment after the dismissal and then to accrue sufficient length of service in the new employment before the remedy was decided. I found that differed from this case, where the claimant had already chosen to cease being employed and to commence new employment without any length of service (and therefore no statutory protection) before she was dismissed. I acknowledge that an award for loss of statutory rights does not require demonstration of financial loss, but to be awarded it still needs to be a loss which results from the dismissal. In this case, the loss of statutory rights was not as a result of the dismissal.

70. There are three factors required to be satisfied for me to find contributory conduct: the conduct must be culpable or blameworthy; it must have caused or contributed to the dismissal; and it must be just and equitable to reduce the award by the proportion specified (**Nelson v BBC (No 2)** [1979] IRLR 346).

71. In **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 the House of Lords held that the fact that the employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by me) may be taken into account when assessing compensation

and can have a severely limiting effect on the compensatory award. If the evidence shows that the employee may have been dismissed properly in any event, if a proper procedure had been carried out, I should normally make a percentage assessment of the likelihood and apply that when assessing the compensation. The issue is what the respondent would have done and not what a hypothetical reasonable employer would have done in the circumstances. The onus is on the respondent to adduce evidence to show that the dismissal would (or might) have occurred in any event. However, I must have regard to all the evidence when making that assessment, including any evidence from the claimant. The claimant referred to the case of **Andrews v Software 2000 Limited** [2007] ICR 825 in which it was said that I should assess the loss flowing from the dismissal using my common sense, experience, and sense of justice.

72. Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that in an unfair dismissal claim, where the employer has failed to comply with the ACAS code of practice on disciplinary and grievance procedures and that failure was unreasonable, I may if I consider it just and equitable in all the circumstances to do so, increase any award by no more than 25%. Similarly, if I find that the employee failed to comply with that code and that failure was unreasonable, I may reduce any award by no more than 25% if it is just and equitable in all the circumstances so to do.

73. The questions which I needed to ask under that provision were summarised by the claimant's representative as being: is the claim one which raises a matter to which the ACAS code applies; has there been a failure to comply with the ACAS code in relation to this matter; was the failure to comply with the ACAS code unreasonable; and is it just and equitable to award an uplift (or reduction) because of the failure to comply with the code and, if so, by what percentage up to 25%?

74. The claimant's counsel in submissions emphasised that what was said in section 207A was a statement of what I may do under that Act, and he therefore contended that I was able to adjust an award whether or not it had been pleaded. He relied upon the analogous situation for awards for contributory fault and the decision in **Swallow Security Services v Millicent** EAT 0297/08. The respondent's representative also sought to rely upon an adjustment to the award under section 207A. I accepted the claimant's submission, in part as both parties appeared to agree and contend that I should apply section 207A despite neither party having pleaded it. I noted that it was not in the list of issues and, as a general rule, all matters to be determined should be set out in the list. Nonetheless I am not required to slavishly adhere to the list of issues and therefore I did consider the adjustments sought under section 207A by both parties, despite that not being in the list of issues and not having been pleaded by the parties.

Conclusions – applying the Law to the Facts - liability

75. The first question in the list of issues which I needed to decide, was whether the respondent had been able to prove that the claimant was dismissed for a potentially fair reason, namely misconduct. Mrs Grainger gave evidence about the dismissal. It was her evidence that she had made the decision.

Her evidence was that she made the decision by reason of the claimant's misconduct. I accepted her evidence and, accordingly, found that the respondent had proved that the reason for dismissal was misconduct (being a potentially fair reason).

76. In his submissions, the claimant's counsel submitted that I should not find that misconduct was the reason for dismissal because he said that the person who made the decision to dismiss had been Mrs Fleury and, as she had not acknowledged the dismissal or provided her reasons for it, it had not been proved it was for a fair reason. I have accepted Mrs Grainger's evidence that the decision made was hers. As a result, that argument did not succeed. I acknowledge the fact that many of the documents used by the respondent are stylistically unusual and similar, and that is reflected in the letter and note recording the decision to dismiss. It was clear that some of the content of the dismissal letter and notes had been contributed by Mrs Fleury, as Mrs Grainger accepted referring to that content as having been a template. It was also acknowledged by Mrs Grainger that she spoke to Mrs Fleury about her decision. Nonetheless, I have accepted Mrs Grainger's evidence at the hearing that the decision was hers (and that the reason for it was misconduct).

77. There appeared to be a little bit of confusion on the respondent's behalf with regard to some other substantial reason. That is, of course, a different potentially fair reason for dismissal. That was not relied upon in the pleaded case as being the (or a) potentially fair reason for dismissal, and it was not recorded as being one in the list of issues. However, reference was made to it including during closing submissions. I clarified this with the respondent's representative, and it was confirmed that the reason relied upon was misconduct not some other substantial reason. She said that the references to the breakdown in trust were part of the background to that case. As I have explained, I found that the respondent proved that the reason for dismissal was misconduct, and therefore nothing material turned in any event upon the fact that some other substantial reason had not been put forward as, or pleaded as, an alternative potentially fair reason.

78. I next considered whether the decision to dismiss the claimant was one which was within the range of reasonable responses which a reasonable employer could have reached. I reminded myself that it was not for me to substitute my own decision for that of the respondent. I found that the decision to dismiss was not one which fell within the range of reasonable responses which a reasonable employer could have reached.

79. In practice, the sole reason for the claimant's dismissal was that she had not attended work on 21 October 2022 as she should have done, and she did so in a way which meant that she was absent without leave rather than having contacted the respondent or having replied to contact from it. Mrs Grainger's evidence was that some of the other matters detailed in her decision document were not part of the reason for dismissal. Mrs Grainger emphasised the events of 21 October as also being a part of her decision. That is, she not only dismissed the claimant for not attending work on 21 October, but part of her reason was also because the claimant did not contact the respondent on 21 October (when she did not attend) and she did not answer Miss James' telephone call or return that call. I accepted the absence of contact on 21 October was a part of the reason for dismissal

alongside the non-attendance. Nonetheless, I found that dismissing the claimant for being absent without leave on a single occasion and not being contactable on the day when absent, was not within the range of reasonable responses which a reasonable employer would make.

80. In reaching my decision, I took into account what was said in the ACAS code. In my view, non-attendance is exactly the type of misconduct which the code envisages should normally result in a warning. It is not the type of conduct which can accurately be described as either gross misconduct, or as otherwise conduct so serious that dismissal is warranted for a single instance of it.

81. As I have highlighted, I reached my own decision. However, I did note, and take into account, what was said by Mrs Grainger when she accepted that being absent on 21 October in and of itself, was only something which merited a written warning. I did not find her reliance upon procedures and policies and the absence of contact on 21 October, as genuinely explaining why a warnable offence was genuinely one which was instead something which could reasonably merit dismissal. I could not see why anything about the absence of contact on 21 October transformed the non-attendance on a single day into being a series of misconduct as she suggested. I also noted the respondent's submission that, if the claimant had answered Miss James' telephone call on 21 October or responded to her message, we would not have found ourselves in the situation of having this hearing because she would not have been dismissed. As I have said, I did not see that the absence of response on 21 October when the claimant was already not working on the day she should have been, in some way meant that the single warnable instance of not attending work, was instead converted into being misconduct so serious that dismissal was the reasonable response of a reasonable employer.

82. In reaching my decision, I noted that the circumstances included: the respondent being a medium to small employer; and the difficulties the absence caused the respondent including with staff ratios.

83. Having determined that the dismissal was unfair because it fell outside the range of reasonable responses, it was not strictly necessary for me to also determine whether I would also have considered the dismissal to have been unfair applying section 98(4) more generally and looking at the procedure adopted, and the other matters set out in the list of issues. Nonetheless, as I heard evidence and argument about them, and as they might have impacted upon my remedy decision, I did go on to consider those issues. What I needed to do was apply the words of section 98(4) and I did so, but I did consider the matters set out in the list of issues, which reflected the key issues to be considered following the case of **Burchell**.

84. I decided that the respondent genuinely believed the claimant had committed misconduct, as I accepted Mrs Grainger's evidence about why she did so. I also found that there were reasonable grounds for that belief, as the claimant had not attended work on 21 October 2022 as she should have done, and had neither contacted the respondent nor responded to Miss James' message.

85. I then turned to consider whether, at the time the belief was formed, the respondent had carried out a reasonable investigation? I had some considerable concerns about the investigation undertaken by the respondent. I did not hear evidence from the investigator. I was only provided with a witness statement from her. In undertaking her investigation, she appeared to have spoken to a key witness (Miss James) but had made no record of that conversation. She had been provided with a detailed email account from the claimant, but there was no evidence provided to me which showed that she had considered it or taken it into account. She did not prepare any form of report or summary of her investigation, what she had identified, or why she believed that a disciplinary hearing was required. As a result, I found her investigation to have fallen sort of what I would have expected in a fair process (that is, it fell outside the range of processes which could be adopted by a reasonable employer).

86. When considering the fairness of the investigation, what can be considered is the entire investigation undertaken up to and including the hearing itself. What occurred at the disciplinary hearing could potentially have rectified the failings in the investigation. In this case, Mrs Grainger spoke to Miss James herself before reaching her decision. However, there was no record of what she had said when spoken to. Mrs Grainger did not appear to have considered the claimant's written account set out in her email to the investigator or, if she did, that was not recorded or documented. As a result, I concluded that the hearing did not rectify the shortcomings in the investigation which I had found.

87. Turning to the final question in the list of liability issues, that asked whether the respondent followed a reasonably fair procedure? A hearing was arranged and conducted by an independent manager. An appeal hearing was also arranged and conducted by another independent manager. Outcomes were provided after each hearing. To that extent, a procedure was followed (and I took into account the size of the respondent and it being an organisation without any HR advice). There were, however, two ways (in addition to the shortcomings I have addressed regarding the investigation) in which the procedure was in my view not a fair one (being one that would reasonably have been adopted by a reasonable employer). One element of unfairness was Mrs Fleury's involvement in the process. She was the most senior person in the organisation. She had a clear dislike of the claimant, as was evident from what she said in her witness statement. She was spoken to by Mrs Grainger about Mrs Grainger's decision. She also had some input into the decision, at least to the extent suggested by the paragraphs she wrote for the decision-letter which went beyond the usual template content which I would expect to see in any letter. The second (and more important) element of unfairness, was the respondent's insistence on concluding the investigation, conducting and determining the dismissal hearing, and conducting and determining the appeal hearing, all during the time when the claimant was certified as not fit to attend work due to stress at work, and when the claimant herself said she was not fit to attend. It was notable that the respondent even refused to delay the appeal hearing from December to January, when the claimant suggested doing so because she might be fit to attend. In the circumstances of this case, taking into account the time taken and the claimant's stated ill-health and the reason for it, I found that conducting the disciplinary hearing in her absence when she was certified as not fit for work for the reasons given and had explained that she

would not attend the hearing for the reasons which she gave, was unfair and fell outside the reasonable process which might be conducted by a reasonable employer.

88. In her submissions, the respondent's representative referred to the claimant's ill-health as having been self-diagnosed. She referred to how people can use Google to obtain medical information. She said it was quite reasonable for an employer to delve into an employee's given ill-health and not to rely on the employee's self-diagnosis. As I highlighted to the representative and she accepted, the claimant's absence was not self-diagnosed. Her reasons were certificated by a GP on two fit notes. We have a system of fit notes which enable employees to obtain and provide medical evidence of the reason for their absence in a straightforward way. The approach of the respondent to the claimant in the circumstances about which I heard, appeared to be based upon a refusal to accept the accuracy of the fit notes provided. That was reflected in the submissions I have referred to, what was said by Miss Moss in her witness statement, and what was said by Mrs Fleury in her witness statement. My finding on the fairness of the dismissal would have been the same irrespective of that evidence, but that view of ill-health absence did appear to have informed the respondent's approach and led to its unwillingness to genuinely consider whether a hearing could fairly take place while the claimant was unwell as certificated (and for the specific reason certificated).

89. Section 98(4) required me to decide whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant, to be determined in accordance with equity and the substantial merits of the case. I found that the respondent acted unreasonably in treating the claimant's misconduct as sufficient reason for dismissing her, for the reasons I have explained.

90. In her submissions, the respondent's representative contrasted the claimant as a part-time term-time worker with other employees who had childcare responsibilities and were full-time. It appeared that she did so as a point being made to criticise or denigrate the claimant, albeit it was not entirely clear why it was part of her submissions at all. In the light of a point raised by the claimant's representative, the respondent's representative confirmed that she was not contending that the claimant had been dismissed because she was a part-time or term-time worker. That submission from the respondent's representative did not add anything to what I needed to consider.

91. In her submissions, the respondent's representative emphasised Mr Fleury's evidence and the evidence given by the witnesses as it related to Mr Fleury. As I have already explained, Mr Fleury's evidence did not assist me in reaching the decisions which I needed to in this case. I asked the respondent's representative whether she wished me to specifically address those submissions in my written Judgment and she confirmed that she did. Accordingly, I have considered it right that I should do so and have recorded what I found on the facts which related to him (even though I did not find them to have been relevant to the decisions which I made).

Remedy

92. In considering remedy, I started by considering contributory fault. The questions which I needed to ask myself for the basic award and the compensatory award were slightly different, as I have set out the in the section on the law above. For the basic award, I needed to consider whether any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent. For the compensatory award, I needed to decide whether the dismissal was to any extent caused or contributed to by any action of the claimant and, if so, had to decide whether to reduce the amount of any compensatory award by such proportion as I considered just and equitable having regard to that finding.

93. I found that the claimant's conduct was such that it caused or contributed to the dismissal. I found it was just and equitable to reduce both awards because of it. The claimant decided not to attend work on 21 October 2022 despite knowing that she was required to do so. I accepted that she had told her manager she would not be attending due to her childcare issue. I also accepted that she considered her absence to be unavoidable due to her childcare issue and the school not being open that day. Nonetheless, where someone is due to work and they have not been informed that their request not to work has been granted, they are obliged to work. The claimant did not do so. I also accepted that it would have been appropriate (or at least courteous) for the claimant to have returned the telephone call from her manager after the message was left on 21 October. To that extent, the claimant's non-attendance at work (and the absence of contact on 21 October) was culpable and blameworthy, that led to her dismissal, and I consider it to be just and equitable to reduce both the basic award and the compensatory award as a result.

94. I then needed to decide the appropriate percentage reduction which should be applied as a result. An important factor was that I did not consider the misconduct to have been reasonably dismissible. I also noted the reason why the claimant was absent and the fact that she had told her manager that she was going to be absent in advance. In those circumstances, I decided that the appropriate reduction to both awards for contributory fault was twenty percent.

95. The parties agreed that the full basic award figure was £1,567.50. Applying the twenty percent reduction for contributory fault which I have found, that resulted in a basic award (after the reduction) of **£1,254**.

96. The claimant's counsel contended the claimant should receive a sum for loss of statutory rights as part of the compensatory award. As, prior to the time of the dismissal, the claimant had already decided to forego her statutory rights and commence new employment, the dismissal did not result in the loss of statutory rights. The resignation did. As I have explained in the section on the law, I considered the authority put forward on the claimant's behalf and noted the differences between that case and this one. I decided that the loss of statutory rights was not a loss resulting from the unfair dismissal. I did not consider it to be correct or just and equitable to make an award for loss of statutory rights in this case.

97. On loss, I accepted that the claimant's losses were the statutory sick pay which she would otherwise have received for the outstanding period of her

employment, plus the holiday pay which would have been paid. She would not have received full pay for the period of notice had she not been unfairly dismissed. I therefore did not accept that she should be awarded losses calculated based upon full pay, as that was not the loss which followed the unfair dismissal. I accepted the respondent's figures (whilst not scientifically calculated or prepared by an accountant they sufficed for the purposes required). The claimant's losses were £321.39.

98. As I have already explained, that sum needed to be reduced by 20% as a result of the contributory fault of the claimant. That resulted in the sum to be used for calculating the compensatory award (losses less twenty percent) being £257.

99. Both parties contended that the compensatory award should be adjusted due to the other party's unreasonable failure to comply with the ACAS code of practice on disciplinary and grievance procedures. For the reasons set out in the section on the law, I accepted I could consider the arguments despite them not being pleaded or being recorded in the list of issues, both parties having sought to argue the uplift/reduction, and as a result of what is actually said in section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 (which appears to say that I am obliged to consider the issue).

100. I did not find that the claimant failed to comply with the ACAS code of practice. I have quoted from the code and noted that it said that the claimant should make every effort to attend meetings. I found that she did, as I accepted her evidence that she was not well enough to attend the relevant meetings, broadly supported as it was by the GP fit notes and the reasons for her absence recorded in those fit notes. I noted that the claimant did provide her account for the investigator in a lengthy email. Even had I found that the claimant had not complied with the ACAS code, I would not have found that failure to have been unreasonable (for the same reasons as I have given).

101. Turning to the respondent, I found the decision on this issue to be finely balanced. The respondent did broadly follow the steps required by the ACAS code. However I have set out the shortcomings in the process in my findings. I found that the respondent did not carry out the necessary investigations as required by the ACAS code, for the reasons I have already given. I found that failure to have been unreasonable. I decided that it was just and equitable for the award made to be increased as a result. I determined that the increase should be ten percent rather than a higher increase, to reflect the fact that some elements of the required process were followed by the respondent (whatever the shortcomings of that process).

102. Applying a ten percent increase to the figure of £257 (and rounding the outcome to the nearest pound), that resulted in a compensatory award figure of **£283**.

103. This is not a case in which I considered it to be just and equitable to reduce the award following the case of **Polkey**. I found that the decision to dismiss was outside the range of reasonable responses of a reasonable employer, it was not a dismissal which was only unfair due to procedural shortcomings. I also noted that the claimant's losses were limited to a very

short period in any event, being the period when she would have (but for her unfair dismissal) have remained in employment and absent on ill health grounds before the notice period from her resignation expired.

104. As I explained to the parties, the recoupment regulations apply to the compensatory award (which in this case is the prescribed element), which should not be paid until the respondent receives a notice from the Department for Work and Pensions. That notice will either tell the respondent to pay all, or part of, the prescribed element to the Department, or tell the respondent that the Department does not require any payment (when the prescribed element should be paid to the claimant).

105. The sum of £1,254 must be paid to the claimant within the next 14 days and the respondent should not delay in doing so awaiting notification from the DWP.

106. I would highlight that the sum awarded as a compensatory award is not an amount calculated to reflect in some way the unfairness of the dismissal, it is a sum which reflects the claimant's losses (being relatively limited losses) as a result of the unfair dismissal.

Summary

107. For the reasons explained above, I found that the dismissal was unfair. I have set out the sums awarded as a result and the reasons for them.

Employment Judge Phil Allen

16 January 2025 (corrected on 31 January 2025)

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 January 2025

FOR THE TRIBUNAL OFFICE

Case No: 2404435/2023

Claimant: **Ms S Lindley**

Respondent: **Kidzruz Nursery Ltd**

ANNEX TO THE JUDGMENT (MONETARY AWARDS)

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2404435/2023**

Name of case: **Ms S Lindley** v **Kidzrus Nursery Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 22 January 2025

the calculation day in this case is: 23 January 2025

the stipulated rate of interest is: **8% per annum**.

S Harlow
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note:

www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.