Case No: 6015062/2025

EMPLOYMENT TRIBUNALS

Claimant: Ms Evemy

Respondent: Tops Day Nurseries

Heard at: Bristol (by CVP) **On:** 15th & 16th June 2026

Before: Employment Judge Clarkson

REPRESENTATION:

Claimant: In person
Respondent: Mr Foure, Solicitor.

JUDGMENT

1. The complaint of unfair dismissal is not well-founded and is dismissed

REASONS

Unfair Dismissal

1. This claim is brought by the Claimant, Ms Evemy, against her former employer Tops Day Nurseries. She represented herself at the remote hearing. The Respondent was represented by Mr Foure and provided four witnesses who gave evidence along with the Claimant.

2. A hearing bundle ran to 192 digital pages and a further witness statement bundle of 13 pages were provided. The Respondent also provided a list of issues and and a counter schedule of loss.

Claims and issues

3. The Claimant asserts that she has been unfairly dismissed.

4. It was not in dispute that the principal reason for the dismissal was the allegation of misconduct in relation to the child 'A' on 11/12/2024.

5. The Claimant claims unfair dismissal under section 98 Employment Rights Act 1996.

6. The issues the Tribunal has to determine are:-
   - Whether the Claimant's behaviour amounted to misconduct.
   - Did the Respondent hold the genuine belief that the Claimant had committed misconduct.
   - Was the procedure fair, including was the investigation reasonable in all the circumstances.
   - Was it fair to conclude that the conduct amounted to gross misconduct having regard to the Respondent size and resources.
   - Was it fair in treating the conduct as sufficient reason to dismiss the Claimant having regard to the factors the Claimant raised.
   - Was the dismissal within the band of reasonable responses of an employer.

The Facts

7. I will only refer to the evidence I consider pertinent to the matters in dispute.

8. The undisputed facts are that the alleged incident occurred with a child, A, who was a vulnerable preschool child with speech and language delay in the care of the Respondents.

9. Undisputed chronology:

   a. On 11/12/24 the Claimant's conduct in relation to JL took place.
   b. On 12/12/24 two of the Claimant's co-workers provided witness statements for the Respondent and the Claimant was suspended.
   c. The Respondent was notified by the local authority designated Officer to suspend internal investigations pending the conclusion of a police investigation.
   d. On 03/01/25 the local authority designated officer informed the Respondent's that the police would not be pursuing any action against the Claimant and that they could proceed with an internal investigation.
   e. On 06/01/25 a further witness statement was prepared by Miss Goosen.
   f. The Claimant was sent a notice of the investigation into her conduct.
   g. On 07/01/25 the Claimant had an investigation meeting with the Respondent.
   h. On 09/01/25 the Respondent had an investigation meeting with Mr Featherstone, Miss Anderson and Miss Goosen,
   i. On 16/01/25 investigation meeting was held with Miss Bull.

10. I make the following findings of fact in this case;

11. In regard to what happened on 11/12/24 I had the benefit of the witness statments and oral evidence of the Claimant, Ms Goosen, Mr Featherstone and Ms Anderson.

12. The Claimants account is that she was in charge of the supervision of children in the garden and that she became aware that child A had bitten another child and had then hidden themselves away in the garden and said they were upset. She described him as being over stimulated. Her evidence is that she therefore picked him up and placed him on a rug inside the nursery for him to calm down. The Claimant was cross examined about her actions and confirmed that when she found child A they were hiding not actively biting anyone. She confirmed that child A was capable of walking but that she picked him up and carried him to indoors as she said that she was giving him support to go to a calmer safer place.

13. When asked why she did not ask another member of staff to supervise him once she had placed him down she said that he did not need comforting. When she was asked if she agreed that the child was hiding and visibly upset she asked for break and when asked after the break why she had placed them down when they could walk and stand she said ‘he needed to be….my intention was to help them clam down’. The Claimant asserted that she did not use unreasonable force in placing the child down.

14. The evidence of Ms Anderson was that at the time she was an apprentice but had received safeguarding training and was working inside at the rear of the room with the sliding doors to the garden. Her evidence was that she heard the doors opening and turned around and said in her statement ‘then saw her flick his feet upwards so that his legs lifted and did not touch the floor first, before slamming him down on the floor inside the room.’ In her oral evidence she again described the incident of the Clamant putting the child on the floor as ‘slammed down on the floor’. Her evidence was that she asked another member of staff to attend to the child she had been with and ran to the child A who appeared visibly upset.

15. Mr Featherstone gave evidence to say that he was a level 3 practitioner and that he was in the kitchen when the incident occurred but turned and saw the Claimant ‘she was holding him and lifted him slightly before flicking his feet downwards so that he landed hard on his bottom on the floor’ and asserted that flicked his feet and threw him on the floor accurately describe what he witnessed. In oral evidence Mr Featherstone stated that he could not remember if the child was crying but remembered that they were upset.

16. Ms Goosen gave evidence that she was a level 2 practitioner and says that she had a clear view to the garden and observed the Clamant carrying child A, holding him under his arms and against her side. She described the Claimant forcefully putting the child on the floor attempting to put him on his

bottom. She confirmed in oral evidence that it was forceful and not a normal thing to see.

17. Both Ms Anderson and Mr Featherstone referred to hand written witness statements that they wrote on the day of the incident and that are contained withing the bundle. I find that their subsequent later statement and their oral evidence was consistent throughout. Ms Goosen did not provide a witness statement at the time of the incident. She gave oral evidence to explain that she thought her employers would contact her to make a statement. When they did not she alerted them to the fact that she had seen the incident and has provided her initial hand written note of the incident on 06/01/25. I note that this was promptly after the holidays and the police notification that they would not be taking action on 02/01/25. I find that her evidence had been consistent and do not find the delay in these circumstances affects the weight of her evidence.

18. The Claimant was also challenged as to why she did not ask another member of staff to deal with or supervise child A. Ms Andersons evidence was that she recalled the Claimant opening the doors for the second time, that her tone was sarcastic and that she was unhappy that child A had been moved. Mr Feathstone's evidence was that she had said something to the effect of I guess its ok to bite friends now, and believed the comment was directed at himself for comforting child A. Ms Goosen's evidence also confirmed that the Claimant had opened to door for a second time and said something about biting.

19. I find that the failure to specifically alert another member of staff reflective of the temperament and attitude of the Claimant at the time and consistent with the three witnesses who report her not raising the matter with other members of staff and then returning to say something in an irritated way that was not requesting assistance. The Claimant accepted in her oral evidence that her communicating could have helped get support. I weight this as supporting the account of the witnesses to the primary event.

20. The witness evidence orally was consistent with the witness statements provided by each of the three witnesses. The evidence was tempered and did not seek to exaggerate and was consistent with each other. The chronology of events is not disputed between the parties but what is disputed is the form in which the events took place.

21. The Claimant sought to challenge the evidence of Ms Anderson and Mr Featherstone as they said that they had discussed the incident before writing their statements. Their evidence was that they did not discuss the nature or contents of their statements. I accept that it would be perfectly normal and correct in a process of raising a safeguarding concern for one member of staff to report the matter to another. I find that their statemtns are reflective of their own words and consistent with their later evidence and do not find that they colluded or fabricated their evidence on the balance of probabilities.

22. The Claimant challenged the account given of the events and said she has not used undue force and that other people who potentially witnessed the event were not interviewed. She did not provide evidence from them to support her assertion of what took place. She said that there was no witness statement from Aven who was in the garden or Alison who was facing the garden. Whilst I accept that there may have been other members of staff that witnessed the event neither party has obtained this evidence for me to weigh. I do not find that the lack of further witness statements detracts from the weight of the witnesses who gave evidence in the investigation and also attended court and gave evidence.

23. The Claimant asserted that the witnesses should have checked the child for injuries and that they did not report any injuries. It was accepted in oral evidence that there was no visible bruising of the child and that the child had been wearing a nappy at the time. I do not find the lack of bruising detracts from the weigh to the evidence in regard to what happened.

24. I find that on the balance of probabilities the three witnesses are consistent and on balance correct in their description of the incident when they used the words dumped, thrown, forcefully, and slammed to describe the actions of the Claimant placing JL on the floor. More importantly I consider that this was the finding of the the decision maker which I find was a reasonable decision for them to make in the circumstances.

25. The Claimant challenged the evidence of Mr Featherstone on the basis that they should not have been holding a child whilst in the kitchen alleging that it was a ‘hot kitchen’. Despite being more senior to the witnesses to the event she did not raise this as a safeguarding matter during the rest of the day and I therefore do not take this assertion as detracting from the weight of Mr Featherstone’s evidence.

26. The Claimant has had time to reflect on the events and justified her actions in her oral evidence, that she could see the child through the door, that he did not need comforting, that he needed to be taken away from other children as he was overstimulated and he could not regulate himself enough to sit down by himself. It was the Claimants own evidence that she found the child hiding, that he had speech and language delays and that he was visibly upset and that he was able to walk by himself. On her own evidence I consider her her actions appear to be inconsistent with meeting the child’s needs at the time, with protecting other children, with reducing overstimulation or of justifying physical intervention and I find this damages her credibility. Her limited reflection that she could have communicated better adds weight to Mr Featherstone’s evidence that she came back and shouted and is indicative of a lack of understanding of the level of appropriate response despite the extensive training she says she has had.

27. In regard to the delay I accept on the evidence before me that the local authority designated officer was contacted and told the Respondents not to investigate further on 12/12/24 until the police had finished their investigation.

The police notified of the decision not to bring charges on 03/01/25. I do not find that the failure to bring charges detracts from evidence before me in regard to the alleged incident.

28. The Claimant asserted that she had been unaware of what was being investigated that the process had not been fair and at the hearing the Claimant raised that she believed that the other members of staff were jealous of her level five qualification and this affected their evidence. I do not find that this assertion is substantiated or probable on the evidence before me, nor would it affect the weight the investigation attached to it or that I attach to it.

29. In regard to the process the Claimant said in her oral evidence she did not exactly understand the allegation and did not understand through first few meetings but accepted that she did understand by the time of the disciplinary meeting.

30. In incident took place on 11/12/24. The Claimant was provided with a letter to say she was suspended on the same day in 'relation to breaches of safeguarding and possible harm to a child.'

31. The investigation meeting was on 07/01/2025. I note that this was after the police must have contacted the Claimant about the alleged incident, in order to make a decision on prosecution. At this meeting it says that 'It has been alleged that you flicked ' A's 'feet from underneath him and put him to the floor with force, can you please explain this allegation against you?'. I find this to a clear description of the allegation against the Claimant and the subsequent questions expand the queries relating to this specific action.

32. I can see that Ms Goosen was interviewed on 09/01/25 as was Mr Featherstone.

33. Included in the evidence is a witness statement from Ms Bull in which she gave an account of the Claimant at a previous place of employment. I place no weight on this evidence or the interview with Ms Bull as the warnings were no longer live and were not relied by the Respondent in regard to the incident on 11/12/24.

34. An investigation pack was completed which referred to previous conduct of the Claimant having been reported to the Local Authority designated officer who had advised that it was in regard to professional conduct. The records notes that the Claimant showed no remorse on being interviewed.

35. The claimant was called to an investigation meeting on 10/10/25. She acknowledged in her oral evidence that she could have been accompanied but explained that she had not paid for union membership. She was asked 'did you know it regarded' A 'and putting him down on the floor with force? Not exactly no'. Given specific wording in the investigation document and the investigation pack, which was provided prior to the disciplinary meeting, I do not find her assertion to be credible in this regard.

36. The investigation was carried out by Ms Harmer the nursery manger and Ms Callen the deputy manager.

37. A disciplinary meeting took place on 24/01/25, the letter of invitation clearly states the allegation and the Claimant accepted that she was aware of what the allegation was when she attended the disciplinary hearing. The Claimant said that she understood the situation and allegations and consulted a solicitor prior to this meeting. The Claimant asserted in her oral evidence that she had not been given the chance to give her account and it was only after she saw the solicitor that she gave her witness statement.

38. Mr Jones conducted the disciplinary meeting I note that he was different person to the person who carried out the investigation,

39. On 28 January 2025 the Claimant was summarily dismissed for gross misconduct.

40. The Claimant then appealed the decision on 10/02/25 and asserts that the Appeals officer failed to carry out her own investigation and failed to interview other potential witnesses. Ms Percival , the people director, wrote to the Claimant on 18/02/25 to say that despite her being out of time with no justification given she would invite her to a meeting to discuss the appeal on 26/02/25. On 27/02/25 the Appeal officer had a meeting with Ms Green the People advisor. A subsequent meeting took place between the Appeal Officer and the Regional Director Mr Jones on 05/03/25.

41. On 03 March 2025 the Disciplinary appeal outcome was notified the the Claimant. It was accepted that the wording 'previous warnings for breaches of safeguarding children' was incorrectly phrased as the warning was from 2023 and no longer live but confirmed that the decision was based primarily on the the seriousness of the current incident. The letter also accepted that Ms Bulls statement in regard to why the claimant left her previous employment should not have been included in the pack.

42. The letter confirming the outcome of the appeal stated:

> 'Conclusion
> The fundamental issue in this case is that your conduct on 11/12/2024 fell significantly below the standards expected of a childcare professional and constituted a serious breach of safeguarding protocols. The evidence from multiple witnesses establishes that you physically mishandled a child in your care and left them in distress, which represents gross misconduct
> warranting summary dismissal.
> While I have identified and addressed some procedural improvements that could have been made during the process, these do not alter the substantive findings regarding your conduct. Therefore, your dismissal is upheld.'

43. I therefore accept that the reason for the dismissal, despite the procedural issues, was the conduct on 11/12/24.

The Law

44. For ordinary unfair dismissal under section 98 Employment Rights Act 1996, the law is well-settled.

45. First, the Respondent has the burden of proving that there was a potentially fair reason for dismissal.

46. In order to decide whether the Respondent has shown that conduct was the reason for the dismissal of the Claimant, the Tribunal is required to consider the evidence available to the Respondent at the time of the dismissal.
47. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within s98 (4) Employment Rights Act, in the case of **British Home Stores Ltd v Burchell [1978] IRLR 379**:

    i) Did the Respondent genuinely believe in the misconduct of the Claimant?
    ii) Was that belief based on reasonable grounds?
    iii) Was a reasonable investigation carried out in the circumstances?
    iv) Was summary dismissal within the band of reasonable responses open to a reasonable employer in all the circumstances?

48. The Tribunal, when considering whether there was a reasonable investigation carried out, must consider whether procedure was fair, reasonable and complied with the ACAS Code of Practice for Disciplinary and Grievance Procedures or the relevant procedure operated by the Respondent. If it finds the Burchell test has been answered in the Claimant's favour or there is an issue with the procedure, the Tribunal is required to consider the percentage chance that the defect made no difference and the Claimant would have been dismissed anyway in accordance with the principles in **Polkey v AE Dayton Services Ltd [1978] UKHL 8**.

Findings;
49. The reason for the dismissal was the conduct of the Claimant in relation to the child A on 11 December 2024.

50. It is not for the tribunal to put itself in the shoes of the employer and determine what it would have done. The test is whether the decision to dismiss was within the range of reasonable responses.

51. I have accepted that the on the balance of probabilities the witnesses were correct in their description of the evidence that took place. I find that the

Respondent, came to that same reasonable conclusion and at each stage genuinely believed there had been misconduct. On the basis of the three witnesses the Respondent genuinely believed that there had been gross misconduct arising from the Claimant's conduct. They had accepted the evidence of three witnesses which describe the event slamming, flicking feet, landing hard on his bottom, forcefully putting the child on the floor on his bottom. On this evidence I find that there were reasonable ground for this belief.

52. The Respondent had evidence that the Claimant dumped, threw, slammed and forcefully sat a child down. I accept that they believed that this reached the level of gross misconduct and I find that this was a potentially fair conclusion based on reasonable grounds. I recognise that the Appeal process recognised errors in the investigation but do not find that this renders the investigation overall unfair or that that it undermines their conclusion.

53. The Claimant asserts that summary dismissal was not a reasonable response to the alleged misconduct. Having regard to the fact that the Claimant was in a position of great responsibility in regard to young children and in particular being responsible for the care of A who was a vulnerable preschool child with speech and language delay. That the description was of slamming, flicking, forcefully putting down and the consistent evidence of the child being upset, and further the Claimant not raising the incident with other staff or asking for assistance reflective of a type of conduct. The Respondent referred to standard expected of child care professionals, safeguarding protocol, physically mishandling a child, leaving the child in distress, a reasonable conclusion of the facts. I find that the Respondent's decision to classify her conduct as gross misconduct is within the bounds of reasonable responses of a reasonable employer. Given the role of the Clamant taking care of vulnerable small children the result of summary dismissal was reasonably open to the employer in these circumstances.

Procedure:

54. The Claimant asserts that there were procedural delays and that the procedure was not fair. I have not found the Claimant's account that she did not understand the allegations against her credible given the circumstances, she was clearly told allegation she had to answer and accepted in her oral evidence that although she had been asked questions about various aspects of the day by the time she had come to the disciplinary hearing she was clear what the alleged conduct was that had given rise to the disciplinary hearing.

55. In regard to the delay she accepted in her all evidence that the Respondent had not taken any action from 12 December through to 3 January due to the advice that they have received from the local authority designated Officer and I find that this did not cause unreasonable delay in the procedure to render it unfair.

56. The Claimant asserted that the evidence given by the witnesses was tainted by bias. In regard to the evidence of Miss Bull I recognise that the appeal officer disregarded the evidence and that it was not material to the events that happened on 11 December. I therefore do not find that it resulted in any unfairness in the investigation of the procedure. Whilst Miss Anderson and Miss Featherstone gave evidence that they had discussed the incident I find that this is a reasonable course of action having seen the incident and the need to report it to the senior management as a safeguarding issue. They both said that they did not influence all see the other statements and I accept the evidence. I do not find the balance of probabilities that there is anything to indicate the evidence of Miss Goosen was unduly influenced by anyone else and found her to be very credible and honest in her evidence. I therefore do not find that the respondent failed to be fair in replying on their procedure in these circumstances.

57. The Claimant also asserted that there was biased against her by her co-workers as she had the same level qualification as the manager but there is no evidence to support her assertion that this affected anybody else's behaviour or that there was even an issue in between her and her co-workers.

58. The Claimant's evidence over the course of the investigation and disciplinary process change in regard to who may be a potential further witness. It would appear that she principally was asserting an unfair process arising from the failure to obtain a witness statement from the member of staff accompanying her in the garden. Whilst I accept that there is the potential that this member of staff may have also seen part of the incident, I weigh this against her being outside when the force that amounted to the misconduct took place inside and the Respondent already had 3 other witnesses to that event.

59. The Claimant failed to present the Respondent with any evidence to contradict their other witness statements and I find that on balance the Respondent's investigation was fair having obtained three out of any other potential witness statements given the detail and consistency of their account. I do not find that the obligation is on the Respondent to interview every single person who was working to see if there was potentially further evidence to be obtained. The Claimant failed to raise an account that that differed in the event, it was the manner of the event that was disputed and the Respondent had obtained evidence from the people directly involved and closest to the incident. I find their Respondent's procedure was a fair and was a reasonable response in the circumstances.

60. The investigation and disciplinary process complied with the ACAS code of conduct.

61. I have considered whether the process was a fair process overall. I note the the Respondent accepts that some evidence should not have been referred to in their investigation, and I accept that it was was not directly relevant to a conclusion on the events that took place. I consider that the Respondent analysed the specific evidence in regard to the event that took place in December 2024 and accepted the evidence of the 3 witnesses and made their

decision to dismiss on the basis of that incident, as confirmed the the disciplinary appeal outcome letter.

62. The Claim for ordinary unfair dismissal under s98 (4) Employment Rights Act therefore fails.

Employment Judge Clarkson
Date: 18 October 2026

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
05 November 2026

FOR EMPLOYMENT TRIBUNALS