

RESERVED JUDGMENT



EMPLOYMENT TRIBUNALS

Claimant: Mr I Williams

Respondent: North Lakes Childrens Services Limited

HELD AT: Carlisle

ON: 19 - 20 September 2017

BEFORE: Employment Judge Humble

REPRESENTATION:

Claimant: Ms Parkinson

Respondent: Mr Tinnion

Reserved Judgment

The Judgment of the Employment Tribunal is that:

1. The claimant was not unfairly dismissed.
2. The respondent was not in breach of the claimant's contract of employment.
3. The claims are dismissed.

REASONS

The Hearing

1.1 The claimant was represented at the Hearing by Ms Parkinson, a lay representative. The Tribunal heard evidence from the claimant and from Reverend Peter Wright. The respondent was represented by Mr Tinnion of Counsel and

evidence was given by Paul Jenkinson, the respondent's investigating officer, Craig Smith, the dismissing officer and Catherine Garton, the appeals officer. The parties had prepared an agreed bundle of documents which comprised 272 pages.

1.2 There were some further documents produced in a separate bundle which comprised the claimant's supervision and appraisal records. The respondent's case was that these documents were not relevant to the issues in dispute but they were disclosed to the claimant the day prior to the hearing at the claimant's request. In the event the Tribunal were not drawn to those documents in evidence.

1.3 The evidence and submissions were concluded on the afternoon of 20 September 2017 and judgment was reserved.

The Issues

The claims and issues were discussed with the representatives and agreed at the outset of the hearing as follows:

Unfair Dismissal

2.1 There was a claim for unfair dismissal. The Tribunal would determine:

2.1.1 Whether the respondent had shown a potentially fair reason for dismissal pursuant to section 98(1) and (2) ERA 1996. The potentially fair reason relied upon by the respondent was conduct.

2.2 If the respondent was able to show that the dismissal was for a potentially fair reason the Tribunal would go on to assess whether the respondent acted reasonably under Section 98(4) having regard to:

2.2.1 whether the respondent had a genuine belief in misconduct on reasonable grounds having conducted a reasonable investigation;

2.2.2 whether the decision to dismiss was within the band of reasonable responses;

2.2.3 whether a fair procedure was followed in accordance with the ACAS Code of Practice; and

2.2.4 whether there was equitable treatment in accordance with Section 98(4)(b). This related to a consistency point, the claimant alleged that another employee who was culpable in the same or a similar manner was treated differently.

2.3 If unfair dismissal was established the Tribunal would go on to determine whether a Polkey reduction was relevant and whether any reduction should be made for contributory fault.

Breach of Contract

2.4 There was a wrongful dismissal or breach of contract claim, the claimant was

seeking his notice pay.

2.5 The claimant's representative clarified that the claimant was not seeking to recover any outstanding holiday pay.

2.6 During an adjournment on the first morning of the hearing the Tribunal read the witness evidence and it transpired that a significant section of the claimant's evidence, in particular paragraphs 62 to 74, related to matters which the claimant said had occurred before October 2016 (the date of the events which led to the his dismissal). In essence, the claimant alleged that he had raised concerns about issues of safety and pay and alleged that he was therefore viewed as a "whistle-blower" and was "set up to fail". These allegations did not form part of the claimant's pleaded case and the Tribunal sought clarification as to whether the claimant was seeking to rely upon these matters. The claimant's representative indicated that the claimant was not seeking to rely upon them and therefore evidence and submissions were taken only upon those issues which were before the Tribunal.

The Law

3.1 The Tribunal applied the law at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA 1996:

"In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

- a) the reason (or, if more than one, the principal reason) for the dismissal, and
- b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

Then by sub-section (2):

"A reason falls within this sub section if it:

- b) relates to the conduct of the employee..."

Then by sub-section (4):

"Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

- a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertakings) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- b) shall be determined in accordance with equity and the substantial merits of the case."

3.2 In considering this alleged misconduct case, the tribunal applied the long-established guidance of the EAT in British Home Stores v Burchell [1980] ICR 303. Thus, firstly did the employer hold the genuine belief that the employee was guilty of an act of misconduct; secondly, did the employer have reasonable grounds upon

which to sustain that belief and thirdly, at the final stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances.

3.3 The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98 (4). Thus, as confirmed by the EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree UK EAT/0331/09, this means that the respondent only bears the burden of proof on the first limb of the Burchell guidance (which addresses the reason for dismissal) and does not do so on the second and third limbs where the burden is neutral.

3.4 The Tribunal reminded itself that it must not substitute its own view for that of the Employer as to what is the proper response on the facts which it finds (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT as confirmed in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA). It was held in the case of Iceland Frozen Foods that:

“It is the function of the [Employment Tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.”

There may be occasions when one reasonable employer would dismiss and others would not, the question is whether the dismissal is within the band of reasonable responses.

3.5 The band of reasonable responses test applies to the investigation and procedural requirements as well as to the substantive considerations see Sainsbury’s Supermarkets Limited v Hitt [2003] IRLR 23, CA, Ulsterbus Limited v Henderson [1989] IRLR251, NI CA.

3.6 The Tribunal must take in to account whether the employer adopted a fair procedure in dismissing having regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. If the Employment Tribunal hold that the Respondent failed to adopt a fair procedure the dismissal must be unfair (Polkey v A E Deighton [1987] IRLR503, HL) and any issue relating to what would have happened with a fair procedure would be limited to an assessment of compensation (i.e. a Polkey reduction). The only exception to Polkey is where the Employer could have reasonably concluded that it would have been utterly useless to have followed the normal procedure (it is not necessary for the Employer to have actually applied his mind as to whether the normal procedure would be utterly useless, Duffy v Yeomans [1994] IRLR, CA).

3.7 On appeals, in Taylor v OCS Group Limited [2006] IRLR 613, the Court of Appeal stated: “What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.”

3.8 As to the consistency of approach, the Tribunal applied Hadjiioannou v Coral Casinos Limited [1981] IRLR 352, EAT and Paul v East Surrey District Health

Authority [1995] IRLR 305, CA.

3.9 The test for a breach of contract claim is quite different. The burden is on the respondent to show on a balance of probabilities, relying not only on matters known to it at the time but if necessary on after acquired evidence, that the conduct of the claimant was such as to fundamentally repudiate the contract of employment. This is commonly called “gross misconduct” and was explored by the Court of Appeal decision in Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 AU ER 285, CA among others.

Findings of Fact

The Employment Tribunal made the following findings of fact on the balance of probabilities (the Tribunal did not make findings upon all the evidence presented but made material findings of fact upon those matters relevant to the issues to be determined):

4.1 North Lakes Childrens Services Limited (“the respondent”) is a business which runs care homes for vulnerable children.

4.2 Mr Williams (“the claimant”) was employed by the respondent from 13 April 2011 to 22 December 2016. At the material time he was employed as a team leader at Kenilworth House in Carlisle, Cumbria (“the Home”), a residential care home for vulnerable children at which four children resided.

4.3 On 4 October 2016 the claimant was returning to work from holiday. He arrived at the Home shortly before his shift was due to commence at 3:00pm. His return to work coincided with an Ofsted inspection which was taking place at the Home, and of which he was unaware until his arrival. There were only two members of staff on duty that afternoon, a third member being absent on business, but Paul Jenkinson, a director of the respondent was also present to oversee the Ofsted inspection.

4.4 During the course of the handover from staff on the morning shift another employee informed the claimant that Revered Peter Wright was due to visit the home at 4:15pm to speak with CB, one of the vulnerable children at home. The background to the visit was that the claimant had provisionally arranged for Rev Wright to attend the home on Monday 26 September since CB had some religious concerns and the claimant believed he might benefit from speaking with a priest. The visit of 26 September was not confirmed and it was later re-arranged, in the claimant’s absence, to take place on 4 October. The claimant had previously had a telephone conversation with Rev Wright in which Rev Wright had said that he had been DBS checked, but in fact the DBS check was not verified by the claimant or any other employee of the respondent until sometime after the 4 October.

4.5 At approximately 4:00pm on 4 October 2016 Rev Wright arrived at the Home but there was no answer to the main door so he went to a rear door where he was let in to the premises by Paul Jenkinson. It was an odd aspect of this case that it transpired in evidence that it was Mr Jenkinson, the investigating officer and director of the respondent, who let Rev Wright into the home and showed him through to the kitchen. It was suggested in submissions that Mr Jenkinson and not made an admission to that effect in his evidence, but Rev Wright confirmed in his evidence

that he was let in to the building by a man who was not the claimant, and Mr Jenkinson (who was the only other man at the Home) conceded in cross examination that he believed he had answered the door and took Rev Wright to the kitchen area where he was met by the claimant. He then added that he could not recall and said that at the time he believed the claimant had opened the door. In view of Mr Jenkinson's equivocation and the evidence of Rev Wright, the Tribunal held that Mr Jenkinson did let Rev Wright in to the Home. This was odd since, when the claimant was later subjected to disciplinary action, among the allegations against him were that he had failed to sign Rev Wright into the Home, failed to check his ID and failed to ensure that he had a DBS check. Mr Jenkinson did not carry out any of these steps himself, nor was there any evidence that he had instructed the claimant to do so. The claimant for his part was not aware that Mr Jenkinson had let Rev Wright in to the property until after his dismissal.

4.6 The claimant met Rev Wright in the kitchen. At that time there were no children in the Home since they were still at school. The claimant had a brief conversation and made him a cup of tea. He did not check Rev Wright's identity or sign him in to a visitor's book. The claimant said that he recognised him from a photograph which he had seen on a church web-site. Shortly afterwards the children arrived, including CB, and the kitchen area quickly became overcrowded. The claimant therefore took CB and Rev Wright through to the dining room and sat with them at the dining table. After a while the claimant left Rev Wright and CB alone in the dining room and went back through to the kitchen, which adjoined the dining room and was separated from it by a glass partition. The claimant was required to attend to another boy at the Home, JM, who had an injured hand. He spent a short time speaking with JM in the kitchen while Louise McGrath, the other care worker on duty at the Home, was also in the kitchen. The claimant gave an instruction to Ms McGrath to "*keep an eye*" on Rev Wright and CB and then he left the kitchen with JM.

4.7 The claimant went through to the office where he obtained some medication which he administered to JM. Paul Jenkinson and Ms Charlie Bamber, the Ofsted inspector, were also in the office and were in conversation. While the claimant was still in the office with JM, Ms McGrath also came through to the room and the claimant said to Ms McGrath, "*How are those two getting on in there?*" meaning CB and Rev Wright. At that point the Ofsted inspector became agitated and said, "*it's not right, it's not right*". Ms Bamber asked Mr Jenkinson who was supervising the visitor and CB, and why both members of staff on duty were now in the office. The claimant then went back through to the dining room and sat with Rev Wright and CB until Rev Wright left the building at about 5:00pm. Rev Wright was signed into the visitor's book only at the point that he was leaving.

4.8 The following day, 5 October 2016, the claimant received a telephone call from Mr Jenkinson who informed him that he was suspended on full pay. It transpired that the Ofsted inspector had criticised the respondent for failing to meet safeguarding standards in respect of the visit of Rev Wright to the Home, and the report which was later produced stated that the young person had been "*put at risk of harm through a visitor not being accompanied*". The Home was rated as Outstanding overall but the safeguarding levels were downgraded from "*Outstanding*" to "*Good*" because of the incident. The report was produced at pages 145-157.

4.9 On 7 October 2016 Mr Jenkinson wrote to the claimant inviting him to a hearing

(page 159-160). The letter stated that a full investigation “*fact find*” would be carried out in respect of an alleged “*failure to follow health and safety guide around visitors to Kenilworth House; failure to follow NLCS safeguarding procedure; failure to protect a vulnerable young person; failure to effectively lead fellow staff around visitors to the home; [and] failure to provide the appropriate standard of work level of care.*” The letter erroneously referred to a disciplinary hearing when in fact it was intended that the claimant should attend an investigation meeting.

4.10 A meeting took place on Tuesday, 18 October 2016 and was conducted by Mr Jenkinson, with Jayne Coleman taking notes for the respondent. The claimant was accompanied by Michael Dodds, a manager from another care home who attended as the claimant’s companion. At the outset of the meeting Mr Jenkinson explained that it was an investigation meeting, which the claimant challenged since he had been informed that it was a disciplinary hearing. There was some confusion and, the claimant having requested various additional documents, it was decided to adjourn to a subsequent date.

4.11 The meeting was delayed until 18 November 2016, initially because of the unavailability of the claimant’s representative and later because of Mr Jenkinson’s absence from work. On that date the claimant again met with Mr Jenkinson, with Catherine Garton taking notes for the respondent and Mr Dodds attending as the claimant’s companion. At the meeting the claimant enquired, among other things, whether anyone else had been suspended and whether Ms McGrath had been interviewed. It transpired that no one else had been suspended and no statement had been taken from Ms McGrath. At the end of the meeting Mr Jenkinson said that he would “*fact find further information*”, but in the event no further information was sought by Mr Jenkinson before the matter was passed to the disciplinary stage.

4.12 On 29 November 2016, the claimant was invited to disciplinary hearing by Mr Chris Smith, a director of the respondent. The allegations remained the same as those which were set out at the investigatory stage, the letter of invitation was reproduced in the bundle (pages 179 to 180).

4.13 The disciplinary hearing took place on 13 December 2016, and a full transcript of that meeting was reproduced (pages 195-203). The meeting was conducted by Craig Smith with Jayne Coleman taking notes, and the claimant was unaccompanied. The claimant was given a full opportunity to put his case and he gave an explanation of the background to the incident and his involvement in it. He challenged procedural aspects of the investigation and requested copy documentation, including copies of any witness statements taken and a copy of the visitor’s signing-in book.

4.14 Mr Smith gave consideration to the matter and, having done so, took the decision to dismiss. The reasons for dismissal were set out in a long-winded letter dated 22 December 2016 which was produced with the assistance of a solicitor (pages 207-211). In essence, the matters which were in Mr Smith’s mind at the time of the dismissal, and which were articulated much more clearly in his evidence before the Tribunal than in the letter, were: a failure to sign Rev Wright in to the visitors book when he attended the Home; a failure to obtain identification from Rev Wright when he attended the site; a failure to ensure a DBS check was in place before he attended; and the claimant having left CB alone with Rev Wright

unsupervised. Of those four matters Mr Smith's main focus, and the one which he came back to repeatedly during cross examination, was the latter. The Ofsted inspector had witnessed the fact that CB was left alone with a visitor and indeed the claimant did not deny that CB been left alone. The claimant's case was that, initially he could see CB and the visitor through a glass partition and subsequently he had given an instruction to Ms McGrath to "*keep an eye*" on CB and Rev Wright while he attended to another boy. Mr Smith took the view that the claimant, as the team leader on site, was responsible for ensuring the safety of the child and he had failed to do so which had resulted in the adverse finding by Ofsted. Ms McGrath on the other hand was an inexperienced member of staff and looked to the claimant for guidance. At the time that he made his decision, Mr Smith was unaware that Mr Jenkinson had let Rev Wright in to the Home.

4.15 Between the date of the disciplinary hearing and receiving notice of dismissal, the claimant had submitted a formal letter of grievance against Mr Jenkinson, dated 22 December 2016 (page 206). The letter complained about Mr Jenkinson's handling of the investigation and the suspension and about alleged failures to follow the respondent's own policies and procedures pertaining to the investigation. Given that these were matters which pertained to the handling of the disciplinary process the respondent reasonably took the view that they should be dealt with as part of the appeal rather than convening a separate grievance hearing.

4.16 On 28 December 2016, the claimant submitted a letter of appeal against his dismissal (page 216-217). His appeal focused upon the respondent's policies and procedures and stated, among other things, that the respondent did not have in place any specific policy which referred to issuing a visitor's badge to any visitor to the home and that there was no instruction to check visitor's identification other than when an Ofsted inspection was taking place. The claimant's case was that he did not leave CB alone with the visitor but in fact instructed another member of staff, Ms McGrath, to "*keep an eye on*" the visitor and CB and it was her failure to properly supervise the meeting that had led to the safeguarding issue. The claimant also challenged some alleged discrepancies in the notes from the investigation meeting.

4.17 On 1 January 2017 the claimant was invited to attend an appeal hearing (page 219), which subsequently took place on 18 January 2017. The meeting was conducted by Catherine Garton, the respondent's director of education, with Rebecca Morton, an administrator taking notes for the respondent. Ms Garton had attended an earlier investigation meeting at which she had taken notes and it was submitted therefore that she was not impartial. Ms Garton presented as a genuine and credible witness and the Tribunal were satisfied that she was partial and was not involved in the decision making process which had led to the disciplinary process and subsequent dismissal.

4.18 Ms Garton gave the claimant a full opportunity to put his case. In summary, the claimant challenged the thoroughness of the investigation; said that signing the visitor's book was not a requirement under the respondent's own policies; maintained that he did not leave a vulnerable person alone with a visitor; and did not accept that the allegations against him amounted to gross misconduct. The claimant again questioned why a statement was not taken from Ms McGrath. Following the meeting Ms Garton contacted Ms McGrath and interviewed her. There was no written statement produced from Ms McGrath, but the Tribunal accepted Ms Garton's

evidence that she spoke with Ms McGrath who denied that she had been instructed to keep an eye on CB when the claimant went through to the office, leaving her in the kitchen. She said that this instruction only came from the claimant when she was in the office and only after the Ofsted inspector had become agitated and insisted that someone should be with CB. Mrs Garton accepted Ms McGrath version of events and, in circumstances where she was presented with two conflicting versions of events, it was not an unreasonable view for her to take. Ms Garton was also unaware of Mr Jenkinson's involvement in letting Rev Wright into the Home.

4.19 Ms Garton explained in evidence that she regarded the safeguarding of the children as of extreme importance and the lack of proper monitoring and supervision of the visitor and child was foremost in her mind. She therefore upheld the decision to dismiss the claimant and the reasons for the decision were communicated by a letter of 7 February 2013 (page 229-231).

Submissions

5.1 The respondent's submission was that this was a care home for extremely vulnerable children, some of whom had suffered from a history of abuse. The respondent owed these children the highest possible duty of care and had to ensure that safeguarding was such that no harm came to them. The respondent was in breach of its duty of care on 4 October 2016 because of the claimant's actions. A stranger to the home had spent five minutes by himself with a vulnerable child with no one else in the room supervising him. The visitor's identification had not been checked, he has not been signed in and there was no DBS check. The most serious breach was the fact that the visitor was left unattended with a vulnerable child. This was picked up by an Ofsted inspector and adversely affected the Home's Ofsted rating.

5.2 It was submitted that responsibility for all these things rested with the claimant, he was the team leader on site responsible for safeguarding that afternoon. He had not given any clear instruction to Ms McGrath, even on his own case he told her only to "*keep an eye*" on CB he did not instructed her to sit with the visitor to ensure that they were supervised. Ms McGrath was an inexperienced member of staff and it was the claimant's responsibility. As to Mr Jenkinson, it was said that he was more cautious in his evidence than simply admitting that he had let Rev Wright into the home, but rather he indicated that he may have done so. In any event it was submitted that he was not an employee of the respondent but rather was an officer of the Company, holding the position of director, and he was not on site in a safeguarding role but rather to deal with the Ofsted inspection and was with the Ofsted inspector throughout the course of that day.

5.3 It was submitted that the dismissal was procedurally fair, it was a lengthy process involving two investigation meetings, a disciplinary hearing and appeal and each stage of the process was dealt with by different senior managers. They found that the claimant was responsible for the failure to carry out checks on Rev Wright and for having left him alone with the child. It was submitted therefore that the decision to dismiss was within the band of reasonable responses of reasonable employer. It was pointed out that there had been many high profile cases of abuse in care homes in recent times and safeguarding standards needed to be maintained at all times. It was said that the claimant's failure to maintain those standards amounted

to gross misconduct and therefore the dismissal was fair and the respondent had also satisfied the test for wrongful dismissal.

5.4 It was submitted on behalf of the claimant that he was not treated reasonably or fairly. In terms of the process there were unreasonable delays, in particular from the suspension on 5 October to the investigation meeting of 19 November 2016 there was a delay of 45 days, and documents were not provided to him. The initial letter inviting him to hearing stated that it was a disciplinary hearing instead of an investigation meeting and this showed that the decision to proceed to a disciplinary was pre-determined. It was also said that there was insufficient investigation and in particular a statement should have been taken from Ms McGrath an early stage. It was also suggested that other people should have dealt with the disciplinary and appeal hearings, Ms Garton was involved in an earlier investigation meeting and therefore should not have conducted the appeal. It was said that the respondent's policies and procedures did not correspond with the allegations put to the claimant in respect of signing a visitor's book and checking for identification.

5.5 It was submitted that CB was not put at any significant risk. The child was allocated free time by the Home during which he was allowed to leave the Home and associate with other people. If a proper explanation had been provided to Ofsted it could have been dealt with without any disciplinary consequences. The claimant was not in any event to blame for the child being left on his own since this was down to Ms McGrath who the claimant had left in charge of the situation and she was not an "unqualified" member of staff as the respondent sought to make out. Further, Mr Jenkinson was also to blame since he was most senior member of staff on duty that day and he let the claimant in to the Home without doing any of the things of which the claimant was accused.

5.6 There were also a number of mitigating circumstances to take in to account. The claimant had just returned from his holiday, he had no prior notice of the meeting with Rev Wright and so was not prepared for the visitor arriving. The Home was also short staffed because one member of staff was out of the home that afternoon. The claimant had a good work record, he always set the highest standards of safeguarding and ironically the reason Rev Wright visited because the claimant tried to assist CB by bringing in a priest to seek to alleviate some religious concerns which CB had expressed. He was therefore acting in the best interests of the child.

Conclusions

6.1 The Tribunal were satisfied that the dismissal was by reason of conduct in accordance with section 98 (1) and (2). While some other reasons were alluded to in the claimant's witness statement, these were not pleaded and not relied upon at the hearing. The Tribunal were satisfied from the evidence of Mr Smith and Ms Garton that the operative reason in their minds at the time of the dismissal was conduct. There were essentially four reasons which were relied upon: a failure to sign Rev Wright in to the visitors book when he attended the Home; a failure to obtain identification from Rev Wright when he attended the site; a failure to ensure a DBS check was in place before he attended; and the claimant having left CB alone with Rev Wright unsupervised. The main focus of both Mr Smith and Ms Garton was the fact that a visitor to the Home had been left unsupervised with a child in their care.

6.2 In respect of reasonableness under section 98(4), there were some deficiencies in the investigation. The main one, and the unusual aspect of this case, was that Mr Jenkinson, the director who conducted the investigation did not himself do some of the things of which he accused the claimant. Mr Jenkinson let Rev Wright in to the Home but did not ask him for any identification and did not sign him in to the visitor's book. He directed him through to the kitchen where the claimant was present but he did not give any instructions to the claimant about signing in the visitor or checking for identification. The Tribunal was therefore troubled by Mr Jenkinson's readiness to blame the claimant for these matters and by the fact that Mr Jenkinson did not interview Ms McGrath. Despite saying that a further "*fact find*" would be done at the end of the final investigation meeting nothing further was done before the matter was passed to the disciplinary stage. These facts tended to support the claimant's contention that he was made a "*scapegoat*" for the adverse Ofsted findings on safeguarding.

6.3 In respect of the key allegation however, and the main one which was operative in the minds of Mr Smith and Ms Garton, these were not matters which required much investigation. The claimant accepted that he left the child alone with a visitor (albeit for a short time and he said he could see them through a glass partition and then gave an instruction to a junior colleague to "keep an eye" on them) and admitted that he had not seen a DBS check for the visitor or any form of identification. The only point which required some investigation here, and the one significant flaw, was the failure to interview Ms McGrath during the investigation and disciplinary stages. This flaw was corrected by Ms Garton on appeal since she interviewed Ms McGrath and accepted her evidence that she was only given an instruction to the effect that she should supervise the meeting after the intervention of the Ofsted inspector. Despite some reservations, looking at the process as a whole, the Tribunal found that the investigation did fall within the band of reasonable responses of a reasonable employer. Likewise, applying Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA, the procedure fell within the band of reasonable responses. The delays were not substantial and were caused, in part at least, by the claimant's requests for adjournments and for documents. The Tribunal was not persuaded that the documents requested by the claimant, including the visitors book and his supervision reports, had any bearing upon the issues to be determined.

6.4 In terms of the substantive decision, Mr Smith and Ms Garton presented as credible witnesses and appeared to be genuinely concerned about the safeguarding issue. They were unaware of Mr Jenkinson's involvement in letting Rev Wright in to the Home but, in any event, Mr Jenkinson was present that day to deal with the Ofsted Inspector and was not supervising the visitor. Mr Smith and Ms Garton took a reasonable view that the claimant was the team leader in charge of the Home at the relevant time and had taken responsibility for supervising the meeting. The matter was, they reasonably believed, a potentially serious safeguarding issue and was identified as such by Ofsted. In those circumstances the Tribunal held that the decision to dismiss did fall within the band of reasonable responses of a reasonable employer.

6.5 The Tribunal were not convinced that a failure to sign the visitors book or to obtain identification from the visitor would, on its own, have amounted to serious misconduct justifying a dismissal, nor were the Tribunal convinced that the respondent's policies and procedures were such that there was a clear policy or a

regular practice of signing in visitors and obtaining identification. The failure to obtain a DBS check was more serious but it was not solely the fault of claimant since he had not arranged the meeting of 4 October and had only just returned from a holiday. The claimant was however responsible for leaving the visitor alone with the child. He sought to deflect blame on to Ms McGrath but this was a junior and inexperienced member of staff who, on the claimant's own evidence, could not be relied upon to follow instructions. Further, the limit of his instruction to her was "*keep an eye*" on the visitor and CB which was not a clear and unambiguous instruction to the effect that she should sit in on the meeting and supervise the visitor at all times. This then also explains the respondent's different treatment of Ms McGrath in comparison to the claimant.

6.6 Turning to the breach of contract, or wrongful dismissal claim, the test here is different. The Tribunal can substitute its view for that of the respondent: the test is whether the respondent had shown that the claimant's conduct was such that it amounted to a repudiatory breach of contract, a gross misconduct offence. The Tribunal had some difficulty with this assessment. The Tribunal were satisfied that the claimant was the team leader in charge that afternoon and was responsible for the supervision of the meeting. However, he was an employee with a good track record, he had the welfare of the children at heart, and he had arranged the meeting with the Rev Wright for the benefit of the child. He was under some pressure, having just returned from his holiday and trying to deal with other matters in the home, and the child was left alone with the Priest for only about five minutes. It should be added that the Rev Wright was DBS approved and there was no suggestion that his meeting with CB was anything other than beneficial for the child. To an extent the claimant was a victim of circumstance since, if the Ofsted Inspector had not been present, then that short period the visit that was unsupervised would probably never have come to light. The relevant point however is what might have happened, the potential risk to a child in those circumstances which was summarised in the Ofsted report. Practices in social care have evolved a great deal in recent years in large part, as Mr Tinnion pointed out, because of the highly publicised cases of abuse which have occurred in various care homes. There is a requirement to be vigilant at all times when a visitor is at a care home with a child, particularly a visitor who is not known to the care home and from whom a DBS check has not yet been received. Accordingly, while this was not a straight forward decision, on the balance of probabilities the Tribunal held that the claimant's actions were sufficiently serious to amount to gross misconduct justifying a summary dismissal. The breach of contract claim is therefore dismissed.

Employment Judge Humble

Date: 12th October 2017

JUDGMENT SENT TO THE PARTIES ON
24 October 2017

FOR THE TRIBUNAL OFFICE