EMPLOYMENT TRIBUNALS

Claimant: Ms C Squires

Respondent: Braunstone Childcare Co-operative Limited

Heard at: Leicester

On: 26, 27 and 28 November 2018

Before: Employment Judge Faulkner (sitting alone)

Representation

Claimant: Mr V Phipps (of Counsel)
Respondent: Mr S Joshi (Solicitor)

JUDGMENT

1. The Claimant was unfairly dismissed. Her complaint of unfair dismissal is therefore well-founded.

2. The matter will now be listed for a further Hearing to determine the question of remedy. The parties will be requested to provide dates of availability for that Hearing.

REASONS

Complaint

1. On the second day of the Hearing, Mr Phipps confirmed that the Claimant was satisfied that she had been paid, including in respect of notice, in line with her contractual entitlements and thus no longer pursued complaints of breach of contract or unauthorised deductions from wages. Accordingly, the sole complaint to be determined by the Tribunal was that of unfair dismissal.

Issues

2. It was agreed at the outset that the Tribunal would deal with matters of liability only, going on to deal with remedy should the Claimant succeed in her complaint. It was also agreed therefore that the issues to be decided were as follows:

2.1. Has the Respondent shown the reason for dismissal?

2.2. If it has, was it a fair reason within section 98 of the Employment Rights Act 1996 ("ERA")? The Respondent relies on conduct.

2.3. If so, was dismissal for that reason fair in accordance with section 98(4) ERA? That entails considering the following:

2.3.1. Did the Respondent believe that the Claimant had committed misconduct?

2.3.2. Did the Respondent have reasonable grounds on which to sustain that belief?

2.3.3. When finally forming that belief on those grounds, had there been as much investigation as was reasonable in the circumstances?

2.3.4. Did the Respondent follow a fair disciplinary process?

2.3.5. Was dismissal within the range of responses of a reasonable employer?

Facts

3. The parties produced an agreed bundle of over 200 pages. Page references below are references to that bundle. I read most of that material during allocated reading time before hearing oral evidence, though I made clear it was for the parties to draw my attention to any document they deemed relevant for me to consider, other than documents referred to in witness statements.

4. Those witness statements were prepared for the Claimant, Mr Gary Blockley (the Respondent's Nursery Manager) and Ms Jenny Brennan (the Respondent's Deputy Nursery Manager), each of whom also gave oral evidence. There were additional statements prepared by Jane Riley (who as will appear below was involved in the Claimant's appeal against dismissal), Zoe Tabor (formerly employed by the Respondent as one of the "Room Co-ordinators" in its Nursery) and Anthony Molyneaux (known to the Claimant socially). None of those three gave oral evidence. It must follow that their statements are afforded less weight than the evidence of those who were present to be questioned. It also follows that where a witness who was present gave evidence as to what one of the absent witnesses said, that evidence was unopposed unless challenged in some other way.

5. The Respondent runs a nursery in Leicester ("the Nursery") for children aged six weeks to four years 11 months, employing around thirty staff. It has a board of trustees. Mr Blockley runs the Nursery on a daily basis, assisted by Ms Brennan, both of them also being trustees. It was necessary in the course of the Hearing, and it will be necessary in the course of this Judgment, to refer to two of the children who attended the Nursery. It was agreed that they should at all times be referred to as Child A, who was the main focus of the issues in this case, and Child D who featured importantly but more peripherally.

6. The Claimant was employed as a cook, from 11 January 2010 until she was dismissed with effect from 22 November 2017. Her job description (page 33) provided amongst other things that she was required to "provide nutritious and well-balanced meals and snacks that meet the dietary and cultural needs of the children". The Respondent's health and safety policy (see pages 44 and 46 to 47) stated, "We operate systems to ensure that children do not have access to food/drinks to which they are allergic. //Staff understand and implement the food and drink policy" and also said that records were kept of "the allergies, dietary

requirements and illnesses of individual children". The Food and Drink Policy, at pages 48 and 49 stated, "We aim to provide nutritious food, which meets the dietary requirements of the children … we regularly consult with parents to ensure that our records are kept up to date, including allergies we ask the parents to sign the updated records to signify that it is correct … we implement systems to ensure that children only receive food and drink that is consistent with their dietary needs and their parents' wishes … we provide nutritious food at all meals and snacks". In respect of allergies it said, "We take account of [information about food allergies] in the provision of food and drinks". Mr Blockley said in his witness statement that systems were in place to ensure children only receive food and drink consistent with their dietary needs. The importance of ensuring dietary requirements of children are observed is of course uncontested.

7. The Respondent's inclusion and equal opportunities policy, adopted in May 2017, is at pages 139 to 145, including at page 145 a statement that, "We will work in partnership with parents to ensure that the medical, cultural and dietary needs of the children are met". The Claimant signed a copy of the policy on 9 June 2017.

8. It is necessary to say something about how, during the Claimant's employment at least, the Respondent sought to fulfil the commitments outlined above to ensure that the dietary requirements of the children in its care were met, and the role of the Claimant in doing so as cook. Beyond the aspirational statements mentioned above, there was no formal procedure. Ms Brennan initially insisted in oral evidence that the Food Policy expressly provided how a child's needs should be communicated from the parents all the way through to the kitchen, but eventually conceded that it did not. Nevertheless, broadly speaking, how the process should have worked seems to have been well understood.

9. Each child in the Nursery was allocated to a particular room, each of which had a Room Co-ordinator. Information about a child's dietary requirements would normally be obtained by the relevant Room Co-ordinator speaking to the parents or carers. The Co-ordinator would then fill in a form, which would be signed by the parent or carer. Page 153E is an example showing that on 10 May 2017 it was noted that Child A should not have any egg, but could have them in cakes, and then from 15 August 2017 that they could have a "normal diet, can now have egg". The Claimant did not see the forms signed by the parents (such as at page 153E); they seem to have been seen by the Room Co-ordinators only. Accordingly, the Claimant says that she did not see the form completed by the Room-Co-ordinator and signed by one of the parents of Child A at page 153F until it was included in the bundle. Given the nature of the document, I accept her evidence.

10. The Room Co-ordinator was expected to take page 153E or its equivalent and put it into a "dietary requirement chart". This is reflected in the note of a meeting between Mr Blockley, Ms Brennan and the Claimant on 25 August 2016, noted at pages 88 to 90, where it was said, "Dietary requirements – this will be given to you daily – by 10.00 am … Room Co-ordinators will ensure you have this by then – [Mr Blockley] to remind and let staff know at next staff meeting … if Room Co-ordinators are not in then this will be arranged through the room …". Page 159, which included information relating to Child A (as well as other children in the same room) for the month of November 2017, is an example of a dietary requirement chart. It was intended that they would be placed on the kitchen fridge as a reminder to the Claimant of the particular child's dietary needs. It is accepted that this was all the Claimant had to go by in determining

what kind of food to produce. The dietary requirement charts should have been produced monthly. That for October 2017 in respect of Child A, was not produced to the Tribunal. Neither Mr Blockley nor Ms Brennan could explain why, Ms Brennan saying no more than that it went missing from her office. At page 185, which is part of the record of the Claimant's appeal meeting with Jane Riley on 11 December 2017, Ms Riley is recorded as saying that she had asked the Respondent about the October dietary requirement chart and was told it couldn't be found.

11. The Claimant's role, when made aware of particular dietary requirements, was to provide food to meet them. She accepts of course that the welfare of children is rightly of paramount concern to the Respondent and its managers. Page 153A is an example of a "menu plan", in that case for mid-October 2017. This was something the Claimant produced so that all parents could know what their children would be eating. The plan indicates what it was intended the children would eat but not what they actually ate, as the actual feeding of the children was supervised or carried out by employees other than the Claimant. The final documentation relevant to the provision of food to children is effectively a diary. Diaries for Child A from mid-October to mid-November 2017 are at pages 148A to 153. They show what the child was actually given to eat for each day attended and also includes space for comments by parents/carers.

12. The Claimant had good – or at least satisfactory – appraisals historically, up to October 2015 (pages 50 to 69) and in May 2016 (pages 76 to 79). Mr Blockley says that he would not necessarily have highlighted misconduct in such meetings as he would deal with such matters separately, but agreed in oral evidence that the Claimant's appraisals showed that she was knowledgeable about dietary requirements and careful about implementing them. Mr Blockley's witness statement at paragraphs 11 to 13 includes reference to various informal discussions with the Claimant regarding her conduct at work, including leaving open a gate to the Nursery premises (see also page 80), and leaving her work area when she was needed (see also page 91). I will return to Ms Brennan's evidence in this regard in due course. It is agreed however that there were no more than two formal disciplinary warnings given to the Claimant prior to her dismissal.

13. The Respondent says that its disciplinary procedure (pages 32 to 36) formed part of the Claimant's contract of employment. It includes in a list of general acts of misconduct, rendering employees liable to disciplinary action, "failure to abide by the general health and safety rules and procedures … unsatisfactory standards or output of work … failure to carry out all reasonable instructions or follow our rules and procedures … a breach of OFSTED regulations". In respect of "serious misconduct", it says, "Where one of the unsatisfactory conduct or misconduct rules has been broken and if, upon investigation, it is shown to be due to your extreme carelessness or has a serious or substantial effect upon our operation or reputation, you may be issued with a final written warning in the first instance". In a non-exhaustive list of acts of gross misconduct on page 36 it includes, "serious breach of OFSTED regulations" and "breach of health and safety rules that endangers the lives of, or may cause serious injury to, employees or any other person". At page 37 the policy says, "In all cases warnings will be issued for misconduct, irrespective of the precise matters concerned, and any further breach of the rules in relation to similar or entirely independent matters of misconduct will be treated as further disciplinary matters and allow the continuation of the disciplinary process through to dismissal if the warnings are not heeded". Final written warnings are said (page 38) to normally be disregarded after 12 months.

14. The Claimant received a written warning on 23 December 2016 (page 115), on the basis that she had discussed another employee's private life with that employee, against her wishes, in front of others. She received a final written warning on 26 January 2017 (page 118), as the Respondent says that she left the premises without authorisation during working time. The warning letter did not say how long the warning would be in place. It did say, "Any further disciplinary processes will result in termination of employment".

15. The Claimant appealed the final written warning on the basis that she says she had only left the premises during her lunch break, had been unable to notify Ms Brennan directly, but had asked that a message be passed on to her. She had left to purchase a cooking hat for work. Her appeal was denied. Mr Blockley, who had given the warning, heard the appeal himself and confirmed his original decision. I note that in September 2016 the Claimant brought a grievance against Ms Brennan relating to the way Ms Brennan allegedly spoke to her (pages 95 to 98). It is not necessary for me to say any more about it, though I understand the grievance was not upheld.

16. On 29 June 2017 the Claimant met with Mr Blockley. A note of that meeting is at page 131 and was signed by the Claimant. Amongst other matters, they discussed dietary requirements. The note says, so far as relevant to this issue, "A discussion was had regard to children with dietary requirements, one child in particular with lactose intolerance, [Mr Blockley] wants [the Claimant] to make puddings that the child can have that look similar to others, eggless cakes and so on, as the child always has a yoghurt when others have cake puddings. [The Claimant] agreed and will explore doing various puddings to accommodate children with dietary requirements".

17. The discussion did not concern Child A; it was about Child D. Mr Blockley agreed in oral evidence that was the case. He nevertheless says in paragraph 22 of his statement that the Claimant "was fully aware of which child was under discussion", says in paragraph 23 that it was clear she was aware of "specific children's dietary requirements" and then says in paragraph 24, "In November 2017, it was brought to my attention that [the Claimant] was not adhering to the child's dietary requirements", going on to explain in subsequent paragraphs the investigation he carried out which I shall come to below. The point is that it is clear that in his statement Mr Blockley is referring to Child A having been the child under discussion at the 29 June meeting, when it was clearly Child D.

18. Mr Blockley said in his evidence that as part of its commitment to equal treatment of any child who came into the Nursery with special dietary requirements, the Respondent needed to provide puddings that looked the same as those given to others. He also said that the Claimant should have kept a stock of such puddings in the freezer, though he did not instruct her to do so at the June meeting. At paragraph 22 of his statement Mr Blockley says that he "personally purchased food for the child and brought some containers to enable the Claimant to date them and store frozen food and ingredients" and in his oral evidence he referred to the note of the June meeting and said that he did refer to containers to put in the freezer. He subsequently accepted however that the first paragraph of the note, the only one dealing with this issue, does not mention containers at all. A plain reading clearly shows that the reference to containers was not a reference to storing special puddings or other food in the freezer, but about serving food to the children generally. Mr Blockley accepts that the requirement to provide similar looking food for all children was not explicitly stated in any policies, but says that it was well-known. The Claimant accepts that

when she said she was going to explore doing various puddings to accommodate dietary needs, this referred to producing a modified version that looked the same as the puddings most children would be having. For her part, Ms Brennan describes Mr Blockley's instruction at the meeting (paragraph 9 of her statement) as "to ensure the child has similar puddings to that of the other children that are fit for their individual consumption".

19. Mr Blockley held a supervision meeting with the Claimant on 26 October 2017, the notes of which are at pages 154 to 156. Ms Brennan was also present. The Claimant says the meeting was very positive, which is a broadly fair reflection of what is said in the notes. Mr Blockley says, also fairly, that the issues which were shortly to lead to the Claimant's dismissal had not at this point come to his attention. He asked the Claimant about any issues in the kitchen and none were identified. The notes also show that the Claimant's absence levels were discussed, and record Mr Blockley saying that he had recently spoken to other nursery managers who accommodate more children but do not have a full time cook. He stated, "I am trying to justify your position". He asked the Claimant whether she wanted to work term-time, which she did not for financial reasons. Ms Brennan is recorded as saying, "we have to think like a business if this is viable". Neither of the Respondent's witnesses agreed that these statements indicated they were considering removing the Claimant from the business, saying that the discussion was about how they could help her work most efficiently. In her own brief evidence on the point, the Claimant emphasised the Respondent's concerns about her attendance.

20. The day after the meeting, 27 October 2017, was the Claimant's last day at work before she went on holiday abroad, returning home on 14 November. Prior to going away, on 10 October 2017, the Claimant was informed that Child A was being taken off cow's milk. This had been communicated by one of Child A's parents to Ms Tabor, resulting in the completion of the form at page 153F. The Claimant's unchallenged evidence was that she found out about Child A's lactose intolerance when another practitioner working in the same room as Ms Tabor, Kerry Grant, shouted over words to the effect, "Cook, Child A can't have cow's milk now, whilst they are waiting for a medical appointment; the doctor has advised to take them off drinking milk [effectively as a trial to test for allergies]. They can have everything else, but not drink milk". As a result of this, the Claimant arranged for the purchase of lactose free milk. The Claimant saw the parent the next morning who explained the situation to her in the Nursery car park, thanking the Claimant for what she had done. The Claimant left instructions for colleagues to ensure that more lactose-free milk was purchased whilst she was away.

21. Whilst the Claimant was away, someone took over her responsibilities as cook. On an unspecified date, but in all likelihood around 8 November, that person informed Mr Blockley that she was making a pudding for Child A which was different to that being made for other children. It appears Mr Blockley enquired why she could not get something out of the freezer and that she replied that no appropriate cakes were available so that Child A had been having fruit or yoghurt.

22. The details of what Child A had been eating whilst at the Nursery can be ascertained to some extent from the diary I have referred to. Child A attended six sessions between the Respondent being given the information about cow's milk and the Claimant going away on leave. Those sessions were on 12, 16, 17, 19, 23 and 24 October. Pages 148A, 149A, 150A and 151A are the relevant diary entries, which would usually though not necessarily always have been completed

by the Room Co-ordinator, in this case Ms Tabor. By comparing the diary entries to the general menus prepared by the Claimant it is possible to see, at least to some extent, the differences between the food given to Child A and the food given to children generally on these days. On 12 October, broadly similar main meals were given to Child A and to others; nothing is recorded on this date for Child A's pudding (page 148A). For 16 October (page 149A), by comparison with the general menu at page 153B it can be seen that for lunch others had Bolognese pasta bake, and Child A had Bolognese and potatoes, not pasta, with banana for pudding, whilst other children had apple cake. Child A was not present for tea. On 19, 24 and 26 October Child A appears not to have had the dessert generally available to other children.

23. On 8 November Mr Blockley and Ms Brennan spoke with Ms Tabor; a note of their discussion is at page 158. Ms Tabor was asked why Child A was not being provided with food similar to others but compliant with their dietary requirements, the note recording, "[Mr Blockley] asked … why you didn't question why [the Claimant] wasn't providing a variety of food or puddings – Zoe never thought to question this to [the Claimant], consequently the child has been given mainly fruit and potatoes". It was also discussed that Child A's food diary was not completed in full, which was of course Ms Tabor's responsibility.

24. Ms Tabor says in her statement that she said to Mr Blockley that the room staff were responsible for giving Child A fruit as opposed to sugary puddings and that this was in response to a parental request. Mr Blockley accepts that he was told by Ms Tabor about that request. Ms Tabor also says in her statement that it was ten days before the Claimant went away on leave that Child A was put on lactose-free milk, which is uncontroversial. She then goes on to say that it was in November 2017 (paragraph 4) that Child A was put on a dairy free diet for a month. The dietary requirement sheet for November 2017 (at page 159) says in respect of Child A, "Dairy free diet only". That sheet would of course have been put in the kitchen whilst the Claimant was away. As already noted, the Tribunal has not seen the sheet for October. Neither Ms Brennan nor Mr Blockley said explicitly in their evidence that the missing sheet stated Child A to be on a dairy free diet at that point. In fact, when initially asked about it Ms Brennan said it would have "supported the Claimant's claim", though she subsequently sought to modify that comment. All of that evidence is consistent with the agreed position that the parents were trialling taking Child A off cow's milk for a month from 10 October to test for lactose intolerance, and the agreed position that this does not necessarily equate to Child A being on a dairy free diet at that point. It is also consistent with the fact that the Response refers only to a dietary requirement sheet for November 2017 (page 31C). What is said in Ms Tabor's statement therefore seems to be borne out by the documentary evidence. Ms Brennan agreed that the note on page 158 of Ms Tabor saying she "never thought to question this to [the Claimant]" was in effect Ms Tabor saying that she had not raised Child A's dairy-free requirement with the Claimant. Ms Brennan went on to say that Ms Tabor had said something different in another (unrecorded) discussion with Mr Blockley, to the effect that the children were not getting the food Mr Blockley had asked the Claimant to provide.

25. On 9 November 2017, Mr Blockley and Ms Brennan began an investigation into what had been discovered. It does seem to me that this suggests there had only been one conversation with Ms Tabor, that noted at page 158, on the previous day. It is said in the Response (page 31C) that several people were interviewed including Child A's parents. The only evidence before the Tribunal that staff other than Ms Tabor and another Room Co-ordinator called Georgie Illston, were interviewed is at a time after the disciplinary hearing took place (see

below) and the only evidence of the parents being interviewed was in February 2018. Accordingly, I do not accept the Respondent's broad assertion.

26. What is clear is that Mr Blockley met with his fellow trustees on 9 November, conveyed the facts of the situation, and got the trustees' permission to suspend the Claimant. There was no record of that meeting in the bundle and the Claimant was of course still on leave. Mr Blockley says, and I accept, that the broad content of what he said to governors was that a matter of concern regarding dietary requirements had been brought to his and Ms Brennan's attention, they had to investigate further and wanted to suspend the Claimant before she returned from leave, which he saw as being more compassionate than doing so when she was actually on the premises. Mr Blockley cannot say whether he brought the trustees' attention to Ms Tabor's evidence of 8 November. I am bound to conclude that he did not.

27. At paragraph 28 of his statement, Mr Blockley says that he held a meeting with the Claimant on 9 November to inform her of her suspension. He accepted in oral evidence that he did not in fact do so as she was still abroad at that point. He explained the error by reference to his dyslexia. At paragraph 29, he says that suspension was necessary because the Claimant's failure to follow his June instruction went "to the heart of our relationship of trust and confidence".

28. A letter suspending the Claimant was hand-delivered to her home whilst she was away. It was dated 10 November 2017 and is at page 160. As well as communicating her suspension, the letter invited the Claimant to a disciplinary hearing on 20 November to discuss her "alleged failure to follow a reasonable management instruction, further particulars being that you failed to meet a child's lactose free dietary requirements resulting in such child was [sic] being fed fruit and mashed potatoes". The letter went on to say that if substantiated, the Respondent would regard the allegations as gross misconduct and warned of the possibility of dismissal.

29. Mr Blockley accepted in evidence that the letter did not identify the instruction referred to nor when it was given, though it did enclose the note of the meeting on 29 June. The letter also referred to the daily contact diary showing what Child A had eaten in recent weeks. As the letter made clear, the diary was not enclosed, though it was to be referred to at the disciplinary hearing. Mr Blockley says that it was not sent to the Claimant because of data protection reasons, but he eventually accepted in his oral evidence that it could have been disclosed as the child's name only appeared on its front-sheet which could have been removed. Mr Blockley also accepted that at this point the Claimant did not know whether the issue being raised concerned Child A or Child D, and that she therefore came to the disciplinary hearing without having seen the evidence on which the Respondent was relying. On this basis he agreed that the Claimant had been unable to properly prepare to put her case.

30. Mr Blockley further accepted – he could hardly fail to do so, given the express wording he used – that he alleged in the letter that the Claimant had failed to meet a child's lactose-free dietary requirements. He agrees however that he was not alleging that the Claimant had caused Child A to be fed any food containing lactose. In fact. at the meeting in February 2018 with Child A's parents (pages 189 to 191) assurances were given by Mr Blockley to this effect. He agreed nevertheless that the Claimant could reasonably have gained the impression from the letter that this was what was being said. Although he made clear many times that the essence of the issue was about equal treatment of children, Mr Blockley also accepts that his letter made no mention of failing to provide food

which looked similar to that given to others. The only misconduct alleged was a failure to follow a reasonable management instruction. As Mr Blockley further accepted, the letter included no mention of a breach of OFSTED rules or health and safety regulations, breach of the Respondent's Food Policy, nor breach of Care Quality Commission requirements.

31. Mr Blockley's oral evidence was that in summary the allegation being put to the Claimant was about children's dietary requirements, which he explained to mean that Child A was just being fed potatoes and fruit compared to the greater variety being given to others. At paragraph 37 of his statement he says that this exposed Child A to a health risk, exposed the Respondent to reputational damage if people found out about it, and was a breach of regulatory requirements to treat children equally and give them a healthy diet.

32. The Claimant returned from her foreign holiday on 14 November. The disciplinary hearing took place on 20 November. Mr Blockley and Ms Brennan were present at the hearing, together with a notetaker. At the Claimant's request, Ms Illston attended to take notes for her. The Respondent's notes are at pages 162 to 167 and Ms Illston's notes are at pages 168 to 171. Neither set is especially easy to follow but it is possible to piece together a broad account of what took place from a combination of the notes and the evidence of the witnesses.

33. It is agreed that at the start of the hearing Mr Blockley produced Child A's daily diary. He did not hand it over, but read a number of extracts. The Claimant did not dispute any of what was read to her. She asked to see it, but her request was refused, again for confidentiality reasons. This was the first point at which the Claimant understood that she was being asked about Child A. It was also at this point that it was clarified that the allegation of misconduct was that she had failed to provide Child A with food that looked similar to that being given to others and the first time any mention was made of breach of legal or regulatory requirements.

34. The Claimant's evidence is that she sought an adjournment of the hearing. The Respondent's case in its Response is that she agreed to carry on (page 31C) but it was conceded in oral evidence that nowhere in either set of minutes does it say that the Claimant did so. Her request was refused. Mr Blockley's explanation for that decision was wholly unclear: he said it was because the hearing was about dietary requirements and because there was a final written warning in place. Ms Brennan said in her evidence that if the Claimant had asked for an adjournment, she would have been given it, but she was in fact only asking for a delay of a few minutes. That is an untenable explanation, given that the Claimant gave as a reason for her request the need to collect evidence.

35. The Respondent's notes at page 162 record the Claimant as saying she had never been told that Child A was on a dairy-free diet. Mr Blockley said in evidence that it never occurred to him the Claimant hadn't been told what Child A's requirements were. He accepted the Respondent needed to investigate what was communicated to her about those requirements, whilst Ms Brennan agreed that this was crucial and that if the Claimant didn't know of the requirements, she was blameless. To the same point, Mr Blockley accepted in oral evidence that the Respondent needed to investigate what was communicated between Ms Tabor and the Claimant. It is clear that no such investigations were undertaken. Ms Brennan nevertheless insisted in her oral evidence that by the time of dismissal the Respondent had evidence that Child A's requirements had been communicated to the Claimant. She was referring to what was on the fridge in

the Nursery kitchen (the missing October dietary requirement sheet), what she says Ms Tabor said to Mr Blockley at the unrecorded meeting, and the diary of what Child A had eaten. Ms Brennan insists that she saw the October dietary requirement sheet when the Claimant was called to the disciplinary hearing, though it is clear it was not sent to the Claimant as part of the disciplinary process and, as noted, Ms Brennan cannot explain how it is missing. The Claimant's unchallenged evidence was that she did not see it until she saw the bundle. In any event, Mr Blockley says it was November he was looking at and so he would not have looked back at dietary requirement charts before then anyway. He says he looked at Child A's diary, which went back further.

36. In its Response at page 31C, the Respondent says that the Claimant stated at the disciplinary hearing that she did not know of Child A's requirements. This is repeated in paragraph 32 of Mr Blockley's statement where he says that the Claimant denied knowing the child was lactose intolerant and that she never knew she had to provide the child with a dairy-free diet. What the Respondent's own notes of the hearing in fact show is that the Claimant clearly said (page 162) that she did not know the child was dairy-free, though she knew before her holiday that the child was to stay off cow's milk. In explaining his decision to dismiss (paragraph 36 of his statement), Mr Blockley says that he was "concerned that the limited options put forward to the children affected by dietary restrictions were inexcusable … I was aware that [Child A] had tried to grab a chocolate pudding as [they were] not served its modified equivalent". That was in fact something which was discovered by the Respondent after the dismissal.

37. At page 162 the notes of the hearing record Mr Blockley as saying that he had purchased lots of food to ensure appropriate variety for the child. It is unclear which child he meant, because the notes then record him saying that he thought the Claimant was making and freezing such food which is clearly a reference back to the discussion of Child D in June. Page 163 also notes Mr Blockley referencing the June meeting and that he had said that food for all children should look similar. The Claimant referred twice to Child A's mother having said the child was to have fruit, and stated again that she was unaware that the child was dairy-free. At page 165 she is recorded as mentioning that she had made dairy-free biscuits for Child D after the June meeting but (page 166) since then she had had no notification of a similar requirement. The Claimant's unopposed evidence was that Child D visited the Nursery just three times after the June meeting and that whilst the Claimant had stored some dairy-free puddings in the freezer, she threw them away 3 months later for hygiene reasons.

38. Ms Illston's notes make similar points to those recounted above. At page 171, Ms Brennan is recorded as saying, "Communication not very good, Zoe has told us she is lactose intolerant from 10 October". In her oral evidence Ms Brennan eventually agreed, after giving a number of different explanations of that note, that she was saying that communication between the Claimant and Ms Tabor was not good.

39. At pages 209 to 219 there are notes of review meetings held by Mr Blockley with three employees, two of them on 21 November, the day after the disciplinary hearing. The employees in question were Rose Drummond and Samantha Marlow. The other set of notes record a meeting he had with Ms Illston on 16 November. Each note records Mr Blockley asking the employees about menu options for children. Ms Drummond said that children who could not have cakes were having yoghurt or fruit "due to nothing else being an option given to the children"; Ms Illston said in response to a question about vegetarian options that

children usually have vegetarian sausages, adding "puddings are usually yoghurt or fruit as an alternative, a couple of times there has been dairy free cakes – however this isn't consistent"; and Ms Marlow said that "vegetarian options are ok … yoghurt or fruit at the minute as this is the option for children … no cakes were given as options". None of the three worked in the room where Child A was based. The Claimant did not see these notes either at the disciplinary hearing or subsequently.

40. In its Response (page 31C) the Respondent explains the Claimant's dismissal on the ground that she failed to follow a reasonable management instruction. It says that what she had done represented "a breach of safeguarding, CQC and OFSTED rules … as well as a breach of [its] health and safety and food and drink policies". The letter of dismissal written by Mr Blockley, dated 22 November (page 172), stated that the matters of concern which led to the disciplinary hearing were, "alleged failure to follow a reasonable management instruction, further particulars being that you failed to meet a child's lactose free dietary requirements". It went on to say, "At the hearing your explanation was that you did not know this to be true. I consider your explanation to be unsatisfactory on 29.06.2017 you attended a meeting whereby it was agreed that you adhere to dietary requirements, and make puddings that children who have dietary needs could have that is similar to others … Having carefully reviewed the circumstances including that you are already on a final warning for conduct … I have decided that dismissal is the appropriate sanction". It concluded with the offer of a right to appeal.

41. The Respondent's case is that the focus in the dismissal letter moved away from Child A to the lack of provision of appropriate food to children generally. Mr Blockley said in evidence he believes this was a matter of conduct not performance because staff are there to protect children. He said initially that the Claimant was not dismissed for gross misconduct, but rather misconduct, then said it was in fact gross misconduct as the Claimant was disrespecting him as a manager given that she knew he would provide whatever ingredients she needed in order to do what was requested, and was also disrespecting the children. The Claimant accepted in her oral evidence that failing to carry out a management instruction relating to promoting the interests of children could be gross misconduct.

42. As indicated by the dismissal letter, in deciding to dismiss the Claimant the Respondent took into account her extant final written warning. Ms Brennan said in oral evidence that the warning wasn't taken into account, then said that it was very important to the appeal decision (see below) but not the dismissal; she could not say however why it was referred to in a letter that she approved. She also said in oral evidence, categorically, that the dismissal decision took into account numerous previous problems with the Claimant in respect of children's dietary requirements. The Claimant was evidently unaware that this was the case.

43. The Claimant sent an appeal (pages 173-177) to Diane Johnson, one of the Respondent's trustees. She accepts that she did not say anything in the letter about her track record of making similar-looking food for all children. The focus of her letter was that she was not told that Child A was dairy free and that she had not had adequate time to gather the information she needed to prepare for the dismissal hearing.

44. The Claimant met with Jane Riley on 11 December 2017. Ms Riley is not a trustee of the Respondent; she owns a completely unrelated nursery. Before she met the Claimant, she received only the suspension letter, the dismissal letter

and the Claimant's appeal letter. Mr Blockley accepts that she could not undertake an objective assessment of the case without all of the evidence.

45. The notes of the meeting between the Claimant and Ms Riley are at pages 181 – 185. In her statement at paragraph 7 Ms Riley says that she concluded there had been evidence obtained from Child A's parents and other staff members that Child A did have specific dietary requirements at the time. That is what is said in the notes at page 181. Page 181 also says "JR concluded that there was further evidence needed to prove that [the Claimant] was informed by management or Room Supervisor that child was dairy free". In addition, the notes say that Ms Riley recommended, amongst other things, that management ensure that room supervisors report to the cook and give details of dietary requirements. Page 182 says "JR also advised and [the Claimant] agreed that proving whether or not she knew child had dietary requirements is difficult". There is no need for me to address the second point of appeal. As I have already noted, at page 185 Ms Riley is recorded as saying she had asked for the October dietary requirement sheet and had been told it could not be found. The notes end with the comment, "Not dairy free but dietary requirements … Evidence missing as to where and what the management instruction directly relating to this child and period of time is".

46. On the basis of these notes Ms Brennan conceded in evidence that Ms Riley had raised issues as to the evidence of the Claimant being told of Child A's dietary requirements, problems of communication, and the problem of the absence of the October 2017 chart, although Ms Brennan rowed back from that concession later in her evidence. She did accept however that the issues raised should have been considered before a final appeal decision was made. She also said that there wasn't enough evidence against the Claimant but that there was still the chronology of previous warnings.

47. As it turned out, Ms Riley was not the decision-maker in respect of the Claimant's appeal. Mr Blockley says her role was to listen to the Claimant's appeal and make recommendations to the Respondent. Mr Blockley received those recommendations and took them to the board of trustees on 19 December. Mr Blockley accepted the Claimant did not know this was how her appeal would be considered. He says that he was a little concerned that difficulties with the evidence were highlighted by Ms Riley, but did not go back to her to discuss them. Instead he took her notes to the trustees, only reading them as he went into that meeting. No further investigation had been carried out before then. The trustees were given Ms Riley's notes.

48. Pages 226 to 228 are the notes of the trustees' meeting on 19 December. Both Mr Blockley and Ms Brennan were present; the Claimant was not. Mr Blockley presented his view that although the Claimant had said she did not know of Child A's dietary requirements, in fact she did because the dietary requirement sheets were "always placed on the fridge in the kitchen and is updated accordingly with Room Co-ordinators and agreed with [the Claimant]". Ms Brennan says she gave the board the chronology of discussions with other staff, her views on how the Claimant approached things generally, saying that they weren't necessarily focussing on Child A but the delivery of the food to children generally. At page 227 the notes record Mr Blockley saying, "I know you are all aware of the ongoing meetings I have had with [the Claimant] in regards to her conduct, following instruction and completing her duties as and when requested – this has been an ongoing struggle for us" and Ms Brennan saying, "We need to review these minutes [I assume Ms Riley's notes] and discuss where we go from here, however in light of the serious breach in terms of not following her job duties, I feel [the Claimant] is impossible to manage". The notes

then record, "[Mr Blockley] agreed; all nodded". The notes of the meeting do not record Ms Riley's concerns being discussed by the trustees.

49. At this point Mr Blockley and Ms Brennan went out of the room whilst the other trustees deliberated. After 15 minutes, they returned. All of the trustees agreed not to uphold the appeal, including Mr Blockley and Ms Brennan. Mr Blockley accepts that he was involved in reviewing his own decision, though says that because he left the meeting, the decision was independent.

50. The written outcome of the appeal is at page 186, a letter from Mr Blockley dated 20 December 2017. The letter was not seen by Ms Riley before it was issued. As such she says in her statement that she is unable to comment on it "or how the appeal outcome was reached". The Respondent says it tried to deliver the letter twice but it was returned. It is the only letter from Mr Blockley in the bundle that does not bear his signature and which did not reach the Claimant. The letter said that as a result of the appeal, "further investigations have now been carried out which included review of documentation and discussions with colleagues and the parents of the child in question to confirm that you were fully aware the child was dairy free". The "further investigations" were said to have demonstrated that the Claimant "had agreed to investigate and look for alternative food options for the child that were dairy free and that you had spoken to the parents of the child to advise that you had purchased dairy free milk … that the evidence was clearly supplied to you whereby you agreed to look for alternative foods and puddings that did not include dairy which could be fed to this specific child". Mr Blockley agreed that he put the letter together, but was unable to say what "further investigations" were being referred to, other than him putting in place what he felt were better procedures. All board members reviewed the letter the day after their meeting and approved it.

51. At page 188 there is a text exchange between the Claimant and one of Child A's parents in January 2018. The parent says, "I am happy for you to say we agreed to the more fruit/less sugary puddings" but wanted to hold off writing anything further. Mr Blockley met both parents on 2nd February 2018 – the notes of the meeting are at pages 189 to 191. Mr Blockley's concern emphasised in that meeting was for Child A to have a balanced diet and food which looked similar to that served generally. Ms Tabor was given a warning in December 2017 – page 220. She subsequently left the Respondent's employment. The Claimant says in her statement that Ms Tabor is a very good friend. In oral evidence she retreated from that somewhat and described her as a friend.

Law

52. Section 98 ERA says:

"*(1) 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 subsection (2) [which includes a reason related to the conduct of the employee] …

(4) [Where] the employer has fulfilled the requirements of subsection (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 undertaking) 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".

53. As Section 98(1) ERA puts it, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee". That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers, in this case Mr Blockley and Ms Brennan, leading them to act as they did in effecting the Claimant's dismissal.

54. If and when the employer shows the reason for dismissal as above, it must then be established by the employer that it falls within one of the fair categories of dismissal set out by section 98(2) ERA (here the Respondent relies only on conduct). Mr Joshi referred to the decision of the Employment Appeal Tribunal ("EAT") in **UPS Ltd v Harrison UKEAT/0038/11** in which the EAT said this: "We have no doubt that the correct approach, when deciding whether an employer's reason for dismissal relates to conduct, or capability, or indeed is some other substantial reason justifying dismissal, is to make findings as to the employer's own reasons for dismissal. Once those findings have been made the Tribunal should then ask itself how the employer's reasons are best characterised in terms of section 98(1). It is not bound by the label the employer puts on its reasons; but it is seeking to characterise the employer's reasons rather than to make findings of its own about the employee's conduct or capability".

55. It is clear from a number of reported cases – Mr Joshi cited the EAT's decision in **RBS v Donaghay UKEATS/0049/10** – that an employee's actions do not have to be reprehensible to constitute misconduct. Mr Joshi also referred to **Vodafone v Nicholson UKEAT 0605/12** in which the EAT held that in a conduct case the Tribunal needs to know what it was that is said to be misconduct: it cannot assess fairness without doing so. As the EAT put it, referring to "misconduct" without more does not help much. In other words, the section 98 reason is only a category; what the Tribunal must consider is what the conduct actually was.

56. Mr Phipps referred to another decision of the EAT, **ASLEF v Brady UKEAT/0057/06**. Elias J accepted a submission for the employee in that case that even where an employer adduces some evidence which tends to show that the reason for dismissal was a statutory reason, that is not necessarily enough. If the employee puts that reason in issue by adducing evidence which casts doubt upon the alleged reason, the burden lies on the employer to satisfy the tribunal that the reason it relied on was indeed the true reason. This reflects the Court of Appeal decision in **Maund v Penwith District Council [1984] ICR 143.** Elias J went on to say that the tribunal did not have to determine what the real reason for dismissal was at all; it was enough to say that the employer had not satisfied it that the real reason was a statutory reason.

57. If the Respondent shows the reason and establishes that it was a reason falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including the size and administrative resources of the business, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This is something which is to be determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and certainly requires an assessment of the reasonableness of the decision to dismiss. In all respects, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer.

58. In assessing these requirements in connection with a conduct dismissal, the Tribunal will of course have regard to the guidelines in **British Home Stores v Burchell [1980] ICR 303** as to whether the Respondent believed the Claimant to be guilty of misconduct (on the basis of a reasonable suspicion), had reasonable grounds to sustain that belief, and when forming that belief had carried out a reasonable investigation in the circumstances. The reasonableness of the Respondent's actions is to be assessed based on what it knew, or reasonably should have known, at the time it took its decision to dismiss. The question to be answered is not what the Tribunal would have done in the same circumstances; rather the focus is on the Respondent's actions – has it acted reasonably? The Court of Appeal in **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23** held that the range of reasonable responses test also applies to the investigation carried out by the Respondent. In respect of both the investigation and the Respondent's decision to dismiss, that would require the Respondent to be willing to listen to and take into account evidence in support of the Claimant's protestations of innocence as well as evidence that supported the Respondent's suspicion of guilt.

59. **West Midlands Co-Operative Society Ltd v Tipton [1986] ICR 192** is well-known authority for the principle that unfairness in connection with an appeal against dismissal can of itself render that dismissal unfair. In that case the appeal was provided for contractually, but there is no reason to doubt that the same principle applies where appeal arrangements do not have contractual force as such.

60. In summary, what is important is to answer the question posed by section 98(4), as summarised above, and in doing so to make an overall assessment of the facts as I have found them to be. Also of course, in any case such as this, the Tribunal must have regard as far as relevant to the ACAS Code of Practice on Disciplinary and Grievance Procedures. The requirements of the Code include that where practicable different people should carry out the investigation and chair the disciplinary hearing, employees should be given sufficient information about the problem to enable them to prepare to answer the case at a hearing, employees should be given a reasonable opportunity to present evidence, and appeals should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case.

Analysis

61. I begin with a few general comments about the witness evidence. Broadly

speaking, it seems to me preferable to resolve each material conflict of evidence on the specific merits of what is said by the witnesses in question. That is what I have done, so far as is necessary, in my findings of fact and to the extent that further conflicts of evidence require to be resolved in my analysis, that is the approach I will maintain. That said, as both representatives made strong references to witness credibility in their closing submissions, I will address that subject very briefly. Mr Joshi is right that the Claimant dissembled to some extent on the question of the closeness of her relationship with Zoe Tabor, but the difficulties with the evidence of the Respondents' witnesses were far more significant. As already made clear at several points, the evidence given by both Mr Blockley and Ms Brennan was at times confused and at other times changed significantly between their written statements or what is stated in contemporary documentation and what was then said in oral evidence. Both were also reluctant to concede anything adverse to the Respondent's case until it was evident that they had no alternative but to do so. For those reasons, to the extent that witness credibility is an important factor in determining a material conflict of evidence, I would be strongly inclined to favour the evidence of the Claimant.

The reason for dismissal

62. The first issue I have to decide is whether the Respondent has shown the reason for dismissal. This is classically thought not to be an especially difficult hurdle for a respondent to overcome. Nevertheless, it is clear from the case law that a Tribunal is not bound to accept the reason given by the employer or the label the employer puts on the reason. What must be determined is what the Respondent's reason actually was, ascertained by an assessment of the beliefs and facts which operated on the minds of the decision-makers. As the **Vodafone** decision makes clear, in a conduct case such as this is said to be, establishing the reason for dismissal is not just a matter of determining whether the Respondent dismissed for misconduct in some general sense, but rather a question of what misconduct it actually relied on, if indeed it did. It is if and when the reason for dismissal has been identified in that way that I must then determine whether it falls within the fair category of "misconduct" on which the Respondent relies.

63. The focus of my attention in determining whether the Respondent has shown the reason for dismissal must be the evidence of what was in Mr Blockley's and Ms Brennan's minds at the time they made their decision. What they have said subsequently, in their witness statements and oral evidence can of course shed light on that question, but it is the contemporaneous evidence that is most likely to be a reliable guide. The key pieces of contemporaneous evidence are as follows:

63.1. Mr Blockley's letter of 10 November inviting the Claimant to the disciplinary hearing (page 160) – this referred to a reasonable management instruction being breached by her alleged failure to meet a child's dietary requirements so that the child was fed a limited diet.

63.2. The notes of the disciplinary hearing (pages 162 to 171) – Mr Blockley's and Ms Brennan's comments focused on concerns about the variety of food for children with particular dietary requirements, the need for food given to all children to look similar, and the allegation that the Claimant had not followed the dietary requirements for Child A.

63.3. Mr Blockley wrote the letter of dismissal (page 172), in line with the general impression one gets from the evidence overall of him having been the primary

decision-maker. The letter repeated the allegation set out in the 10 November letter and then said that the Claimant had agreed (referring back to June) to "adhere to dietary requirements" and make food for children with those requirements similar to food given to others.

63.4. The minutes of the trustees' meeting of 19 December (pages 226 to 228) – the comments made by Mr Blockley focused on Child A's dietary requirements and on the Claimant not following his instruction, and as noted there were said to have been ongoing issues with the Claimant "completing her duties".

63.5. The appeal outcome letter of 20 December 2017 (page 186) which focuses very much on Child A.

64. What does that evidence suggest operated on the minds of Mr Blockley and Ms Brennan in deciding to dismiss the Claimant and, to the extent that it is possible to tell, the minds of the trustees in upholding that decision? It is not a coherent picture, something I will return to in assessing the questions that arise under section 98(4) ERA, but it is all evidence which firmly suggests that it was principally a combination of a belief that the Claimant had not done what Mr Blockley had asked her to do in June 2017 with a belief that as a result Child A had not been fed a varied diet of food which looked the same as that given to other children.

65. The Claimant challenges the case that the reason for dismissal was as I have just characterised it. As the **ASLEF** decision makes clear, adducing some evidence that there was a statutory reason for dismissal is not necessarily enough. It remains open to the Claimant to produce evidence of a different reason casting doubt on that given by the Respondent, in which case the burden is placed firmly on the Respondent to show that the given reason was the true reason. Were the Claimant able to produce such evidence and were the Respondent to be unable to discharge the burden it then bears, I need go no further than conclude that it has not established a fair reason for dismissal; I do not need to decide what the reason actually was.

66. The challenge to the Respondent's case on this point really only emerged in Mr Phipps' closing submissions. It was not at all a significant feature of the Claimant's case in her written statement or her oral evidence and was only raised in passing in her Particulars of Claim (paragraph 4 on page 16). Mr Phipps referred to two matters. First, as I have noted, there is the record of the meeting on 26 October 2017 (page 154), which on its face reads as though Mr Blockley and Ms Brennan were considering whether the Claimant should be retained in the Respondent's employment. Mr Blockley (who was not taken to the point in cross-examination) and Ms Brennan gave evidence to the effect that the discussion was about how to accommodate the Claimant's potential need for flexible working. That broadly fits with the Claimant's own explanation that the discussion was focused on her potential need for time off. The second matter Mr Phipps drew attention to was the fact that the Claimant brought a grievance against Ms Brennan some time before her dismissal. It must be said that this barely featured in the Claimant's case at all.

67. Whilst the Claimant's grievance and the content of the 26 October meeting give some pause for thought, and whilst the reasons given by the Respondent changed during the course of the dismissal process and were thus to a considerable extent confusing – a matter I will return to – I am satisfied that what principally operated on the Respondent's mind in deciding to dismiss the Claimant was the belief that Mr Blockley's June instruction had not been followed

and the consequent belief that the dietary requirements of Child A had not been met in terms of provision of a balanced diet and provision of food that looked similar to that for other children. As I have indicated, the Claimant has not produced evidence which raises a serious question as to whether those were the Respondent's reasons, largely because it was barely touched on in the presentation of her case.

68. The next issue to determine is whether the reason as summarised above falls into a fair category under section 98(2) ERA. The point of challenge here is Mr Phipps' submission that what the Respondent relied upon is actually to be properly characterised as a matter of performance and therefore in the category of capability rather than conduct. That would not necessarily render the dismissal unfair, because if the reason shown by the Respondent falls into any of the fair categories under section 98(2), a fair reason is established, though having applied the wrong label can have a significant impact on the question of fairness under section 98(4). I am however satisfied that in principle a failure to follow a management instruction (from which the concerns about what was being given to Child A flowed), even without such failure being reprehensible, could be considered a matter of conduct. I conclude therefore that a fair reason operated on the Respondent's mind in dismissing the Claimant. That is not to say the Claimant was in fact guilty of gross misconduct or even misconduct – that is not something I am required to determine for these purposes – and nor is it to say that dismissal in reliance on this reason was fair and reasonable. That is the question to which I now turn.

Reasonableness – section 98(4)

69. In doing so, I remind myself that the question I have to consider is not what I would have done; that would be to substitute my decision for that of the Respondent, which is impermissible. My focus is on the Respondent's actions and the question of whether what it did was fair and reasonable.

70. I begin with three aspects of the Respondent's case which I accept. First, I accept of course that it is right for the Respondent to at all times have critical concern for the welfare of the children in its care. As I have noted, the Claimant shared that belief. Secondly, purely as a matter of general principle, I reject the Claimant's argument that the final written warning could not fairly have been taken into account in deciding to dismiss her because it related to an entirely different type of conduct. The express provisions of the Respondent's disciplinary policy in this respect and the broad wording of the warning itself clearly stand against that argument. Thirdly, I would not find the dismissal to be unfair just because no written procedure can be pointed to which it is said the Claimant did not follow in terms of ensuring dietary requirements were met. It was barely disputed that what should have happened in the nursery in this regard was well known.

71. I am in no doubt however that the dismissal of the Claimant was manifestly unfair and that a number of criticisms can fairly be made of the Respondent's actions. I have accepted in my analysis above that the Respondent had a genuine belief that the Claimant had committed misconduct and that this is what led it to dismiss her. Assessed overall however, once its questions about the food being given to Child A arose, the way in which the Respondent approached this matter can be fairly characterised as admitting of no other explanation but the Claimant's misconduct and no other outcome but dismissal, such that I conclude that the Respondent did not have reasonable grounds on which to sustain its belief in the Claimant's misconduct and did not carry out a reasonable

investigation in forming that belief. I am equally clear that the Respondent did not follow a fair procedure when assessed overall. As a result, the decision to dismiss was not within the band of reasonable responses.

72. First of all, I turn to the question of whether the Respondent had reasonable grounds to sustain its belief that the Claimant had committed the misconduct it relied upon. There are a number of things to consider in that regard.

73. The first of those is the management instruction which it is said was breached by the Claimant. At the meeting in June 2017, the Claimant clearly agreed to make puddings to accommodate children with dietary requirements. The instruction itself was however in respect of Child D – that much is plain from the notes at page 131. It is not disputed that the Claimant did in fact make appropriate puddings for Child D; she was not subjected to any disciplinary process for failure to do that. It is also clear that she was not instructed to keep a stock of appropriate puddings for Child D, or more generally for children with similar dietary requirements. For the reasons given in my findings of fact I have rejected Mr Blockley's evidence to the contrary. Further, the Claimant was not instructed to make for Child D – or any child with special dietary requirements – puddings which looked similar to those given to children generally. It might be said by the Respondent that the need to do so was abundantly clear and that the Claimant said she would, but it is equally clear that where an employer relies on failure to follow a reasonable management instruction as a basis for dismissal, the content and clarity of that instruction is of paramount importance in assessing the fairness of the dismissal. The instruction given by Mr Blockley in June 2017 was plainly reasonable in and of itself, but for the reasons just explored it is far from clear that the Respondent could reasonably have concluded that it had been breached and dismiss the Claimant on that basis.

74. Even if it were the case that the instruction had been as clear and specific as the Respondent contends however, there remains the question of whether based on the evidence it had the Respondent reasonably concluded that the Claimant had not provided food appropriate to Child A's needs, that is taking into account the child's dietary restrictions, providing the child with a varied diet and providing the child with food that looked similar to that provided to others. As to that:

74.1. The dietary requirement sheet for November 2017 (page 159) made clear that Child A was now to be given a dairy-free diet. That form was of course completed at a time when, as the Respondent knew, the Claimant was abroad on leave.

74.2. Given the apparent disappearance of the October 2017 dietary requirement sheet, and the fact that neither Mr Blockley nor Ms Brennan could say what was on it, all that the Respondent could reasonably have concluded in respect of the communication of Child A's dietary needs to the Claimant (from which the concerns about varied diet and similar-looking presentation of food flowed) was that the Claimant knew from 10 October 2017 onwards that Child A was not to drink cow's milk. Mr Blockley cannot have reasonably concluded that the October dietary requirement sheet showed that the Claimant knew about the dairy-free requirement for Child A, for the simple reason that he positively disregarded anything earlier than the November version. He was content to rely on the child's diary, but of course that could never show what the Claimant knew. Ms Brennan for her part gave evidence that the October sheet would have supported the Claimant's case.

74.3. It is undisputed that the Claimant accommodated Child A's needs in terms

of drinking milk. It is also undisputed, as noted above, that she accommodated the needs of Child D until he left the Nursery not long after the June meeting. That should reasonably have suggested to the Respondent the need to at least consider an explanation for the situation Mr Blockley discovered during the Claimant's leave other than unwillingness or failure on her part to follow his instruction.

74.4. The Respondent knew that the parents had requested Child A be given fruit rather than sugary puddings. That too would reasonably suggest that the Claimant had not conducted herself in breach of Mr Blockley's instruction.

74.5. Ms Tabor's evidence at the only recorded meeting with her on 8 November was that she had not told the Claimant that Child A was dairy-free. That should also reasonably have created significant doubt as to what the Claimant could properly be said to have known. Mr Blockley's evidence was that he never considered that she did not know that Child A was dairy free.

74.6. Ms Brennan accepted in the disciplinary hearing itself that communication between Ms Tabor (the relevant Room Co-ordinator) and the Claimant was not good. Ms Riley raised the same issue at the appeal stage, recommending that the Respondent take action to ensure better communication between the cook and the rooms and questioning what hard evidence there was of the Claimant's knowledge of Child A's needs.

75. Mr Joshi said in closing that my focus should be on the dismissal letter and yet also submitted that it would be superficially narrow to focus solely on what the Claimant had or had not done in respect of Child A. It is plain from my findings of fact that it was not the burden of the Respondent's case, either as put to the Claimant in the disciplinary hearing or pleaded in its Response, that she had not provided food appropriate for children generally. The evidence that was put to her at the disciplinary hearing, and indeed the evidence before the Tribunal, referred to no child other than Child A. There were the comments of Ms Illston, Ms Drummond and Ms Marlow, but the meetings with Ms Drummond and Ms Marlow took place after the disciplinary hearing. The reasons for dismissal and the evidence on which the Respondent relied all revolved around Child A. In light of all of the matters identified in paragraph 74 above, it cannot have been reasonably concluded that the Claimant knew Child A had to be given a dairy free diet at the point at which she went on leave. The Respondent's conclusion to the effect that she did was the very heart of its conclusion that the management instruction had been breached, yet such objective evidence as was available should without question reasonably have led to the opposite conclusion. As to Mr Joshi's submission, it clearly cannot have been reasonable for the Respondent to conclude that the Claimant failed to carry out the management instruction and meet dietary requirements more broadly, where no such evidence was put to the Claimant, no opportunity was given for contrary evidence to be adduced and no possibility of such contrary evidence was countenanced by the Respondent given what it believed it had uncovered in relation to Child A. The Respondent did not reasonably conclude that the Claimant had committed the alleged misconduct.

76. The next issue I need to consider is whether the investigation the Respondent carried out was such as was reasonable in the circumstances? I have already alluded to a number of difficulties with the investigation in paragraph 74 above and so do not need to repeat those points in the same detail. There were a number of aspects of the Respondent's investigation which fell outside the band of reasonable approaches:

76.1. First, as already made clear, the evidence leads me to conclude that Child A's parents were not interviewed until well after the Claimant was dismissed. In a case where the Claimant's job was known to be at risk, where at 8 November Mr Blockley knew from Ms Tabor that it was being said the parents had requested that the child be given fruit instead of sugary puddings, and given the Respondent's willingness to discuss the matter with them after the event, it was unreasonable in my judgment not to ascertain the parents' views prior to dismissal. Doing so could have produced evidence such as that which transpired in the text message to the Claimant at page 188 which of itself would reasonably have been persuasive in ameliorating the Respondent's concerns and may have produced other evidence of relevance to the case.

76.2. Secondly, I have made a number of references to the missing October dietary requirement chart. As I have said, neither Ms Brennan nor Mr Blockley have given evidence as to what that chart said, and it was certainly not shown to the Claimant. That was the crucial document, and as far as the evidence presented to the Tribunal is concerned, the Respondent did not take it into account. Mr Blockley said as much – he said he did not need to see it – and he was the primary decision maker.

76.3. Thirdly, the Respondent's own evidence is that further steps should have been taken to investigate the crucial point of what the Claimant knew about Child A's dietary requirements, something which Ms Riley would later raise in the context of the appeal.

For these reasons the Respondent did not carry out such investigation as was reasonable in the circumstances of the case.

77. Even if all of the above could be put aside, which plainly it cannot, the procedure adopted by the Respondent leading up to the Claimant's dismissal was manifestly unfair in a number of respects:

77.1. Whatever the October dietary requirement chart said, the Claimant plainly did not see it. This was the crucial document in the whole case and indeed Ms Brennan indicated it would have supported the Claimant.

77.2. The Claimant did not see Child A's diary either. This was of less fundamental importance but given that the Respondent clearly placed significant reliance on it, it was manifestly unfair to the Claimant to do no more than read extracts from it at the disciplinary hearing, when there was no good reason why full disclosure could not have been made. This was refused even after the Claimant asked to see it at the disciplinary hearing itself.

77.3. The Claimant was not shown the record of Ms Tabor's discussion with Mr Blockley. As already noted, Ms Brennan agreed that page 158 amounts to Ms Tabor saying that she had not raised Child A's dairy-free requirement with the Claimant.

77.4. It was certainly not improper for the Respondent to interview Ms Illston, Ms Drummond and Ms Marlow as well, though it would then have needed to reformulate the nature of its case against the Claimant. In any event, none of their evidence was put to the Claimant, even though in Ms Illston's case it was evidence available before the dismissal letter was sent and in the case of the other two before the Claimant met with Ms Riley. Mr Blockley said he did not know these points were going to arise in the meetings but I reject that

explanation as the notes clearly show he raised the issue himself in each case.

77.5. It is accepted the Claimant did not know until the disciplinary hearing which child was being referred to. Not only would that reasonably lead to the conclusion that she did not know that Child A had the specific requirements central to the Respondent's case (as otherwise it would have been obvious which child was under discussion), but it is of itself blatantly unfair to the Claimant that there was such a lack of clarity as to what case she was expected to answer.

77.6. Moreover, it was also not until she arrived at the disciplinary hearing that it was clarified that the allegation of misconduct was that she had failed to provide for Child A food that looked similar to that being given to others and that the Respondent was alleging she was in breach of legal or regulatory requirements. The Respondent accepts that the Claimant could not have prepared properly for the disciplinary hearing. As this is so basic to natural justice and, as I will come to, given that the appeal process was fundamentally flawed, I reject Mr Joshi's submission that the explanations of the Respondent's case given at the disciplinary hearing, and in the dismissal letter, cured the defects in the way in which the hearing was arranged.

77.7. The matters set out in the preceding two sub-paragraphs make the failure to grant the Claimant a postponement of the disciplinary hearing manifestly unfair. It cannot reasonably be said that a delay of a few days would have been at all adverse for the Respondent in the circumstances of the case and given that the Claimant was suspended.

77.8. To the conclusion of the Tribunal hearing it remains unclear what previous conduct of the Claimant was taken into account in the decision to dismiss her. The dismissal letter made clear reference to the final written warning. What was plainly unfair however was that earlier alleged failures regarding dietary requirements – of which the Tribunal has seen no evidence – also appear to have been taken into account, according to the evidence of Ms Brennan and the note of the Board meeting in December 2017. It is a basic tenet of fairness that an employee should know, and be given an opportunity to respond to, those matters an employer is taking into account in deciding whether to dismiss. The Claimant appears not to have had that opportunity.

77.9. That leads into the next aspect of unfairness which is, as Mr Phipps said, that the Claimant was presented with a constantly moving target in terms of the case against her. The allegations the Respondent was relying on were different in each of the invitation letter, the disciplinary hearing and the dismissal letter, making it far from straightforward for the Tribunal, let alone the Claimant, to understand precisely why she was being told she may be (and then was) dismissed. As already noted, there was confusion about which specific child was under discussion, whether she was also facing dismissal because the dietary needs of children more generally had not been met, whether it was being said that children had been given food contrary to their dietary restrictions, whether the point was that they were not given a variety of food or not given similar-looking food to others, or indeed all of the above. As I have noted, Mr Blockley himself was confused about which specific child was under discussion even in his evidence for this Hearing – see his statement at paragraphs 22 to 24. Whilst I have held that the Respondent has shown the reason for dismissal on the basis that what was in the decision-makers' minds can with some care be pieced together, it is plainly unfair under section 98(4) that the position remained so uncertain throughout the disciplinary process.

77.10. Finally, as Mr Phipps pointed out, Mr Blockley was both investigator and principal decision-maker. That will not always be unfair of course, particularly with a smaller employer, and of itself that would not have rendered this particular dismissal unfair. Nevertheless, there seems to have been no reason why, for example, Ms Brennan could not have carried out the investigation with Mr Blockley dealing with the disciplinary hearing. That may well have mitigated against some of the problems I have identified above, principally the fact that once the investigation – such as it was – had been completed, the Respondent seems to have closed its mind to any alternative to the Claimant's guilt and dismissal. Separating out responsibility for the investigation and hearing may have introduced some much-needed objectivity to the process.

78. Turning to the appeal, there are regrettably a number of ways in which that process too was fundamentally unfair to the Claimant. As is clear from **Tipton**, a defective appeal can of itself render a dismissal unfair, and it was unfair for the following reasons:

78.1. The Claimant did not know how the appeal process would work, namely that the decision would not be made by Ms Riley but by the trustees.

78.2. It followed that she did not get the opportunity to appear before and make representations to the people making the decision.

78.3. For her discussions with the Claimant, Ms Riley did not see all of the relevant evidence. Mr Blockley agreed therefore that she could not give recommendations based on an objective assessment of the circumstances.

78.4. As noted, and as the Respondent agrees, the issues Ms Riley raised should have been considered before the trustees made their final decision. They were not.

78.5. The original decision-makers were involved in the appeal decision, as had been the case with the Claimant's appeal against the final written warning. It was not unfair to put the management case at the appeal hearing – that is both common practice and to a large extent inevitable – but in the Claimant's absence and with no evidence of Mr Blockley putting Ms Riley's concerns or the Claimant's points other than making their notes available, the presentation of the matters to be considered on appeal was one-sided and thus unfair.

78.6. As an illustration of that, Mr Blockley told the trustees that the dietary requirement sheets were "always placed on the fridge in the kitchen and … updated accordingly with Room Co-ordinators and agreed with [the Claimant]". And yet he had not seen the crucial sheet from October.

78.7. Mr Blockley accepts that he also added his own comments to the decision letter and referred to further investigations that he accepts had not taken place.

78.8. The letter also referred to a meeting with Child A's parents. That does raise a question as to when the letter was composed. In any event, as I have made clear in my findings of fact, that meeting does not appear to have taken place until after the appeal decision was made.

78.9. Both Mr Blockley and Ms Brennan gave views about "ongoing meetings" and an "ongoing struggle", together with views on how the Claimant approached things generally in respect of the delivery of food to children. That was also plainly unfair as these matters had not been addressed with the Claimant at the

dismissal stage.

79. For all of the reasons set out above, it follows that dismissal was outside of the band of reasonable responses. The dismissal of the Claimant was unfair, whether assessed as a dismissal for a further act of misconduct following the final written warning or as a dismissal for gross misconduct. The dismissal also breached a number of the requirements of the ACAS Code as I have made clear, namely:

79.1. that where practicable different people should carry out the investigation and chair the disciplinary hearing;

79.2. that employees should be given sufficient information about the problem to enable them to prepare to answer the case at a hearing;

79.3. that employees should be given a reasonable opportunity to present evidence; and

79.4. that appeals should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case.

80. This matter will now be listed for a further hearing to determine the Claimant's remedy.

____

Employment Judge Faulkner

Date: 20 December 2018

JUDGMENT SENT TO THE PARTIES ON

....

....
FOR THE TRIBUNAL OFFICE