



EMPLOYMENT TRIBUNALS

Claimant: Ms Mary Arofah

Respondent: The Midcounties Co-operative Limited

Heard at: London Central (by CVP)

On: 24 & 25 October 2022

Before: Employment Judge Isaacson

Representation

Claimant: Mr Oduntan, consultant

Respondent: Ms N Webber, counsel

Judgment and full reasons were given verbally at the end of the hearing on 25 October 2022. The claimant asked for written reasons.

JUDGMENT

1. The judgment of the Tribunal is that the claimant's complaint of unfair dismissal is not made out and is dismissed.
2. The claimant's claim for wrongful dismissal fails and is dismissed.

REASONS

Evidence before the Tribunal

1. The Tribunal was presented with a joint bundle. The Tribunal was also shown CCTV of an incident on 11 January 2022. I was also able to view the CCTV after the hearing. On day one a form A chronology was provided by the respondent and on the second day the claimant provided a copy of a document from the Department for Education headed "Keeping children safe in education 2022".
2. The Tribunal heard evidence from the claimant and from Ms A Williams, the respondent's nursery manager and investigating officer and from Ms D Blaney, the respondent's operations manager and dismissing officer.

3. Both parties had an opportunity to question witnesses and give oral submissions (a summary of their case). A draft list of issues, prepared by the respondent, was carefully considered at the start of the hearing and agreed.

Background

4. At the beginning of the hearing the parties agreed that the correct name of the respondent was The Midcounties Co-operative Limited.
5. The claimant presented her claim form on 1 June 2022. The claimant claimed unfair dismissal and breach of contract. The only particulars on the claim form were in box 8.2 where the claimant alleged *“This inconsistency of treatment suggests that the alleged misconduct was not the genuine reason for the Claimant’s dismissal. In the circumstances the Claimant’s dismissal was unfair and [s]he claims: compensation”*.
6. The respondent requested further and better particulars of the *“inconsistent treatment”*. These were provided by the claimant on 23 September 2022. The claimant compared her treatment to Ms Williams and referred to an incident in 2019/2020. She alleged that the real reason for her dismissal was due to issues she had with Ms Williams who *“had it out for her”*. She also alleged that the dismissal was substantially unfair because Ms Williams carried out the investigation and was impartial and the respondent failed to follow the ACAS code or follow their own procedures.
7. There was no mention in the claim form or in the further particulars that the claimant was alleging race discrimination. In the claimant’s witness statement at paragraph 8 the claimant stated: *“I believe that my dismissal was tainted with a racism undertone and personal vengeance”*.
8. I clarified at the beginning of the hearing, whether the claimant was now alleging race discrimination and whether she wanted to make an application to amend as the claim form did not contain such a claim. After taking instructions from the claimant her representative confirmed that she would not be making an application to amend but the allegation in paragraph 8 was part of the background to her claim.

Claims and issues

9. Unfair Dismissal

9.1 What was the reason (or principal reason) for the Claimant’s dismissal?

9.2 Was the reason a reason set out within s98(2) of the ERA 1996? The Respondent relies on conduct.

9.3 Did the respondent genuinely believe the claimant had committed misconduct?

9.4 Did the respondent have reasonable grounds for that belief?

9.5 Had the respondent carried out a reasonable investigation?

9.6 Did the respondent follow a fair procedure?

- 9.7 Was the dismissal within the range of reasonable responses?
- 9.8 If the claimant was dismissed for misconduct, did the Respondent act reasonably or unreasonably in treating the reason for dismissal as a sufficient reason to dismiss the claimant?
- 9.9 Was the claimant's dismissal fair within the meaning of s98(4) ERA?

Remedy Issues

- 9.10 If the Claimant was unfairly dismissed:
- a. What basic and/or compensatory award is the claimant entitled to?
 - b. What is the likelihood that the claimant would have been dismissed in any event, notwithstanding any unfairness in the decision to dismiss?
 - c. What reduction, if any, should be made to the basic and/or compensatory award for any contributory fault?
 - d. Has the claimant mitigated her loss or made satisfactory attempts to mitigate her loss?
 - e. If the ACAS code of practice is relevant was there any breach and should an uplift be applied?

Breach of contract – wrongful dismissal

- 9.11 It is accepted that the claimant was summarily dismissed and not given notice or paid in lieu. Did the claimant's conduct amount to a fundamental breach of contract, serious enough to entitle the respondent to dismiss without notice?

Submissions

- 10 In brief, and not including all that was said, the respondent argued that the Tribunal must consider what was in the mind of the decision maker at the time. The context of the case was important as the claimant was dismissed from a nursery where safeguarding was taken very seriously. The nursery had received a complaint from the parents and there was clear CCTV footage of what had happened at the time.
- 11 The claimant had been dismissed for misconduct, a fair reason, as evidenced by the CCTV. There was no evidence of any other reason for her dismissal other than the misconduct. The claimant never raised the issue of bias or that Ms Williams was out to get her at the disciplinary meeting.
- 12 The respondent genuinely believed the claimant was guilty of the misconduct, having seen the CCTV and spoken to the claimant and having carried out a reasonable investigation. There was no evidence of any prejudice by Ms Blaney who was the decision maker. The claimant had not given a plausible explanation for her hand on S's face. The respondent had followed a fair procedure in line with their own policies. The decision to dismiss fell within a band of reasonable responses.
- 13 Ms Blaney had considered that the claimant had breached the respondent's policies, that the claimant had shown no remorse and had not sufficiently explained what was seen on the CCTV. The respondent had a legal obligation to make a referral to DBS in the circumstances.

- 14 In relation to wrongful dismissal the respondent argued that the Tribunal must decide whether the claimant had fundamentally breached the contract of employment. The respondent referred to the case of Laws v London Chronicles (Indicator Newspapers) 1959 CA 2 ALL ER 285. CCTV showed the claimant put her hand over S's face and push her back. The respondent found this action utterly unacceptable. The Local Authority's District officer (LADO) who was entirely independent described the action as "rough". The HR advisor from the council agreed with the decision to dismiss for gross misconduct. The claimant may not have intended harm, but her action was reckless and amounted to gross negligence.
- 15 The claimant's submissions are taken from her claim form, further and better particulars, witness statement, the questions her representative asked in cross examination and her representative's summary of the case.
- 16 In brief, and not including all that was said, the claimant argued that the alleged misconduct was not the genuine reason for the claimant's dismissal. Ms Williams targeted the claimant. She had treated the claimant inconsistently, for example, by not supporting her request for flexible working, not making a referral to occupational health and Ms Williams had not been dismissed for comparable misconduct. Ms Williams was bias towards the claimant as they had had a previous argument. Ms Williams would say the claimant was deaf and ask how old she was. Ms Williams was out to get her as demonstrated by her exaggerating the allegation raised by S's parents from finger marks to bruising and grabbed and squeezed the mouth.
- 17 The respondent should never have made a referral to DBS. The respondent should not have taken the matter further when the police had indicated the matter should have been dropped. A scratch on S's face the next day, when the claimant was not working, was not taken further. The dismissal was a knee jerk reaction.
- 18 The respondent breached their own procedures by not telling the claimant why she was being sent home or being told the extent of the charges before her investigation meeting. The claimant was never given an opportunity to appeal because the dismissal letter was only emailed to the claimant, and she did not receive it. The respondent did not consider a lesser sanction.
- 19 The Keep children safe in education 2022 document shows you can use reasonable force in certain circumstances. The disciplinary process was a sham as the outcome was predetermined. Ms Blaney's focus was too narrow only focusing on the "action". The whole dismissal was tainted by a racist undertone.

The law

- 20 Section 94 Employment Rights Act 1996 (ERA) provides the right not to be unfairly dismissed. Section 98 provides that misconduct can be one of the potentially fair reasons to dismiss. Whether a claimant has been unfairly dismissed depends on whether in all the circumstances, including the size and administrative resources of the employer, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing

the employee and should be determined in accordance with equity and the substantial merits of the case (s98(4) ERA).

21 Case law has established that the Tribunal should not put itself in the shoes of the employer and decide what it would have done in the circumstances. The test to apply is whether the respondent's decision to dismiss fell within the range of reasonable responses open to the respondent.

22 In considering whether the respondent acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason to dismiss the Tribunal should consider, in misconduct cases, the following three principles:

- a) whether the respondent carried out a reasonable investigation into the circumstances of the alleged misconduct;
- b) whether the respondent believed that the claimant had committed the alleged misconduct; and
- c) if so, whether the respondent had in mind reasonable grounds to sustain that belief?

23 At common law an employer is entitled to dismiss an employee without notice for gross misconduct on the basis the employee has committed a repudiatory breach of contract and the employer has accepted it. Whether the conduct was sufficiently serious and injurious to the relationship to justify dismissal depends on the circumstances. There is no rule of law which stipulates the degree of misconduct required. Cases of summary dismissal typically involve dishonesty, disobedience or incompetence on the part of the employee. Cases often involve wilful or deliberately negligent misconduct or a series of breaches of contract.

24 In Laws v London Chronicle (Indicator Newspaper) LTD [1995] 2 ALL ER 285, 1 WLR 698 Lord Evershed MR at p700 said:
"It follows that the question must be – if summary dismissal is claimed to be justified – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service".

25 Whether the conduct is sufficiently serious to warrant summary dismissal will depend upon the circumstances and the nature of the business and position of the employee. In Mgubaegbu v Homerton University Hospital NHS Foundation Trust UKEAT/0218/17 Choudhury J summarised a number of cases on wrongful dismissal and concluded: *"There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate clearly that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.....conduct amounting to gross misconduct is conduct such as to undermine the trust and confidence inherent in the relationship of employment"*

26 In Jupiter General Insurance Co LTD v Shroff [1937] 3 ALL ER 67 and Lane v Secretary of State for education [2019] IRLR 523 a one-off act of negligence with potentially serious consequences was held to justify summary dismissal.

27 It is for the Tribunal to determine for itself whether the employee has committed a repudiatory breach and the test is objective. The employer needs to prove that the employee's misconduct in question was actually committed. The Tribunal must make its own findings of fact in relation to the breach in order to determine whether that breach was sufficiently serious to warrant immediate termination. It is not enough to apply the unfair dismissal test in misconduct cases of whether the employer reasonably believed that the employee had so acted.

Findings of fact

28 Many of the facts in this case are undisputed and are corroborated by contemporaneous documents and CCTV footage.

29 The respondent is a consumer owned co-operative society which has several businesses including food, travel, healthcare, post offices and childcare nurseries.

30 The claimant was employed on 3 December 2018 as a full time senior child care practitioner at the Society's nursery at the Little Pioneers nursery at Galway Street from December 2018. The nursery cares for 78 children up to the age of 5 and has 23 staff including 9 child care practitioners and 13 senior child care practitioners. A copy of her statement of terms of employment is at p113. This document refers to the respondent's disciplinary policy.

31 The claimant had over 20 years' experience in the childcare field and had a clean disciplinary record prior to working at the respondent.

Policies and procedures

32 The claimant was subject to a number of policies and procedures. A schedule setting out the policies that had been shown to the claimant is at p116.

33 The respondent's disciplinary procedure (p35) sets out the procedure and states under examples of Gross misconduct:

- *“Actual or threatened physical or verbal violence towards colleagues or customers*
- *Serious negligence which causes or might cause loss, damage or injury”*
- *Bringing the Society into serious disrepute”.*

34 The respondent's code of conduct (p38) states that *“To promote good practice and minimise the risk of allegations within our nurseries we expect our colleagues to: Put our children first, their safety, welfare and ongoing development is the most important part of their role”.*

- 35 It goes on to state: *“Avoid inappropriate behaviour such as over tickling, over boisterous play or inappropriate questions such as asking children to tell them they love them”*.
- 36 It also refers to being *“respectful”* and *“behave as a positive role model”*.
- 37 It states that colleagues are not expected to act inappropriately with fellow colleagues or customers, and to not have physical contact that is objectionable or causes offence or unnecessary bodily contact.
- 38 The policy confirms that if any behaviours cause concern about safety or welfare of the children then the procedure on the safeguarding policy will be followed as in the case of allegations against a team member and the Local Authority Designated Officer (LADO) will be called.
- 39 At p53 is the respondent’s Safeguarding Policy. The policy requires a colleague *“to provide a safe and secure environment for all children, keep the children at the centre of all we do”* and states that *“children have the right to be treated with respect and to be safe from any abuse in whatever form”*. It also provides: *“We support the children within our care, protect them from maltreatment and have robust procedures in place to prevent the impairment of children’s health and development”*.
- 40 At p74 is the procedures for reporting a concern.

Flexible working request and incident in August 2021

- 41 The claimant made a request for flexible working in July 2021. This was refused by Ms Williams for the reasons set out in her letter dated 12 August 2021. The claimant felt that it was possible for the nursery to have allowed her to arrive at 9 am and leave work at 5pm to accommodate her caring responsibilities at home. However the claimant did not appeal the decision.
- 42 There was an incident in August 2021 when Ms Williams alleged that the claimant spoke to her in a threatening manner. The claimant alleged that Ms Williams raised her voice at her and provoked her and pushed her out of the room. Ms Williams reported the matter and it was investigated by Ms Patel and followed by a disciplinary meeting conducted by another Nursery Manager. She concluded, as recorded in the letter at p 119, based on the witness evidence before her that the claimant had breached the code of conduct. She concluded that Ms Williams did not shout at the claimant or push her but that the claimant had shouted at Ms Williams and made threats to her *“If I fall, you will be in trouble”*. The claimant was given a verbal warning that remained on her file for 6 months. The claimant did not appeal the decision.
- 43 The claimant alleged in her witness statement in paragraph 23 that she was ill on 21 December 2021 but that Ms Williams refused to call a cab for the claimant and advised that the office cannot call an ambulance. This allegation was not put to Ms Williams so I make no finding in relation to this allegation.

Incident on 11 January 2022

- 44 On the morning of 12 January 2022 a mother of a child, S, informed a member of staff in the nursery that S had returned home from the nursery the previous evening with finger marks and a thumb print on her face and the mother asked the nursery to look into it. S is a 3 year old girl with autism who does not communicate with speech. On the morning of 12 January there were no marks visible on S's face. The parents had not taken a photo of the marks/print. The member of staff informed the Nursery Manager, Ms Williams.
- 45 Ms Williams looked at S and saw no marks and then spoke to colleagues who'd been working the previous day and they could not recall anything. Ms Williams then reviewed the CCTV footage of the room. She had been expecting to see an altercation with another child. The CCTV showed the claimant with S at 5.14 pm. She moved S to one side and then put her full hand over S's face, including her mouth and nose, and pushed her head back. This is recorded in a form A record of concern, which Ms Williams completed at the time.
- 46 In Ms William's witness statement she refers to S's mother reporting that the marks "*were as if S had been grabbed around the mouth and squeezed*". These words were not used in the form A. The claimant's representative complained that Ms Williams exaggerated S's mother's allegation by referring to bruises and grabbing. It is possible S's mother or father used those words at some stage to Ms Williams. Whether or not those words were told to Ms Williams I find that having viewed the CCTV footage Ms Williams believed that the claimant had grabbed around the mouth and squeezed S's face and pushed her head backwards.
- 47 The claimant does not dispute that she moved S to one side and then put her full hand on S's face and pushed her back. At the hearing the claimant did not give a clear explanation for the action shown on the CCTV. She said she was checking for stickers or something else in S's mouth or ear for safety and also mentioned playing hide and seek. She said she was not doing any harm to S. She questioned why S's parents had not taken photographs of the marks if they really were there and referred to the fact that in all the other witness statements no one had seen any marks or any incident apart from a paint mark on S's face.
- 48 Having viewed the CCTV footage I find that the claimant did place her full hand over S's face with some force as it looked as if she had grabbed her face. She then pulled the claimant back into an unnatural position. I felt uncomfortable watching the CCTV. I find on a balance of probability that the force of her hand over S's face caused the finger marks and thumb print to still be visible on S's face when she went home on 11 January 2022, resulting in S's mother raising her concerns with the nursery on 12 January 2022. The fact that there were no photographs of the marks does not mean there were no marks. The fact that S's mother made the complaint is evidence that it was likely there were marks on her face. No one else witnessed the incident because they were not sitting near the claimant.

LADO referral

- 49 Since she believed what she had seen on the CCTV may well have caused the marks being complained of, Ms Williams followed procedure and

contacted Islington Local Authority and spoke to the Local Authority Designated Officer (“LADO”) who deals with Children’s Services to seek some advice. she informed him of the complaint and that she believed she had seen a serious incident which may have caused the marks being complained of. At that point, no names were disclosed. She also completed a LADO referral (page 121 – 123).

- 50 A video conference call was arranged for 13 January 2022. Ms Williams met with the claimant and told her she was being suspended and that there were allegations they needed to look into. She was not given any details of the allegations and was very shocked.
- 51 On the same day S’s mother called Ms Williams and said that she’d made a formal complaint to the police and that the police would be attending the nursery that day to view the CCTV. The police did attend and returned again a few days later on 17th January 2022 to take a copy of the CCTV.
- 52 A meeting with the LADO took place on 19th January 2022. Other members of staff attended, together with a member of the HR team and a police officer from the Child Abuse Investigation Team (“CAIT”). The meeting is referred to as Allegation against Staff and Volunteers (ASV) meeting. They discussed the incident and viewed the CCTV footage as recorded in minutes (p124). DS Clayton who was present at the meeting, but had not viewed the CCTV footage herself, concluded that the police would not take the matter any further and not go down the criminal prosecution route but would be happy to review the matter.

Scratch on S’s face on 12 January 2022

- 53 The claimant was not working at the nursery on 12 January 2022. S had a visible scratch mark on her chin at the end of nursery. This had been caused by a member of staff tickling S and her nail caught S’s on her jaw line. The member of staff immediately reported it and explained it was an accident. Ms Williams reported it to the parents and the parents were satisfied with the explanation. Ms Williams concluded it was not necessary to carry out any further investigation into the incident as the member of staff had reported the accident and explained the circumstances. This is recorded in the minutes of the ASV meeting on 19 January 2022.

Suspension

- 54 The claimant was sent a suspension letter (p132) dated 20 January 2022 from Ms Williams. The letter confirmed she was being suspended on full pay pending an investigation into alleged serious breach of the safeguarding policy. No details of the allegations were provided.

Claimant’s investigation meeting

- 55 The claimant was sent an invitation to an investigation meeting on 24 January 2022 by letter dated 20 January 2022. The claimant was informed of her right to be accompanied. The letter did not set out the details of the allegations. There is no legal requirement to do so and I do not find this a fundamental flaw. However I do think it would have been better practice for

the claimant to be informed in advance of her investigation meeting the nature of the allegations against her.

- 56 The claimant was not able to get a union representative to accompany her to her investigation meeting in the time given. However the claimant did not ask the respondent to postpone the meeting before or at the beginning of the meeting. I accept that the claimant felt very alone and worried at this time.
- 57 Minutes of the meeting commence at p 138. The claimant was asked about the 11 January 2022 and if she could recall any cause for concern. She recalled S sitting at her table and playing with stickers and that she had put one on her face. She also recalled them playing with the fishing toys. She said she was holding S's face because she was peeling a sticker from the side of her face and wanted to prevent her putting it in her mouth or ear. She was not hitting her.
- 58 After she was shown the CCTV footage she said "*I don't know why I did that*" and that she might have been playing and giving her attention. When told there were no stickers she suggested she may have been playing hide and seek.
- 59 Ms Williams also took statements from 5 colleagues of the claimant on 24 January 2022. Some of the colleagues had seen a paint mark on S's face. None of them had seen any incident.
- 60 Ms Williams concluded, following her investigation, that the claimant's actions on 11th January 2022 appeared to be unacceptable in the way she had handled S. The nursery had received a complaint of marks on a child's face and the CCTV footage clearly showed the claimant grabbing S's face and forcefully pushing her head backwards in a way that was inappropriate and likely to have caused the marks. She concluded that the matter should proceed to a disciplinary hearing.
- 61 I find that Ms William's decision was genuine and based on a reasonable investigation. There is no evidence that her decision was tainted by bias or racial prejudice. Ms Williams had seen the CCTV footage, spoken to the parents and colleagues and reached a reasonable conclusion. The claimant had been given an opportunity to explain the incident on 11 January 2022.

Disciplinary meeting

- 62 Ms Blaney was appointed as the disciplinary officer by HR and another Operations Manager. Ms Blaney had no prior knowledge of the claimant before being asked to conduct the disciplinary meeting. She had worked in childcare for in excess of 30 years and is qualified to degree level in Early Years. Before joining the Co-operative she worked for a number of different organisations and held positions such as National Safeguarding and Compliance Officer, Head of Childcare and Development, Performance Management Group Manager and had also been a Regulatory Inspector for OFSTED as well as an Early Year's Consultant. She had carried out a number of disciplinary and grievance meetings.

- 63 Ms Blaney was given a file containing the investigation material and spoke to Ms Williams and watched the CCTV footage via video. She did not see the minutes of the ASV meeting on 19 January 2022.
- 64 The claimant was sent a letter inviting her to a disciplinary meeting. The letter confirmed the allegations against her, her right to be accompanied and warned the claimant that if the allegations were upheld her continued employment maybe under threat. All the investigation documents were enclosed, together with the relevant policies and she was told that the CCTV footage would be available.
- 65 The allegations were that the claimant had seriously breached the safeguarding policy as seen on CCTV that she had grabbed a child's face with her fingers outstretched and pushing her head back, obscuring the child's mouth at the same time. The letter went on to state the alleged procedural/policy breaches:
- *a breach of the nursery's Safeguarding Policy; namely, to provide "support [to] the children within our care" and to "protect them from maltreatment" (page 56); to "Provide a safe and secure environment for all children" which is "... free from abuse in whatever form (page 57); and to "Ensure children are never placed at risk while in the charge of nursery colleagues" (page 63).*
 - *a breach of the Code of Conduct and Colleague Behaviour and Respect in the Workplace Policy, namely, "To Promote good practice and minimise the risk of allegations within our nurseries we expect or colleagues to: Put our children first, their safety, welfare and ongoing development ..." (page 40); to "Be respectful of ... children ..."; and to "Behave as a positive role model ... by remaining professional at all times and demonstrating caring attitudes to all" (page 41).*
 - *a breach of the Disciplinary Procedure relating to an "actual or threatened physical or verbal violence towards colleagues or customers." (page 36)*
- 66 Minutes of the disciplinary meeting are at p151. The claimant was accompanied by a trade union representative. The meeting was by video. Ms Williams was present at the meeting. After viewing the CCTV footage the claimant said what happened was not "bad" and that she was "playing" and was not hurtful but cuddling. The claimant was asked about her work experience.
- 67 After a short adjournment the claimant said she was sorry for such an act and that she was not hurting her and would be very careful when she plays and that she was very sorry and had learnt a lesson for the future. The claimant's representative then confirmed how experienced the claimant was, that she had a clean disciplinary record and that she was sorry. It is clear from the minutes of the meeting that the claimant was given an opportunity to explain what was shown on the CCTV footage and to put forward anything in mitigation.
- 68 At the end of the meeting Ms Blaney said she would consider her decision but warned the claimant if she was dismissed for gross misconduct a DBS referral would be made.

- 69 Ms Blaney considered all the evidence and concluded that the claimant should be dismissed for gross misconduct. She felt the claimant had been inconsistent in her answers and did not accept her explanation that she had just been playing.
- 70 Ms Blaney concluded that even though there may have been no marks on S's face the following day, S's parents had complained to the nursery about S having finger and thumb marks on her face on her return from nursery on 11th January 2022. As a result CCTV for that day had been viewed. The CCTV evidence showed that the claimant had grabbed S's face in a rough manner and had then forcibly pushed S's head backwards. The force had bent S's head and neck backwards. There were no other incidents which may have caused the marks complained of.
- 71 She felt that the claimant had grabbed S's face in a manner which was unacceptable and was more likely than not to have caused such marks. In her professional opinion, the claimant's actions amounted to unacceptable conduct towards a child and, in fact, could possibly have caused more serious injury to a 3 year old. The nursery is responsible for minding other people's children. The claimant's actions fell short of the Co-operative's expected standards of professionalism and conduct required by a colleague within any childcare setting. They also breached a number of the Co-operative's policies including, the Safeguarding policy, the Code of Conduct and Colleague Behaviour and Respect in the Workplace Policy, and the Disciplinary Procedure.
- 72 She considered the claimant's employment record with the Co-operative. Although it was not relied upon in considering whether her actions on 11th January 2022 amounted to conduct warranting dismissal, the claimant did not, in fact, have a clean record as contended by her representative and was subject to a "live" verbal warning which had been issued on 8th September 2021.
- 73 Whilst the claimant had apologised for her actions, she had only done so following consultation with her representative during an adjournment in the hearing. Ms Blaney felt that the claimant had shown no remorse prior to the disciplinary hearing being adjourned to talk to her trade union representative. She also considered the fact that the claimant had significant experience within the childcare sector. However, given that experience, she should have been fully aware that her action was entirely inappropriate and of the potential consequences for the child, herself, and the nursery.
- 74 She concluded that the nature and seriousness of the offence amounted to gross misconduct and the claimant's actions, in treating a child attending the nursery as she did, meant she no longer had any trust and confidence in her and therefore warranted summary dismissal. At the Tribunal hearing Ms Blaney confirmed that she had concentrated on the "action" seen in the CCTV footage.
- 75 I find that the decision to dismiss was made by Ms Blaney alone and that she was not influenced by Ms Williams. She had viewed the investigation file but had reached her own decision based on the CCTV footage, what the claimant had said in answer to her questions and all the other considerations set out in her witness statement and set out above. She had a genuine belief

that the claimant was guilty of the misconduct, having carried out a reasonable investigation. The claimant had been given an opportunity to put her side of the story and was represented by a trade union representative.

76 Ms Blaney attended a second ASV meeting on 2 February 2022 (p124). Ms Blaney summarised the disciplinary process. She confirmed her decision to dismiss the claimant. I accept that this meeting did not influence Ms Blaney's decision but was part of the internal reporting process. At that meeting Mr Burford, the HR Advisor from Islington, supported Ms Blaney's decision to dismiss the claimant for gross misconduct.

77 After the ASV meeting Ms Blaney telephoned the claimant and informed her of her decision to dismiss her for gross misconduct and that she would get a letter confirming the decision. She also warned the claimant that she would be making a DBS referral and told her of her right to appeal.

78 A letter dated 8 February 2022 was sent only by email to the claimant (p163). The letter sets out each of the allegations and the conclusion reached by Ms Blaney based on the responses from the claimant and the CCTV footage. She confirmed that the claimant was dismissed for gross misconduct on 2 February and that a DBS referral was being made. It also stated that she had a right to appeal. Unfortunately the letter was not sent by post, as well as email, and the claimant never received the letter. The claimant was in shock when she was told of her dismissal over the phone and waited to see the dismissal letter. She only really understood that she had been dismissed when she was notified that a DBS referral had been made.

79 The claimant did not appeal the dismissal because she said she never received the dismissal letter. I find that it was unfortunate that the claimant did not receive a copy of the dismissal letter. It should have been sent by post as well as by email. The respondent was not aware that the claimant had not received the letter. I do not find that the failure to send the letter by post was a fundamental flaw to the dismissal procedure. The claimant could have chased the respondent for the dismissal letter or enquired about an appeal, having been already told over the phone that she had been dismissed and had the right to appeal the decision.

80 Ms Williams completed a referral to DBS on 16 February 2022 (p169). I accept she had a statutory obligation to make the referral when a member of staff in a regulated activity, like the nursery, is dismissed for a concern relating to safeguarding.

81 Ms Williams, in preparation for the Tribunal hearing wrote to the LADO at Islington Council to ask if he had a copy of the CCTV footage, as it had been automatically deleted. He confirmed that he had and emailed the CCTV. In his email he described what he observed: "*Ms Aforah seemed to initially look at S's mouth and on the second occasion she grabbed S's head with her fingers outstretched pushing her head back in a rough manner*".

Incident in 2019/2022

82 The claimant alleges she was treated inconsistently with another comparable instance of gross misconduct in which Ms Williams was involved. Ms Williams informed the Tribunal that when she and another colleague were

taking a group of children from one room to another, between the headcount taking place and leaving the room, a child hid in the toilet and was left behind in the room. The child, though upset, was not harmed in any way. This was a case of human error which she immediately took full responsibility for. The incident was reported to the LADO and a full investigation and disciplinary hearing was carried out. OFSTED were also informed of the incident. Ms Williams received a written warning which she did not appeal against. There was no evidence before the Tribunal to dispute what Ms Williams told the Tribunal that this incident was a case of genuine human error.

Applying the law to the facts

- 83 The reason for the claimant's dismissal was misconduct, which is one of the potentially fair reasons to dismiss set out in s98 of ERA. Ms Blaney genuinely believed that the claimant was guilty of grabbing S's face in a rough manner and had then forcibly pushed S's head backwards. This conclusion was reached having seen the CCTV footage and having spoken to the claimant and seen other witness statements. She concluded that the claimant had grabbed S's face in a manner which was unacceptable and was likely to have caused the marks complained about by S's parents. This amounted to unacceptable conduct.
- 84 The nursery was responsible for minding other people's children. Ms Blaney believed that the claimant's actions fell short of the respondent's standards of conduct, safeguarding policy, and disciplinary procedure. She no longer had any trust and confidence in the claimant continuing to work in the nursery and therefore warranted summary dismissal.
- 85 The Tribunal does not accept the claimant's assertion that the genuine reason for her dismissal was not misconduct but that she was targeted by Ms Williams, who exaggerated the allegation against her and had it in for her. Ms Williams carried out the investigation but was not the person who dismissed the claimant. Ms Blaney reached a decision to dismiss the claimant and that decision fell within a band of reasonable responses. She reached her decision independently from Ms Williams without any prior knowledge of the claimant. Her decision was based on the evidence before her and was a carefully considered and reasoned decision. She had concluded that the claimant had grabbed S's face in an unacceptable way causing marks to her face. The dismissal was not a knee jerk reaction but a carefully considered decision, following a full investigation.
- 86 The claimant's case can be distinguished from the incident with Ms Williams in 2019 and the scratch to S's face on 12 January 2022. Ms Williams did receive a written warning for the child being left in the classroom, but it was accepted, after an investigation, that the child had been left by accident. The investigating officer did not find that Ms Williams' behaviour amounted to gross misconduct. The scratch mark on 12 January 2022 was due to an accident. It was as a result of tickling and not from unacceptable grabbing of a child's face.

- 87 The respondent was obliged in the circumstances to make a DBS referral. Although the police had concluded on 19 January 2022 that they would not be taking the matter further it was appropriate for the respondent to conclude, on viewing the CCTV, and following a complaint from the parents of S, that the matter should be investigated further.
- 88 The respondent did not breach their own procedures. It would have been better if the claimant had been notified in advance of the investigation meeting regarding the specific allegation against her but it is understandable that Ms Williams may have wanted to hear the claimant's explanation without any advance warning. The claimant was given an opportunity to appeal but it was unfortunate that the claimant did not receive a copy of the dismissal letter that had been emailed to her.
- 89 The respondent did consider a lesser sanction and did consider the claimant's experience and disciplinary record. However Ms Blaney no longer had confidence in the claimant after viewing the CCTV and the disciplinary meeting. She had concluded that the nature and seriousness of the offence amounted to gross misconduct and warranted summary dismissal.
- 90 The 2022 keep children safe in education report may refer to the use of reasonable force but there is no explanation why any form of force was needed to be used by the claimant on S on 11 January 2022. S appeared to be calm while sitting on the claimant's lap. There was no suggestion by either party that S required some form of force on the day.
- 91 There is no evidence before the Tribunal that the disciplinary process was a sham and that the outcome was predetermined. Ms Blaney had no knowledge of the claimant prior to the disciplinary hearing. The decision to dismiss was her decision alone. She reached her decision to dismiss based on carrying out a reasonable investigation in all the circumstances. Ms Blaney did focus on the action seen on the CCTV but she also considered the claimant's experience, her answers to the questions in the disciplinary meeting and her disciplinary record.
- 92 There is no evidence before the Tribunal that the dismissal was tainted by a racist undertone. This was never raised by the claimant during the internal process or in her claim form or further and better particulars.
- 93 In conclusion, the reason for the claimant's dismissal was misconduct backed by clear evidence, following a careful investigation. The respondent followed a fair procedure and their decision to dismiss fell within a band of reasonable responses. The respondent had a genuine belief in the claimant's guilt, based on reasonable grounds following a thorough investigation. Alternative sanctions to dismissal were considered but rejected in the circumstances. There were no fundamental procedural failings and the respondent complied with the ACAS code of conduct.
- 94 Therefore, the Tribunal finds that the claimant's dismissal was fair in all the circumstances and her claim for unfair dismissal fails and is dismissed.
- 95 It is not disputed that the claimant first moved S's head to one side and then put her full hand over S's face and pushed her back. This is clearly seen on the CCTV footage. As set out in the findings of fact above I do find that the

claimant placed her whole hand over S's face with enough force to have marked her face and then pulled her head back in to an unnatural position. The marks on her face led to the parents making a complaint. Both Ms Williams and Ms Blaney, who have had years of experience in the childcare profession found the claimant's action to be unacceptable and could have really injured S. Neither felt it looked like a playful interaction. The HR advisor from Islington council agreed with Ms Blaney's decision to dismiss and the LADO viewed the claimant's action as "rough".

96 In considering whether the claimant has committed a repudiatory breach of contract which is sufficiently serious and injurious to the relationship to justify dismissal I have considered the circumstances and nature of the business and the position of the claimant. The claimant was a senior practitioner at the respondent's nursery, looking after children up to the age of 5 years old, including children with autism, who had difficulty communicating.

97 The nursery is required to have in place safeguarding policies and codes of conduct to protect the vulnerable children in their care. The respondent's safeguarding policy requires the nursery to provide a safe and secure environment where the children are never placed at risk. The claimant may not have intended to cause harm to S but she did grab her face and push her back in to an unnatural position which probably caused visible finger marks and a thumb print on S's face. Although it may have been intended to be a playful act in fact it looked uncomfortable and unnatural and did leave a mark on S's face. I find that the claimant had breached the respondent's safeguarding policy by her action which potentially caused harm to S.

98 The respondent's code of conduct puts the child's safety and welfare first and specifically refers to deliberate and inappropriate handling of a child. On viewing the CCTV I concluded that the claimant's handling of S was inappropriate. It was uncomfortable watching the way she had handled S, even though it was for a very brief moment.

99 The respondent's disciplinary policy provided that actual or threatened physical or verbal violence towards a colleague or customer amounted to gross misconduct. As stated above I do not believe the claimant meant to cause S any harm but by grabbing her face with her whole hand with some force she did cause marks on S's face.

100 I do find that the claimant's actions undermined the trust and confidence which is inherent in the contract of a senior practitioner in a nursery looking after young and vulnerable children. I agree with Ms Blaney's conclusion set out in the claimant's dismissal letter:

"In this role you are expected to be a role model for the children, provide a safe and secure environment, and adhere to the Societies policies and values. It is evident that your actions go against the societies expected standards of behaviour and fails significantly short of the levels of professionalism and conduct required by a colleague within the childcare setting."

101 Therefore I find that the claimant's claim for wrongful dismissal fails and is dismissed.

Employment Judge A Isaacson

2nd November 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
04/11/2022

FOR EMPLOYMENT TRIBUNALS