

THE INDUSTRIAL TRIBUNALS

CASE REF: 7406/17

CLAIMANT: Stephanie Pickering

RESPONDENT: John Donnelly T/A Silver Birch Childcare

DECISION

The decision of the tribunal is that the claimant was fairly dismissed by the respondent.

Constitution of Tribunal:

Employment Judge: Mr I Wimpres

Members: Mrs M O'Kane
Mr R Hanna

Appearances:

The claimant was represented by Mr Tim Jebb, Barrister-at-Law, instructed by Worthingtons Solicitors.

The respondent was represented by Mr Denis McGettigan of Peninsula Business Services.

SOURCES OF EVIDENCE

1. The tribunal received witness statements and heard oral evidence from the claimant, Ms Bronagh Stephenson, Ms Stella O'Neill, Mr Nicholas Young and Ms Louise McGonagle. The tribunal also received an agreed bundle of documents which was supplemented by further documents during the course of the hearing.

TITLE OF PROCEEDINGS

2. The respondent's correct legal name and status is John Donnelly T/A Silver Birch Childcare. The title of the proceedings is amended accordingly.

THE CLAIM AND THE RESPONSE

3. In her claim form the claimant complained that she was unfairly dismissed from her job as a Nursery Assistant at a child care centre by the respondent. The reason for her dismissal was that a child left the Baby Room where the claimant was working via an open fire door without being noticed and made his way outside the premises to a nearby road. The claimant alleged that in dismissing her the respondent failed to take into account a number of relevant factors which were as follows:
- Failing to interview other staff members present in the room that day and/or failing to provide their witness statements to the claimant as part of the investigation;
 - Failing to interview the manager, Bronagh Stephenson, and/or failing to provide her witness statements to the claimant as part of the investigation;
 - Failing to place any weight whatsoever on the fact that the claimant was, at the relevant time, supervising eight children;
 - Failing to place any weight on the absence of Ms Cathy McKenna (the child's key worker);
 - Failing to acknowledge that the claimant did not open the fire exit door in question;
 - Failing to acknowledge that it was custom and practice of the respondent to open the fire exit door when necessary;
 - Failing to take account of the fact that the manager was aware that the fire exit door was open at the time in question;
 - Failing to take account of the fact that the manager did not request the fire exit door to be closed at the time in question;
 - Failing to take account of the fact that the manager, upon her own request, had the relevant fire exit door open from time to time;
 - That the claimant was disciplined; failing to discipline the manager for her role in the incident;
 - Failing to take account of the ongoing problem with the air conditioning system which, the claimant will state, was the reason why fire exit door was open;
 - Failing to take into consideration that attempts had been made to resolve the issues with the air conditioning system, which did not rectify the problem;
 - Failing to acknowledge that the failings of the air conditioning system was a health and safety hazard for the employees and children of the nursery.
4. In its response the respondent denied that the claimant was unfairly dismissed or that it failed to follow a fair dismissal process and provided a detailed and lengthy factual history of the matter from its perspective. The respondent did not

specifically address each of the matters set out above but the following points emerge from its narrative:

- The respondent did interview all staff in the room and provided their witness statements to the claimant during the disciplinary process.
- The manager provided a verbal statement during the disciplinary process and a recorded statement during the appeal process;
- The claimant was one of three nursery assistants who were responsible for supervising nine children;
- All three nursery assistants were equally responsible for the safety and wellbeing of the children in the room, the key worker policy only dealt with specific responsibilities such as nappy changing or feeding;
- It was accepted that the claimant did not open the fire exit door but was aware or should have been aware that it was open and that she and her colleagues should therefore have been more vigilant;
- The respondent denied that it was custom and practice of the respondent for the fire door to be opened but occasionally nursery assistants would open the fire door if nappy odour was particularly bad;
- The claimant notified the manager that they had opened the fire door to let some fresh air in as they were warm at the time;
- As all the children were at the opposite end of the room around the table with the claimant and two other members of staff were observing the activity the manager felt that it would be safe (to leave the fire door open) as long as the children were well supervised;
- It is the respondent's policy that a head count be undertaken every fifteen minutes;
- No action was taken against the manager as the nursery assistants were present in the room and responsible for the children in the room. They made the decision to open the door that day and did not ensure that they followed procedures regarding head counts and all three failed to notice that a child in their care had left the room;
- The respondent asserted that the air conditioning system was in full working order, a problem with bad odours having been fixed on 20 January 2017.

THE ISSUES

5. The main legal issue was whether the claimant was unfairly dismissed either substantively or on the basis of a procedural error and if so what compensation she was entitled to. A number of facts were helpfully agreed as identified in a factual matrix which was provided to the tribunal and these are incorporated in our decision. Some factual disputes remained and others emerged during the course of the hearing and these will be addressed where necessary bearing in mind the limited role of the tribunal as a fact finder when considering the fairness or otherwise of

disciplinary proceedings. We are also mindful that it is not necessary to identify the child at the heart of these proceedings and where necessary the decision refers to the child as “Child X”.

THE FACTS

6. The respondent business is a provider of childcare for pre-school children and is located at the Silver Birch Centre in Magherafelt. Mr John Donnelly is the owner of the respondent business and Ms Stephenson is employed by him as the Manager. At the material time Ms Stella O'Neill was the acting Deputy Manager.
7. The claimant was employed as a Nursery Assistant from 29 July 2015 until her dismissal on 23 August 2017. She worked between thirty to forty hours per week and was paid £7.50 per hour. Her normal weekly take home pay therefore varied from £200 to £250 per week.
8. On 3 July 2017 the claimant was given a written warning by Ms Stephenson for unsatisfactory job performance of duties in the Baby Room.
9. The respondent operated a key child policy on the premises which included a statement that at all times management will ensure that “a minimum of two vetted staff are on duty at any one time” and “ To meet this we use the following ratios of adult to children 0-2 being 1:3”.
10. On 4 July 2017, at 1.30 pm nine children were in the Baby Room. Three members of staff were on duty in the Baby Room on 4 July 2017 – the claimant, Ms McKenny and Ms McFlynn. At some point prior to approximately 1.45 pm, Ms McKenny opened the fire exit door situated towards the far side of the Baby Room opposite the entrance to it.
11. At or around 1.45 pm, Ms Stephenson entered the Baby Room. All three female staff members were present (the claimant, Ms McKenny and Ms McFlynn). The claimant was sitting on the ground next to the table immediately to the right of the entrance of the room. The claimant was rocking a child next to her in a bouncer chair. Ms McKenny and Ms McFlynn were standing in the middle of the room. Ms Stephenson did not see any children behind Ms McKenny and Ms McFlynn (i.e. near the fire exit) and all children that she saw were at or around the table engaged in an activity.
12. Ms Stephenson was made aware that the fire exit door was open. Ms Stephenson authorised that the door remain open. Ms Stephenson then left the room, returning briefly to provide glitter for use in the activity. Ms McKenny left the room for a short period of time to return the glitter to the office.
13. At 2.00 pm Ms Dolores Niblock rang the buzzer at the entrance to the centre and returned one of the children (Child X) to the centre. It transpired that the child had escaped from the Baby Room and made his way to the main road whereby a passing vehicle (driven by Ms Niblock) stopped. Ms Niblock got out of her car and took the child back to the centre.
14. Ms Niblock was met by Ms Stephenson and Ms O'Neill who checked the child over and returned him to the Baby Room at 2.03pm. The three female staff members

were in the same position as they had been whenever Ms Stephenson had been in the room approximately 15-18 minutes earlier.

15. It seems likely that Child X escaped from the Baby Room via the open fire door sometime between 1.45pm and 2.00 pm. It is possible that Child X could have left even earlier
16. The child's key worker on the day in question was Ms McKenny.
17. The respondent had a head count policy and it is not in dispute that no head count was carried out between 1.45 pm and the child's return.
18. At 2.10 pm Ms Niblock made a statement to Ms Stephenson in relation to what happened.
19. The three female staff members were moved into a different room for the remainder of their shift.
20. Later that afternoon, the three female staff members were spoken to by Ms Stephenson. Ms O'Neill was also present.
21. The claimant provided an account of what occurred. The claimant said that she was making play dough with the children. One child was in the change area with Ms McFlynn. Child X was sitting at the table engaged in this activity. The claimant was moving the bowl of play dough between the children so that they all got an opportunity to stir it and was also rocking one of the younger babies in a bouncer chair beside her. The claimant did not see Child X leave the table. The room was very calm as all the children were enjoying and engaged in this activity. A handwritten record was made of the claimant's account.
22. Ms McFlynn also gave an account of the incident. She stated that no head count was done and that she had left the room for a few minutes to get colouring for the play dough and that Ms Stephenson had entered the room. Ms McFlynn was also changing nappies in the changing area which was next to the fire exit. Ms McFlynn observed one child coming close to the door and so lifted her back to the other side of the room.
23. Ms McKenny provided a written statement. According to Ms McKenna she and the claimant were saying how warm it was and the claimant said, "Gone [sic Go and...] open that door". Ms McKenny then opened the fire door. She believed that this would be ok as all of the children were occupied at the top end of the room. When Ms Stephenson came into the room Ms McKenna told her that the fire door was open. Ms McKenny also referred to her leaving the room for 45 seconds to 1 minute to leave the glitter back in the office. About 5 seconds after she returned to the room the buzzer went and it was the lady (Ms Niblock) and the child at the door. Ms McKenny's written statement was supplemented by a few questions and answers. Ms Stephenson asked Ms McKenny if she noticed the child at the table when she went out with the glitter and she replied that she had not and just saw that children were around the table and the beanbag area.
24. The child's father attended that evening and was told what happened. His reaction at the time was calm.

25. Ms Stephenson also contacted Mr Donnelly that evening and briefed him as to what had occurred. While he was alarmed as to what happened, he did not take any action himself in respect of the claimant, Ms McFlynn and Ms McKenny save for authorising Ms Stephenson to continue with an investigation process.
26. On 5 July 2017 both of the child's parents attended for a further meeting with Ms Stephenson. By that stage they were very angry but while there was discussion of them going to the press/social media they indicated that they do not intend to do so.
27. On the same day Ms Stephenson spoke with the social worker assigned to the centre about next steps and she visited the centre in the afternoon. Ms Stephenson also phoned the Labour Relations Agency and was advised to suspend the three staff members involved on full pay pending a full investigation. On the basis of this advice Ms Stephenson called Ms McFlynn and Ms McKenny into her office separately and advised them of the position. Both were suspended and invited to an investigatory meeting. As the claimant was on a scheduled day off Ms Stephenson arranged for Ms O'Neill to phone her and ask her to come in to the office that afternoon as Ms Stephenson understandably did not want to inform the claimant of her suspension over the phone.
28. Upon arrival Ms Stephenson handed the claimant a letter inviting her to attend a disciplinary hearing on 6 July 2017 and informed the claimant that she was being suspended on full pay. The claimant asked how Child X was and Ms Stephenson replied that Child X was ok and had been taken to the doctors just in case but was fine.
29. The material portion of the Ms Stephenson's letter read as follows:

"You are required to attend a disciplinary hearing on 06 July 2017 at 1.00pm in the main office with Bronagh Stephenson and Stella O'Neill will be in attendance to take notes.

The purpose of this hearing is to discuss with you and afford you the opportunity to provide an explanation for the following matters of concern: On 04/07/17 when you were in the baby room the fire exit door was opened and one of the babies made their way out and into the main road, it was failed to be noticed by any of the staff in the room that the child had left the room."
30. The letter also informed the claimant of her right to be accompanied by a trade union official or fellow employee. Similar letters were issued to Ms McFlynn and Ms McKenna. The letters were inaccurate as these were investigatory meetings rather than disciplinary hearings.
31. On 6 July 2017 the claimant attended the hearing. Ms Stephenson was accompanied by Ms O'Neill. Ms Stephenson opened the meeting by explaining that the purpose of the meeting was to go over the claimant's initial statement, ask a few further questions and get more detail on what happened. The claimant's account was in similar terms. The claimant again confirmed that the child was definitely at the table and went on to explain that from where she was sitting she could not see the open door. Ms Stephenson commented that the fact that the child had left the room and no-one had noticed was a big problem and as the door was open they should have been even more vigilant. The claimant stated that it wasn't fair that she was getting blamed as she was doing the activity (play dough) and rocking one

of the babies next to her at the same time but admitted that the room was very calm at the time.

32. After completing the investigatory meetings Ms Stephenson sought advice on disciplinary procedures from Peninsula Business Services who subsequently recommended that Graphite HRM be engaged to carry out the disciplinary process. Ms Stephenson duly engaged Graphite HRM on 20 July 2017 and gave a verbal briefing to Mr Nicholas Young of Graphite HRM at the outset of the process.
33. On the 21 July 2017, Ms Stephenson wrote to the claimant and invited her to attend a disciplinary hearing on 2 August 2017 with Mr Young. The letter explained that the purpose of the hearing was to discuss an allegation which, if substantiated, would be considered gross misconduct. The specific disciplinary charge read as follows:

“Alleged gross negligence resulting in a breach of the Organisation’s safeguarding Children & Child Protection Policy – further particulars being that it is alleged that on 4 July 2017 when you were on duty in the baby room, the fire exit door was opened, one of the babies made their way out and onto the main road, and you failed to notice by any of the staff in the room that the child had left the room.”

Copies of relevant documents were enclosed and the procedure at the hearing was explained. The letter advised that if the allegation was substantiated it would amount to gross misconduct and the claimant’s employment may be summarily terminated. The claimant was also advised of her right to be accompanied by a fellow employee or Trade Union official.

34. The claimant attended the hearing on 2 August 2017. Mr Young asked a series of questions to which the claimant responded. The hearing was tape recorded and a typed transcript was made available to the tribunal. In keeping with a properly conducted disciplinary hearing the questions were more detailed and probing. During the hearing in answering questions the claimant elaborated on some of what she had said previously. She stated that her view of the fire door was obstructed by a piece of furniture and that normally when the fire door was open it would be blocked off in some way by chairs or other items but on this occasion it was not. The claimant also explained that she was not taking any active steps to monitor the open door as she was engaged in activity with the children and rocking a crying child. The claimant did not dispute that it was company policy for head counts to be conducted every fifteen minutes but confirmed that there was no head count schedule or person in charge of head counts. The position was rather that headcounts were conducted on an ad hoc basis by staff. The claimant accepted that additional attention should have been paid to head counts when the fire door was propped open. The claimant also explained the key children policy whereby nursery assistants would be particularly responsible for children allocated to them on a given shift. Child X was not one of the claimant’s key children on the day in question and therefore if Child X was not at the table at the time Child X could have been with Ms McFlynn who was changing nappies at that time. The claimant commented that the policy was confusing and contradictory. However, the claimant did not notice that Child X had left the table. Mr Young put it to the claimant that the policy covered specific attention such as nappy changing, feeds, naps and sleeping but that the paramount consideration for the health, safety and wellbeing of all children was a shared responsibility and not divided up in a key children

designation. The claimant maintained that the respondent's policy was unclear to her. In answer to a suggestion that she had been negligent the claimant responded that she didn't really know and that it was manic trying to supervise activity at the table and rocking a crying child at the same time. The claimant also commented adversely about the investigatory process citing a lack of confidentiality, other persons' statements being attributed to her and going into an investigatory meeting believing it to be a disciplinary hearing. The claimant also put it to Mr Young that the outcome of the process had already been determined by the respondent.

35. Following the hearing Mr Young compiled a report of his findings dated 18 August 2017. Mr Young found the claimant's explanations to be unsatisfactory and considered that if she had been paying due attention to her responsibilities she ought to have been aware that one child was missing. The fact that the fire door had been propped open in the past did not absolve the claimant of responsibility and nor did the fact that she was busy during the period in question. Mr Young was satisfied that the claimant's concerns about the process were not sufficiently serious to undermine its fairness. Mr Young was satisfied that the claimant's conduct amounted to gross negligence and recommended that her employment be summarily terminated. Mr Young noted that the claimant was the subject of a live written warning but did not comment on it otherwise. He would in our view have been acting reasonably to have taken it into account in making his recommendation but we are satisfied that he did not accord any significant weight to it. Had he done so it could only have been harmful to the claimant's interests. There is no evidence that Mr Young acted improperly in any way. The claimant's two co-workers were also dismissed on the same basis as the claimant and neither was the subject of a live warning of any nature.
36. Ms Stephenson accepted Mr Young's recommendation that the claimant should be dismissed. As was the case with Mr Young, Ms Stephenson would have been fully entitled to take the warning into account to the claimant's detriment but we again accept her somewhat surprising evidence that she did not do so.
37. On 21 August 2017 Ms Stephenson wrote to the claimant and formally dismissed her. Mr Young also conducted the disciplinary process in relation to Ms McFlynn and Ms McKenny and made similar recommendations. They were also dismissed around the same time.
38. On 23 August 2017, the claimant submitted a written appeal. The main points made by the claimant were that she did not open the fire door or suggest that it should be opened; that the incident was due to the negligence of a colleague and that there had never been an issue about the fire door being opened during hot weather. The claimant also stated that she was confused about the way in which the investigation was conducted and that she was not aware that the first meeting was an investigatory meeting as the invite described it as a disciplinary meeting and that she sought a discussion with Ms Stephenson about this and the policies of shared responsibilities in which she believed there was a contradiction. The claimant also drew attention to a conversation with Ms Stephenson in which she informed the claimant that the previous warning would not affect the decision on the loss of her job yet the warning was noted in Mr Young's report. As a result the claimant felt that she had been misled. The claimant further stated that she felt that she had been unfairly treated and that Ms Stephenson came to a decision on her employment before the investigation procedure concluded.

39. Ms McGonagle of Graphite HRM was engaged to hear the claimant's appeal.
40. By letter of 21 September 2017, Ms McGonagle invited the claimant to an appeal hearing on 28 September 2017. Ms McGonagle's letter set out the grounds of appeal as follows:
- That you were not aware that the first meeting you had in relation to the issue was an investigation hearing.
 - That you believe there is a contradiction in relation to the shared responsibilities policies.
 - That you believe that the issue in relation to negligence is not your fault.
 - That the disciplinary officer referred to an existing warning on your file and that you had been led to believe that this warning would not affect the decision on the loss of your job.
 - That you feel that the decision to dismiss was predetermined.

The claimant was again advised that she could be accompanied by a fellow employee or Trade Union official.

41. On 28 September 2017, the claimant attended the appeal. Ms McGonagle went through all of the points raised by the claimant in her appeal and gave her the opportunity to add anything that she wished at the end of the interview.
42. Ms McGonagle also interviewed Ms Stephenson on the same day in relation to the appeals process in respect of the claimant and Ms McFlynn. Ms Stephenson gave an account of what happened on the day of the incident and Ms McGonagle asked relevant questions in relation to both appeals.
43. Ms McGonagle compiled a report on the claimant's appeal dated 17 October 2017. Ms McGonagle described the role of an Appeal Officer as to make a recommendation on whether or not the process followed was so unreasonable that the that the original decision to dismiss should not be upheld. In her report Ms McGonagle went through each of the grounds of appeal and her findings can be summarised as follows:

Ground 1 - That the claimant was not aware that the first meeting you had in relation to the issue was an investigation hearing.

Had the error not occurred the sanction would have been the same given the severity of the allegation and all of the claimant's rights were upheld during both the investigatory and disciplinary process. On this basis the claimant's appeal was not upheld.

Ground 2 -That the claimant believed there is a contradiction in relation to the shared responsibilities policies.

Being a key worker did not absolve the claimant from responsibility for the care and safety of children under observation in the Baby Room. The claimant failed to

observe the baby going missing. On this basis the claimant's appeal was not upheld.

Ground 3 - That the claimant believed that the issue in relation to negligence is not her fault.

It was clear that the claimant knew that the fire door was open despite not being able to see it from where she was sitting. The baby may have left the table out of the view of the claimant but this did not absolve the claimant of her responsibility to ensure the safety of babies in her care in the room. Therefore Ms McGonagle did not uphold this ground of appeal.

Ground 4 -That the disciplinary officer referred to an existing warning on the claimant's file and that you had been led to believe that this warning would not affect the decision on the loss of your job.

Ms McGonagle noted that the warning was mentioned in Mr Young's report but was not referred to as an influencing factor in his decision. Ms McGonagle considered that from reading Mr Young's report it was clear that the basis for his recommendation was that the claimant was not sufficiently monitoring the open door or that the baby had left the room where the claimant was working with serious consequences for its health and safety. Regardless of prior warnings this was considered gross misconduct. Accordingly, Ms McGonagle did not uphold this ground of appeal.

Ground 5 -That the claimant felt that the decision to dismiss was predetermined.

Ms McGonagle noted the differences in the accounts given by the claimant and Ms Stephenson of a conversation about whether the claimant needed to look for a new job. Ms McGonagle also referred to the minutes of the investigatory meeting on 6 July 2017 which recorded Ms Stephenson's response to the claimant's query about her job to which she replied that it was out of her hands and that she had outsourced the disciplinary process to ensure objectivity in relation to the decision. Ms McGonagle therefore did not uphold this ground of appeal.

Accordingly, Ms McGonagle recommended that none of the grounds of the appeal were upheld. Ms McGonagle further noted that it was for the respondent to decide whether to accept her recommendations.

44. Ms Stephenson accepted Ms McGonagle's recommendation.
45. On 19 October 2017, Ms Stephenson wrote to the claimant and advised her that the decision to dismiss her stood. Ms Stephenson addressed each ground of appeal and set out her conclusions which were on the same basis as Ms McGonagle's recommendations though with slightly different wording. Ms Stephenson concluded her letter by stating that the decision was final.

THE LAW

46. Article 130 of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") insofar as relevant provides as follows:-

"130. - (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 paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) *A reason falls within this paragraph if it -*

- (b) *relates to the conduct of the employee,*

(4) *Where the employer has fulfilled the requirements of paragraph (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."*

47. In the application of this statutory guidance the tribunal is mindful of the considerable body of case law and in particular the guidance stemming from the case of ***Iceland Frozen Foods Limited v Jones [1982] IRLR 439*** (reaffirmed by the Court of Appeal in England in the cases of ***Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827***) which includes (inter alia) that in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another and that the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. In this regard the tribunal is also assisted by the guidance given by the Court of Appeal in ***Dobbin v Citybus Ltd [2008] NICA 42*** as to how an industrial tribunal should approach the task of determining the fairness of a dismissal and in the case of ***Rogan v South Eastern Health and Social Care Trust [2009] NICA 47***.

48. In ***Dobbin v Citybus Ltd [2008] NICA 42*** the Court of Appeal provided guidance as to how an industrial tribunal should approach the task of determining the fairness of a dismissal. The judgment of Higgins LJ reads as follows:-

"[48]... *The equivalent provision in England and Wales to Article 130 is section 98 of the Employment Rights Act 1996 which followed equivalent provisions in section 57 of the Employment Protection (Consolidation) Act 1978.*

[49] *The correct approach to section 57 (and the later provisions) was settled in two principal cases - British Homes Stores v Burchell [1980] ICR 303 and Iceland Frozen Foods Ltd v Jones [1983] ICR 17 - and explained and refined principally in the judgments of Mummery LJ in two further cases - Foley v Post Office and HSBC Bank Plc (formerly Midland Bank Plc) v Madden reported at [2000] ICR 1283 (two appeals heard together) and J Sainsbury v Hitt [2003] ICR 111.*

[50] *In Iceland Frozen Foods Browne-Wilkinson J offered the following guidance -*

'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by section 57(3) of the [Employment Protection (Consolidation) Act 1978] is as follows:

- (1) the starting point should always be the words of section 57(3) themselves;*
- (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*
- (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
- (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
- (5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'*

[51] *To that may be added the remarks of Arnold J in British Homes Stores where in the context of a misconduct case he stated -*

'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the

employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion'."

49. As highlighted by the Court of Appeal in its recent decision in **Connolly (Caroline) v Western Health and Social Care Trust [2017] NICA 61** the interpretation of Article 130(4)(a) of the 1996 Order "has been fixed by a series of appellate courts over the years i.e. that whether an employer acted reasonably or unreasonably is to be addressed as whether an employer acted within a band of available decisions for a reasonable employer even if not the decision the Tribunal would have made. That test, expressed in various ways, is too long established to be altered by this court, and in any event has persuasive arguments in favour of it. But it is necessary for tribunals to read it alongside the statutory provision of equal status in Article 130(4)(b) i.e. that that decision "shall be determined in accordance with equity and the substantial merits of the case".
50. The statutory disciplinary and dismissal procedures are set out in the Employment (NI) Order 2003 (Dispute Resolution) Regulations. Essentially there are three steps in the standard disciplinary and dismissal procedure which the employer must follow when considering the termination of any employment as follows –

"Step 1: statement of grounds for action and invitation to meeting.

1. - (1) *The employer must set out in writing the employee's alleged conduct or characteristics, or other*

circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2. - (1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless -

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

3. - (1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

(5) After the appeal meeting, the employer must inform the employee of his final decision."

SUBMISSIONS

51. Both Mr Jebb and Mr McGettigan provided very helpful written and oral submissions in a form that both clearly identified the issues. Their written submissions are appended to this decision. As noted above, Mr Jebb in collaboration with Mr

McGettigan provided a list of agreed facts which greatly assisted the tribunal in focusing on the matters in dispute. This commendable approach should in our view be utilised more often.

Claimant's Submissions

52. The main thrust of the claimant's case was that the investigation should have encompassed Ms Stephenson on the basis that she was an active participant in the incident having been present in the Baby Room at the material time, observed that the Fire Door was open and undertaken a risk assessment. On this basis it was suggested that Ms Stephenson was arguably partially responsible for the incident and both should have been a subject of investigation herself and ought not to have been the ultimate decision maker in respect of the decision to terminate the claimant's employment. In addition, it was suggested that allowing the fire door to remain open was a breach of Health and Safety Regulations. Mr Jebb in his submissions identified five main issues for determination as follows:

- (1) Whether as a matter of fact the claimant asked for the fire door to be open on the day in question.
- (2) If not, whether as a matter of fact the claimant had knowledge of the fire door being opened.
- (3) Whether the claimant's view of the fire door was blocked by furniture within the room, whether there was a conversation regarding the opening of the door, who instructed the door to be opened and to what extent this was brought to the attention of the claimant and Ms Stephenson. Whether or not there was a practice within the centre of opening the fire door before and after the installation of the air-conditioner.
- (4) The likely whereabouts of Ms McFlynn and Ms McKenny during the period in question and whether the key child policy makes any one of the three present in the room more or less culpable or responsible for the welfare of the child. In view of the conclusions reached on the above and given that Ms Stephenson authorised the door remaining open, whether or not the claimant's conduct on the day in question amounted to gross misconduct.
- (5) Irrespective of the conclusions to the issues raised above, no disciplinary proceedings were brought against Ms Stephenson further to her authorising that the door remain open. Issues arose therefore of whether it was reasonable to hold Ms Stephenson to the same accountability as those present in the room; to what extent if any might Ms Stephenson have been subject to regarding disciplinary proceedings and whether this was a failure and if so if that cast doubt over the fairness of the overall procedure or whether the outcome would have been the same in any event.

In addition, Mr Jebb sought to rely upon the absence of person in charge policy, specifically the guide ratio of 1:3 suggesting that this ratio was not maintained during the entirety of the time when the child went missing.

Respondent's Submissions

53. (1) Mr McGettigan submitted that the presence of Ms Stephenson in the Baby Room was a side issue as it was impossible to be sure that was in the room when Ms Stephenson entered and that in any event Ms Stephenson could not be held to the same standard as the three nursery workers who were primarily responsible for the welfare of the children in the Baby Room. Mr McGettigan also rejected the suggestion that the process of dismissal was pre-determined and drew attention to the claimant's own evidence that Mrs Stephenson had told her that she didn't know what would happen and in cross examination stated "I don't know she didn't know what to do". Mr McGettigan also drew attention to Ms Stephenson's evidence that the dismissal of the claimant and her two co-workers placed the respondent in real difficulty in terms of staffing.
- (2) In relation to the open fire door Mr McGettigan accused the claimant of picking and choosing parts of the evidence that support her account and denying the rest that contradicted her account. Mr McGettigan drew attention to discrepancies in the claimant's evidence as to why the fire door was open. The claimant told Mr Young that it was opened because it was warm but in her witness statement she gave the reason as a bad smell from the air conditioning. Mr McGettigan also drew attention to the claimant's answer to Ms McGonagle that she was not "100% sure" if the door was open and the claimant's failure to produce notes that she made in order to help her remember what had occurred. Other inconsistencies included the claimant changing her evidence once she realised the seriousness of the allegation and suggesting it was much busier and preoccupied or "manic" as she put it in her oral evidence. Mr McGettigan also cast doubt on the claimant's contention that she was alone in the Baby Room and pointed to her admission in oral evidence that she could not see the whereabouts of Ms McFlynn or Ms McKenny and did not see Ms McKenny leave or return to the room and accepted therefore that she could not say that she was ever alone in the room as stated in her claim and statement. Mr McGettigan submitted that on this basis it was quite possible that the claimant was never alone in the room.
- (3) Mr McGettigan challenged the claimant's evidence that she would not have had a line of sight of the fire door due to the height of furniture and the presence of boxes and relied on photographic evidence in support of the respondent's position.
- (4) Mr McGettigan submitted that contrary to the claimant's evidence head counts were of great importance and ought to have been carried out every 15 minutes and not just when children are moving to and from a room or area and that if a head count had been done the alarm would have been raised earlier.
- (5) In relation to the investigatory meeting Mr McGettigan submitted that the claimant, as she accepted, was not disadvantaged by it being described as a disciplinary hearing and that rather she was confused or upset as she was expecting an outcome rather than a further meeting. The claimant would also have been familiar with the process having been through a recent disciplinary procedure.
- (6) With regard to the previous warning both Mr Young and Ms McGonagle stated that warning was not taken into account in their recommendations. Further, Ms Stephenson's evidence was that at the time of instructing Mr Young she was not aware that the claimant would raise the issue of the key child policy as

a defence and thus felt the warning was not relevant to the incident. On that basis Mr Young made no further investigations as to the contents of the previous warning. In any event part of the warning could have been relied upon as relevant as it related to failings on the claimant's part regarding her duties for her key children. Ms Stephenson also gave evidence that she explained the purpose of the key child policy to the claimant and issued the warning on the 3 July 2017, which was the day before the incident.

- (7) Mr McGettigan submitted that it was clear that the claimant was seeking to absolve herself from responsibility on the basis that Child X was not her key child and this had nothing to do with the ratio of staff to children in the room as submitted on behalf of the claimant. The claimant also sought to rely on the absence of the person in charge policy, specifically the guide the ratio of 1:3 suggesting that this ratio was not maintained during the entirety of the time when the child went missing. Mr McGettigan submitted that it was clear that the policy was that there should be two staff present at all times, but there must be time when a staff member has to go to the bathroom, or go to the office, or will not be present in the room as they are undertaking a nappy change or putting a child to bed. To allow for this the 1:3 ratio is used, but this did not mean that there must be at all times three staff members in the actual room, but in fact two, the third being a substitute as it were for any of the other two should one leave. Mr McGettigan submitted that in all probability there were at least two staff in the Baby Room at any one time. If, on the other hand, the policy was breached, this would not assist the claimant as it would serve as further evidence that all three staff failed to adequately communicate to each other as to their whereabouts, Thus there was a duty on all staff to maintain these safeguarding policies, and even if it was breached, which Mr McGettigan suggested was unlikely, this would be a further failing on the claimant and the other staff.

CONCLUSIONS

54. As indicated above a number of factual disputes emerged from the evidence. It is not the role of the tribunal to re-hear a disciplinary hearing or the appeal but rather what a tribunal has to do is to decide whether these hearings were substantially fair. This distinction is of particular importance in cases such as the present in which new facts are relied on which were not before the relevant decision makers. However, having heard evidence on these matters we consider it proper to express our views insofar as it is possible to do so and with particular emphasis on their relevance or otherwise.
55. Firstly, there is a dispute between the parties as to whether the claimant requested the fire door to be opened or not, and as to the reasons for the door being opened. It is also in dispute as to the level of knowledge that the claimant had in relation to this action of opening the door and thereafter. It is clear from the decision to dismiss the claimant was based on her knowledge that the fire door was open and therefore whether she requested it to be opened or not is immaterial.
56. On a similar vein the reasons for the door being open are beside the point. The key point is that the door was open not whether this was due a problem with the air-conditioner emitting a smell on occasions or because of the heat. We have no reason to doubt that prior to the installation of air-conditioning the fire door would be permitted to be opened. The dispute as to whether it was custom and practice for

the door to be opened after the installation of the air conditioner again misses the point and it was not raised by the claimant either at the disciplinary hearing or the appeal.

57. We also heard evidence from the claimant that her line of vision and that of her colleagues of the fire exit door was obstructed due to the placement and size of the furniture in the room on the day in question. Again this issue was not raised by the claimant either at the disciplinary hearing or the appeal. It seems to us in any event that this could not conceivably assist the claimant as it was her job along with her co-workers to make sure that the children remained in the Baby Room.
58. The dispute as to whether the claimant informed Ms Stephenson that all children were at the table was not raised by the claimant at the disciplinary hearing or the appeal. As this point was not relied upon by either Mr Young, Ms McGonagle and Ms Stephenson as a basis for their decisions we do not regard it as being of any particular significance. Our firm impression is that the claimant did not inform Ms Stephenson that all children were at the table.
59. It is common case that Ms Stephenson was made aware that the fire exit door was open. It is of no relevance who told her this or what knowledge the claimant had of this conversation. The key point which is not in dispute is that the claimant was aware that the fire door was open.
60. There is a dispute between the parties with regards to what type of risk assessment (if any) Ms Stephenson carried out in relation to the fire door remaining open and what would have been appropriate. However, all parties agreed that Ms Stephenson authorised that the fire door remain open. We are doubtful as to the relevance of this point as it is the claimant's action or inaction that is of importance. Such significance as this point may have goes to the suggestion that Ms Stephenson either should herself have been the subject of disciplinary action or that she should not have been involved in the process at all given her involvement in the incident. It is not clear to what extent, if any, Mr Donnelly considered whether any action was appropriate regarding Ms Stephenson. It is not necessary for us to form a view on the first point as we know that no action was taken against Ms Stephenson and she is not in the position of a co-worker against whom the claimant could make a legitimate comparison in terms of treatment.
61. We are also satisfied that Ms Stephenson took appropriate steps to ensure that the disciplinary hearing and appeal were both objective and independent. We do not consider that Ms Stephenson's presence in the Baby Room compromised the fairness of these procedures or made it inappropriate for her to make the final decision to dismiss.
62. Returning to the factual dispute having heard Ms Stephenson's evidence we are satisfied that she carried out a basic risk assessment. In the event no disciplinary proceedings were brought against Ms Stephenson either generally or as a result of her decision to authorise the door to remain open. Whether it would have been reasonable to hold Ms Stephenson to the same accountability as those present in the room and whether Ms Stephenson ought to have been the subject of disciplinary proceedings are interesting questions but in our view they do not sound on the fairness or otherwise of the decision to dismiss the claimant.

63. There was also a dispute and some uncertainty as what exactly happened in and around the time that Child X went missing. It is far from clear when Child X left the room and how long Child X was missing. There is some dispute as to where exactly Ms McKenny and Ms McFlynn were at the relevant time. It was not in dispute that Ms McKenny left the room for a short period of time to return the glitter to the office. It also seems clear that Ms McFlynn was changing nappies in the changing area during this period. It is possible therefore that the claimant was left alone in the room for a short period. In our view however this does not add anything of relevance. It was the job of the three co-workers to ensure the safety and welfare of the children in their care. This must involve on any sensible view working as a team. If the numbers of nursery staff in attendance dropped at any time for whatever reason it was incumbent on those remaining to be extra vigilant during such periods.
64. As noted above the claimant did not dispute that it was company policy for headcounts to be conducted every fifteen minutes but gave evidence that there was no headcount schedule or person in charge of headcounts and that headcounts were conducted on an ad hoc basis by staff. She also accepted that additional attention should have been paid to headcounts when the fire door was propped open. While it may be the case that staff do not follow this policy when the children are within one room it seems to us that the policy does not admit of that exception. In practical terms even if the policy was unclear or not enforced rigorously a headcount would have been a very sensible precaution for the claimant to take during a period when the fire door was open and her co-workers were otherwise occupied.
65. Having given careful consideration to all of the evidence and submissions we are satisfied that the claimant was not unfairly dismissed. This would be the result under either of the approaches endorsed by the Court of Appeal in **Connolly**. We are satisfied that the respondent had a genuine and reasonable belief in the guilt of the claimant and formed that view after a reasonable investigation. The respondent's decision was well within the band of reasonable responses. We are not persuaded that any of the suggested failings in either the process or the substantive decision either can avail the claimant or have any intrinsic merit. There is no suggestion that the respondent failed to adhere to the 3 step minimum statutory dismissal procedure and we have not detected any such failing.
66. The claim must therefore be dismissed.

Employment Judge:

Date and place of hearing: 15-17 May 2018 and 14 June 2018, Belfast.

Date decision recorded in register and issued to parties:

BETWEEN:

Stephanie Pickering (Claimant)

V

Silver Birch Childcare (Respondent)

Submissions on behalf of the respondent

1. The respondent confirm the legal facts and issues as provided by the claimant's representative Mr.Jebb (Barrister) are agreed and we rely upon them as a basis of chronology and background without repeating the same here.
2. The respondent submit that the claimant was dismissed fairly under the Employment Rights (NI) order 1996 (130 (2) B) summary dismissal on basis of conduct (in this case gross misconduct) after due process including the use of external objective experts.

Claimants allegations: Ms Stephenson should have been disciplined, the outcome was predetermined, and her involvement therefore undermined the fairness of the entire dismissal.

3. The claimant and two other nursery staff Rosin McFlynn and Cathy McKenná were employed as nursery staff and charged with a duty of care to safeguard and protect the children under their watch.
4. Ms Bronagh Stephenson is the operations manager for the respondent, that being clarified as John Donnelly T/A Silver Birch Childcare.
5. The respondent submit that Ms Stephenson has overall responsibility for the day-to-day running of the organisation which by her own evidence includes approximately 92 children, not all of whom are full time or are present on the same days. At any given time, it would be impossible and we would argue unreasonable to expect Ms Stephenson to know exactly what children are due to be in each room. It is not her place to know this.

staff the respondent contend were aware of the door being open, but importantly failed to act with due care and attention, in other words negligence, allowing a toddler to leave the room under their supervision, being unaware of this fact when it was their direct duty to be aware at all times of the whereabouts of the children. The disciplinary policy relied upon states “a breach of health and rules that endangers the lives of, or may cause serious injury to employees or any other person”, the claimant maintain this demonstrates a breach by Ms Stephenson, but the respondent contend that as above the act of the door being open is not the breach per se, or the thing that directly placed Child A or any others at risk, but the key factor being the failure to supervise that open door is what resulted in Child A escaping and placing him at risk.

15. It is accepted there was a potential time of around 15mins or more (1.45 – 2pm) when Child A could have exited the room. It is Possible that Child A could have left the room before 1.45 as Ms Stephenson’s evidence was that she entered the room and a conversation was had with the claimant whereby she had stated she asked for the door to be opened. Ms Stephenson’s evidence was that no headcount was undertaken but asked if all children were accounted for and was advised they were and were at the table.
16. It is conceivable that Child A could already have been missing before Ms Stephenson was made aware of the door being opened. No one can say what time Child A left and if he had left before Ms Stephenson was even aware the door was open she could not be held in any way accountable, if Child A went missing after Ms Stephenson was in the room, her evidence was that she was told that all children were accounted for at the table and there seemed little risk at that stage.
17. The claimant argue that Ms Stephenson should have been subject to disciplinary proceedings, but with respect the respondent argue that is not likely and in any event would have been a matter for her employer to determine. Ms Stephenson’s employer did not take any action and on that basis Ms Stephenson was not in any way tainted from continuing to oversee the investigation and disciplinary process, In addition, being a small business there was no one else that could have been a decision maker.
18. The claimant also suggested that the outcome of the disciplinary was predetermined at paragraph 27 of her witness statement suggesting staff were recruited before she was dismissed. Ms Stephenson’s evidence is that cover was needed for maternity, and that to dismiss three members of staff actually placed them in a “hole” being under significant pressure, and that on a personal level she would have preferred if she did not have to dismiss the three staff. This was not disputed by the claimant in her evidence. At p140 is an email to social services, indicating that Ms Stephenson was awaiting the outcome and would provide this once it was made. The claimant in her own witness statement at para 13, stated she was told “she didn’t know what was going to happen” and in evidence when asked if she still felt the decision was predetermined was that “I don’t know she didn’t know what to do”.
19. Ms Stephenson is not experienced in disciplinary procedures and instructed Graphite to undertake the disciplinary for all three care assistants and subsequent appeal of the Claimant. Mr Young and Ms McGonagle both gave very clear evidence that they were

independent, would form a view on the evidence and would provide recommendations to Ms Stephenson. Their evidence also indicated that Ms Stephenson did not suggest a desired outcome, and even if she had, which she did not, they would not have considered that, stating the outcome would be independently decided by them and their recommendations provided accordingly. Unless the claimant is suggesting that Graphite are not independent, it is difficult to see how Ms Stephenson could have had influence over what their recommendations would have been.

20. The claimant argue that Graphite undertook their reviews based on instruction from Ms Stephenson and it was in her interests for the claimant and others to be dismissed, it was not in Ms Stephenson's interests and placed them in great difficulty, there are key factors that distinguish any actions of Ms Stephenson and the claimant and others, and the claimant was provided with every opportunity to put forward her account and defence unhindered by Ms Stephenson.
21. On this basis the respondent argue that Ms Stephenson did not and could not have influenced the outcome of the disciplinary and subsequent appeal and we would argue that there is no evidence to suggest that there was any pre-determined outcome. Ms Stephenson's evidence was clear that she relied upon the external expert's opinions which indicated that dismissal was appropriate. We therefore say that the process of dismissal was not pre-determined nor was it tainted or flawed as argued.

The opening of the door, knowledge of such, and timing of Child A escaping.

22. It is not clear when Child A left the room, but a time of potential around 15 mins or more (maybe 1.45 – 2pm) is agreed on the assumption that Child A was present in the room when Ms Stephenson entered about around 1.45.
23. Dealing first with the claimant's knowledge of the door being open which she denies. Para 8 of the claimant's witness statement and her evidence is insistent that Roisin was undertaking a nappy change and she didn't know where Cathy was.
24. The nappy changing records do not show Roisin undertaking any nappy changes around this time. P118 shows on Roisin's records that Cathy undertook a change at 1.50. It is argued that the changing room would not hold two people at the one time, so we argue that Cathy undertook a change at 1.50.
25. The claimant maintains that her account of Roisin undertaking a nappy change is consistent with Cathy's account p124 where she states Roisin was changing nappies, and Roisin's own account p122. The records do not support this version of events and the claimant seeks to rely on these statement as supporting her account, yet at p124 Cathy states clearly she was asked by the claimant "gone open that door". The claimant seeks to dismiss this part of Cathy's statement as being untruthful or inaccurate. It would seem the claimant is picking and choosing parts of the evidence that support her account and denying the rest that contradict her account. I submit that either all of Cathy's evidence is to be accepted or possibly none, Cathy is both credible and consistent or not.

26. If we are to assume therefore that Cathy's evidence is credible then we must also accept that the claimant had direct knowledge of the door being opened as she herself asked for it to be opened.
27. Ms Stephenson's evidence is that the claimant when she entered the room told her that she had requested the door to be open, this being consistent with Cathy's account.
28. The claimant at p144 states the reason for the door being opened was "to let air in as it was warm" but para 34 p7 of the claimant's witness statement states the door was open because of the "bad smell from the air-con". The claimant suggested that she is aware the door was open with hindsight but this goes further that merely suggesting she is now aware the door was open, but offering explanations of why.
29. In the disciplinary with Mr Young, p144, the claimant was questioned as to her knowledge and when asked a direct question about the door being opened she answered "aye" and then suggests that she can't remember.
30. In her interview at appeal p250, the claimant stated she was not "100% sure if the door was open".
31. The claimant in her evidence to the Tribunal was adamant she remembers clearly. When asked how she can now recall so clearly being almost one year later and she could not recall at that time, the claimant indicated that she had made notes and this is how she is so certain. The claimant's evidence is that these notes helped her to remember and were made at the time, but these notes were never presented during her disciplinary, appeal, or now during her Tribunal claim and when asked the whereabouts of the notes the claimant stated she had destroyed them.
32. The respondent would assert that such important notes should have been disclosed, and to suggest destroying them given they are fundamental to the claimant now being certain she was not aware of the door being open seems unlikely to be credible. If such notes existed and were important then they would have been provided during the process. In the absence of said notes, the claimant's evidence in the Tribunal was still that she could not be 100% sure. This is contradictory to her previous accounts and particularly p220 where the claimant maintains she lost her job because of the decision of another colleague to open the door", or the claimant's own witness statement at para 25, p5 " I did not at any time say to open the door....i was unaware that the door was opened".
33. The respondent would say that they are unsure what the claimant means as not being 100% sure, but in the general meaning it suggests that you cannot say for certain. It seems incredible that the claimant cannot say for certain if she did or did not know the door was open. The respondent contend that this response is vague and shows a reluctance to give a definitive answer, however given the importance of this point, if the claimant really was not aware then surely she should be able to say she is 100% certain, it seems more likely the claimant therefore neither wants to deny or accept.

34. Photographs of the room in question were submitted, p279-297. It is accepted that they were not take contemporaneously, but the respondent's evidence is that the layout is consistent with how it was on the day.
35. The claimant gave evidence to suggest the unit seen on p279 with the lamp was moved and joined to the units in the middle of the room p283.
36. The claimant maintains she had no line of sight of the fire exit door and was sat on the floor. The claimant maintains that the moved unit was about one foot taller than the other units and was filled with boxes blocking her vision.
37. The respondent's evidence was that the units were the same height, and had no such boxes and was not in the position the claimant claims. We have submitted new photographs to show that in fact the claimant is incorrect in her evidence, that the units are indeed as is consistent with the respondent's evidence the same height exactly, that being 76 cm. There are no boxes and Ms O Neill in her evidence stated that even had the furniture been there she would have had a line of sight of the fire door.
38. To suggest that sitting on the floor and for an adult to not be able to see over a 73cm unit, and see an approximately 7-foot exit door seems somewhat unlikely.
39. Mr Young drew conclusions that he believed it was more likely than not the claimant knew the door was open, upon appeal Ms McGonagle drew the same conclusions, and we now ask the Tribunal to also draw the same conclusion from the claimant's inconsistent and vague testimony.
40. The next point is how distracted the claimant alleges she was during the key period. P123 and p130 both state that the atmosphere in the room was very calm and all the children were engaged. P130 states none of the children were crying. This only seems to change tone at appeal and now for her claim to suggest it was "manic", the claimants witness statement para 10 p2 suggests that the child in the bouncer was crying. The claimant's evidence once the seriousness of the allegation becomes clear, seems to now change to suggest she was much busier and preoccupied to be accountable for Child A, this seems a convenient change of account.
41. The claimant maintains she was left alone looking after 8 children as per para 32 of her witness statement p6. Dealing with this issue, it is accepted that Cathy left the room, there was much debate as to the time, but the respondent and Cathy herself seem to be consistent that it was a short time. P124 Cathy suggests about 45 seconds.
42. Roisin's account is that she was undertaking a nappy change. No records prove this, and there is no time of when this allegedly happened if at all.
43. The claimant admitted in oral evidence she could not see the whereabouts of Cathy or Roisin and did not see Cathy leave or return to the room and accepted therefore that she cannot

say she was ever alone in the room as stated in her claim and statement. It is quite possible that the claimant was never alone in the room.

Head counts

44. The claimant's representations at para 12 suggest that headcounts are a red herring". The respondent argues that headcounts as per the policy p338 (A) of the arrivals and departures policy make it clear headcounts are recommended every 15 minutes.
45. Headcounts are not just for when children are moving to and from a room or area, but are undertaken when in the room as at any given time a child be may be taken for nappy change, or placed in the cot room, or some may be playing. The respondent argue that a headcount on a regular on-going basis is still important to ensure the staff are aware of the whereabouts of all children.
46. The respondent argue that the headcount is a relevant factor in this case, none of the three staff members were aware that Child A had left, a headcount could possibly have raised the alarm sooner and a search commenced. This would not absolve the three staff from responsibility for Child A having escaped in the first place, but would have at least potentially reduced the risk to him, or at least have shown that his absence was noticed and action taken. Not knowing that Child A had left the room only further undermines the trust and confident the respondent had in the claimant and other two staff.

Investigation/disciplinary letter

47. At p127, the respondent accept that a letter was provided to all three staff inviting them to what was termed as a disciplinary meeting. The respondent contend that this was remedied at the meeting whereby it was clear that it was in fact an investigation meeting. The claimant alleges she was not aware of this until she was invited to an independent investigation meeting but accepts at that point she was provided with the minutes of the meeting. The claimant also accepts she was not disadvantaged by this, but more that she was confused or upset as she was expecting an outcome rather than a further meeting.
48. The claimant attended at all formal meetings and was afforded the right to be accompanied, the claimant chose not to involve another colleague or make a request for someone else such as a friend or family member to attend. The claimant could have brought someone to what was the investigation meeting which would generally not be normal practice, so in a way the claimant had an advantage to the meeting being an investigation rather than disciplinary. The claimant had only just gone through a disciplinary process in the days prior and we argue she would therefore be familiar with the policy and process and ought to have been aware the investigation was an investigation and not disciplinary.
49. In any event, it is acknowledged this letter may have caused some upset which is regrettable but nevertheless has not caused any failing or disadvantage and thus no unfairness to the claimant.

Key Child/Previous Warning

50. The claimant raised the issue with Mr Young commenting on the claimant's previous warning which the claimant says she was told by Ms Stephenson that it would not be taken into account. Mr Young and at appeal Ms McGonagle both state the warning was not taken into account in their recommendations.
51. Ms Stephenson's evidence is that at the time of instructing Mr Young she was not aware that the claimant would raise the issue of the key child policy as an apparent defence and thus felt the warning was not therefore relevant to the incident. On that basis Mr Young made no further investigations as to the contents of the previous warning.
52. The respondent would note that p115 contains the warning, and although there are other aspects that are not relevant and I will not go into those, the aspects that are relevant are points one and two which relate to failings on the claimant's part regarding her duties for her key children.
53. Ms Stephenson's evidence is that she explained the purpose of the key child policy to the claimant and issued the warning on the 3rd of July, the day before the incident of Child A escaping.
54. At para 10 of the claimant's representations it is suggested that the importance of the key child policy is not regarding the responsibility for the children but to do with the ratio of staff in the room.
55. The respondent would say that is not the claimant's original contention of her reliance on the key child policy, and it is clear that the claimant was seeking to absolve herself from responsibility on the basis Child A was not her key child. The claimant argued in her appeal and at para 31 of her witness statement that no weight was placed on the fact that Cathy was Child A's key worker.
56. At p148 the claimant outlines her belief that there is a "contradiction in the policy between the shared responsibility and your own children" It is clear that the claimant was seeking to use this policy as a suggestion that she was not responsible for Child A, on that basis as this is not the purpose of the key child policy, the previous warning should have been, and is, in the respondent's opinion relevant given the claimant was made aware and has now accepted that it is not a policy to avoid overall or general responsibility of a duty of care to any child, be it a key child or not.
57. The claimant now seeks to rely on the absence of person in charge policy, specifically the guide the ration 1:3 suggesting that this ratio was not maintained during the entirety of the time when Child A went missing.
58. P347 outlines this policy, under the 3d paragraph, at all times management will ensure that "a minimum of two vetted staff are on duty at any one time", it then states " to meet this we use the following ratios of adult to children 0-2 being 1:3".

59. It is therefore clear that the policy is that there should be two staff present at all times, but there must be times when a staff member has to go to the bathroom, the office, or will not be present in the room as they are undertaking a nappy change or putting a child to bed. To allow for this the 1:3 ratio is used, this is not suggested that there must be at all times 3 staff members in the actual room, but in fact two, the third being a substitute as it were for any of the other two should one leave.
60. Given as above, the claimant cannot say if she was ever alone in the room, then it is more than likely she was not, and that at all times the policy was adhered to meaning a minimum of two staff were at least present and this policy was not breached.
61. If the claimant is suggesting the policy was breached, then rather than being a defence it only serves as further evidence that all three staff failed to adequately communicate to each other as to their whereabouts, it is not enough for the claimant to maintain a stance that she was in a corner with no sight of anyone and no knowledge of what was going on and no knowledge of where anyone was. There is a duty on all staff, the claimant included to maintain these safeguarding policies, and even if it was breached, which the respondent finds unlikely, but if it was this is a further failing on the claimant and the other staff not a defence.

Conclusion:

62. The respondent would argue that it is a convenient argument from all three nursery staff that they all just so happened to be busy and engaged in other activities, the claimant was engaged at the table, with a differing account of either a calm room or a manic room, Cathy stepped out briefly to return glitter, Rosin was doing nappy changes although no records exist to show this, all effectively suggested they were engaged in other duties and could not be responsible for Child A.
63. Given that all three were facing potential dismissal, we submit that it is more than likely under the circumstances that a person will protect their own position and the easiest way of doing that under these circumstances is to say they were each busy and so it must be someone else's fault.
64. The claimant has presented a vague and contradictory account of her knowledge of the door, whether she requested it to be opened, the size and placement of the furniture in the room, the whereabouts of the other two ranging from being alone in the room to accepting she cannot say she was ever alone. Child A was at the claimant's table and at some point left unnoticed by the claimant or anyone else.
65. Given that not one of the three, including the claimant during her evidence at Tribunal can give a credible account of what happened that day and how Child A escaped, the respondent contend that all three staff including the claimant more likely than not had knowledge of the door being open and the risks around this, failed to adequately communicate with each other, failed to adequately supervise the door, failed to even notice that one of the nine children had left the room to face imminent danger, the respondent contend that all three

staff, the claimant included are equally responsible, equally culpable, and were treated in the same fair process resulting in the same outcome. We argue the claimant was not unfairly dismissed.

66. Should the Tribunal decide otherwise, the respondent would argue that the claimant has submitted evidence of her attempts of securing alternative employment, she has now secured such, but there has been a significant period of time from September 2017 to April 2018 whereby the claimant made very few real actual job applications, my understanding being during this period of six months only 7 actual applications were made, p103. There appears to be a repeat of the same applications in the claimant's records, the remaining being asking a friend, or looking online. With respect the respondent argue that this does not sufficiently constitute real attempts to mitigate one's losses. In addition, the claimant appears to have been actively seeking out alternative employment prior to the incident even occurred, p85-86 shows applications to Tesco on the 29th of June 2017. The claimant's evidence to this when posed to her was that she was "looking around wanting a mix of different jobs to do, looking for a bit of a change". It seems more than likely the claimant was determined to leave her employment with the respondent in any event, and on this basis failed to adequately mitigate her losses. The respondent would say that the claimant should not be entitled to any loss of earnings.
67. In addition, the respondent would argue that the outcome of any reasonable process would have resulted in the same conclusions, the claimant has had sight of all the evidence, has had a disciplinary and appeal and now Tribunal to put forward her account, and by her own evidence has not been able to provide a consistent or credible account, the respondent argues that under the principles of Polkey the claimant contributed so significantly to her own dismissal by her own actions and failings that any award should be reduced to nil to reflect this.

Denis McGettigan

Peninsula.

Case Reference Number 7406/17

In the INDUSTRIAL TRIBUNALS

and THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN

Stephanie Pickering

(Claimant)

v

Silver Birch Childcare

(Respondent)

Pages 2 - 7
Pages 8 - 9
Pages 10 - 17

Agreed Facts between the Parties
Agreed Issues that require determination
Submissions on behalf of the Claimant

1. Agreed Facts

1. The respondents full and correct legal name and status is John Donnelly T/A Silver Birch Childcare.
2. On the 4th July 2017, at 1.30pm all 9 children were in the baby room at Silver Birch centre.
3. At some point prior to approximately 1.45pm, Cathy McKenny, one of the female staff members in the room opened the fire exit door situated towards the far side of the baby room (as it appears whenever you enter it). It is accepted that prior to the installation of the air-conditioner the door would be permitted to be opened, there is a dispute as to whether it was custom and practice for the door to be opened post installation of the air conditioner.
4. There is a dispute between the parties insofar as to whether the claimant requested the door to be opened or not, and as to the reasons for the door being opened, it is also in dispute as to the level of knowledge that the Claimant had in relation to this action of opening the door and thereafter.
5. There is no dispute regarding the fact the air-conditioned on occasions omitted a smell, there is however a dispute regarding the extent of that smell, whether it posed any hazard and the frequency of use of the air-conditioner.

exactly Cathy and Roisin were during that time including who undertook nappy changes and at what time although all parties accept that Cathy left the room for a short period of time to return the glitter to the office. The exact period of time is in dispute. There is a dispute regarding whether the claimant was therefore ever left alone in the room at any stage.

10. At 2pm Dolores Niblock rings the buzzer at the entrance to the centre and returns one of the children (Child A) to the centre. It transpires that Child A had escaped from the baby room (presumably via the open fire door) and made his way to the main road whereby a passing vehicle (driven by Dolores) stopped. Dolores got out and took Child A back to the centre.
11. Dolores was met by Bronagh and the assistant manager Stella O Neill who checked Child A over and returned him to the baby room at 2.03pm. The three female staff members were in the same position as they had been whenever Bronagh had been in the room approximately 15-18 minutes earlier.
12. It seems likely (although no one can say for certain) that Child A escaped from the baby room somewhere between 1.45pm and 2pm.
13. Child A's key worker on the day in question was Cathy McKenna which is not disputed. The relevance or significant of the keyworker policy or its application is in dispute.

14. It is accepted there is a policy regarding headcounts, it is disputed as to what extent this policy is followed when the children are within one room but is accepted that no count was carried out between 1.45 and Child As return.
15. At 2.10pm Dolores Niblock makes a statement in relation to what happened.
16. The 3 female staff members were moved into a different room for the remainder of their shift.
17. Later that afternoon, the three female staff members are spoken to by Bronagh. Stella is also present although it is unclear as to who exactly took the notes of these meetings. In the case of Cathy, she provides a written statement which is supplemented by a few questions and answers.
18. Child A's father attended that evening and was told what happened. His reaction at the time was calm.
19. That evening, Bronagh contacted the owner of the centre John Donnelly and briefed him as to what happened earlier. While he was alarmed as to what happened, he does not appear to have taken any action in respect of the claimant, Roisin and Cathy save for authorising Bronagh to continue with an investigation process. There is a dispute regarding to what extent if any Mr Donnelly considered any action if appropriate regarding Bronagh Stevenson.

20. On the 5th July, the Claimant is telephoned and asked to attend at the centre. Upon her arrival she is given a letter inviting her to attend a disciplinary hearing the following day. She was also told that she was suspended on full pay. She is also told that Child A is doing well.

21. At some point that same day both of Child A's parents attend for a further meeting with Bronagh. By that stage they are very angry but while there is discussion of them going to the press/social media they indicate that they do not intend to do so.

22. On the 6th July, at 1pm the Claimant attends for the hearing although it transpires that it is an investigatory meeting as opposed to a disciplinary meeting. Persons present at the meeting are the Claimant, Bronagh and Stella. There is a dispute as to whether the claimant was advised of this during the meeting.

23. On the 21st July, the Claimant is written to and asked to attend a disciplinary hearing on the 2nd August with Mr Nicholas Young from Graphite HRM.

24. On the 2nd August, the Claimant attends this hearing.

25. Mr Young's report in relation to same, dated 18th August 2017 recommends dismissal. There is a dispute as to what if any extend Mr Young gave consideration to the claimants previous warning, what extent if any Ms

Stevenson gave to the warning and if any consideration would have even been appropriate.

26. On the 21st August, the Claimant is formally dismissed. It is not in dispute that both Roisin and Cathy were also dismissed at around this time.

27. On the 23rd August, the Claimant appeals. It appears that Roisin also appeals

2. Main issues arising for determination

1. Whether as a matter of fact the Claimant asked for the fire door to be open on the day in question.
2. If not, whether as a matter of fact the Claimant had knowledge of the fire door being opened.
3. In relation to the above, the tribunal may need to reach a finding as to whether the Claimant's view of the fire door was blocked by furniture within the room, whether there was a conversation regarding the opening of the door, who instructed the door to be opened and to what extent this was brought to the attention of the claimant and Ms Stephenson. Whether or not there was a practice within the centre of opening the fire door before and after the installation of the air-conditioner.
4. The likely whereabouts of Rosin and Cathy during the period in question and whether the key child policy makes any one of the three present in the room more or less culpable or responsible for the welfare of Child A. In view of the conclusions reached on the above and given that Bronagh authorised the door remaining open, whether or not the Claimant's conduct on the day in question amounted to gross misconduct.
5. Irrespective of the conclusions to the issues raised above, it appears as though no disciplinary proceedings were brought against Bronagh further to her

authorising that the door remain open. Whether it is reasonable to hold

Bronagh t

3. Submissions on behalf of the Claimant

extent if a

subject to Introduction

4. During that meeting, the Claimant indicated that during the relevant time there were 9 children in the room and that Ms McFlynn had one of them in the changing area. At hearing, the Claimant's oral evidence confirmed that she was unaware of the location of Ms McKenna. In other words, the Claimant was supervising 8 of the 9 children alone. At the investigatory meeting (page 130), the Claimant confirmed that at this time she was carrying out an activity at a table which is on the other side of the room from the fire door.

5. The Respondent has referred to the nappy records (118-121) as evidence that Ms McFlynn was not changing nappies but whether or not this is correct is unclear upon any reasonable analysis of these records. In any event, both Ms McFlynn and Ms McKenna agree with the Claimants contention that Ms McFlynn was in the changing room for much of the relevant time (see pages 123, 124, 130 and 132). Indeed Ms McFlynn states that not only was changing nappies in the changing room for part of this time but she was also "*sorting 3 cots in the sleep room*" (page 132).

6. It is therefore clear that Ms McFlynn was not in the main part of the baby room for much of the relevant time. In addition, it is accepted by the Respondent that Ms McKenna was not in the baby room for a period of time, although the exact period is in dispute.

7. On the balance of probabilities, this must have been the time during which Child A left the baby room. There is no other reasonable explanation as to how Child A was able to leave the room without either Ms McFlynn or Ms

presumably the (NI) Order states that her conduct and that range of responses

on, the person involved, should be taken into account, she cannot

led to the

between 1.45pm and 1.55pm. At this time did the fire alarm go off? What was the fire alarm set and the

Ms Stephenson

McKenna noticing. Indeed, Ms Stephenson in her oral evidence accepted that it would have been impossible for Child A to leave the room if Ms McFlynn and/or Ms McKenna remained located in the position they were in at or around 1.45pm.

8. In respect of the culpability of the three staff members within the baby room, it is clear that little, if any, should fall onto the Claimant. She was engaged with 8 children at the other side of the room from the fire escape and did not realise that it had been opened. She cannot be criticised for not recognising that the door was open given that she could not see it from where she was sitting, nor had she been told that it was open.

9. The Respondent's disciplinary and disciplinary dismissal procedures are found at pages 414-418 and examples of gross misconduct are found at 416. While the list is non exhaustive, the example that is perhaps closest to the present circumstances is at (h) namely "*breach of health and safety rules that endangers the lives of, or may cause serious injury to, employees or any other person*". Clearly, the fact that the fire door was opened caused danger to the children, however it must be remembered that it was not the Claimant who opened the door, nor did she have cause to believe that the door was open. Given that the Claimant was occupied with 8 other children at the other side of the room, her failure to notice the open fire door for a short period of time falls significantly below the standard necessary to be deemed gross misconduct.

other hand, the Respondent asserts that the Claimant was aware that the fire door was open and that there was therefore a duty on her to ensure that no children left the room through it and that in any event she was not as isolated within the room as she made out. The decision for the decision maker in the disciplinary process was which of the two versions was more likely to be true.

21. This meant that Ms Stephenson had to make a decision with regards to whether she accepted the Claimant's account and if she did she would surely have found that the Claimant's actions fell short of gross misconduct. However, if Ms Stephenson had held those facts to be true, culpability would have shifted onto her yet further as effectively she would have authorised a scenario whereby the Claimant did not notice Child A leaving the room through no fault of the Claimant.

22. In other words there was an incentive for Ms Stephenson to accept the version of events whereby the Claimant knew that the fire door was open as it made it easier to ensure that Ms Stephenson herself did not face disciplinary proceedings.

Conclusion

23. On the evidence before the tribunal, it is likely that the Claimant was left alone in the baby room with 8 children for a short period of time at some point between 1.45pm and 2pm on the day in question and it is equally likely that it was during that short period of time that Child A left the room.

24. The Claimant's conduct during that time cannot be criticised as she had 8 children that she was looking at, she was unaware that the fire door was open and she did not have sight of the open fire door. On this basis, no reasonable decision maker could have found that her conduct was such as to amount to gross misconduct warranting immediate dismissal.

25. Notwithstanding the above, *prima facie* Ms Stephenson should have been the subject of disciplinary proceedings. In that regard, she certainly should not have been the person who made the decision to dismiss the Claimant as she could not be described as an independent decision maker. This failing had a material impact on the fairness of the proceedings generally.

26. In all of the circumstances, the Claimant's dismissal was unfair.

Tim Jebb BL