



EMPLOYMENT TRIBUNALS

Claimant: Mrs. H Thorpe
Respondent: Children's Links Limited
Heard at: Via Cloud Video Platform
On: 6th & 7th January 2021
21st January 2021 (In Chambers)
Before: Employment Judge Heap

Representation

Claimant: In person
Respondent: Mr. H Menon – Counsel

COVID-19 Statement

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V – fully remote. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

The claim of constructive unfair dismissal fails and is dismissed.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Mrs. Helen Thorpe (hereinafter referred to as "The Claimant") against her now former employer, Children's Links Limited (hereinafter referred to as "The Respondent") presented by way of a Claim Form received by the Employment Tribunal on 2nd December 2019. The Claim is one of unfair constructive dismissal contrary to Sections 95 Employment Rights Act 1996. Although at an earlier Preliminary hearing before Employment Judge Brewer he had identified that the Claimant was also bringing a complaint of wrongful dismissal, it is common ground that the Claimant was paid in full for her notice period and she confirmed at

the outset that that was not a complaint that she was advancing in these proceedings. The sole complaint, therefore, is one of constructive unfair dismissal.

2. The Claimant relies in this regard on a breach of the implied term of mutual trust and confidence and at the Preliminary hearing before Employment Judge Brewer on 5th August 2020 she set out five actions which she said were destructive of that term. Those were that the Respondent had:
 - a. Failed to carry out an objective and fair disciplinary procedure;
 - b. Failed to fairly implement their own disciplinary procedure;
 - c. Failed to allow the Claimant sufficient time to prepare her case;
 - d. Taken into account evidence that had been ruled as inadmissible at the disciplinary hearing;
 - e. Conducted an unfair appeal; and
 - f. Placed unreasonable conditions on her return to work.

THE HEARING

3. The claim was originally listed for two days of hearing time. Whilst the evidence was able to be concluded within that time, there was insufficient time for submissions. Both parties were agreed that they would prefer to make written submissions than to attend for a further day of hearing time. Whilst I have in mind the guidance from the Employment Appeal Tribunal with regard to written submissions, I am satisfied that in this instance there would be no unfairness caused by not also hearing oral submissions.
4. The hearing was a remote one which was facilitated by Cloud Video Platform. Whilst a few technical issues were encountered, those were overcome and I am satisfied that we were able to have an effective hearing.
5. I apologise to the parties for the delay in this Reserved Judgment being promulgated which has been caused, in part at least, as a result of difficulties working remotely on this and other cases during the pandemic without access to typing facilities.

WITNESSES

6. During the course of hearing, I heard evidence from the Claimant. The Claimant also adduced in evidence a witness statement from her former line manager, Lisa Corney. Whilst the content of her witness statement was not agreed, Mr. Menon indicated that it was not necessary for him to cross examine Ms. Corney because her evidence was not relevant to the issues in the case. I have considered Ms. Corney's witness statement but ultimately I have not placed any reliance on it as she had left the Respondent a good deal of time before the events in question and there was nothing in her evidence that was relevant to the issues that I am required to determine.
7. On behalf of the Respondent I heard from Karen Parsons, the Claimant's former line manager; Kate Truscott who dealt with disciplinary proceedings involving the Claimant and Rachel Croft who dealt with the Claimant's appeal against the imposition of a final written warning and a performance improvement plan.

8. In addition to the witness evidence that I heard I also considered the documents contained in an agreed hearing bundle running to just over 400 pages, although a number of those were duplicated. Additional documents were also disclosed during the course of the hearing and I have also taken those into account.
9. I have also paid close attention to the closing submissions of both parties. Whilst the Respondent's submissions were received slightly late as a result of a slight error on Mr. Menon's part, I have nevertheless considered them as the delay was very minor and has not caused any prejudice to the Claimant.

CREDIBILITY

10. One issue that has invariably informed my findings of fact in respect of the complaints before me is the matter of credibility.
11. I begin with my assessment of the Claimant. Ultimately, I found her evidence to be somewhat evasive on the core issues and that affected my assessment of the credibility and reliability of her evidence. She would frequently make continued reference to the balance of probabilities but not in any way that was of particular relevance to the issues in the claim and certainly not in the context of answering a number of the questions that she was asked by Mr. Menon in cross examination. In other areas the Claimant had a tendency to refer to what she clearly believed to be strong evidence in her favour but which, when considered objectively, did not make the point that the Claimant believed that it did. I consider that she has a great strength of feeling in respect of the issues that led to her resignation and how she perceives that she has been treated, but that caused her evidence to lack objectivity and ultimately everything is seen through the prism of unfairness.
12. I found the witnesses for the Respondent to be credible in the evidence that they gave. Unlike the Claimant, they were prepared to countenance different points of view and I did not have any concerns as to the accounts that they gave.
13. In short, therefore, unless I have expressly said otherwise, I prefer the evidence of the Respondent to that of the Claimant.

THE LAW

14. Before turning to my findings of fact, I remind myself of the law which I am required to apply to those facts as I have found them to be.

Constructive Unfair Dismissal

15. A dismissal for the purposes of Section 95 Employment Rights Act 1996 includes a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation.
16. Tribunals take guidance in relation to issues of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA:-**

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is

entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

17. Implied into every contract is a term that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will inevitably almost always be repudiatory by its very nature.
18. The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee are only relevant in so far as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.
19. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no extraneous reasons for the resignation, such as them having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon.
20. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703**).
21. It is possible for an employee to waive (or acquiesce to) an employer's breach of contract by their actions. In those circumstances, an employee will affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

FINDINGS OF FACT

22. I ask the parties to note that I have only made findings of fact where those are required for the proper determination of the issues in this claim. I have inevitably therefore not made findings on each and every area where the parties are in dispute with each other where that is not necessary for the proper determination of the complaint before me. The relevant findings of fact that I have therefore made against that background are set out below. References to pages in the hearing bundle are to those in the bundle before me and which were before the Tribunal and the witnesses. I should note that whilst I have considered all documents within the bundle, ultimately it has to be said that a considerable number of them were historic and/or did not have any relevance to the claim or the issues within it.

The Claimant's employment with the Respondent

23. The Respondent is a charity and a provider of childcare facilities in a wide variety of settings. The Claimant commenced employment with the Respondent on 11th June 2012. At that time, she was engaged in the position of Early Years Child Care Manager. She later applied for an internal vacancy to the role of Early Years Quality Coordinator and was appointed to that position in February 2014, initially on a part time basis alongside her existing role, but later on a full time and permanent basis with effect from June 2014. The Claimant was also a part of the Respondent's Senior Management Team ("SMT"). It is not in dispute that the Claimant was hardworking and often achieved good results for the Respondent.

The Little Wings contract and lease

24. The role of Early Years Quality Coordinator saw the Claimant oversee the management of a number of nursery schools, including Little Wings nursery ("Little Wings") which was based at RAF Odiham. Little Wings had its own nursery manager, as did the other settings, and those nursery managers were line managed by the Claimant. As part of the operating of Little Wings, the Respondent had a contract with the Ministry of Defence ("MOD") to provide childcare services for military personnel at RAF Odiham and also for members of the public. In respect of the military personnel, the Respondent held a contract with the MOD via Defence Estates. In addition to that contract, the Respondent leased the premises which Little Wings operated out of from the MOD. There were therefore two parts to the relationship between the MOD and the Respondent; one being the lease and the other the contract to provide nursery services within the Little Wings setting.

25. Part of the Claimant's duties came to include taking the lead in lease negotiations. The Claimant had no prior experience of that sort of work but I am satisfied that she never requested any specific training or gave any indication to the Respondent that she needed assistance or was having any difficulties. I am satisfied that she would have had ample opportunity to do so both on a general basis or otherwise during specific performance reviews with Ms. Parsons who was the Chief Executive Officer ("CEO") of the Respondent and the Claimant's Line Manager at the relevant time.

26. I am also satisfied from the evidence that had the Claimant raised any issues then they could then have been addressed. It is also difficult to see how the Claimant's criticism of the Respondent not providing specific training on lease negotiations could be relevant given that her position in this regard has always been that there was no deficiency in her performance or actions as regards the Little Wings lease. She had also successfully concluded lease negotiations on two other nursery premises, although I accept that they were more than likely easier negotiations as the relationship with the MOD had always historically been somewhat more difficult.

27. Whilst the Claimant took the lead in negotiations, she did not have the authority to conclude and sign off on the new lease. She would simply make recommendations to the Respondent Board and the ultimate sign off would be by the Board. It was Ms. Parsons as the newly incoming CEO who asked the Claimant to take on lease negotiations, which had previously been dealt with by the exiting CEO. As I have already observed, the Claimant raised no concerns at this or any other time in taking on those additional duties.

28. It therefore came to be that the Claimant held responsibility for lease negotiations for Little Wings. The lease had in fact expired in 2017, prior to the Claimant being asked to take on this particular role and things appear to have stalled in respect of negotiations between the Respondent and the MOD. The Respondent, as a result of the fact that they were “out of lease” on Little Wings, had not been paying rent to the MOD but instead had been holding the money that should have been paid in their accounts pending the renewal of the lease being finalised. I understand that in the final event around £20,000.00 per annum was being held in that account as a result of the unpaid rent. The contract to provide nursery services had continued despite the Respondent being out of lease.
29. I am satisfied that the Respondent Board and the SMT were aware of the fact that the lease had expired and that negotiations were continuing. I am also satisfied that the Claimant did not disclose any specifics about those negotiations to the Board, the SMT or to Karen Parsons and the information provided was in general terms (see for example the SMT meetings of 29th September 2017, 30th October 2017 and 29th November 2017 at pages 73, 75 and 79 of the hearing bundle). Specifically, I prefer the evidence of Ms. Parsons to that of the Claimant that at no time was she informed about any cap on the amount of fees that the MOD were prepared to countenance for the children of defence personnel who used Little Wings had been suggested. I come to that further below.
30. I accept that that information was precisely the sort of detail that should and would have been included in the risks and issues log which was prepared by the Claimant (see page 92A of the hearing bundle). That mentioned nothing about the fees issue and instead focused on the suggestion that there had been a stall on negotiations on the MOD’s part and that a letter from Ms. Parson’s might be required as a next step to seek to move things along. I found the Claimant’s evidence that the fees cap would not be something that would have been included on this log, and that that was simply a platform for further discussion, somewhat unconvincing. It seems to me that a cap on fees is precisely the sort of thing that should have been clearly included in a risks log given that if the parties were apart on the amount of fees that could be charged, then that was likely to create a significant risk as to the loss of the contract.
31. In regard to the fee cap, the Claimant had earlier been informed by Gary Reid who was involved in the negotiations on the MOD side that the maximum fee that the MOD would agree to would be around £35.00 per child per day for service personnel. That had followed on from an earlier telephone conversation that he had had with the Claimant and which was followed up by email. The relevant parts of the email said this:

“Further to our recent telephone conversation I have set out below the few items for discussion at our upcoming meeting this Wed (sic) at 1:30.

The term length & repair clause both are outstanding items. Also agreement to the annual Rent will need to be finalised.

However in addition the Establishment has expressed concern respectively about the level of the per day cost to users & the percentage of service personnel to civilians using the facility. It is fully appreciated that the income from the nursery users has a correlation to the rent level that the Nursery is able to pay – as well as other costs such as repairs – but the Command feels the maximum day rate for users should be capped at circa £35 per day.

With respect to the percentage of service personnel the Establishment is asking for confirmation of the percent at present with a view to assurances that it will remain the same going forward.

Ultimately RAF Odiham is in support of Little Wings but as a welfare provider they need to ensure the needs of the service personnel are adequately covered & at a cost which is reasonable given circumstances of those personnel."

32. I accept the evidence of Ms. Parsons that the Claimant did not make her aware of the content of the email nor the £35.00 cap. Particularly, if the Claimant had made Ms. Parsons aware of that matter I am satisfied that she would not have approved the Claimant writing to the MOD setting a fee per child of almost double that.
33. In this regard, on 7th June 2018 the Claimant wrote to Gary Reid setting out the Respondent's proposals for the lease renewal (see page 136 of the hearing bundle). That included the proposals for the cost per day to MOD staff using Little Wings. That set out a day charge per pupil for MOD users and for children of civilian service users of between £57.50 to £59.50 without any discount being offered to MOD staff. It was suggested that if the MOD were to offer a "significantly reduced" annual rent and significantly subsidise maintenance costs for the Little Wings premises then the Respondent would "be more likely to be able to offer a discount to MOD families". An example of a 5% discount was set out in the letter. That would, of course, still be significantly more than the £35.00 per pupil referred to in Mr. Reid's earlier letter.
34. Sam Vaughan and Natalie Menzies who were respectively the manager and deputy manager at Little Wings had some input into the information which fed into the lease proposal (see page 121 of the hearing bundle) but that was nothing to do with the amount of fees to be charged. Similarly, whilst Ms. Parsons had sight of the letter and approved it before it was sent, that was on the basis that she had not been given any knowledge of the fees cap position which Mr. Reid had informed the Claimant about.
35. Mr. Reid emailed the Claimant on 26th June 2018 and asked for some further details about the staff costs at Little Wings. The Claimant replied two days later to say that she was sure that some figures could be gathered the following week. She referred to being very busy that week.
36. In fact, it does not appear that the Claimant provided the information requested to Mr. Reid until some weeks later. She emailed him on 16th July 2018 saying the following:
- "Apologies that I have not yet been able to send you the information to support our suggestions to the MOD regarding the cost of salaries at Little Wings.*
- We have had external financial auditors at head office for the past two weeks to complete our annual audit and combined with my annual leave this has taken up most of my time.*
- I will endeavour to get some figures over to you early next week."*
37. I accept the evidence of the Respondent that the Claimant's input in the audit was relatively minimal and that this would not have resulted in her being unable to draw together the information that Mr. Reid had requested.

38. Mr. Reid was clearly perturbed about the position and emailed the Claimant on the same day. The relevant parts of his email said this:

“I have a meeting next Monday which it would have been useful to have figures prior to. Given they won’t be available we will just have to deal with things when the numbers are provided as they are central to understanding financial considerations & taking Lease matters further.

At this stage I can only stress that time is very much pressing on & negotiations not moving forward are not in the interests of The Station. Apologies for being so direct in what is state (sic) here but I must highlight it is important that the relationship remains in a positive direction & we move towards agreement soon.”

39. The Claimant replied the following day with some additional financial information. Her email was purely factual and there was no attempt to smooth what were clearly Mr. Reid’s ruffled feathers.

40. The Claimant chased a response from Mr. Reid on 4th September 2018 (see page 138 of the hearing bundle). Mr. Reid replied the following day to say that a working group had been set up to look at the matter but that they would be looking to get the best value and needed to understand the Respondent’s costings at Little Wings. It was made plain that there was a difficulty in retaining personnel at the base and that the cost of childcare could be a “significant factor” in that.

41. In early October 2018 there was a meeting at the base between the Claimant and representatives of the MOD. Ms. Vaughan, the Little Wings nursery manager, was also in attendance. The Claimant would of course have taken the lead in the meeting on the Respondent’s part. The Claimant emailed the MOD representatives the following week setting out that she felt it had been a positive meeting; re-sending the financial information previously sent to Gary Reid and suggesting that further meetings were scheduled (see page 147 of the hearing bundle).

42. The current position with Little Wings was discussed at a Board Meeting on 27th November 2018. The Claimant was not present at that meeting having offered her apologies for absence. The main thrust of the discussion related to the carrying over of the rent for Little Wings in the accounts, although there was mention of the MOD having expressed an expectation of a reduction in fees. There was no mention of the fees cap and again I am satisfied that the Claimant had not informed anyone about that.

43. The Claimant’s position appears to be that the Respondent would not have been able to meet the MOD’s demands as to fees but that rather misses the point. It may have been that some negotiation could have taken place and reaching an agreement remained a possibility. It would have also avoided the letter being sent setting fees at an unrealistic level as far as the MOD were concerned which would have not assisted an already fractious relationship and if it had been clear to the Respondent that no agreement could be reached on fees, measures could have been put in place so that an unfortunate situation whereby the MOD entered the site and informed staff and parents that the Respondent was no longer going to run the nursery and the knock on effects for the staff could have been avoided. An email from Ms. Parson’s to the MOD after the termination of the contract and the Claimant’s suspension envisaged that that would have been a preferable position in the event that no agreement could have been reached (see page 237 of the hearing bundle).

44. The issue with the lease was again discussed at an SMT meeting on 30th January 2019 at which it was noted that matters were not moving forward and that a new contact was needed (see page 161 of the hearing bundle). It was listed as an action point that the Claimant would contact the base commanding officer about the matter. That had not progressed by the time of the next meeting on 27th February 2019 (see page 165 of the hearing bundle) and Ms. Parsons emailed the Claimant on 1st March 2019 to ask the Claimant for an update (see page 182 of the hearing bundle).
45. At an SMT meeting on 25th April 2019 the Claimant reported that whilst there was still no progress, she had been given details of a point of contact. That had been provided to her by email from the MOD on 7th March 2019 (see page 185 of the hearing bundle) following a request made by the Claimant the same day. The position remained the same at the next meeting on 29th May 2019 although the Claimant had asked for further details from that point of contact in early and late April 2019 (see pages 189 and 211 of the hearing bundle).
46. As matters had not progressed it was agreed that Ms. Parsons would write to the Commanding Officer at the base. The Claimant drafted that letter and it was approved, after "tweaks" by Ms. Parsons and sent on or around 10th June 2019. The relevant parts of the letter said this:

"As you will be aware, the five-year lease expired on 28th July 2016 and traction of negotiations regarding renewal has been inconsistent and frustrating and as a direct result, the MOD has declined any acceptance of our annual rent payment for the 2017/2018 and 2018/2019 financial year.

We are currently holding this money in order to pay the outstanding rent, however as a registered charity it is questionable holding onto such large amounts of money which could be of benefit to delivery of services and have a real impact on some of our charitable aims.

We can confirm that we wish to continue occupying the premises in question and are committed to continuing to offer high quality childcare to the local community.

Our last communication was with Gary Reid, Principle Estates Surveyor DIO but I understand that Gary is no longer assigned to this negotiation and we have since attempted to find out who we should continue negotiations with, but to no avail.

We wish to resolve the situation and ensure we have suitable lease arrangements in place and that the monies regarding outstanding rent are either paid over to the MOD or reallocated to improve the quality of lives of children.

Please can you sign post me to the appropriate person to re-establish communications and appropriate negotiations."

47. In late afternoon on 26th June 2019 Ms. Parsons received a letter from the Station Commander terminating the contract for the Respondent to provide nursery services at Little Wings. The relevant parts of the letter said this:

"I hereby notify you that I am terminating the Service Level Agreement between the Station and Children's Links with immediate effect; RAF Odiham is seeking a new childcare provider to occupy the Little Wings setting (as of close of business on 26th July 2019). The reasoning for this decision is Station's dissatisfaction with both the cost of childcare and management of the staff and Little Wings childcare facility. Costs in particular have risen exponentially for Service Personnel, during my tenure

as Head of Establishment, and the provision of childcare is assessed as no longer in keeping with either the spirit or tenor of the Formal Submission to Station of 22nd October 2010 or the Service Level Agreement, dated 1st August 2011.

Whilst I would like to thank you for the service provided to date this decision is final and non-negotiable.”

48. The Station Commander gave his Commanding Officer, Wing Commander Bond, as a point of contact for any enquiries.
49. The Claimant contends that the reference to the management of staff was not a reference to her but to the nursery manager. In view of what Ms. Parsons was later told by Wing Commander Bond – which I deal with below – I do not accept that position and the Respondent was entitled to conclude that the dissatisfaction was with the Claimant who was, of course, the person with overall management responsibility for Little Wings. Moreover, it was plain from an email that Ms. Parsons sent to Wing Commander Bond on 28th June 2019 following their telephone conversation and the Claimant’s suspension that it had been the Claimant that had been the focus of discussion. Wing Commander Bond replied to that email and made no suggestion that what she had recorded was inaccurate.
50. As I have already touched upon above, on the morning after Ms. Parsons received the letter from Wing Commander Bond she received a telephone call from the Little Wings nursery manager to inform her that the MOD had entered the nursery and taken over the building. The staff had been instructed to leave and told that they would now be transferring their employment to a new provider, doubtless under TUPE, and parents of the children within the nursery were informed likewise.
51. Ms. Parsons had attempted to contact Wing Commander Bond on receipt of the letter terminating the Respondent’s contract but he was not available. She managed to speak with him the following day and asked how the situation had come about. I accept her evidence, as recorded in a contemporaneous note at page 228A of the hearing bundle, that Wing Commander Bond informed her that in meetings with the Claimant those who had been present on behalf of the MOD had been “less than impressed” with her attitude and responses given about increasing costs and reducing fees and that the Claimant had said that reducing fees (namely those being the ones proposed in the 6th June 2018 letter) was not something that the Respondent was able to entertain. It was also said that the ethos of the Respondent was not felt to be in keeping with that of the RAF in terms of supporting families and that after seeking legal advice they had found a new provider who were more in line with their values and who would ensure that nursery costs were reduced. It was said by Wing Commander Bond that the legal advice that they had received was not to discuss anything relating to the lease with the Respondent.
52. The Claimant denies that she made any comment that the Respondent was not able to reduce fees, but I accept that that was what Ms. Parson’s was told by Wing Commander Bond.

The Claimant’s suspension

53. The Respondent determined that the situation was serious enough to warrant the suspension of the Claimant pending an investigation. Ms. Parsons sought to reach the Claimant by telephone but was unable to do so and so she sent the Claimant a text message on 27th June 2019 informing her that she had been suspended pending

investigation. That was said to be for *“behaviour that has brought the charity into disrepute and caused financial loss”*. That was far from clear and did not provide the Claimant with sufficient information to know precisely what it was that she was said to have done.

54. The message set out that the Claimant would receive a letter which had been posted to her that day to deal with the process.
55. In that regard, Ms. Parsons wrote to the Claimant on the same day confirming the suspension which was also conveyed orally to her. The suspension letter reiterated the same vague reason for suspension and invited the Claimant to an investigatory meeting on 8th July 2019. It was made plain that the suspension was on full pay and advised of the Claimant’s right of accompaniment at the investigatory interview.
56. Ms. Parsons carried out the investigation and the Claimant was informed about that in the suspension letter. The Claimant is critical of the fact that Ms. Parsons carried out the investigation because she contends that she was fully aware of the situation with the Little Wings lease, including the fee cap proposed by the MOD, and was therefore in a position to skew the investigation so that her involvement was not uncovered. I do not accept those criticisms. I prefer the evidence of Ms. Parsons that she had not been informed of the fees cap by the Claimant and therefore there was no reason for her not to undertake the investigation nor would she have any reason to skew it in any way. As the Claimant’s line manager, it was appropriate for her to have undertaken the investigation.
57. Moreover, the Claimant only mentioned for the first time that Ms. Parsons had been aware of the fees cap at a later disciplinary hearing. She at no time suggested that Ms. Parsons was an inappropriate person to conduct the investigation and given that she was able to write letters – which I shall come to below – raising concerns and complaints about the process I am satisfied that if that had been a genuine and significant issue then she would have made that plain.
58. As part of the investigation Ms. Parsons wrote to Wing Commander Bond by email on 28th June 2019 informing him that the Claimant had been suspended and that she was conducting an investigation and asked him for a statement regarding the discussions that he had referred to and any information, minutes, notes or emails “regarding Helen’s behaviours that would indicate what brought [him] to the point of feeling that [he] was unable to continue” the relationship with the Respondent.
59. Wing Commander Bond replied the same day to say that he was sorry that the Claimant had been suspended but that he understood the concerns of Ms. Parsons as CEO. He said he would reply with further information in due course but implied that there may be some delay with that because one of the colleagues involved was on maternity leave and the other on compassionate leave. It is notable that he did not suggest that it was not the Claimant who was said to be at fault on the MOD’s part despite the Claimant’s suggestion that the management could have been the nursery staff at Little Wings.
60. Ms. Parsons also discussed the position with Wing Commander Bond on 4th July 2019 whilst removing the Respondent’s property from Little Wings.
61. The Claimant is critical that the investigation did not obtain a statement or written confirmation from Wing Commander Bond about what he had told Ms. Parsons or from the two individuals who had told him that she had said in October 2018 that fees

could not be reduced. However, I accept that there is no reason for Ms. Parson's to have embellished or made up what she was told by Wing Commander Bond and that in all events she had made enquiries about such matters with him and whilst he initially indicated that he would provide the information that she had requested, he emailed her on 17th July 2019 to say that he had sought advice and would not be providing further detail (see page 271d of the hearing bundle). There was, of course, nothing that Ms. Parsons could do to force the MOD to engage and provide the required information.

62. The Claimant attended an investigatory meeting with Ms. Parsons on 8th July 2019. Although the Claimant had not been provided earlier with the precise reasons for her suspension, Ms. Parsons did explain at the meeting that the investigation concerned the termination of the Little Wings contract (see page 241 of the hearing bundle). Ms. Parsons set out the detail of the conversations that she had had, including with Wing Commander Bond, since receipt of the letter from the MOD of 26th June 2019 and sought an explanation from the Claimant as to how the situation had come about and details of the meetings that she had attended.
63. The Claimant was unsure about dates of meetings but indicated that she believed that there had been two and that thereafter she had attempted to contact the MOD but had not received responses. Ms. Parsons asked if the meetings had concerned the issue of fees. The Claimant replied that there had been although that that had not been directly about the Little Wings lease but that the MOD representatives had commented that the Respondent appeared to be the most expensive provider in the area which the Claimant and another member of staff of the Respondent who was also present refuted.
64. The Claimant was also asked about the relationship with Mr. Reid and she told Ms. Parsons that there had been no barriers to their communication; that he had been looking for a discount and she had said that she would work with him and the Respondent was open to communication. After that she explained that she had chased up Mr. Reid; that there had been delay on his part and then someone else had been assigned to deal with the matter but she had received no response to communications thereafter.
65. At the end of the meeting Ms. Parsons indicated that she had some further investigation to undertake but that she would keep the Claimant updated.

The disciplinary hearing

66. It was determined following the investigation that the matter should proceed to a disciplinary hearing and the Respondent wrote to the Claimant on 17th July 2019 inviting her to a meeting on 24th July. The Claimant was advised of her right of accompaniment and was provided with a copy of the Respondent's disciplinary procedure and the notes of the investigatory meeting. She was told that she could submit any documents that she wanted the disciplinary panel to be aware of and was able to call witnesses to attend the hearing.
67. The Claimant wrote to the Respondent on 19th July 2019 to request a postponement to the date of the disciplinary hearing until at least 9th August 2019 to enable her to obtain legal advice from a solicitor and from ACAS and to consider what documents and witnesses would be needed (see page 247 of the hearing bundle).

68. The Claimant also wrote to the Respondent on 25th July 2019 requesting access to various drives and documents and details of the specific allegations made against her. That was because the invitation to the disciplinary hearing simply reiterated the generic allegations set out in the suspension letter. However, I am satisfied that the Claimant was fully aware from the details provided at the investigatory meeting by Ms. Parsons that the reason for the disciplinary hearing was because of her actions relating to the termination of the Little Wings contract and what Ms. Parsons had been told by Wing Commander Bond in that regard. Whilst the matter could have been made clearer in correspondence, the Claimant was nevertheless aware of the substance of the allegations against her. Whilst the Claimant told Ms. Pettit in a telephone conversation that she had not been told what the allegations were at the disciplinary hearing (see page 265 of the hearing bundle) I do not accept that that was accurate.
69. The disciplinary hearing was postponed, albeit not to after 9th August because Ms. Parsons was on annual leave between 2nd and 19th August. Instead, the hearing took place on 31st July 2019. The hearing was chaired by Kate Truscott who is a Trustee of the Respondent. A note taker was also present and do was Ms. Parsons although that was in her capacity as investigating officer so as to present the management case and was in accordance with the Respondent's disciplinary procedure (see section 5.2.1 of the disciplinary procedure at page 106f of the hearing bundle).
70. As part of her preparation for the disciplinary hearing the Claimant requested access to the Board minutes. There were some difficulties in the Claimant accessing those on the Respondent's drives and although I am satisfied that she was given all necessary assistance to log onto the system and to view the minutes, as it was she was not able to do so until the day before the hearing. Nothing, however, turns on that given that there was nothing in the minutes which went positively towards the Claimant's defence of the allegations against her.
71. The Claimant also spoke to and emailed Kerry Pettit of Human Resources ("HR") on 29th July 2019 requesting copies of the Board minutes and papers from June 2016 to date. It is common ground that the Board papers were not supplied to the Claimant (although Ms. Pettit did offer to email those to the Claimant but that offer was initially declined because she was concerned that the Respondent might selectively filter them) but nothing turns on that as I am satisfied from the evidence of the Respondent that the Board minutes would accurately reflect what was presented and that would have included the information provided to the Board by the Claimant about the Little Wings lease.
72. The Claimant wrote to Ms. Pettit the day before the disciplinary hearing attaching a zip file of the documents that she wanted to rely on and also raising her concern that the hearing had not been delayed further and complaining about problems with access to the documents that she had requested and the fact that these had been provided (with the exception of the Board papers which had not been received) in "dribs and drabs" making it difficult for her to prepare. She also reiterated her view that she had not been advised of the specifics of the allegations against her.
73. At the disciplinary hearing the Claimant denied the allegations made against her. The minutes of the meeting appear at pages 271A to 271K of the hearing bundle. Ms. Parsons outlined the case against the Claimant and the communications that she had had from the MOD terminating the contract; her conversation with Little Wings staff and later with Wing Commander Bond. She set out that in response to her

enquiry about the reasons for terminating the contract, Wing Commander Bond had told her the following:

“I asked WC David Bond what had led to this decision and his words were – ‘that they were less than satisfied with the attitude and responses given by Helen Thorpe during meetings last year’.

That there had been a continuous increase in costs to families and when his colleagues had had communications regarding the fees and the need to reduce they were told that it was not something that Children’s Links could entertain and therefore a decision was taken to terminate with Children’s Links. The legal advice was that it was not prudent to engage and therefore a new provider was found.

I asked WC David Bond that if they were so dissatisfied why he had not gone above Helen and come to me.

His response was that they would expect that Helen would be sharing their concerns and that the responses given were agreed.”

74. She also detailed her later emails and in person discussion with Wing Commander Bond, her communications with the Claimant and the process that she had undertaken after the termination of the contract, including to deal with the TUPE process and parent enquiries.

75. Ms. Parsons also expressed her disappointment that the Claimant had not been more proactive in seeking to support those involved and in that regard, she said this:

“I was very disappointed that Helen had not gone to the office¹ and worked alongside those who were now left to unpick the pieces. Helen had not acted as I would have expected a member of SMT to act and in supporting one another and take a lead in ensuring everyone was okay and that there was a plan.... I don’t feel it was appropriate for a member of SMT. I then had time to reflect on some of the conversations from WC Bond..... I therefore decided to seek HR advice re Helen and agreed that suspension pending investigation at this point was the only option as I had lost trust and confidence in Helen as a member of SMT. I don’t think she had acted appropriately on that day when something so significant had happened and I wouldn’t have expected to have to ask her to come to office.”

76. Whilst Ms. Parsons made reference to having already lost trust and confidence in the Claimant prior to her investigation, I am satisfied that that did not cause unfairness given that the issues that she reported were entirely factual matters as to what she had been told by Wing Commander Bond and others and what had happened in the aftermath of the loss of the contract. Moreover, she was not the eventual decision maker – that was Ms. Truscott – and as such there can be no suggestion that the outcome had been prejudged.

77. Ms. Parsons also set out further details of her investigation and that that had included a review of the Claimant’s emails. As to the email from Mr. Reid about the fees cap issue, Ms. Parsons said this:

“This was the first point I had seen this. It hadn’t been seen by me and I was not included in any response. I was aware that there had been an ask for fees – E7²

¹ The Claimant usually worked from home.

² E7 is a reference to an exhibit used at the disciplinary hearing.

outlines this. I was sent a draft version by Helen which I did check and amend however, had I been aware of the communication sent on 8th May then the context of that letter would have been different. 5% discount suggested by Helen still wouldn't take down the day rate to anywhere near the level that was suggested – in the region of about £20 a day higher and I do not believe in this communication that there was enough info given that would lead to satisfactory responses against the letter of 8th May."

78. As I have already indicated above, I accept that what Ms. Parsons said in that regard was true.
79. She also detailed to the disciplinary hearing the further communications between the Claimant and Mr. Reid, including his emails of 16th July to which I have referred above, and which she described as him sounding "anxious" about things being progressed and 4th September in respect of which she commented that Mr. Reid was making it clear that the fees and costs to families were connected to the terms of the lease. She also noted that those matters had not been brought to the attention of the Board at Board meetings. I am satisfied that that was accurate and that the Claimant had not made the Board aware of those issues.
80. At the conclusion of her presentation, Ms. Parsons outlined what she said were the updated costs of the closure which she said were £19,543.00 against a £22,964.00 forecast surplus (see page 271E of the hearing bundle).
81. The Claimant was given the opportunity to respond and to set out her position. In doing so, she made the following points:
- a. That she was disappointed about the comments about her not attending head office as she had spent a lot of time on the telephone and in research that day; she had been absent with migraines for six days in a row and it was her first day back at work and she was not 100% fit for work and that she had not been asked to attend the office;
 - b. That she took offence to Ms. Parsons suggesting that she had made an excuse why she had not replied to an email immediately as she was honest and would have given a justified reason;
 - c. That she felt that Ms. Parsons evidence pack supported the fact that she did present to the MOD that the Respondent was open to negotiation and working together and that the relationship was positive;
 - d. That the letter had only been a suggestion as to fees and that she had wanted a "win win" for both the Respondent and the MOD;
 - e. That she had made efforts to communicate with the MOD and chase them up but those had not been replied to;
 - f. That her email after the face to face meeting demonstrated that she felt that it had been positive and so she had no inkling that there was any dissatisfaction;
 - g. That she had not commented that the Respondent could not or would not reduce fees; that there was no evidence to that effect and the emails suggested to the contrary and that she had been prepared to negotiate;

- h. That there were no witness statements from the MOD but that she challenged their impression or interpretation;
- i. That Ms. Parsons had had sight and input into the fees letter and that she had had a conversation with her about the fees cap and that that was at the £35.00 level;
- j. That she had been nervous about the first lease meeting and had sought advice from Ms. Parsons;
- k. That she had been given no handover when she had taken over lease negotiations and had had to start from scratch;
- l. That the emails sent and received did not suggest a negative relationship and that there had been delays in responding on the MOD's part;
- m. That she had not been involved in or invited to participate in the MOD's working group;
- n. That with regard to financial losses, that whilst she did not say that the figures were wrong or inaccurate, there were no receipts to support the sums referred to;
- o. That the risks and issues papers had been presented to the Board and therefore nothing had been hidden and that she would have expected any points of clarification to have been requested;
- p. That the MOD were a confident organisation and could and should have escalated any concerns over her head if they had been dissatisfied and that she had had no inklings that they were;
- q. That it was the Respondent that had not been able to reduce fees and so it was not her own actions that had resulted in the situation;
- r. That she had spoken about the risks of fees being increased;
- s. That her nature and actions during her employment did not suggest that she was difficult to communicate with or held back information and she had included a performance evaluation to evidence her character and performance;
- t. That it was the behaviour of the MOD and not her that was at fault for not escalating the matter in which case the situation may have been able to be avoided as Ms. Parsons had suggested to Wing Commander Bond; and
- u. That there was nothing more that she could have done as the MOD had received legal advice not to communicate with the Respondent.

82. After the Claimant had presented her case, Ms. Parsons denied the Claimant having informed her about the £35.00 fees cap and it was agreed that she had not seen the relevant emails from Mr. Reid in that regard. However, the Claimant maintained that she had been aware of the matter via discussions that they had had.

83. I am satisfied that the Claimant was given ample opportunity at the disciplinary hearing to present her case and, indeed, she answered in the affirmative when asked by Ms. Truscott if she had covered everything that she wanted to cover (see page 271K of the hearing bundle).

84. At the close of the disciplinary hearing Ms. Truscott confirmed that she wanted to take time to review matters and that the Claimant could expect an outcome within the next five working days.

85. After the disciplinary hearing the Claimant requested a copy of the investigatory report and her email in that regard said this:

“As agreed at the disciplinary hearing yesterday, please email me a copy of the investigating officers report which includes her consideration of evidence which she considered both incriminating and mitigating and her conclusion of this which led her to bring me to a disciplinary”.

86. There was no formal investigation report prepared but the Claimant was provided with notes of the investigatory meeting; the evidence collated during the investigation and was given ample opportunity to respond to the management case and all the available evidence at the disciplinary hearing. The absence of an investigation report was not therefore prejudicial to her as she was aware of what the allegations were and the evidence that Ms. Parsons had gathered through the investigation.

87. By letter dated 1st August 2019 Ms. Truscott wrote to the Claimant with the outcome of the disciplinary hearing. The relevant parts of her letter said this:

“I have taken the following into account in my decision making:

- *The Station Commander at RAF Odiham, Group Captain Turner, notified Children’s Links on 26 June 2019 that he was terminating the service level agreement with immediate effect because of the Stations dissatisfaction both with the cost of childcare and management of staff and Little Wings childcare facility. The facility and service was your management responsibility.*
- *Wing Commander David Bond at RAF Odiham informed Karen Parsons on 27 June 2019 that those MOD staff who had met with you in 2018 were less than satisfied with your attitude and your responses relating to increasing costs and the issue of reducing fees.*
- *Wing Commander Bond had reported that you had said “Children’s Links would not be able to entertain reducing fees”.*
- *Wing Commander Bond informed Karen Parsons that he had not raised his dissatisfaction with you with her as CEO since he had expected you to share the MoD’s representatives’ concerns with Children’s Links and your stance and responses had been agreed by Children’s Links.*
- *Despite being asked for witness statements from 2 MoD colleagues whom you had met in October 2018, Wing Commander Bond advised that they had been advised by the RAF Secretariat not to do so.*
- *Karen Parsons asserted that she could not recall that you had raised the issues of fees for Little Wings being capped at £35 per day as outlined in Mr.*

Gary Reid's email to you of 8 May 2018, and she had not been copied into the email exchange.

- *You told me that you had raised the issue of the fees being capped at around £35 in discussions with Karen Parsons.*
- *No written evidence was provided that the issue of capping or reducing fees at Little Wings had been flagged up to the Trust Board as a risk or issue via the standard reporting process to the Board, only concerns relating to the lease.*
- *Wing Commander Bond informed Karen Parsons on 4 July 2019 that the meeting which you attended on 10 October 2018 with MoD colleagues had resulted in their reporting back that there was no way that fees could be reduced.*
- *You did provide information to Mr. Gary Reid on 6 June 2018 which contained comparison costs showing local market rates for childcare fees locally were lower at Little Wings but MoD rates were lower at all institutions than Little Wings. This letter had been seen by Karen Parsons.*
- *Your letter of 6 June 2018 indicated a possible 5% reduction of fees which would not have reduced the fees to the suggested capping level of £35.*
- *In his email of 7 July Mr. Reid emphasised that financial considerations were key for the MoD.*
- *In his email of 4 September 2018 Mr. Reid again emphasised that the Station was looking to get best value and that childcare costs were significant to them.*
- *In the amended notes of the investigatory meeting held on 8 July 2019, you informed Karen Parsons that you had discussed fees with the 2 MoD representatives Clare and Lynsey and that you and the Nursery Manager Same had disagreed with Lynsey in her assertion that Little Wings fees were the most expensive in the area.*

You told Mr. Gary Reid that you were not the sole negotiator and would be feeding back to SMT.

Having considered all the information presented I have reached the following conclusion

1. *The way in which you conducted your working relationship with MoD colleagues at RAF Odiham led them to recommend to the Station Commander terminating the service level agreement with 7 days notice.*
2. *Karen Parsons was not aware of the worsening situation with regards to the ongoing negotiations around childcare fees at Little Wings.*
3. *You did not explicitly raise the risk around Little Wings and the capping of childcare fees with SMT or the Trust Board via the risks and issues log as per Children's Links Procedures.*
4. *You gave me no indication that you were aware of the impact of your conduct and its direct consequent adverse financial impact on the Charity. Indeed,*

your expectation was that the MoD should have raised matters directly with Karen Parsons if they wished to escalate an issue.

5. *The Charity did suffer an adverse financial impact.*
6. *Karen Parsons, as CEO, had lost trust and confidence in you as a result of your actions.*

I have concluded therefore that:

Your interactions with MoD representatives around negotiations of fees; your action in not explicitly raising the problems with negotiations of fees and costs with SMT, the Board and Karen Parsons all led to the closure of Little Wings and a financial loss and serious adverse impact to the Charity do constitute Gross Misconduct.

The sanction for Gross Misconduct in accordance with Children's Links policy is dismissal.

However, I have taken into consideration your service with Children's Links; your previous good conduct; your positive performance review and I have therefore decided to take the disciplinary action of issuing you with a final written warning.

You will be expected to reflect on what has happened and agree a performance improvement plan with Karen Parsons. Dismissal may result if the actions agreed in the improvement plan are not delivered.

A copy of this Final Written Warning will remain on your personal file. Subject to satisfactory conduct it will be disregarded after 12 months."

88. The Claimant was advised of her right of appeal and how to exercise that and was also informed that her suspension would end on 18th August and that she should return to work the following day. Whilst it was somewhat unusual to continue with the Claimant's suspension after the disciplinary outcome had been confirmed, I accept that that was done because a return to work interview needed to be undertaken to discuss the PIP and Ms. Parsons – who would be responsible for overseeing that – was absent on annual leave until 18th August. In all events, this cannot have disadvantaged the Claimant because she in fact sought an extension of the suspension period until after the outcome of her appeal.
89. Although Ms. Truscott had of course determined that the allegations against the Claimant were proven and amounted to gross misconduct, she did not elect to dismiss her. Non-exhaustive examples of gross misconduct under the Respondent's disciplinary policy are set out at page 106z and 146B of the hearing bundle. One such example is serious neglect in carrying out duties.
90. It should be noted that the Claimant accepted in evidence that if she had done what the Respondent believed her to be guilty of then they would have been entitled to dismiss her. As such, clearly Ms. Truscott acted leniently when imposing the sanction. Instead of dismissal, she imposed a final written warning for 12 months and it was made plain that the Claimant would have to agree a performance improvement plan ("PIP") with Ms. Parsons. It was made plain that any failure to meet the terms of the PIP may result in dismissal. I accept that a PIP was appropriate because there had been found to be serious failings on the Claimant's

part and a PIP was intended to support her and to seek to ensure that the same issues did not occur again in the future.

91. A form of PIP accompanied by a final written warning is also provided for by the Respondent's disciplinary procedure (see section 7.2 at page 106v of the hearing bundle).
92. The Claimant appears to contend that the PIP was setting her up to fail and that Ms. Parsons could engineer her to not succeed and secure her dismissal. I do not accept that that was the reality of the situation. It was appropriate for Ms. Parsons to manage the PIP as she was the Claimant's line manager and there can be no reasonable suggestion that Ms. Parsons in some way wished to engineer her dismissal.
93. Moreover, the Claimant's case is that there were no deficiencies in her performance and as such it is difficult to see how she could possibly be being set up to fail.
94. The Claimant also contends that it was plain that the MOD had always intended to bring in a new service provider because they had invested in decoration for Little Wings that they had resisted previously and she had also received word from the local Council that there was to be a new provider. Even if that was correct (and there is no evidence to that effect) all of that misses the point which is that the Claimant should have told Ms. Parsons and the Board about the position on negotiations – and particularly the issue of the fees cap – and she did not do so. Irrespective of whether the eventual outcome of loss of the contract might have been the same, that did not excuse the Claimant not informing the Respondent of a key issue which resulted in immediate cessation of the contract.

Appeal

95. The Claimant appealed against the sanction imposed by Ms. Truscott (see page 323 to 334 of the hearing bundle). Her appeal letter was very lengthy and so it is not set out here in its entirety. The appeal letter largely focused upon the fact that the Claimant contended that the allegations could not be proved on the balance of probabilities (although of course that was not the test to be considered) and that they were therefore unsubstantiated and there was no basis to take disciplinary action against her.
96. She also made the following points:
 - That the investigation was flawed and Ms. Parsons had embellished her account and given irrelevant opinion;
 - That she had not been given adequate time to prepare for the disciplinary hearing or appeal;
 - That she had not been told what the allegations against her were and so was unable to prepare;
 - Inadmissible evidence had been taken into account – this was said to be the case on the basis that the evidence could not be corroborated on the balance of probabilities;

- Ms. Parsons had presented a false allegation because the evidence showed that she was aware of the relationship between fees and the lease negotiations;
- There had been an inconsistency of treatment because other cases of financial loss had not been taken into account; and
- The imposition of the PIP to be overseen by Ms. Parsons and her continuing to be the Claimant's line manager made her position untenable because she had presented false information during the investigation and disciplinary hearing.

97. Thereafter, the Claimant set out her assessment of the evidence and how that was said to support her position. She ended the appeal letter by saying that if the disciplinary action against her was not quashed then she would seek legal advice.

98. The Claimant's appeal was heard on 22nd August 2019 by another Trustee of the Respondent, Rachel Croft. She had not previously heard an appeal and this was her first experience of dealing with such matters. Ms. Croft made notes of the appeal hearing the following day and those appear in the bundle at pages 404 to 426.

99. I am satisfied from the evidence of Ms. Croft that she took into account the representations made by the Claimant at the hearing and had had sight of all of the relevant evidence which was considered at the disciplinary hearing. I also accept her evidence that she had considered points raised by the Claimant as to having sufficient time to prepare and whether the Claimant had been made sufficiently aware of the allegations before the disciplinary hearing. She concluded in respect of the former that the Claimant had had adequate time to prepare and that notice of the disciplinary hearing had been given in accordance with the Respondent's disciplinary procedure and that in respect of the latter the suspension letter had been sufficiently clear.

100. Ms. Croft also took into account the Claimant's position as to inadmissible evidence which related to the conversations that Ms. Parsons had reported having with the MOD as to the reasons for termination of the contract with the Respondent. The Claimant's position was that they were inadmissible because there were no statements from the MOD or other corroborating evidence and that that had been agreed by Ms. Truscott who had "ruled them inadmissible". I am satisfied that Ms. Croft reviewed those documents and whilst she considered that the notes of the conversations could be considered as uncorroborated (as opposed to the email exchange between Ms. Parsons and Wing Commander Bond which the Claimant also referred to) she formed the view that there was still sufficient evidence to support the allegations against the Claimant and, particularly, that there was nothing to evidence that the Claimant had informed the Respondent about the issue of the fees cap. She took the view that that alone justified the imposition of the warning.

101. The outcome of the Claimant's appeal was communicated to her on 28th August 2019 and that was to dismiss her appeal. It has to be said that the appeal outcome did not adequately set out the reasons why the Claimant's appeal had not been successful. It merely set out in very short terms that the final written warning stood and that that amounted to the final decision (see page 279 of the hearing bundle).

Arrangements for a return to work

102. On 28th August 2019 Karen Parsons emailed the Claimant about her return to work arrangements. She attached an action plan for discussion with the Claimant upon her return to work and proposed a return to work meeting on 4th September 2019. By that stage the Claimant had been signed off sick with stress and low mood and, in fact, she did not return to work for the Respondent.

103. The Claimant replied to indicate that the action plan appeared to relate to outstanding tasks during absence rather than what she referred to as the performance "improvement plan". Ms. Parsons relied to say that the action plan did include issues which had arisen in respect of the disciplinary proceedings and proposed that they be discussed at the return to work meeting. The Claimant responded by indicating that she would put the date of the return to work meeting in her calendar assuming that she had returned by then. Her email made plain in terms that she did not agree with the imposition of the PIP and in this regard it said this:

"I will wait until my return to hopefully be able to see how these actions relate to "things" that I am required to "improve" in direct relation to my alleged failings in respect of the lease/fee negotiations re Little Wings".

104. Ms. Parsons also provided the Claimant with a detailed update about the present position with the nurseries that she was responsible for by way of a handover (see pages 287 and 288 of the hearing bundle).

The Claimant's resignation

105. The day before the Claimant was due to return to work she submitted her resignation giving two months notice to the Respondent. She was paid in full for that period of notice and her employment ended on 2nd November 2019. She did not return to work during her notice period and continued to be signed off sick.

106. The Claimant's resignation letter said this:

"It is with regret that I write to issue my resignation from employment with Children's Links with two months notice from the date of this letter.

It saddens me greatly to find myself in this position after enjoying 7 years of exemplary performance within the organisation and having contributed above and beyond the requirements of my role.

I wish to make it very clear that the only reason I am resigning is in direct response to Children's Links conduct in relation to the recent suspension, investigation, disciplinary and appeal process that I have been subject to, which has made my position untenable.

Your actions have caused a significant breach of trust and confidence, damaged my internal and external reputation and as a result, to continue the working relationship is detrimental to my mental and physical health.

I wish to make clear that I am only providing two months notice due to my obligation under the terms of my employment contract and not by choice. I will be working my notice under protest and immense duress.

Please acknowledge receipt of my resignation as soon as possible."

107. Ms. Pettitt acknowledged receipt of the Claimant's resignation the following day. She also sent a further email the same day to offer the Claimant the option of ending her employment immediately due to her comments about the stress that working her notice period would cause her. As to the reasons for the Claimant's resignation, Ms. Pettitt's email said this:

"You have also stated in your letter that your resignation is due to the organisations conduct during the recent disciplinary process. The organisation does feel that due process was followed however we have taken your comments on board. It is unfortunate that the circumstances have led to this outcome but we do with you all the very best for the future."

108. The Claimant replied to say that she was unable to make a decision about her notice period at that time (see page 295 of the hearing bundle). As it was, the Claimant spent her notice period on sick leave and did not return to work. She was paid by the Respondent during that time.

CONCLUSIONS

109. Insofar as I have not already done so within my findings of fact above, I deal here with my conclusions in respect the claim.

110. As already set out above, the Claimant relies on a breach of the implied term of mutual trust and confidence and she sets out six elements to that alleged breach. I deal with each of them below. I should observe that the Claimant's closing submissions go significantly further than that and include eleven different aspects that she seeks to rely upon in establishing a breach of the implied term of mutual trust and confidence. I have, however, limited my consideration of the claim to the points advanced at the Preliminary hearing before Employment Judge Brewer at the Preliminary hearing on 5th August 2020.

111. The first of those matters is that it is said that there was a failure to carry out an objective and fair disciplinary procedure. The Claimant is critical of a number of aspects of the process in that regard. She contends that it was unfair for Ms. Parsons to have undertaken the investigation into the allegations against her on the basis that she was able to sway the investigation to cover up her own failings. I do not accept that that was the case. Ms. Parsons, as the Claimant's Line Manager, was an appropriate person to undertake the investigation and the Claimant did not suggest otherwise during the investigatory or disciplinary process. I do not accept that Ms. Parsons or the Board was ever told by the Claimant about the £35.00 cap on fees for the reasons that I have already given. There is therefore no basis upon which to suggest that Ms. Parsons swayed the investigation, embellished matters or gave a misleading account of what she had been told by Wing Commander Bond. Indeed, there is support for what she was told in her email to Wing Commander Bond where she requested additional detail and had the account been incorrect, no doubt he would have replied to set Ms. Parsons straight.

112. The Claimant also contends that Ms. Parsons had effectively pre-judged the situation by making representations that she had lost trust and confidence in her before the matter had been fully investigated. I am satisfied that that comment came from what Ms. Parsons was told by Wing Commander Bond and, particularly, her own view of the Claimant's inaction in the aftermath of the contract loss. The Claimant was of course a member of SMT and held a senior position with responsibility for reporting into the Board. That view was one that she was entitled to hold given the circumstances and,

in all events, she did not make the decision as to the imposition of a disciplinary sanction. That fell to Ms. Truscott.

113. A further criticism made by the Claimant is that she was not provided with clear details of the allegations against her. Whilst I accept that the suspension letter and disciplinary hearing invitation were set out in generic terms and did not specify the precise allegations, I do not accept the Claimant's evidence that she did not know what she was being accused of. She had clearly been told at the investigatory meeting with Ms. Parsons what the allegations were and she was more than able to request documents, submit evidence and make representations about them all at the disciplinary hearing. Whilst it would have been better for the suspension letter to have been more detailed, the Claimant knew full well what the allegations were by the conclusion of the investigatory meeting and so she was not occasioned any unfairness or placed at any disadvantage.
114. The Claimant also contends that there was no basis to impose any disciplinary sanction at all. Again, I do not accept that to be the case. I accept that Ms. Truscott had a genuine and reasonable belief from the information before her that the Claimant had not informed Ms. Parsons or the Board about the fees cap and that there had also been dissatisfaction from the MOD about the way in which she had approached the negotiations and that those matters had led to the loss of the contract. There had been delay and Mr. Reid's email was evidence of a dissatisfaction with her approach. There was also evidence before Ms. Truscott that Ms. Parsons had been told by the MOD that the Claimant had represented that there could be no reduction in the amount of fees proposed by the Respondent and that had been the prompt for them to approach the Station Commander who elected to terminate the contract. Whilst the Claimant denies having made that comment, I accept that it was reported to Ms. Parsons by Wing Commander Bond that she had done so and that that had led to the decision to terminate the contract because fees for MOD staff were a key issue.
115. Moreover, whilst the Claimant points to the fact that the Respondent would not have been able to meet the £35.00 fees cap as it would not have been viable to do so, I accept that there could have been further negotiation and if there had been awareness on this point it would have avoided the position whereby staff were told by the MOD that they were to TUPE transfer to a new provider and the building was taken over without notice. There might therefore still have been financial losses caused to the Respondent, but steps to mitigate the effects could have been taken.
116. The Claimant has also suggested at this hearing that the MOD were looking for a reason to justify termination of the contract as they had already been looking to new providers and were simply gathering information about costs to that end. However, there is no evidence to that effect nor would it be reasonable for the Respondent to conclude that Wing Commander Bond's representations to Ms. Parsons were in some way untrue.
117. Whilst the Claimant maintains that the evidence did not prove, on the balance of probabilities, that she was guilty of the allegations alleged that was of course not what the Respondent needed to consider. In the context of the disciplinary proceedings the Respondent only needed to undertake such investigation from which they were able to form a reasonable belief, on reasonable grounds, that the Claimant was guilty of the misconduct alleged. There was ample before Ms. Truscott to enable her to draw that conclusion and I remind myself that the Claimant accepted that if she had been guilty of the allegations – and I accept that Ms. Truscott reasonably believed that she was –

it would have been fair to dismiss her for gross misconduct. The sanction of a final written warning with a PIP was therefore reasonable.

118. I am therefore satisfied that the Respondent did not fail to carry out a fair and objective disciplinary procedure as the Claimant contends.
119. The second element of the process which the Claimant contends led to a breach of the implied term of mutual trust and confidence is that it is said that the Respondent failed to fairly implement its own disciplinary procedure. By this, I understand from the Claimant's closing submissions, she asserts that she was disciplined but Ms. Parsons was not. Particularly, she references that she was disciplined for a lack of recording on the risks and issues log, but that Ms. Parsons was not held accountable for not logging explicit issues herself in 2017. However, this is comparing apples with oranges given that the situation with the risks and issues log was relevant to the fact that the Claimant had not appraised the Board about the fee cap and the importance that the MOD placed on the fees issue which should have been recorded in that log. There was no similar issue for Ms. Parsons and the Board were at all times aware that the Respondent was out of lease at Little Wings.
120. She further relies upon Ms. Parsons word about the reasons for the termination of contract having been accepted but her representations that she had told Ms. Parsons about the fee cap were not accepted. There was, however, no supporting evidence that Ms. Parsons had been told about the fee cap. There was nothing in the risks and issues log; the emails from Mr. Reid were not forwarded to Ms. Parsons by the Claimant and the matter was not reported at Board meetings. Moreover, the Claimant did not suggest at the disciplinary or appeal hearings that Ms. Parsons was lying as is now said to be the case. In contrast to the position on communication of the fees cap, there was supporting documentation about the reasons for termination of the lease – most notably the emails between Ms. Parsons and Wing Commander Bond which repeated what the former was told and was met with no contradiction from the latter.
121. The Claimant also contends that the Respondent did not investigate the loss of other contracts but there is nothing at all to suggest that those circumstances were comparable with the loss of Little Wings and the key failure to report into the Board and Ms. Parsons what the position was in respect of the cap on costs.
122. I do not accept the Claimant's position, therefore, that the Respondent failed to implement its own disciplinary policy.
123. The next issue relied on by the Claimant is that the Respondent failed to allow her sufficient time to prepare her case. I do not accept that that is an accurate representation of the position. The Claimant was invited to the disciplinary hearing by letter dated 17th July 2018 which gave her seven days notice and was in accordance with the Respondent's disciplinary procedure. At her request the hearing was then postponed and did not take place until 31st July 2018, some 14 days after the invite letter. Whilst it was not postponed as the Claimant had requested until after 9th August because of Ms. Parsons' annual leave, she still had more than ample time to prepare and to seek legal advice and advice from ACAS if she had needed to do so.
124. Whilst there were delays in enabling the Claimant to access some of the documentation that she sought, I am satisfied that the Respondent took all necessary steps to assist her and that she still had time to consider the documents before participating in the disciplinary hearing.

125. I also understand a further aspect of this issue to be the failure to provide the Claimant with Board papers. As I have already set out in my findings of fact above, nothing turns on this issue at all given that the Claimant had the Board minutes which were a record of what was presented to the Board at meetings. Nothing within the Board minutes records the Claimant presenting about the fees cap with regard to Little Wings or that there was therefore a risk about the contract continuing and the lease renewal.
126. There was also no failure at the appeal stage to allow the Claimant time to prepare. She had submitted a very detailed appeal letter and the appeal hearing did not take place until 22nd August 2018, over three weeks after the outcome of the disciplinary hearing was conveyed. There is nothing that suggests that the Claimant did not have adequate time to prepare and, as I have already observed, her appeal letter was very detailed.
127. Therefore, I am not satisfied that there was at any stage insufficient time given to the Claimant for her to prepare for any hearings or to present her case.
128. The next issue that the Claimant relies upon is that it is said that evidence that had been ruled inadmissible was taken into account by Ms. Truscott. That related to evidence which it is said by the Claimant could not be corroborated and amounted to hearsay. That is essentially the notes of conversations that Ms. Parsons had had with Wing Commander Bond. I do not accept that the evidence that the Claimant relies on had ever been "ruled inadmissible". It was clear given the allegations against the Claimant and the refusal of the MOD to provide statements that those records would need to be considered. There was, of course, also some supporting evidence for what was recorded in those discussions by way of the emails between Ms. Parsons and Wing Commander Bond and in all events the issue of the fee cap and the importance of fees to the MOD in looking at the lease renewal was also recorded in email communications. I therefore do not accept that anything had been "ruled as inadmissible" nor do I accept that it was inappropriate or unreasonable for Ms. Truscott to have taken into account the detail provided by Ms. Parsons about her discussions with Wing Commander Bond.
129. The next point that the Claimant relies upon is there having been an unfair appeal process. The Claimant relies upon in this regard the fact that Ms. Croft had never undertaken an appeal hearing before and that there were at least two other Trustees who could have undertaken the process. In her closing submissions she relies on it being fairer to have someone with experience undertake the appeal because she was "fighting for her career" but of course the Claimant had not been dismissed and her evidence was that there was no issue with her performance so that completion of the PIP should not have been in any way problematic. There was therefore no risk to her career.
130. Whilst it would have been better to have an appeal officer with prior experience, I am not satisfied that this caused the Claimant any disadvantage. Ms. Croft took into account all of the evidence, including that relied on by the Claimant - and not just the position of the Respondent as is suggested - and there can be no reasonable suggestion that a more experienced appeal officer who had the same evidence before them would have reached a different conclusion.
131. I do agree with the Claimant, however, that the appeal outcome letter was cursory and did not engage with the reasons why her appeal had been refused when it should have. The Claimant was entitled to know in full and properly the reasons why her

appeal had been refused and Ms. Croft's outcome letter was unsatisfactory in that respect. However, that of itself was not enough to render the appeal as a whole unfair as I am satisfied that Ms. Croft did take all relevant evidence into account in dismissing the appeal and reached a reasonable conclusion, even if she failed to properly convey that to the Claimant in writing.

132. The final matter that the Claimant relies on is that unreasonable conditions were placed on her return to work. This aspect of the matter relates to the PIP and that that would be overseen by Ms. Parsons, who would remain as her line manager, and that a further period of suspension until after the appeal outcome had been communicated was not agreed.
133. I do not accept that it was inappropriate to impose a PIP on the Claimant. That was provided for under the Respondent's disciplinary process and was designed to support the Claimant given the shortcomings in her dealings with the Little Wings negotiations and failure to keep Ms. Parsons and the Board properly informed and to ensure that those sorts of things did not occur again. In all events, the Claimant's case has always been that there were no issues in her performance so it is difficult to see how the PIP could have placed her ongoing employment at risk as appears to be suggested.
134. I also do not accept that it was unreasonable for Ms. Parsons to remain the Claimant's line manager and to oversee the PIP. She had not embellished or misled anyone during the disciplinary process nor was she seeking to set the Claimant up to fail. Whilst Ms. Parsons had expressed the view that she had lost trust and confidence in the Claimant, she had at no stage indicated that she was not prepared to work with her as part of the SMT and it was clear that she was seeking to discuss the PIP with the Claimant at a return to work meeting. No doubt by meeting the objectives in the PIP, that would have gone a long way to restoring confidence in the Claimant.
135. Whilst the Claimant's view is that only one aspect of the PIP related to the issues from the disciplinary hearing, the content had of course been due for discussion at a return to work meeting which did not take place in view of the Claimant's resignation.
136. Finally, the Claimant complains of the refusal to continue her suspension until after the appeal hearing had taken place. I do not consider that to have been unreasonable. The suspension was only continued post the disciplinary hearing because of the absence of Ms. Parsons on annual leave. There was no reason or need to extend the period of suspension any further.
137. I do not therefore accept that the conduct of the Respondent was in any way such as to amount to a breach of the implied term of mutual trust and confidence. Whilst there were aspects of the process which could have been dealt with better – such as giving full reasons for the appeal outcome – the actions of the Respondent were not calculated or likely to destroy trust and confidence. The main issue is that the Claimant does not agree that the Respondent should have initiated the disciplinary process and imposed the sanction that it did. However, having regard to all of the evidence and the reasonable belief of the disciplinary and appeal officers, that was something that they were entitled to do.
138. Whilst I am aware that the Claimant feels very strongly about the imposition of the final written warning and PIP and that she considered it to be an unfair blot on her otherwise relatively unblemished record with the Respondent, that is not the same as the actions of the Respondent being such as to repudiate the employment contract and for the reasons that I have already given above, I am not satisfied that they did so.

139. For all of those reasons, the claim is dismissed.

Employment Judge Heap

Date: 18th April 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Note:

Public access to employment tribunal decisions

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