



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Elliott

Respondent: Blaydon Youth and Community Centre

Heard at: Leeds (by Cloud Video Platform) **On:** 17 – 19 January 2022

Before: Employment Judge Bright

Representation

Claimant: Miss S Brewis (Counsel)

Respondent: Mr P Sangha (Counsel)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.
2. The claimant is entitled to damages for breach of contract (wrongful dismissal).
3. A remedy hearing will be listed.

REASONS

Claims

1. The claimant presented complaints of unfair dismissal, wrongful dismissal (damages for breach of contract in respect of notice) and regarding the non-payment of a statutory redundancy payment, on 16 November 2020, following ACAS early conciliation from 28 September 2020 to 16 October 2020.
2. The final hearing was held by Cloud Video Platform on 17, 18 and 19 January 2020. Unfortunately, owing to illness, there was a lengthy delay before promulgation of this reserved judgment, for which Employment Judge Bright offers her sincere apologies to the parties.

Issues

3. It was agreed at the outset of the hearing that the issues to be decided were:

Unfair Dismissal

4. What was the reason for dismissal? Was it a potentially fair reason within section 98(1) of the Employment Rights Act 1996 ("ERA")? The respondent submitted that the principal reason was conduct and the claimant accepted that reason at the outset of the hearing and in the agreed list of issues.
5. Did the respondent act reasonably or unreasonably in the circumstances, including the size and administrative resources of the respondent's undertaking, in treating that reason as sufficient to dismiss the claimant, in accordance with section 98(4) ERA?
6. Did the respondent in all respects act within the 'band of reasonable responses'?
7. Did the respondent have a genuine belief in the claimant's misconduct, based on reasonable grounds, following a reasonable investigation, in accordance with the test in **British Homes Stores v Burchell**?
8. In particular:
 - 8.1. Was the decision to dismiss the claimant pre-determined?
 - 8.2. If the respondent believed her conduct was so serious, why did it not suspend her/prevent her carrying out financial duties from the date it found out about her involvement?
 - 8.3. Was there a lack of impartiality throughout the process, including the appeal, in particular because the investigation and disciplinary processes were carried out by the same manager?
 - 8.4. Did the respondent take account of the claimant's arguments in mitigation that she had not received any training in financial duties and did not understand the Childcare Voucher System?
 - 8.5. Was the disciplinary procedure unfair, and in breach of the ACAS Code, because:
 - 8.5.1. the investigation and disciplinary processes were carried out by the same manager;
 - 8.5.2. the claimant was not interviewed;
 - 8.5.3. there was a failure to conduct a fair and transparent investigation or procedure to establish the facts; and/or
 - 8.5.4. the respondent did not give the claimant a proper opportunity to respond to the charges?

Unfair Dismissal Remedy

9. If the claimant was unfairly dismissed and the remedy is compensation:
 - 9.1. Would it be just and equitable to reduce the amount of the claimant's basic award because of any conduct before the dismissal, pursuant to s.122(2) ERA; and if so to what extent?
 - 9.2. Did the claimant, by blameworthy or culpable actions, cause or contribute to her dismissal; and if so, to what extent, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to s.123(6) ERA?
 - 9.3. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed in any event given time, or if a reasonable procedure had been followed?

9.4. Was there a breach of the ACAS Code? Should any compensation be adjusted accordingly?

Wrongful dismissal

10. Was the respondent entitled to terminate the claimant's contract of employment without notice or payment in lieu of notice because she had committed gross misconduct?

Evidence

11. The claimant gave evidence on her own behalf and called:

- 11.1. Mr Steve Ronchetti, former Business and Finance Manager;
- 11.2. Ms Alison Dare, former management committee member; and
- 11.3. Mr Malcolm Brain, former management committee member.

12. The respondent called:

- 12.1. Mr Christopher Marr, Chief Executive Officer and disciplinary decision maker; and
- 12.2. Mrs Dorothy Burnett, Trustee, member of the management committee and appeal decision maker.

13. The parties presented an agreed electronic file of documents of 241 pages. The file contained the typed minutes of the claimant's disciplinary hearing (pages 121 - 126) and appeal hearing (pages 132 - 137). At the start of this hearing an audio recording of the full disciplinary hearing was added to the evidence, with consent. An audio recording (in two parts) of the full appeal hearing was added to the evidence, with consent, on the second day of this hearing. I listened to the audio recordings when they were adduced in evidence. There were no transcripts available of the audio recordings.

Findings of fact

Credibility of the witnesses

14. Miss Brewis, for the claimant, made submissions on the general credibility of the witnesses. While it is generally unhelpful to make findings about the overall credibility of a witness's evidence, this was one of the rare cases where, in my judgment, the reliability of the whole of the evidence of Mr Marr and Mrs Burnett was called into question by the following factors:

14.1. Mr Marr's witness statement contained a number of statements of fact which were shown to be inaccurate. For example, at paragraph 5 he said that his statement of events (page 101, 'Statement of Events') was prepared in February 2020 in response to a prompt by HMRC. This was significant because, if contemporaneous, it would carry more weight as corroborative evidence on the disputed facts of what happened on 26 February 2020. However, in cross examination he conceded that at least part of it was written as late as July 2020 (see paragraph 28 below). The Statement of Events also contradicted his witness statement on the question of what the claimant told him on 26 February 2020 (see paragraph 29 below) and his evidence in cross examination was different again.

14.2. Mr Marr altered his account on a number of occasions during cross examination, giving the impression that he was trying to justify himself, rather than giving an account

of the facts (see paragraphs 36, 44 and 49 below). He gave the generic answer a number of times that he was 'following legal advice' or 'being as fair as possible', rather than giving factual detail, and showed a reluctance to make any concessions, even ones which would not have harmed the respondent's case.

- 14.3. Mr Marr's evidence appeared disingenuous at times. For example, he said in cross examination that he had not told the claimant about the investigation until July 2020 because he "didn't want to alarm her, it was for her health and wellbeing". However, his language in the disciplinary invite letter (page 105), which was the first the claimant knew of the allegations or investigation, and also during the disciplinary hearing, was alarmist, accusing the claimant of a 'potentially criminal act' and referring to an HMRC and Police investigation.
- 14.4. Mr Marr appeared to improvise his evidence on occasion. During cross examination, he explained that he had learned from Mr Ronchetti in March 2020 that the claimant had known voucher refunds were wrong. Later in cross examination, Mr Marr contradicted his previous evidence, saying he had referred previously to the claimant saying she knew it was wrong. Separately, when asked in cross examination if he had found that the claimant had anything to gain from or a motive for her alleged misconduct, Mr Marr accepted that he did not make any such finding during the disciplinary proceedings, but told the Tribunal, "*the claimant could have gained, hypothetically, if payments were going to parents on a regular basis, it might have encouraged parents to put their children in our childcare and that would have helped the claimant's role. There was no direct evidence but there were lots of things which could have come from that but it would have been before I started*". There was no mention of any such finding in the outcome letter or Mr Marr's witness statement. In my judgment, Mr Marr was embellishing his conclusions from the disciplinary process to justify his decision.
- 14.5. Mrs Burnett changed her evidence on occasion, when presented with uncomfortable implications. For example, in cross examination, she initially agreed with her comment recorded in the appeal hearing notes (page 133) that the cheques were not requested from the bank until June 2020. However, when it was suggested to her that would mean the cheques were requested in the same month that the claimant had raised a grievance against Mr Marr, Mrs Burnett changed her evidence to say they were first requested in February 2020. When asked to explain her comment at page 133, she said, "I think I knew [they were requested in February] and made a mistake saying they were requested in June". I concluded from the way she changed her evidence that she was not being candid on this point. Her evidence also contradicted that of Mr Marr on their communication in the course of the appeal (see paragraph 74 below).
- 14.6. I was struck, in particular, by the contrast between the audio recordings of the disciplinary and appeal hearings and the evidence of Mr Marr and Mrs Burnett about those hearings. Audio recordings obviously do not give a full picture of communication, as they are not always clear and omit visual evidence such as facial expressions or physical gestures. Nevertheless, the tone of voice used by both Mr Marr and Mrs Burnett and the interruptions which were not captured in the written transcripts indicated that they were both arguing the respondent's case against the claimant and justifying their conclusions (see paragraphs 55 and 70 below). The impression gained from the audio recordings, was that Mr Marr and Mrs Burnett were reluctant to entertain the possibility of the claimant's innocence.

15. For these reasons, I concluded that the evidence of Mr Marr and Mrs Burnett was unreliable and, in places, simply not credible. I therefore treated it with caution. Although Mr Sangha made the point that Miss Brewis gave only a single example of inconsistency from the evidence of each witness in her submissions on general credibility, I noted that she dealt with the numerous inconsistencies in the evidence in her submissions on the facts.
16. The evidence of some of the claimant's witnesses was also problematic for the following reasons:
- 16.1. The evidence in the witness statements of Mr Brain and Ms Dare consisted mainly of background information (they left the respondent before February 2020) and opinion. In so far as they provided opinion evidence, I disregarded it. However, where their evidence was relevant to the issues and was evidence of fact (not opinion), I have evaluated it in the normal way. For example, their evidence relating to the financial practices at the respondent during the period 2017 to 2019 was relevant to the question of Mr Marr's knowledge of the respondent's practices and procedures and whether the respondent acted reasonably in concluding the claimant committed gross misconduct. It was also relevant, along with what the claimant in fact knew about the refunding of voucher payments, to remedy issues (contribution) and the wrongful dismissal complaint.
- 16.2. Mr Sangha drew my attention to a declaration of a conflict of interest made by Mr Brain at the start of his witness statement. That declaration showed recognition by Mr Brain that he potentially had a motive to injure the respondent, but I considered that it also showed self-awareness and frankness. I took Mr Brain's evidence into account and gave it such weight as I saw fit, with due caution.
- 16.3. Mr Ronchetti was dismissed by the respondent some months before the claimant for offences which included similar allegations to those made against the claimant. I therefore treated his evidence with caution, as he too had a motive to injure the respondent.
17. In making my findings of fact, taking account of my observations on the witness evidence set out above, I placed particular weight on the documentary evidence and on the audio recordings. Where there was a dispute of fact, I resolved it on the balance of probabilities on the evidence, in accordance with the following findings.

Unfair dismissal liability

Background

18. The respondent is a charitable incorporated organization, with three volunteer trustees, including Mrs Burnett, who sit on its management committee along with its chief executive officer and others. It has fewer than 10 employees. It operates a pre-school nursery and after-school club. Childcare voucher schemes are arrangements by which employers deduct some of an employee's salary before tax and national insurance (salary 'sacrifice') and pay it into an account held by the employee with one or more voucher companies, such as Busy Bees or Edenred. The voucher companies then issue childcare vouchers on the instruction of the employee/parent. The vouchers can be used to pay childcare providers such as nurseries and after-school or breakfast clubs for childcare.
19. While I treated Mr Ronchetti's evidence with some caution, as noted above, his evidence regarding the way parents paid for childcare with the respondent was not disputed. There

was a dispute about Mr Ronchetti's job title, but it was not disputed that he was in charge of the respondent's accounts and financial management for a number of years, having previously been Secretary and acting Treasurer. I accepted his evidence that parents sometimes had a child in childcare with the respondent for up to 11 years. Parents might start paying cash, while the child was in nursery for 2 to 3 years. Then, as the child reached an age where they became eligible, they would have a government funded place for a certain number of hours, but might pay for additional hours. Finally, once a child started school, the parents might pay for after-school or breakfast club. I accepted the evidence of Mr Ronchetti and Mr Brain that parents could pay for any or all of that childcare using a variety, and often a mixture, of childcare vouchers, cash, credit or debit card payments, local authority childcare grants, standing orders, and/or payments by employers. Many families used a combination of methods of payment for different children accessing different services at different times. The respondent accepted childcare vouchers from a number of different childcare voucher providers.

20. Irrespective of how payments were made, they would be credited to the parent's account by the respondent and used to pay for childcare. If a significant credit balance built up, the respondent would refund the overpayment. I accepted Mr Ronchetti's evidence that the respondent did not make any distinction between different types of overpayments and a refund might therefore be made for a credit balance which had been built up through payments originally made by cash, credit/debit card, childcare vouchers and/or other methods. Mr Ronchetti was however aware that some parents, who paid predominantly by childcare voucher, were accumulating large credit balances and claiming refunds. He mentioned it to Mr Hewitt, the then Centre Manager, who called it a 'nice little nest egg'. However, there was insufficient evidence for me to find that either Mr Ronchetti or Mr Hewitt understood the respondent to have done anything wrong.
21. The claimant was employed by the respondent on 13 June 2005 as a play worker. I accepted her evidence that she became Childcare Manager in 2010 when she opened the respondent's nursery. It was not disputed that, at the time of her dismissal, she had 15 years' service for the respondent (10 years as childcare Manager) and no previous disciplinary warnings. I accepted Mr Brain's evidence that relations between staff and committee members and within the committee itself had become increasingly strained in recent years. The evidence suggested that had occurred against a background of local politics, financial pressures, proposals for restructuring and the strain of the pandemic.
22. There was a dispute between the parties about the claimant's financial responsibilities and her understanding of the childcare voucher system. The claimant's job description (pages 44 – 45) did not mention financial responsibilities. Its focus was on educational and safeguarding requirements and the management of staff. The claimant's account of her role and duties matched that in the job description. The respondent submitted that the claimant's role in reality included financial management. I accepted the claimant's evidence, in cross examination, that there was a difference between being involved in strategic financial decisions (such as the appropriate price to charge for childcare) and the day-to-day management and administration of parents' and the respondent's accounts. I found that it was Mr Ronchetti who had responsibility for the latter.
23. It was not disputed that in 2017 the claimant was asked to become the second signatory for the respondent's cheques and bank account payments and to assist Mr Ronchetti with some of the day-to-day financial matters, because the former Centre Manager had left, the number of Trustees had dwindled and the committee members were frequently unavailable. I accepted the claimant's evidence, which was supported by that of Mr Ronchetti, that she was told this was a temporary arrangement, until an administrator could be recruited. She

was not expected to have any financial responsibility other than counter-signing payments or setting up online payments (Faster Payments Online, or 'FPO's), as and when instructed by Mr Ronchetti or other members of the committee. I accepted the claimant's evidence that she was not required nor encouraged to question the nature of the payments. Her involvement was viewed by all as merely a formality. The text messages at pages 59 and 65 of the bundle evidenced committee members asking her to make payments on their behalf, including Mrs Hall. I accepted the claimant's evidence, supported by the committee meeting minutes (pages 46 – 47), that her pay-rise in 2017 reflected her additional duties overseeing staff at a breakfast club. It had nothing to do with any additional financial responsibilities.

24. There was a dispute between the parties about whether the claimant received any training on financial administration. I accepted the claimant's evidence that she received 2 days' training from the local authority on administration of the 30 hours of Early Years funded childcare available to parents. I accepted her evidence that this training did not cover the operation or administration of childcare voucher schemes. I accepted her evidence that she had no training on the administration of childcare vouchers nor the financial administration of the respondent, such as the accounts system. I accepted her evidence at paragraph 10 of her witness statement that, as a result, she struggled to help train the new Office Administrator, Sue Forster, on the financial system when she was appointed. The claimant possessed only a basic understanding of how to input some of the codes for payment and the authorization of FPOs. It was agreed that the respondent had no written or other policies concerning the administration of childcare vouchers or financial administration.
25. I accepted the claimant's evidence that she was uncomfortable about the role of cheque counter-signatory and assistant to Mr Ronchetti. There was insufficient evidence that she raised concerns about the role or lack of training formally with the Trustees or management committee, but I accepted her evidence that she expressed reservations verbally to the interim Centre Manager Mr Hewitt.

February 2020

26. A new Chief Executive Officer, Mr Marr, was appointed to the respondent at the end of January 2020 and did not therefore have first-hand experience of how the respondent operated prior to his arrival. The practice of making repayments to parents who had overpaid childcare vouchers first came to his attention on 26 February 2020. It was agreed that Mr Marr asked the claimant to help the new Office Administrator, Sue Forster, look at the computer system which recorded parents' fees accounts. The parties agreed that when Mrs Forster asked the claimant what the payments to parents represented, the claimant explained they were refunds of overpayments. Mrs Forster asked if they were refunds of childcare voucher payments, to which the claimant replied in the affirmative. The parties agreed that Mr Marr, who was within earshot, said he thought childcare voucher payments should not be refunded. They agreed that he googled it and found confirmation on-line that that was the case. Mr Marr asked the claimant and Mrs Forster to identify the voucher overpayment refunds since 2017.
27. There was a dispute as to what happened next. The claimant said she told Mr Marr that she did not know that childcare voucher payments should not be refunded. The claimant said that, later that day, Mr Marr and Mrs Hall suggested that the payments might amount to money laundering or fraud by Mr Ronchetti. She said that, on hearing that, she told them she was getting worried because she had obviously been countersigning the cheques. Mrs Hall told her not to worry, because she was not to blame.

28. The respondent said the claimant told Mr Marr on 26 February 2020 that she had previously told Mr Ronchetti that he should not be refunding parents. The respondent submitted that this showed that the claimant knew refunding childcare vouchers was wrong. The respondent relied, both at this hearing and during the course of the claimant's disciplinary process, on three accounts (the 'Statements of Events' (pages 101 – 104)), one of which was written by Mr Marr (pages 101 – 102). Those Statements of Events contained accounts of the events on 26 February 2020, and all recorded the claimant saying she had told Mr Ronchetti it was wrong to refund childcare voucher overpayments. However, I had significant doubts about the reliability of the Statements of Events for the following reasons. Mr Marr's evidence at paragraph 5 of his witness statement was that he prepared his Statement of Events the following day (i.e. 27 February 2020) and it was therefore close to contemporaneous. In cross examination he initially stated it was prepared in February or March 2020. However, the whole document could not have been prepared at that time, as it made reference to events which did not occur until July 2020. Mr Marr's witness statement for this hearing did not mention any later addition or amendment to the Statement of Events. When questioned about possible additions in cross examination, Mr Marr changed his evidence to say he had added to the Statement of Events. He called it, for the first time, a 'running log' of events. However, he was unable to identify which parts had been added later or on what dates. When asked about the other Statements of Events (those of Mrs Forster and Mrs Hall, who were not called to give evidence to the Tribunal) Mr Marr said, for the first time, that they too were 'running logs', which had been updated at a later date, but again was unable to identify when or what was added. Given Mr Marr's changing evidence about the Statements of Events and the lack of clarity about how, why and even when they were prepared, I concluded they were neither contemporaneous nor reliable. I preferred the claimant's first-hand evidence that she told Mr Marr she did not know it was wrong.
29. The respondent said the claimant did not tell Mr Marr that she had signed refund cheques or set up FPOs. However, Mr Marr's evidence contained contradictions, which in my judgment, rendered his evidence on this point unreliable. In his witness statement (paragraph 3) Mr Marr said the claimant did not mention that she had been actively involved in the refund process and he made no mention of the claimant expressing concern that she may have signed the cheques. However, in his Statement of Events (page 101) Mr Marr recorded that the claimant 'stated that she was worried as she might have signed some of the cheques for refunds and could she go on the sick'. When asked about this discrepancy in cross examination, Mr Marr said for the first time that the claimant's comment about signing the cheques and wanting to go on the sick had been a joke.
30. It was agreed that Mrs Hall sent the claimant a text message at 19.41 on 26 February 2020 (page 210) saying, "Hi Janet, I just need to confirm and stress that what was discovered and discussed tonight must stay between the 4 of us. This is now a serious matter and not sure at this point where it will end up. I'll speak to you next week when you are in work". The claimant responded saying "I won't say anything Maria. Cannot believe or understand how this could happen and wish I took control of the system when it was first set up". Mrs Hall replied saying, "Hindsight is a great thing. You're not to blame at all so don't worry. We know now and will have to put it right".
31. The respondent submitted that Mrs Hall's message demonstrated that the respondent did not believe the claimant was responsible for processing the payments. The respondent submitted that the claimant's response suggested that she was aware that there had been maladministration and wished for more responsibility over financial matters rather than less. However, Mrs Hall was not called to give evidence and there was insufficient evidence to

persuade me of the respondent's interpretation. I preferred the claimant's evidence that she had told Mrs Hall and Mr Marr that she was worried she had played a part, albeit unknowingly, by signing the cheques. Her expression of regret in the email accords with her having expressed concerns about her involvement and her failure to understand the operation of the parents' accounts and childcare voucher system. Further, her email suggested shock at discovering that there had been wrongdoing, which supported her evidence that she could not have told Mr Marr that she had previously told Mr Ronchetti refunds were wrong. Mrs Hall's offer of reassurance in the email also accorded with the claimant's evidence.

32. The tone of the claimant's email and Mrs Hall's response would both have been misplaced if Mr Marr was correct in cross examination that the claimant's comment about signing the cheques was a joke. In my judgment, Mrs Hall's text message only made sense on the claimant's version of events on 26 February 2020. Further, if the claimant had known that the refunding of voucher payments amounted to maladministration, I find it surprising that she would so readily have confirmed to Mrs Forster and Mr Marr that the refunds related to voucher over-payments.
33. On the evidence before me, on balance, I therefore preferred the claimant's evidence that she told Mr Marr on 26 February 2020 that she had not known that it was wrong to refund voucher over-payments and that she told him that she was worried because, as counter-signatory, she would have counter-signed some of the cheques.
34. Mr Marr said that he contacted HMRC, who confirmed that repayments of childcare voucher overpayments were not permitted. Mr Marr referred to reporting the 'potential tax evasion scheme' and said that HMRC agreed that it looked like it was an 'illegal scheme'. Mr Marr gave evidence that HMRC and the Police were conducting investigations into the 'scheme by Mr Ronchetti and the claimant'. However, there was insufficient evidence to suggest that either the Police or HMRC were investigating the actions of Mr Ronchetti, the claimant or the respondent or that they told Mr Marr they were doing so. It seemed more likely that the Police would investigate their own officers who were the parents who stood to benefit from the salary sacrifice scheme/tax avoidance and that HMRC would investigate tax avoidance by the employees liable for the tax. There was insufficient evidence to persuade me that Mr Marr had grounds for believing that liability for non-payment of tax in the circumstances of refunding childcare vouchers would rest with the childcare provider or administrator, rather than the individual responsible for paying the tax. The documents produced by the respondent consisted of advice for parents and employees regarding the non-refunding of vouchers, but I saw insufficient evidence to indicate that such refunds were illegal or amounted to fraud or to suggest that there would be any liability for a childcare provider which issued such refunds.
35. The respondent commenced a disciplinary process against Mr Ronchetti, in part in connection with allegations that he had been refunding childcare voucher payments. Mr Ronchetti was dismissed in March 2020 for gross misconduct. However, the claimant was not informed of any concerns about her own conduct at that time. The respondent's witnesses said this was because the respondent did not know that she was involved and they were waiting for evidence from the bank as to who the counter-signatories were for the refunds in question. That evidence was implausible, in my judgment. Even if I am wrong that the claimant told Mr Marr on 26 February 2020 that she was likely to have been a counter-signatory, it must have been obvious to the respondent that it was at least highly likely to have been her. Although Mr Marr was a newcomer to the respondent, Mrs Hall had been there for some time. The number of signatories was limited to Mr Ronchetti, the claimant and the members of the management committee. The claimant had been

specifically asked in 2017 to act as counter-signatory to assist Mr Ronchetti with financial matters during the period in question (2017-2019). In my judgment therefore, it must have been plain that the claimant was likely to have been the counter-signatory. Moreover, Mr Marr stated at paragraph 8 of his witness statement that Mr Ronchetti, in the course of his disciplinary proceedings, told him the claimant was involved. By Mr Marr's own account, therefore, he knew at the latest by 13 March 2020 that the claimant was involved in the refunding of voucher overpayments. Separately, on the respondent's case that the Statements of Events at pages 101 – 104 were contemporaneous, the respondent would have known from the date of those statements that the claimant was involved, because they all referenced the claimant.

36. When it was put to Mr Marr in cross examination that he knew in February or March 2020 that it was the claimant who was issuing/counter-signing the refunds, because the Statements of Evidence all "point the finger at the claimant", Mr Marr went from agreement, to partial agreement, to denial in the course of his answer ("Essentially. Partly. Well, no they don't"). He went on to say he had "no idea she [the claimant] was involved because there were 4 other signatories". But he was not able to satisfactorily explain why he did not ask all the signatories in February 2020 if they had countersigned refunds of voucher overpayments. In my judgment, the respondent's submission that it had to wait until receipt of the copies of the cheques from the bank in July 2020 before it knew who to investigate was simply not plausible. I concluded that it knew that the claimant was, at the very least, likely to have been the counter-signatory on the refund cheques from February or March 2020.
37. In April 2020 the claimant was put on furlough, following the nationwide Covid pandemic lockdown from 23 March 2020. The claimant was required to continue authorizing and making payments from home, including signing documents, authorizing staff wages, inputting figures for pay and responding to instructions by email from Mrs Hall. From the fact that the claimant was not suspended and was asked to carry on with her financial duties during furlough and until her dismissal, I concluded that the respondent did not consider her actions to have amounted to a breach of trust and confidence or gross misconduct. Had it done so, I consider that she would have been suspended from the date of Mr Ronchetti's disciplinary proceedings at the latest and would certainly not have been permitted to continue with her financial duties. I did not accept Mr Marr's evidence in cross examination that he did not tell the claimant there was an investigation into the repayments during her furlough because he did not want to alarm her and it was for her wellbeing.

Redundancy process

38. It was agreed that, by June 2020 the respondent was experiencing financial difficulties because of the Covid pandemic and a redundancy exercise had become necessary. It was not disputed that Mr Marr had anyway had plans to make the respondent more financially viable by restructuring.
39. On 18 June all staff received an email to say they were at risk of redundancy (pages 214 – 215). On 20 June 2020 the claimant was told that, as she was not applying for any alternative posts, the redundancy process would begin (page 215a). I accepted that the claimant did not apply for the new managerial post because she was not suitably qualified.

Grievance

40. Following a post-furlough return-to-work meeting on 15 June 2020, the claimant was signed off sick by her GP from 17 June 2020. I accepted the claimant's evidence that Mr Marr's

email to all staff that evening (page 210a) blamed her absence for the need to keep staff on furlough and for putting the future of the service in jeopardy, which caused staff to telephone her in tears in fear for their jobs and made her feel scapegoated. She gave undisputed evidence that this email was unnecessary because there were two other managers who could deputise for her and there was therefore no need to disrupt the scheduled reopening of the service.

41. After receipt of Mr Marr's email, the claimant put in a grievance against Mr Marr and Mrs Hall (page 211) on 17 June 2020. Her grievance was that her return-to-work interview had felt more like a disciplinary, that Mr Marr and Mrs Hall were making her worried about the security of her job and Mr Marr's email blamed her absence for the "*closure of the nursery, this causing me to feel humiliated guilty and even more stressed around the possibility of becoming redundant*".
42. Mr Connaughton, the trustee to whom the claimant addressed her grievance, mistakenly copied the claimant in on an email (page 212) later that day. Mr Connaughton's email read, "*And so it begins! For my information as I wasn't present, could you tell me if any of her complaints are valid?*". Mr Connaughton did not uphold the grievance and, when the claimant appealed, he wrote to her upholding his decision. The grievance was concluded on or around 8 July 2020. The respondent submitted that the fact, process and/or outcome of the grievance was not relevant to the disciplinary procedure against the claimant or her dismissal. I agreed, in so far as the subject matter of the claimant's grievance was entirely separate from the subject matter of the respondent's investigation and disciplinary process against her. However, the claimant submitted, and I agreed, that the fact the claimant had presented a grievance against Mr Marr and Mrs Hall on 17 June 2020 was known to Mr Marr and must therefore have been in his mind during what followed.

Investigation

43. Mr Marr suggested that it was the receipt of copies of some of the repayment cheques from the bank in June 2020 and confirmation that the claimant's name was on the FPO refunds which prompted him to investigate the claimant. I found this surprising, as Mr Marr had known of the likelihood of the claimant being the counter signatory from February/March 2020, was told of her involvement by Mr Ronchetti in March 2020 and was in possession of the Statements of Evidence, including his own, which pointed the figure at her from February 2020. The proof of the claimant's signature on the cheques could therefore not have been the 'smoking gun' Mr Marr seemed to suggest.
44. Mr Marr accepted that he had regard to the three Statements of Events (pages 101 – 104) in the course of his investigation. Whether or not they were prepared specifically for the investigation was unclear, given the lack of clarity about the purpose, preparation and timing. It was not disputed that Mr Marr did not interview nor take a statement from the claimant in the course of the investigation, either about the subject matter of the investigation or about the events on 26 February 2020. Mr Marr gave various reasons during cross examination for not interviewing or taking a statement from the claimant during his investigation: He did not need to interview her because the evidence was all paper-based; she had an opportunity to state her case at the disciplinary hearing; she was not in the office because of the Covid pandemic; the respondent was a small charity; his mother passed away; he did not think the claimant had a big role to play. Mr Marr conceded in cross examination that, had he taken a statement from the claimant in February 2020, there may have been a different outcome to the investigation and disciplinary process.

45. Mr Marr's evidence regarding the investigation was confusing for a number of reasons. Firstly, Mr Marr's witness statement referred at paragraph 7 to investigating all refunds to parents, rather than just refunds of overpayments relating to payments made by childcare vouchers. During cross examination Mr Marr similarly did not make a distinction between refunds of payments made by childcare voucher and refunds of payments made by other means. Secondly, and separately, Mr Marr initially said in cross examination that he had evidence from the bank of all the cheques which were the subject of the allegation against the claimant. However, he later conceded he was not sure. It was unclear to me from the evidence, including Mr Marr's Statement of Evidence (page 101), whether all of the overpayments which were the subject of the disciplinary allegations were accounted for, either by cheques which the respondent now possessed or FPOs, or whether some repayments remained unaccounted for following the investigation.
46. At paragraph 15 of his witness statement Mr Marr identified that the claimant had "set up numerous payments to the sum of £2,000+ over a considerable period". However, there was insufficient evidence for me to be clear how the respondent arrived at the figure of £2,000+ or what the '+' was or why it could not be clearly quantified. I accepted the claimant's submission that that figure must have represented an estimation of the total amount refunded, rather than any unpaid tax and national insurance, but the cheques and FPOs accounted for in the evidence did not appear to amount to that figure.
47. Mr Marr accepted that the respondent took payments for childcare in a range of childcare vouchers, some of which were non-refundable while others could be refunded provided they were processed through PAYE and subject to tax. Mr Marr conceded that he did not establish as part of the investigation what type of vouchers the refund payments which were the subject of the allegations related to. Mr Marr also accepted that, in the course of his investigation, he did not make enquiries with HMRC as to whether the refund of childcare vouchers could be remedied after the event, for example, by a parent paying the tax and national insurance due on that amount.
48. Mr Marr accepted in cross examination that the allegations put to the claimant in the disciplinary hearing were that she had been involved in a criminal act and/or fraud. He accepted that allegations of that gravity would require a thorough investigation by an employer.
49. Mr Marr's disciplinary report (pages 118 – 120), which he prepared following his investigation, made the finding that "considerable sums have been refunded directly to parents via cheque and bank transfer (over £2,000), meaning that this money has not be subject to legal tax and NI contributions, which is ultimately a potentially criminal act". However, the report did not detail the repayments made, how the £2,000 was broken down, what potential criminal act was alleged, nor who the families were. The Statements of Events (pages 101 – 104) were provided to the claimant with the report but were unsigned and undated and had the names redacted. Mr Marr's evidence about the redactions was contradictory and contributed to my decision to treat the statements with caution. He initially said he redacted the statements so that the claimant would not know who had written them and to avoid unrest among the staff over a lack of confidentiality. He then said he knew the claimant would be able to work out who had written the statements, because it was obvious.

Disciplinary invite

50. The claimant was sent an invitation dated 23 July 2020 to a disciplinary hearing. The letter informed her that, "*The purpose of the Hearing is to review the evidence gathered as part of an ongoing investigation into the misuse and misapplication for the childcare vouchers.*"

Specifically, the allegations are that in a position of trust and responsibility you: have mishandled childcare voucher payments by way of refunding at least three families for payments made via childcare vouchers. Childcare vouchers are deemed by HMRC as a 'non-cash benefit', and can therefore not be exchanged for cash. Considerable sums have been refunded directly to parents via cheque and bank transfer, meaning that this money has not been subject to legal tax and NI contributions, which is ultimately a potentially criminal act. HMRC and the Police have been informed and are due to conduct an investigation into our findings" (pages 105 – 106). Mr Marr accepted this was the first time the claimant became aware she was suspected of misconduct. Mr Marr accepted that he did not send copies of the cheques from the bank nor the document identifying the payments in question (page 154) nor his disciplinary report (pages 118 - 120).

51. The claimant responded by email denying making any "payments to families" (page 107). I accepted her evidence that her response was genuine, in that she believed she had not been making payments to families. She was alarmed by the mention of a criminal act and investigation, did not read the letter carefully and did not immediately understand that the allegations related to the countersigning of cheques and setting up of FPOs as that issue had not been discussed with her since February/March 2020.
52. On 24 July 2020 redundancy payment information was sent by letter to the three other members of childcare staff, setting out their redundancy payment calculations. The claimant had been expecting to receive her redundancy payment calculation at the same time. However, despite being among those selected for redundancy, her letter was withheld. The respondent's evidence was that it would not have been appropriate to serve redundancy notice on the claimant when she was the subject of disciplinary proceedings. I agreed with the claimant's submission that the failure to issue her notice of redundancy suggested that the dismissal for misconduct was pre-determined. Had the respondent been prepared to dismiss the disciplinary allegations or apply a lesser sanction, delaying her notice of redundancy would have set back the redundancy timetable. I accepted the claimant's submission that it was more likely that the notice of redundancy was withheld because the respondent knew the claimant would not be made redundant.

Disciplinary hearing

53. The claimant's disciplinary hearing was held on 29 July 2020. The claimant submitted that Mr Marr was not impartial because he relied on his own witness evidence (the Statement of Events at page 101) in the disciplinary hearing, had been responsible for conducting the investigation and had been the subject of the claimant's grievance. Although the respondent was a small organization facing operational difficulties caused by the Covid pandemic, there was insufficient evidence for me to find that Mr Marr was the only person at the respondent who could have heard the claimant's disciplinary hearing. Mr Marr explained in cross examination that only he and 'one other' were not "childcare related", but it was not explained who that 'other' person was nor why they were not available. Nor was it explained why another trustee, such as Mr Conaughton, the trustee who had dealt with the claimant's grievance, could not have conducted the disciplinary hearing.
54. The respondent's notes of the disciplinary hearing are at page 121 – 126. The claimant did not challenge the accuracy of the notes, but the audio recording of the disciplinary hearing was available at this hearing (although there is no transcript). It is not disputed that the claimant accepted at the disciplinary hearing that she counter-signed the refund cheques and set up/authorised the FPO refunds. On the audio recording she is heard repeatedly insisting that she did so on the instruction of others and that she did not know, and had no way of knowing, that such refunds were not permitted, as she had had no training in

financial matters and had been told to follow instructions. The claimant can also be heard stating at the disciplinary hearing that she could not have known the refunds were wrong because Mr Hewitt had not alerted Mr Ronchetti that it was wrong in their discussions, the auditor had not raised it and she did not have any financial responsibilities as part of her job role. The claimant is also heard telling Mr Marr during the disciplinary hearing that she had received an email from Mrs Hall telling her she was blameless, evidencing that she had told him and Mrs Hall that she would have signed the cheques.

55. Mr Marr is heard telling the disciplinary meeting at the outset that his role was to put the respondent's case, then listen to the claimant's case and make a decision. In my judgment, however, the approach he took during the meeting was not one of fact finding. He did not ask open questions, but instead argued the respondent's case. He can be heard defending his investigation in the face of criticism ("We've got the evidence we feel like we needed to progress with this" (3 minutes 32 seconds)). He can be heard repeatedly arguing with the claimant and contradicting her when she puts forward her case ("You can't use ignorance as an excuse for signing the cheque or setting payments up" (page 124), "if your signature is on a cheque you are accountable also" (page 125)).
56. Mr Marr gave evidence in cross examination that, in reaching his decision to dismiss, he relied on his own recollection of the conversation in the office on 26 February 2020. His belief that the claimant said on 26 February 2020 that she knew it was wrong to issue refunds meant that he did not believe her when she told the disciplinary meeting that she did not know it was wrong. Mr Marr can be heard contradicting her account on the audio recording of the disciplinary meeting: "there was no laughing in the office when that was found" (page 124). In cross examination, when it was put to him that he was "saying that he wasn't laughing, as a witness", he responded, "No, I'm saying it as a fact". There were clearly a number of disputes of fact between Mr Marr and claimant about what happened on 26 February 2020 and Mr Marr relied on his own recollection of events. In my judgment Mr Marr was not able to take an objective and impartial view of his own and/or the claimant's evidence at the disciplinary hearing.
57. Mr Marr gives the impression on the audio recording of having already decided that the claimant was guilty and of looking for evidence to support that view. For example, at 22 minutes and 54 seconds, Mr Marr picks up on the claimant's previous comment (page 124) that Mr Dave Hewitt and Mr Ronchetti had referred to parents' childcare voucher credit balances as being a 'nest egg'. The minutes of the disciplinary meeting are inaccurate at page 124, where they record the claimant saying that DH said it looks like a nice little nest egg "but SR needs to check it". In fact, the audio recording records the claimant saying that "I remember Steve saying "what am I supposed to do? It's their money". There is no mention of checking. Mr Marr is heard giving his personal opinion that, having heard the reference to a 'nice little nest egg', the claimant was culpable for continuing to sign the cheques. Mr Marr appears to have considered the term 'nest egg' to indicate fraud and expected the claimant to know that. However, in common usage the term 'nest egg' merely means 'savings', which accords with the claimant's recollection of Mr Hewitt's comments. I find that Mr Marr assumed, without justification, that the claimant shared his interpretation of the term. Rather than listening to what she actually said at the disciplinary hearing, he contradicted her assertions that she did not know refunding childcare vouchers was wrong and misinterpreted her evidence to support that view.
58. I find that Mr Marr did not give the claimant an opportunity to consider or address the evidence against her in the disciplinary hearing. In the audio recording Mr Marr can be heard briefly holding up the paper evidence (the copies of cheques etc) for the claimant and her representative to see on the Zoom video call, but he does not take them to the

copies of cheques, nor explain the evidence nor ask the claimant any questions about that evidence. Those documents were anyway heavily redacted and, even if the claimant and her representative had had an opportunity to examine them before the hearing, I considered that it would not have been obvious what they were or how they were relevant. Mr Marr did not explain during the disciplinary hearing how his investigation arrived at a figure of £2,000+, nor what the '+' represented. He did not identify which childcare voucher providers were involved nor identify the three families to whom refunds were said to have been made, nor which payments were said to have been made to which families. The redactions in the documents made it impossible to interpret them. It was only when Mr Marr explained the redacted document at page 154 during re-examination at this hearing, that it transpired that, because some families had two children at the respondent, cheques were issued representing refunds of voucher payments for both children. Thus, the item under the first redacted heading shown for "27th November 2017 refunded £296 – paid by Cheque" and the item under the second redacted heading shown for "27th November 2017 refunded £104 – paid by cheque" related to the cheque for £400 on page 150. Until this was explained in re-examination, the Tribunal had no way of understanding how the items at page 154 related to the copies of cheques and bank statements provided or the generic figure of £2,000+ quoted by Mr Marr. The claimant's representative did not cross examine Mr Marr on that evidence, as it was only provided in re-examination.

59. During the disciplinary hearing the claimant told Mr Marr that she had not been trained on financial responsibilities nor childcare voucher administration and that her job did not involve financial responsibilities. Mr Marr accepted that, following the disciplinary hearing, he did not check her training records, nor look at her job description. The claimant told Mr Marr about the email from Mrs Hall on 26 February 2020. Mr Marr accepted that he did not speak to Mrs Hall about that email, nor seek to obtain a copy. In cross examination he said that email was not relevant to whether the claimant was guilty or not. I find that Mr Marr did not conduct any investigation into the points the claimant raised in her defence at the disciplinary hearing. He accepted in cross examination that he made an assumption that the claimant, as Childcare Manager, would know that vouchers should not be refunded. I find that he did not consider the possibility that the claimant might in fact not have known.
60. Mr Marr accepted that he did not speak to Mr Hewitt, Mr Ronchetti or Mrs Hall to establish whether they had asked the claimant to counter-sign cheques or set up online payments without necessarily telling her what they were for. I agreed with the claimant's submissions that Mr Marr failed to consider gathering or taking account of any exculpatory evidence. He focused instead on finding evidence to support her guilt. I did not accept Mr Marr's evidence that he considered alternatives to dismissal, took account of the claimant's length of service or clean disciplinary record or considered whether training might be an alternative. They were not mentioned in the outcome letter and taking those factors into account would have been entirely inconsistent with his approach to the investigation and disciplinary, in that he was not looking for ways to save her job but instead ways to dismiss her.
61. Mr Marr accepted that he had been involved in the disciplinary proceedings against Mr Ronchetti, which culminated with Mr Ronchetti's dismissal in March 2020. Those disciplinary proceedings concerned allegations which included the same or similar allegations to those made against the claimant. During cross-examination Mr Marr referred to statements made during Mr Ronchetti's disciplinary proceedings, although he accepted that no evidence from Mr Ronchetti's process was put to the claimant during her disciplinary process. He denied that anything from Mr Ronchetti's process was taken into account in the claimant's process. However, in my judgment, the fact that he made reference to those comments during cross examination and the close link between the two sets of proceedings suggested that, even if Mr Marr made an effort to put Mr Ronchetti's proceedings out of his

mind, he took account of what he had heard and the conclusions reached during Mr Ronchetti's disciplinary process.

62. Mr Marr sent the claimant a letter notifying her of her summary dismissal for gross misconduct (pages 127 – 128). That letter set out the grounds for Mr Marr's belief that the claimant had committed misconduct. They were a repetition of the allegation from the invitation letter with the addition of, "*I am satisfied that your unacceptable behavior has had a significant detrimental impact on the organization. This behavior represents a very serious breach of trust and confidentiality that at I consider is an act of gross misconduct*". Mr Marr was unable to explain in cross examination what the detrimental impact on the organization was nor what evidence he had of it, other than to say that it "Could have had an even bigger impact. It was really serious in my opinion". When it was put to him that there was no evidence to say that the claimant or the respondent was guilty of tax avoidance, his evidence was that "it could be seen as tax avoidance". However, he did not make that finding in the disciplinary process. It was not clear to me what evidence Mr Marr obtained to indicate fraud or a potential criminal act by the claimant, as stated in the disciplinary outcome letter. There was insufficient evidence for me to find that anything said in his conversations with HMRC or the Police indicated liability for the respondent or the claimant. It appears that the concern for the Police and/or HMRC was potential tax avoidance by its own officers/the parents/employees.
63. The outcome letter stated, "*it is inconceivable to suggest you did not know how the scheme operated over a long period of time or that you were not required to know how it operated as the manager*", yet Mr Marr did not investigate whether the claimant's assertion that she did not know was correct. As he was new to the respondent, I find that this conclusion was an assumption based on his own opinion of what a manager ought to know. Mr Marr's conclusion that the claimant was guilty of a breach of trust and confidence was reached because he did not believe the claimant and concluded that she knew what the refunds were for and knew that they were wrong.
64. It was not disputed that the respondent had no disciplinary policy, and therefore no examples of gross misconduct, to provide guidance for Mr Marr in reaching his decision regarding the seriousness of the claimant's conduct.
65. On the balance of probabilities, the following factors, in combination, lead me to conclude that Mr Marr had already decided to dismiss the claimant before commencing the disciplinary hearing:
- 65.1. The timing of the claimant's grievance and the difficult relations between her and Mr Marr in June 2020;
 - 65.2. Mr Marr's conviction that the claimant must have known that refunds of voucher payments were not permitted, his reliance on his own assumptions, and his focus on incriminatory rather than exculpatory evidence;
 - 65.3. Mr Marr's failure to interview the claimant, either in February/March 2020 or prior to the disciplinary hearing, despite obtaining witness evidence from himself and two others;
 - 65.4. Mr Marr was both the investigator and disciplining officer, despite the claimant's grievance against him and despite the fact he was a witness the risk that he would be influenced (consciously or subconsciously) by what had taken place during the disciplinary hearing of Mr Ronchetti which he had chaired and which, in part, concerned the same or similar allegations;
 - 65.5. Mr Marr did not investigate the points the claimant raised in mitigation, that financial responsibilities were not in her job description, that she was merely doing what other

managers and committee members were instructing her to do, and that Mrs Hall's email of 26 February 2020 demonstrated that she had expressed concern on that day about having signed cheques;

65.6. The lack of concrete evidence that the claimant's actions in refunding voucher payments amounted to fraud or a potential criminal act (as opposed to the actions of the parents who were liable for the tax);

65.7. Despite knowing that the claimant was implicated at least from the date of Mr Ronchetti's disciplinary hearing, the respondent apparently did not view the claimant's actions as sufficiently serious to warrant suspension and she was permitted to continue handling financial transactions;

65.8. The lack of consideration of alternatives to dismissal, the claimant's length of service or clean disciplinary record;

65.9. The redundancy process was halted to make way for the disciplinary process.

66. I found that Mr Marr genuinely believed, based on his experiences with Mr Ronchetti's disciplinary process and his various assumptions, that the claimant had been involved in a scheme devised by Mr Ronchetti to assist parents in tax avoidance. I find that he was not prepared to consider the possibility that the claimant did not know voucher refunds were wrong or was simply following instructions and did not know what the payments were for. He closed his mind to the possibility of a lack of guilt or any alternatives to summary dismissal. In my judgment, even if Mr Marr did not consciously set out to ensure that the claimant would be dismissed, he was subject to confirmation bias to such a degree that dismissal was inevitable.

Appeal

67. The claimant appealed (pages 129 – 130) on 5 August 2020, on the grounds that:

67.1. The halting of the redundancy process indicated that the disciplinary outcome was predetermined;

67.2. She had continued to handle finances while on furlough, indicating that trust and confidence were still in place;

67.3. The investigation and disciplinary should have been dealt with promptly and without delay;

67.4. Her job description made no mention of financial responsibilities, there was no policy, she had had no training and support and was acting on instructions;

67.5. Mr Marr's involvement in the incident and as investigator and disciplinary decision maker rendered the decision unsound and there had been other trustees available to hear the disciplinary;

67.6. She had raised a grievance against Mr Marr and Mrs Hall, had been given no right to appeal and received an email which suggested it had been handled poorly;

67.7. Some nurseries made refunds and asked parents to sign a disclaimer.

68. The appeal hearing was held on 20 August 2020 by Zoom video call, chaired by Mrs Burnett. The notes of the appeal hearing (pages 132 – 137), taken by Mr Connaughton, were not a verbatim record of what was said and deviated from the audio recording of the appeal in some important regards (see below). I preferred the evidence of the audio recording. Mrs Burnett agreed in cross examination that the audio recording recorded the claimant explaining that she did not understand the voucher system, she did not set up the FPO system, she merely followed Mr Ronchetti's instructions, she had not been trained in financial matters and she did not know it was wrong to issue refunds for overpayments made by childcare voucher.

69. Mrs Burnett explained to the claimant at the appeal that she would not be re-hearing the disciplinary, but instead reviewing the decision made by Mr Marr. Mrs Burnett therefore declined to hear any repetition of the arguments which had been put at the disciplinary hearing. Because the claimant had already raised concerns at the disciplinary hearing about the outcome being pre-determined because Mr Marr conducted both the investigation and the disciplinary, Mrs Burnett refused to consider that issue again at appeal. She also refused to hear the point about the grievance (page 135), on the grounds that it was irrelevant. In my judgment, the claimant's reference to the grievance was not irrelevant. Although any concerns the claimant had about the grievance procedure itself were not a matter for the disciplinary appeal, the fact that she had raised a grievance against the disciplinary manager and one of the key witnesses (Mrs Hall) just prior to the commencement of disciplinary action was potentially relevant, in my judgment. Mrs Burnett accepted that she did not ask the claimant about the relevance of the grievance to her disciplinary appeal.
70. Miss Brewis characterized Mrs Burnett's tone in the appeal hearing as "berating" the claimant. Audible on the audio recording, is a moment in the final stages of the meeting when the claimant attempts to raise the point that her job no longer existed, when Mrs Burnett speaks over the claimant for several sentences, such that it is not possible to hear the point the claimant is trying to make. Mrs Burnett also cuts across the union representative on a number of occasions and on one occasion asks the claimant an important question ("I need to understand what you understood about the voucher system when you were inputting things, what you understood you were doing") but does not let her answer. Between minutes 12 to 15.20 of the audio recording, Mrs Burnett says, "I don't want to go over things again because I'll be reviewing things". This is the third occasion on which she tells the claimant she does not want to hear any more from her on a point. Responding to a query from Mrs Burnett about £600 being a lot of money, the claimant tries to explain that it represented two siblings where one had left the respondent's care, but Mrs Burnett interrupts with, "We're going into a little bit too much detail. I was just trying to clarify that you knew the payment was a very large sum". Mrs Burnett does not appear to be interested in hearing the claimant's evidence. I find that Mrs Burnett's tone in the meeting was direct and on occasions dismissive and impatient. She did not give the impression of listening carefully to the claimant's arguments or taking care to understand what the claimant was saying.
71. The claimant raised a new piece of evidence at the appeal. She showed Mrs Burnett the email at page 153. It was not disputed that that email was evidence of another nursery issuing refunds of both Busy Bees and Edenred vouchers to a value of £1200 to the claimant's niece. The claimant explained to Mrs Burnett that she had rung another nursery and the manager had told her they had made the same mistake (issuing voucher refunds), but telephoned HMRC and been told, "Oh you just have to have a paper trail, get back to the parent, explain what's happened and tell them to get in touch with HMRC" (page 135). Mrs Burnett refused to consider the claimant's new evidence, telling her, "It really is totally irrelevant what other nurseries do". I accepted the claimant's evidence that this was evidence that HMRC did not treat the refund of childcare vouchers as fraud and was therefore relevant. Mrs Burnett maintained in cross examination that what other nurseries did was irrelevant to the respondent. She accepted that she had not called HMRC to see if the error could be easily remedied.
72. I accepted the claimant's evidence in cross examination that she had also telephoned two voucher companies, Busy Bees and Edenred, and both had told her that voucher refunds were not a problem. I find that this evidence was relevant to whether the claimant had committed a disciplinary offence (fraud), particularly in the absence of any disciplinary

policy or procedure at the respondent. I find that the claimant was unable to present this evidence at the appeal hearing because Mrs Burnett told her it was irrelevant.

73. The notes of the appeal hearing recorded on page 5 in section 2 (page 136) the claimant saying she knew it was wrong to refund childcare vouchers. The audio recording of the claimant's words is muffled, although I agreed with the claimant's submissions that it sounds as if she says she did not know it was wrong. More significantly, however, the notes of the appeal recorded the claimant maintaining throughout the remainder of the appeal meeting that she did not know that her actions were wrong. The note relied upon by Mrs Burnett was therefore obviously anomalous. Mrs Burnett referred in her outcome letter to the claimant agreeing that she knew it was wrong (see below), without checking the accuracy of the anomalous note or taking account of the claimant's arguments throughout the remainder of the hearing.
74. Mrs Burnett sent the claimant an outcome letter dated 24 August 2020 (page 138 – 144) upholding the decision to summarily dismiss her. The letter explained that Mrs Burnett had reinterviewed the witnesses who submitted statements to the disciplinary hearing, i.e. Mr Marr, Mrs Forster and Mrs Hall. The claimant was not told that this would be happening and Mrs Burnett did not take any notes of these interviews, nor was there any evidence relating to these interviews in the bundle. The evidence obtained was not put to the claimant. Mr Marr's witness statement does not make any reference to being interviewed by Mrs Burnett about his Statement of Events or about the disciplinary hearing. The only reference to the appeal in his witness statement is, "To ensure fairness I was not involved with the appeal hearing" (paragraph 26). Mrs Burnett assured the claimant during the appeal hearing that she had not spoken to Mr Marr before the appeal hearing. This evidence is contradictory. Either Mrs Burnett did speak to Mr Marr before deciding the outcome of the appeal but Mr Marr neglected to mention it in his evidence and Mrs Burnett's assurances to the claimant were hollow, or Mrs Burnett did not speak to Mr Marr before deciding the outcome of the appeal, in which case her evidence that she spoke to the witnesses and investigated Mr Marr's decision making was not accurate.
75. Regarding the first point of appeal (that the decision was predetermined and redundancy figures were not sent to the claimant) I find that Mrs Burnett did not review the disciplinary decision. She told the claimant in the appeal hearing that this had already been dealt with, and the outcome letter merely repeated the finding of the disciplinary hearing (page 139). Further, much of the detail cited in the outcome letter was not discussed with the claimant during the appeal.
76. Mrs Burnett's outcome letter referenced 14 cheques over 4 years. In fact, there were 13 payments, including only 3 cheques, over a period of 2 years. She referred to the claimant having been Childcare Manager for 15 years, but the claimant had only held that position since 2017. The inaccuracies in the outcome letter contributed to the impression of a lack of care by Mrs Burnett about the details and a failure to properly evaluate the evidence.
77. I concluded, from Mrs Burnett's outcome letter and her attitude to the claimant during the appeal meeting, that she had already made up her mind before the appeal meeting that the claimant was guilty of misconduct. I find she had a genuine belief in the claimant's misconduct, but that belief was formed before the appeal and she did not approach the appeal with an open mind and therefore did not review Mr Marr's decision making objectively.

Wrongful dismissal/contribution

78. Separately, I made the following findings of fact in relation to the wrongful dismissal complaint and issue of contribution. It was not disputed that the respondent had no disciplinary policy and therefore no disciplinary rules concerning the penalty for refunding childcare voucher overpayments to parents. There was no document at the respondent which identified this action as misconduct or gross misconduct.
79. I accepted the claimant's evidence that she had not had any training on administration of the childcare voucher scheme, and had not been told by anyone, including the trustees, Mr Ronchetti or the management committee, that refunding childcare voucher overpayments to parents was not permitted.
80. I found, from the claimant's evidence of her conversations with another nursery manager, her conversations with the childcare voucher providers, the email at page 153 and the evidence of Mr Ronchetti, that refunds of childcare voucher overpayments are made on occasions by childcare and voucher providers.
81. The respondent submitted that the refunding of payments made by childcare vouchers was plainly maladministration and/or fraud. However, there was insufficient evidence for me to find that the claimant's involvement in refunding childcare vouchers was maladministration of the scheme or fraud. The extract from HMRC's website (page 148) appeared to be from a site intended for employers. It stated, "You need to deduct PAYE tax and national insurance contributions before making the refund to employees. This applies to both current and former employees. If your company no longer exists, the voucher provider may refund the employee directly. This will depend on the contract between your company and the voucher provider". It did not appear to be advice intended for childcare providers.
82. The other extracts (pages 147) suggested that refunds should be made via employers and be subject to tax and national insurance and that employees should not seek or accept refunds from childcare providers, but did not state or imply that childcare providers would be liable if they provided refunds.
83. There was insufficient evidence that any investigation by HMRC or the Police was an investigation into the actions of the claimant or the respondent. Rather, I find from the evidence, that it was more likely HMRC and the Police were concerned with tax avoidance by the employees who were liable for the tax and national insurance.
84. There was insufficient evidence or explanation for me to determine that the overpayments the claimant refunded were solely or partly refunds of payments made by childcare vouchers. It was not clear that the cheques or electronic payments detailed (page 154) were for overpayments of childcare vouchers, rather than refunds for payments made by cash, credit or debit card, standing order or a combination of several types of payment. Nor was it clear whether, if they were refunds of childcare voucher payments, they represented refunds of refundable or non-refundable voucher payments.
85. Further, and separately, I accepted the claimant's evidence in cross examination that she did not know that refunding vouchers was not permitted, had not been trained to that effect and did not consider it her responsibility to check the purpose of the cheques she was counter-signing. I find that it was Mr Ronchetti's responsibility to administer the voucher scheme and parent accounts. The claimant's role was to temporarily assist him by counter-signing payments as instructed and, separately, to administer the Early Years funded scheme.

86. I find that the claimant did not tell Mr Marr, Mrs Forster and Mrs Hall on 26 February 2020 that she told Mr Ronchetti it was wrong to refund vouchers, but did tell them that she would have counter-signed the cheques. Mrs Forster and Mrs Hall were not called to give evidence. As stated above, I treated the statements at pages 101 – 104 with caution as it was not clear how and when they were prepared and I did not accept Mr Marr's evidence of the conversation on 26 February 2020. I found the claimant's account more likely, given the tone of Mrs Hall's text message to her reassuring her later that evening.
87. I concluded that the claimant's actions did not amount to misconduct. Nor were they culpable or blameworthy. She was following instructions, did not know that what she was doing might be problematic, did not stand to gain from it and could not have known, given the circumstances, that the respondent would treat it as a disciplinary offence.

Law

88. Section 98 of the Employment Rights Act 1996 ("ERA") provides that conduct is a potentially fair reason for dismissal, falling within section 98(2) ERA. In determining whether the employer acted reasonably or unreasonably in dismissing for the reason given, the burden of proof is neutral and it is for the Tribunal to decide. Section 98(4) ERA reads:

The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon 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 that question shall be determined in accordance with equity and the substantial merits of the case.

89. The test of whether or not the employer acted reasonably is an objective one. The Tribunal must determine the way in which a reasonable employer in those circumstances, in that line of business, would have behaved. The Tribunal must determine whether the employer's actions fell within the range of reasonable responses open to a reasonable employer in the circumstances (**Iceland Frozen Foods Limited v Jones** [1983] ICR 17 (approved by the Court of Appeal in **Post Office v Foley, HSBC Bank PLC (formerly Midland Bank PLC) v Madden** [2000] IRLR 827)). The Tribunal must not substitute its decision for that of the respondent. The 'range of reasonable responses' test (the need for the Tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether the employee was fairly and reasonably dismissed (**Sainsbury Supermarkets Limited v Hitt** [2003] IRLR 23).
90. In determining the fairness of a dismissal for alleged misconduct, the case of **British Home Stores Ltd v Burchell** [1978] IRLR 379 is relevant. The Tribunal should consider whether the respondent entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This lays down a three-stage test: 1) the employer must establish that they genuinely did believe that the employee was guilty of misconduct; 2) that belief must have been formed on reasonable grounds; and 3) the employer at the stage at which they formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The burden of proof is on the employer on point (1) but it is neutral on the other two points (**Boys and Girls Welfare Society v McDonald** [1996] IRLR 129; **Sheffield Health and Social Care NHS Trust v Crabtree** [2009] UKEAT/331/09). Whether or not the employee is actually guilty of the misconduct is not relevant to the fairness of the dismissal.

91. In determining the reasonableness of the investigation, in the case of **Shrestha v Genesis Housing Association Ltd** [2015] EWCA Civ 94 the Court of Appeal held that: “*To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the **Burchell** test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the **Burchell** test will depend on the circumstances as a whole*”.

92. In **A v B** [2003] IRLR 405 the Employment Appeal Tribunal (“EAT”) held:

[60] *Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.*

[61] *This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.*

93. In deciding whether a conduct dismissal falls within the range of reasonable responses, a Tribunal may also consider whether the respondent:

- 93.1. had sufficient regard to the claimant’s length of service and disciplinary record;
- 93.2. gave sufficient regard to arguments in mitigation;
- 93.3. gave consideration to alternatives to dismissal;
- 93.4. followed a fair procedure, in accordance with the ACAS Code of Practice on Disciplinary and Grievance Procedures (“the ACAS Code”).

94. The ACAS Code gives guidance that:

- 94.1. Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions (paragraph 4);
- 94.2. Employers should carry out any necessary investigations, to establish the facts of the case (paragraph 4);
- 94.3. Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made (paragraph 4);
- 94.4. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing (paragraph 5);
- 94.5. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing (paragraph 6);

- 94.6. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification (paragraph 9);
- 94.7. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses (paragraph 12).
95. In determining the reasonableness of an employer's decision to dismiss, the Tribunal may only take account of those facts or beliefs which were known to the employer at the time of the dismissal. The employee's assessment of their own behaviour is irrelevant.
96. Compensation for unfair dismissal can be reduced for contributory conduct. Under section 122(2) ERA a reduction can be made to the basic award where the Tribunal considers there has been conduct by the claimant before the dismissal which was such that it would be just and equitable to reduce the amount of the basic award. Under section 123(6) ERA, where the Tribunal find that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable. In assessing contribution, the tribunal should: 1) identify the relevant conduct, 2) assess whether it is objectively culpable or blameworthy, 3) consider whether it caused or contributed to the dismissal, and 3) if so, determine to what extent it is just and equitable to reduce any award (**Steen v ASP Packaging Ltd** UKEAT/0023/13/1707).
97. The Tribunal may also make a reduction to the compensatory award for future loss to reflect the chance that the claimant would have been dismissed fairly in any event (**Polkey v AE Dayton Services Ltd** [1988] ICR 142). This can be a percentage reduction or a finding that the claimant would have been dismissed fairly after a further period of employment, or a combination of both approaches. The question is whether the respondent in the case would have dismissed the claimant in any event had the unfairness not occurred.

Determinations

Unfair Dismissal

98. The claimant accepted that the sole or principal reason for her dismissal was conduct-related, and therefore that it was a potentially fair reason in accordance with section 98(1) ERA. Although there was a redundancy situation in the background and some suggestion of relationship breakdowns at the respondent, resulting in or arising from restructuring and changes in personnel, it was not submitted that any of those were the real, sole or principal reason for the claimant's dismissal. I found as a fact that Mr Marr and Mrs Burnett both genuinely believed that the claimant had been involved in a scheme with Mr Ronchetti to assist parents in tax avoidance, by refunding overpayments originally made to the respondent by way of childcare vouchers. Their belief that she had committed misconduct was genuine and was, I find, the principal reason for the claimant's dismissal.
99. However, I find that the claimant's dismissal was unfair in accordance with section 98(4) ERA for the following reasons. In my judgment, the belief in the claimant's guilt was not formed on reasonable grounds. Nor, at the stage at which the belief on those grounds was

formed, had the respondent carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Grounds

100. Mr Marr's belief in the claimant's guilt was based on the grounds that: she had mishandled childcare voucher payments by refunding at least three families; childcare vouchers could not be exchanged for cash; the refunds made were not subject to tax and national insurance; this was a fraud on the scheme and potentially a criminal act; there was a significant detrimental impact on the organization; and/or, her behavior was a serious breach of trust and "confidentiality".
101. Although not explicitly stated in the outcome letter, Mr Marr concluded that the claimant knew what she was doing. This was a key ground for his belief in her misconduct. He concluded that: 1) she knew what the refunds were for; 2) she knew that the refunds were wrong; and 3) the refunds were fraudulent. I find that all of those conclusions were based on Mr Marr's own assumptions and/or what he had heard and the conclusions reached during Mr Ronchetti's disciplinary process.
102. He formed his belief that she knew what the refunds were for on the basis of his own assumption that a childcare manager, counter-signing cheques/setting up faster payments online, ought to ensure they know what those payments were. He based his belief that she knew the refunds were wrong on an assumption that a childcare manager ought to know that childcare voucher payments were non-refundable. He believed that her signature on the cheques and the bank's evidence that she set up the faster payments online was a 'smoking gun' pointing at the claimant's guilt. However, the claimant had never denied signing the cheques or setting up payments. Everyone at the respondent knew she was the second signatory for cheques, she told Mr Marr and Mrs Hall on 26 February 2020 she would have signed the refund cheques and Mr Ronchetti mentioned her involvement in March 2020. Rather than pointing to the claimant concealing her involvement, all that the evidence from the bank did was corroborate what the claimant had already told Mr Marr about her involvement.
103. Mr Marr's finding that there was fraud was also based on an assumption. If he established clearly how the parents had originally paid for their childcare, he did not explain it to the claimant nor to this Tribunal. It was not explained to the claimant whether the original payments had been made exclusively by voucher and/or whether they were through a voucher scheme which did not issue refunds. Nor was it clear to the claimant or this Tribunal that HMRC would not consent to repayment of the tax and national insurance by the parent, that HMRC would consider the refunds fraudulent or that there was anything potentially criminal about the claimant's actions. He also made an assumption about the claimant's understanding of the term 'nest egg' which supported his pre-determined view of her guilt and her involvement in Mr Ronchetti's alleged 'scheme'.
104. Mr Marr did not explain to the claimant nor to the Tribunal what the significant detrimental effect on the respondent was, nor how the claimant's actions breached trust and confidence. Again, I find that these were assumptions which did not form part of Mr Marr's investigation and had no evidential basis. In short, I find that Mr Marr set out with a series of assumptions and a pre-determined outcome (that the claimant would be dismissed) and worked, whether consciously or unconsciously, to reach a conclusion which

matched them. I find that no reasonable employer, appreciating the requirements of the ACAS Code for an employer to establish the facts and make a just decision in accordance with basic principles of fairness, would have based their conclusions on pre-formed assumptions and a pre-determined outcome in the way that Mr Marr did.

Investigation

105. Had Mr Marr carried out a reasonable investigation, I consider that it was likely he would have realized that some of the key facts did not match his assumptions. I find that Mr Marr's investigation was outside the range of reasonable responses in a number of ways. Firstly, Mr Marr relied on his own witness evidence and recollection of what happened on 26 February 2020, while failing to explain to the claimant that he was doing so (by redacting his name from his Statement of Events). The claimant had also made allegations against Mr Marr in the course of her grievance just prior to the commencement of the disciplinary process. Mr Marr was not able to take an objective and impartial view of his own and/or the claimant's evidence at the disciplinary hearing. In my judgment, no reasonable employer would expect an investigator to be able to maintain impartiality in those circumstances. I considered that even the smallest employer, acting within the range of reasonable responses, and having some regard to the ACAS Code, would have realized the risk of bias and sought a more objective investigator. In this case, that might have involved bringing in outside help, another trustee (Mr Conaughton or Mrs Burnett), or another employee from outside Childcare. There was insufficient evidence for me to find that other options were not available.
106. Secondly, and separately, Mr Marr did not interview or take a statement from the claimant in the course of the investigation. The ACAS Code states that, in some cases, reasonableness requires the holding of an investigatory meeting with the employee before proceeding to a disciplinary hearing. In others, it says, the investigatory stage will be the collation of evidence by the employer. The respondent submitted that this was one of the latter cases and that the lack of investigatory meeting with the claimant prior to the disciplinary hearing did not render the investigation unreasonable. The respondent submitted that the respondent's collation of the three Statements of Events (pages 101 – 104) relating to 26 February 2020 and the copies of the cheques and information from the bank was sufficient evidence to proceed to a disciplinary hearing. In assessing whether that decision of the respondent fell within the range of reasonable responses I took account of the following factors:
- 106.1. In **A v B** the EAT held that serious allegations of criminal misbehavior, at least where disputed, must always be the subject of the most careful investigation. Mr Marr agreed in cross examination (see paragraph 48 above) that allegations of the gravity of those made against the claimant would require a thorough investigation by an employer. The investigator charged with carrying out the inquiries, the EAT stressed, should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him. While there was insufficient evidence for me to find that the respondent was correct that the allegations against the claimant amounted to criminal conduct, it was clear from the letter of invite to the claimant that the respondent told her she was accused of "*a potentially criminal act*" (pages 105 – 106). I accepted the claimant's submissions that the seriousness of the allegations was such that no reasonable employer would fail to provide an opportunity for the employee to provide exculpatory evidence at the investigatory stage.

106.2. While obtaining documentary evidence was clearly a part of the respondent's investigation (going through the databases and requesting the information from the bank), the evidence of the claimant's signatures from the bank was not the 'smoking gun' the respondent claimed. The respondent saw the need to obtain Statements of Events (pages 101 – 104) from three witnesses and Mr Marr relied on those statements in evidence, as he referred to them in his disciplinary report. I concluded that he therefore considered witness evidence to be of value in the investigation.

106.3. Mr Marr's decision to dismiss the claimant was because he concluded that she knew what she was signing, that it was wrong and that she knew it was wrong. Key questions for the disciplining officer to consider were therefore whether she knew what she was doing, whether it was in fact wrong, and, if so, whether she knew it was wrong. Establishing what the claimant understood of the transactions and the childcare voucher scheme was therefore an important and obvious step in any investigation.

106.4. The respondent submitted that the claimant had an opportunity to give her version of events at the disciplinary hearing and it was therefore unnecessary to interview her first. But Mr Marr's approach at the disciplinary hearing was not one of interviewing or fact finding (see paragraph 55 above). The fact that so much of the claimant's side of the story only emerged for the first time at the disciplinary hearing and the appeal hearing demonstrated the importance of obtaining her account before the disciplinary hearing, in my judgment. Her account differed from the other witnesses in several important regards: she told them she was a signatory on 26 February 2020; she did not know it was wrong; she told them she did not know it was wrong on 26 February 2020; she did not know what the cheques/refunds were for; and financial matters were not part of her role. Without being able to identify those areas of dispute beforehand, Mr Marr was faced with a choice after the disciplinary hearing. He could either make a decision without investigating her version of events, or he could conduct further investigation into her version and make a decision without putting his findings to her, or he could invite her back for a second disciplinary hearing after investigating further. I find that he chose the former course of action. He focused exclusively on evidence of the claimant's guilt and did not explore potentially exculpatory evidence. He did not establish the facts of the case, as required by the ACAS Code. I consider that no reasonable employer in these circumstances would have failed to find out what the claimant had to say about the refunds and her involvement in the alleged 'scheme', before proceeding to a disciplinary hearing.

107. I find that Mr Marr had already made up his mind that the claimant was guilty of gross misconduct and would be dismissed before the disciplinary hearing. Although the claimant had an opportunity to address the contents of the Statements of Events (pages 101 – 104) and the allegations at the disciplinary hearing, she was trying to overturn a decision which had already been made. She played no part in the investigation and she had no opportunity to address the allegations against her prior to the decision to dismiss her being made, because that decision had been taken before the disciplinary hearing, on the basis of Mr Marr's investigation alone. Mr Marr did not consider the claimant's clear disciplinary record, length of service nor any alternative to dismissal. In my judgment, no reasonable employer would have approached the investigation and/or disciplinary process in this manner.

Procedure

108. The procedure followed was not within the range of reasonable responses. Mr Marr, the investigatory and disciplinary officer, was also a witness for the employer. Moreover, he had also been the subject of the claimant's grievance just prior to the disciplinary hearing. I find that no reasonable employer would have expected the disciplining officer to be able to maintain an open mind in these circumstances. There was insufficient evidence for me to find that it was impracticable for the respondent to find someone else to investigate the allegations. I find that the respondent breached paragraph 6 of the ACAS Code.
109. As set out above, I find that the respondent did not conduct the necessary investigation to establish the facts of the case. This breached paragraph 5 of the ACAS Code.
110. The statements which formed the basis of the respondent's belief in the claimant's guilt (her culpability and knowledge) were not signed or dated. Although the claimant could clearly work out who had written them, their purpose and origin was opaque and the claimant was not provided with an opportunity to question the writers nor challenge their content before the decision to dismiss her was taken by Mr Marr. Separately, the claimant did not have an opportunity to consider or address the documentary evidence against her either before or during the disciplinary hearing, as that evidence was not sufficiently explained until the Tribunal hearing. I find that this was in breach of paragraphs 9 and 12 of the ACAS Code.
111. The respondent dismissed the claimant for conduct which was not identified as misconduct anywhere in the respondent's policies. The respondent had no disciplinary policy giving examples of gross misconduct and nowhere in the respondent's financial policies did it say that refunding childcare vouchers was not permitted. I find that the respondent was in breach of paragraphs 23 and 24 of the ACAS Code.
112. Separately, the disciplinary process was in breach of some basic principles of the ACAS Code: that an employee should have a fair opportunity to defend themselves and that an employer should not reach its decision before hearing what the employee has to say. The respondent breached both of these principles by pre-determining that the claimant was guilty.

Appeal

113. The appeal was not dealt with impartially. Mrs Burnett did not have an open mind and did not review Mr Marr's decision. She refused to consider a number of the issues raised by the claimant, including the question of whether it had been appropriate for Mr Marr to be both investigator and decision maker. Mrs Burnett's reason for refusing to consider that point was that it had been raised at the disciplinary hearing and had therefore already been dealt with by Mr Marr. That conclusion was surprising, in my judgment, as the purpose of an appeal is to examine the original decision making. Where the complaint on appeal is about the original decision maker themselves, that must be a valid point of appeal, even if, or perhaps even more particularly if, that argument has been considered already by the decision maker in question. Mrs Burnett also refused to hear the point about the claimant's grievance, on the grounds that it was irrelevant, when it plainly related to the question of Mr Marr's objectivity.
114. The claimant put forward exculpatory evidence, that she had spoken to other nurseries and the voucher companies, but Mrs Burnett told her it was irrelevant. While,

following **Shrestha**, the extent to which it is necessary to carry out further investigation into points of defence raised by an employee will depend on the circumstances as a whole, what other nurseries do, especially what HMRC had condoned, was relevant to whether the claimant understood what she was doing was wrong and whether, in fact, it was wrong. The respondent had not contacted HMRC for itself to check if the tax could be refunded or it was just an admin error. In those circumstances, the experience of other nurseries was relevant, and I find no reasonable employer would have explicitly excluded that evidence or refused to allow the claimant to present it on appeal.

115. Further and separately, I was not persuaded that Mrs Burnet had conducted any further interviews or investigation (see paragraph 74 above). If Mrs Burnett did re-interview witnesses, she did not put that evidence to the claimant or even inform her that she would be speaking to them. I find that, if so, that failure to provide the claimant with the further evidence was not within the range of reasonable responses (**A v B**). It denied the claimant any opportunity to engage with the evidence of those witnesses which, since she had been denied any opportunity to be interviewed at the investigatory stage or any opportunity to explore their earlier evidence (by virtue of the redactions in the Statements of Events), cumulatively rendered the failure to put their further evidence to her outside the range of reasonable responses, in my judgment. Mrs Burnett did not call HMRC to see if the claimant's evidence that it could be remedied was correct. Nor did she allow the claimant's evidence about what the voucher companies said, despite its relevance.
116. Mrs Burnett's outcome letter mentioned factually incorrect findings which did not accord with Mr Marr's conclusions nor the evidence the respondent had heard, mentioning 14 cheques over a 4 year period. She also selectively relied on an anomalous note of what the claimant said at the appeal hearing, without checking the anomaly or taking account of the other contradictory evidence. I concluded that Mrs Burnett did not review Mr Marr's decision. The appeal failed to remedy any of the flaws made at the disciplinary stage. In my judgment, Mrs Burnett's decision to uphold the decision to dismiss was pre-determined and was outside the range of reasonable responses.
117. In my judgment, for the reasons set out above, the respondent's decision to dismiss the claimant was outside range of reasonable responses of a reasonable employer in all the circumstances, including the size and administrative resources of the respondent. I conclude that the respondent acted unreasonably in treating the claimant's conduct as sufficient reason for her dismissal (section 98(4) ERA) and I therefore find that the claimant was unfairly dismissed.

Wrongful dismissal

118. In my judgment the claimant did not commit a fundamental breach of her contract of employment entitling the respondent to terminate her contract of employment without notice or payment in lieu thereof. The respondent, in summarily dismissing her for gross misconduct, acted in breach of her contract of employment. I reach that conclusion on the balance of probabilities for the following reasons.
119. The claimant at no stage denied counter-signing refund cheques or setting up FPOs. She denied knowing the nature of the cheques and she denied knowing that it was wrong to refund overpayments made by childcare voucher. As Childcare Manager she was in a position of trust and responsibility, but there was insufficient evidence that her role explicitly or impliedly included a requirement that she understand how parents' childcare voucher accounts operated. I find that she did not know that voucher payments should not be refunded, as it was not stated in any policy of the respondents, either a disciplinary policy

or any financial policy. She had not had any training on the operation of the childcare voucher schemes and Mr Ronchetti had responsibility for the administration of the accounts, although she helped him out from time to time. There was no expectation at the respondent that, as second signatory, she would ensure that she knew the nature of every payment she was counter-signing. The practice at the respondent had previously been to expect her to sign the payments without checking. There was insufficient evidence for me to conclude that the actions of the claimant were fraudulent or that HMRC or the Police were investigating the claimant's actions or considered her actions to be unlawful. Further, and separately, I find that the claimant did not know that her actions might be considered misconduct and did not act out of malice or self-interest. It was not alleged that she stood to gain anything from her actions. In conclusion, in my judgment, there was insufficient evidence for me to conclude that the claimant's actions amounted to misconduct.

120. On the balance of probabilities, I therefore find that the claimant was not guilty of gross misconduct, did not fundamentally breach her contract of employment and the respondent was not therefore entitled to dismiss her summarily. She was wrongfully dismissed and is entitled to damages for breach of contract in respect of notice.

Remedy issues

121. For the reasons set out above in relation to wrongful dismissal, I find that the claimant's actions were not blameworthy or culpable. She was not guilty of misconduct and I made no findings of fact that she did anything which contributed to or caused her own dismissal. There should therefore be no reduction to her compensation in respect of contribution under section 123(6) ERA. I made no findings of any conduct prior to dismissal which would render it just and equitable to reduce the amount of the claimant's basic award pursuant to section 122(2) ERA.

122. The respondent has not shown that, had it conducted an investigation and disciplinary process in accordance with the ACAS Code and within the range of reasonable responses, there was any likelihood of the claimant being dismissed in any event for her conduct. I find that the process was so flawed that it is impossible to say what a reasonable employer would have uncovered had it been done properly. Mr Marr himself conceded (see paragraph 44 above), that had the claimant been interviewed, the outcome might have been very different. I consider that, had the Statements of Events from the three witnesses been obtained contemporaneously, been presented to the claimant for her to challenge them, had Mr Marr not been the investigator, had the claimant been interviewed, had the respondent established the facts of the case, it seems likely the outcome would have been entirely different. Other evidence, either incriminatory or exculpatory, might have been uncovered which was not available to the respondent and has not been available to this Tribunal. The burden of showing that the claimant would have been dismissed in any event is on the respondent and I find that the respondent has not discharged that burden. I do not consider that any reduction should therefore be made under the principles in **Polkey v AE Dayton Services Ltd** [1988] ICR 142.

123. However, given the redundancy process which was underway, it seems inevitable that the claimant's employment with the respondent would have come to an end within some weeks or months, in the same way as the other employees in Childcare who were made redundant with notice. No evidence or submissions were heard as to how long the redundancy process would have taken nor what the claimant's period of loss should be for the purposes of section 123 ERA. Those issues will be considered at the remedy hearing.

124. I find that the respondent was in breach of some of the fundamental principles of the ACAS Code (the requirements to establish the facts and for fairness and impartiality), although it followed the step-by-step process set out therein (investigation, disciplinary, appeal, right to be accompanied etc). There was not therefore a complete disregard of the Code, albeit that some fundamental tenets of the Code were glossed over. I find that it would be appropriate to uplift any compensatory award to the claimant by 20%.

Employment Judge Bright

16 June 2022