



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Capper

**Respondent:** The Place Young People's Company Limited

**Heard at:** By Cloud Video Platform **On:** 29th March 30<sup>th</sup> March , 31 March 2021 and 16 June 2021

**Before:** Employment Judge Broughton (sitting alone)

## Appearances

For the Claimant: In Person

For the Respondent: Mr Fennell – solicitor

## RESERVED DECISION

- 1) The claimant's claim of unfair dismissal is well founded and succeeds.
- 2) A reduction of 100% is applied to the compensatory award under section 123 (1) ERA
- 3) A reduction of 100% is applied to the basic award under section 122(2) ERA
- 4) No compensation is awarded to the claimant.
- 5) The complaints of unlawful deduction of wages are not well founded and are dismissed

## REASONS

### Background and Issues

1. The claim was presented to the employment Tribunal on 21 August 2020. The effective date of termination of the claimant's employment was 15 May 2020. There was a period of Acas early conciliation from 14 July 2020 to 29 July 2020.
2. The claims are :
  - Unfair dismissal under Sections 94 and 98 of the Employment Rights Act 1996 ("ERA")
  - Unlawful deduction from wages: section 13 ERA

### The claim – summary

3. By way of a brief background to the claims; the claimant was employed by the respondent to manage a children's residential home called High Leys Farm (**Home**). There was an incident involving Child A (see anonymisation order below). The claimant was dismissed for failing to comply with safeguarding procedures including completing the necessary paperwork and reporting the incident to an appropriate person or body.
4. The claimant complains about the fairness of the process however, the crux of his claim is that he did not consider the incident to be sufficiently serious to report and he delegated the task of preparing the necessary paperwork to his deputy.

### **The issues**

5. The issues to be determined in this case are as follows;

#### ***Unfair dismissal***

- (i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"): The Respondent asserts that it was conduct.
- (ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

- (iii) If the Claimant was unfairly dismissed and the remedy is compensation:
  - a. 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 still have been dismissed had a fair and reasonable procedure been followed. See: Polkey v AE Dayton Services Ltd [1987] UKHL 8;
  - b. would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
  - c. did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)

#### ***Unauthorised deductions***

- (iv) Did the Respondent make unauthorised deductions from the Claimant's wages in accordance with ERA section 13 and if so how much? There are two separate claims; a claim for a bonus payment of £800 and a claim for unpaid wages;

*Claim for bonus payment: £800*

- (v) Did the Respondent make unauthorised deductions from the Claimant's wages pursuant to section 13 of the Employment Rights Act 1996 (ERA) by not paying him a lump sum in lieu of the remaining annual salary increment awarded following a OFSTED rating of Good and if so how much remained unpaid?

*Claim for unpaid wages 14 Hours: £225*

- (vi) Did the Respondent make unauthorised deductions from the Claimant's wages pursuant to section 13 by not paying him £225 for the hours he worked in excess of 40 hours per week in November 2020 ? The practice is he alleges, that the hours worked in excess of 40 hours are paid or can be taken back as time off (TOIL).

### **Preliminary Matters**

- 6. There were a number of preliminary matters the Tribunal was required to address before and during the course of the hearing.

### **Amendment Application**

- 7. The claimant raised with the Tribunal when discussing the claims at the commencement of the hearing, that he had wanted to include a claim for discrimination but that he had been informed by Employment Judge Hutchinson at a preliminary hearing on 12 January 2021 that he could not do so. On reading the record of that telephone preliminary hearing there was no mention of this being raised however on enquiring further about the basis of any potential claim, the claimant informed the Tribunal that another member of staff, his former deputy manager, had been given a second disciplinary appeal hearing (denied by the respondent) . The claimant did not allege that this treatment was based on any protected characteristic or otherwise identify any basis for a discrimination claim. His complaint appeared to be of inconsistent treatment relevant to issues of fairness in respect of the unfair dismissal claim. When this was discussed further with the claimant, he did not proceed with an amendment application.

### **Evidence**

#### Documents

- 8. The Tribunal was provided with a bundle of documents initially numbering 434. Additional documents were added to the bundle during the course of the hearing.

#### Witnesses

- 9. The claimant produced a witness statement and was cross-examined by the respondent. He had also produced five further witness statements for; Alexander Astill, the Designated Responsible Individual (RI), Katherine Taylor, Jacqueline Smith, Emma Lazenby, and Laura Cox; all former colleagues.

10. In the event Laura Cox and Emma Lazenby were not able to attend the hearing. The claimant applied to have their statements admitted into evidence. The respondent objected.
11. Having considered the representations from both sides and mindful that the claimant is without representation, the Tribunal determined that the witness statements should be admitted into evidence although they were of questionable relevance, their relevance could be better assessed however, during the course of and at the conclusion of the hearing however, it was explained to the claimant that they would in any event, carry less evidential weight than if those witnesses had attended the hearing to give evidence under oath and submitted to cross examination by the respondent.
12. Those witnesses who attended the hearing and gave evidence on behalf of the claimant; were Alexander Astill, Katherine Taylor and Jacqueline Smith.
13. The Respondent called as witnesses; Mr Richard Craner employed by Edison Education Limited as Finance Director and Mr Thomas Charles McDonald-Milner, employed by Edison Education Limited as Chief Executive Officer. Edison Education Limited is the parent company of the respondent. Both those witnesses were cross-examined by the claimant.
14. The claimant was given some guidance by the Tribunal as he was unrepresented, regarding the purpose of cross examination however he informed the Tribunal as the hearing was about to commence, that he would need time to read their witnesses statements over the lunch break because he had not yet read them. The statements had been exchanged on Thursday 25 March 2021. Mr Fennell informed the Tribunal that the respondent had contacted the Tribunal to request assistance in chasing the claimant to exchange statements however the application was made too late. The claimant does not allege that exchange on the 25 March was due to any fault, delay or otherwise on the respondent's part. In any event, the claimant had had 3 full days before the start of the hearing to read the respondents statements which were not particularly lengthy, however by his own admission he had not done so in preparation for the hearing and there was no particular reason advanced by him for not having done so. No application to adjourn the hearing was made by the claimant.

### **Memory stick - disclosure**

15. The claimant mentioned at the outset of the hearing that Mr Astill had received a memory stick posted through his letterbox which contains information which shows, the claimant alleged, that the respondent had falsified documents.
16. The claimant asserted that he had only found this out that same morning of the hearing and thus had not made the respondent aware that he would be raising this. When asked whether the alleged falsified documents were documents which had been provided to the Tribunal in connection with this hearing and thus directly relevant to his claims, he informed the Tribunal that he did not know. The claimant mentioned that he had questioned the accuracy of the minutes of meetings held with him during the disciplinary process however he did not know what relevance if any, the information on the memory stick may have to his case and indeed he did not have any details about what information was alleged to be contained on that memory stick. The Tribunal directed that the claimant

may if he wished, seek to obtain and provide the information from the memory stick to the respondent during the lunch break. The respondent may accept that the documents/information are relevant. In any event if the claimant considers them relevant and wants to admit them in as evidence, he can make an application to do so.

### **Voice recordings**

17. The claimant during the afternoon of the first day of the hearing, also disclosed 4 voice recordings to the respondent. The Tribunal did not listen to the recordings. It was not disputed that the voice recordings of meetings with; Hillary Jones, Sarah Knapper and Mr MacDonald-Milner, all individuals who were involved in disciplinary investigation and in the case of Mr MacDonald Milner, the chair of the disciplinary hearing. However, the recordings related to meetings which were not related to the claimant's case or even to the same Home where he worked. The claimant asserted that the recordings showed that Ms Jones, Ms Knapper and Mr Macdonald-Milner had bullied and intimidated those being interviewed and that the respondent's minutes of those same meetings had been falsified. That is a serious allegation however the claimant confirmed that he did not actually have copies of the minutes of the meeting which the respondent had produced following those meetings and which it was being alleged did not reflect what had been said in the meetings themselves. The claimant accepted that the Tribunal could not therefore make any findings on whether the minutes of those meetings were inaccurate when compared to the voice recordings. On their own the claimant agreed that the voice recordings were of no assistance.
18. The claimant was asked why he had not called the individuals who had been subject of those proceedings as witnesses if he considered their experiences and evidence to be relevant, to which he stated that he had not been in touch with them since they had left the respondent but he believed that they would be prepared to give evidence and provide the minutes of the hearings. Any such efforts to enlist their support as witnesses should have been made prior to the hearing and in accordance with the directions of the Tribunal. When asked what evidence they would give about the extent to which the minutes had allegedly been falsified however, the claimant informed the Tribunal that he did not know.
19. In the circumstances, given the claimant's concession that without notes the audio recordings would not assist him in proving that in those other cases, the content of the meetings had been deliberately misrepresented, the Tribunal did not consider that it was in the interests of the overriding objective to spend time listening to voice recordings of other disciplinary investigations that had no direct bearing on this case.

### **4 May 2020 recording**

20. The claimant referred to having had an audio recording of some of his own meetings in which he alleged bullying and falsification of the minutes of those meetings. However, he had not disclosed the audio recording to the respondent. He had disclosed a transcript of the meeting of the 4 May 2020 [p.419] but not the recording.
21. Mr Fennell explained that the Respondent had no 'huge' issue with the content of the transcript in any event although they had not received his recording of the meeting to compare it to. The claimant informed the Tribunal that he had been told to disclose the transcript but not the audio recording by Employment Judge Hutchinson at the preliminary

hearing on 12 January 2021. That however was not the case. The order of Employment Judge Hutchinson was clear and provided that the claimant will provide to the respondent a list of all documents he has in his possession which are relevant to the hearing by **26 January 2021** and went on to order that if he intends to rely on recordings he must provide with his documents a transcript of the recording together with a copy of the recording to the Respondents. The order could not have been clearer. Mr Fennell confirmed that if the audio recordings were going to be admitted into evidence there would have to be an adjournment as the respondent would need to listen to the recordings.

22. The claimant also wanted to include in the bundle independent inspections of the Home carried out under regulation 44 of the Children's Homes Regulations and Quality Standards 2015. Regulation 44 requires an independent person to visit to make impartial assessment of a children residential home's arrangements for safeguarding and promoting the welfare of the children in the home. The claimant stated that this would show issues at the Home however he did not explain precisely what issues or explain their relevance to his claim further, he stated that he had not sought to include these before because: "*I did not think about them to be honest*"
23. The claimant made an application to adjourn the hearing to give him time to obtain minutes of the hearings which related to the audio recordings of interviews undertaken with other staff, try and arrange further witnesses (whom he had not yet taken steps to contact) and obtain additional disclosure of the regulation 44 inspections.
24. The application was opposed by the respondent on the grounds that the claimant had conceded that the audio recordings and any minutes he may be able to obtain relating to interviews with staff were not related to his case and thus not directly relevant, he has had numerous opportunities to comment on the minutes produced by the respondent in his own proceedings, did so and had confirmed the accuracy of those in the bundle.
25. The Tribunal determined that it was not in the interests of justice and the overriding objective to adjourn off this hearing on the basis that the claimant has some voice recordings and may be able to obtain minutes of the same hearings which he has been told but cannot confirm, evidence a difference between the two when the claimant is not able to explain the extent of any inaccuracy. Further, these are not meetings the subject matter of which had any direct relevance to the subject matter of this claim. It appeared to amount at this stage to a 'fishing expedition' relating only to issues potentially of credibility. The audio recordings were not admitted into evidence. The claimant has not explained the relevance to the issues in the claim ( which relate to his conduct) of previous audits under regulation 44 and he not previously sought disclosure because he had not given any consideration to those documents.
26. With regards to the voice recordings of the hearings conducted with him, the claimant had been ordered to disclose those of he wished to rely on them, he had not done so. He has disclosed transcripts and they are not disputed by the respondent. Had he considered the audio recordings of themselves to be relevant, he had had plenty of opportunity to disclose them. He appeared not to have, (as demonstrated by his failure to have even read the respondent's witness statements before the hearing commenced) taken reasonable steps to prepare for this hearing and the Tribunal did not consider it fair or just to agree to an adjournment to permit him more time to do so, in the absence of any satisfactory explanation for his lack of preparedness.

### Anonymisation Order

27. On the morning of the first day of the hearing, the Tribunal noted that within the bundle some of the documents included the full name of the child involved in the incident which is at the heart of this claim. There was no reason to have retained the same in the documents. Some of the witness statements also referred to the child by his initial which meant it may still have been possible to identify the child. An anonymisation order was made and the fuller reasons and its terms are set out in a separate order. The child for the purposes of this judgement shall be referred to in accordance with that order, as Child A.
28. Those were the issues around disclosure at the outset of the hearing and the Tribunal now moves onto the findings of fact.

### Findings of fact

29. The Tribunal has considered all the evidence however, it only refers in these findings of fact to that evidence which it considers relevant to the findings, however unless expressly stated otherwise, all the evidence presented has been considered. The findings throughout are reached on a balance of probabilities. The reference to page numbers in square brackets are to pages in the agreed bundle.
30. Edison education Limited (EEL) is the ultimate parent company of the respondent.
31. The respondent is a specialist provider for children with complex needs and provides therapeutic care to children and young people with social, emotional and mental health issues as a result of past trauma and attachment difficulties.
32. The respondent owns and operates several residential homes and a specialist school ("**School**").
33. The respondent operates within the education sector and is therefore regulated by the Department for Education and is in turn assessed by OFSTED and the relevant local authority. The individual responsible for the relevant home within the local authority is known as the Local Authority Designated Officer ("**LADO**")
34. The homes are subject to legislation including but not limited to The Children's Act 1989, The Children's Homes (England) Regulations, The Care Standards Act 2000 and Safeguarding Vulnerable Groups 2006 plus health and safety legislation. As an organisation that works with children, the respondent is required under the safeguarding legislation, to have someone that takes the lead on safeguarding and child protection. The Designated Safeguarding Lead (DSL) within the respondent at the relevant time was John Steward. The Home was also required under safeguarding legislation to have a designated Responsible Individual (RI) and that person at the relevant time was Alexander Astill.
35. The Home was also required to have a Registered Manager. The Registered Manager has overall responsibility for the day to day management of the Home and is accountable for matters including the welfare, safety and security of all children and young people in their care.

36. For the children and young people in its care, the respondent acts in a parental capacity however, ultimate parental responsibility rests with the young person's social worker and local authority. That is the undisputed evidence of Mr MacDonald- Milner.

### **Claimants contract of employment**

37. The claimant was issued with a temporary contract of employment dated 12 March 2019. It refers to being a temporary contract for 12 months. The claimant was not issued with a further contract and it is not in dispute that the terms of this contract therefore applied during the relevant period.

38. The relevant provisions of that document are;

#### **Job Title: Para 41**

*You are employed as a Registered Manager*

#### **Salary: Para 6**

*Your salary is £32,000 a year to recognize flexible and weekend [sic], payable monthly on or about the last working day of each month directly into your bank account.*

#### **Hours of work and rules: Para 7**

*7.1 Your normal contracted hours of work will be 40 hours per week.*

*7.2 you are expected to be flexible in your working hours in order to perform your duties as described in your job description.*

...

#### **Overtime: Para 8**

*8.1 in addition to the contracted hours, you may be offered overtime. The company is under no obligation to offer you overtime*

### **Reporting Requirements**

39. Mr MacDonald-Milner in describing the responsibilities of the respondent towards the young people in its care, compared it to the responsibilities held by a school towards young people and their parents. If an incident or accident takes place while the young person is under the school's care, school management will consider whether or not to report the incident to the parent at the end of the school day. If an incident arises within the respondent's homes, the home is required to decide whether an incident should be reported to the social worker and local authority (LADO) – who act in effect in loco parentis. None of this is in dispute nor was Mr MacDonald's evidence that;

*“As a rule of thumb, A carer cannot go far wrong by asking themselves this question; “if it was my child, would I want to know about this?”*



40. The undisputed evidence of Mr MacDonald-Milner was that if the carer/home is unsure whether to report an incident to the social worker and LADO, it should err on the side of caution and report.

### **The Respondent's disciplinary policy and procedure**

41. Volume 2 of the Employee Handbook [p.49] includes at section E under: unprofessional conduct and HR processes subsection 1: disciplinary;

*"The Place disciplinary rules are contractually applicable to all employees, however the disciplinary process and procedure is for guidance only and is not intended or deemed to be contractual."*

42. There are a list of examples of offences which may constitute acts of gross misconduct and included within the list [p. 50] are;

*l) failure to report or record any matter which it is in the employee's contractual duty (either expressed or implied) to report*

43. the policy includes an express right to suspend while an investigation is carried out [p.51].

44. The policy only provides for one appeal against disciplinary action, it does not set out a second stage appeal.

### **The respondent's guidance on the role of LADO and OFSTED [p.62 – 64]**

45. Volume 2 of the Employee Handbook; under section D: safeguarding children and service, under subsection 4: explains the role of LADO and OFSTED [ p.62] to employees of the respondent. It includes the following guidance;

#### *Role of LADO*

*A local authority designated officer (LADO) works within each local authority area and is there to support staff across all organisations who work with children and young people if any concerns arise regarding any practitioner who works with children and young people.*

*The LADO **should** be alerted to **all cases** in which it is alleged that a person who works with children has:*

- ***Behaved in a way that has harmed child***
- ***Or may have harmed the child***
- *possibly committed a criminal offence against a child/child*

*If a **practitioner** has concerns regarding the conduct of a colleague, then they should in the first instance report this to the Designated Safeguarding Lead within their own organisation (the Registered Manager/Responsible Individual/Safeguarding Lead) **who is required by law to report this concern to the LADO**. However, it is important to note that anyone can contact LADO if they need to do so for advice or support..."*

*[Emphasis Added]*

46. The claimant accepted under cross examination that he was a 'practitioner' for these purposes.

**Respondent's safeguarding policy and procedure [p 65- 73]**

47. Volume 3 of the Employee Handbook on working with children: D safeguarding 1: safeguarding policy and procedure provides **[P.66]**;

*"The PLACE Young People's company recognise that children/young people who are Looked After are particularly vulnerable to abuse both within and outside of the care system. It is the duty of all those involved within children's homes run by the company to protect children/young people from abuse and to promote their welfare.*

*It is the responsibility of all staff to liaise with LADO to ensure this policy runs within the guidelines of the local authority safeguarding procedures.*

*The PLACE Young Peoples Company safeguarding lead is John Steward  
The PLACE young Peoples Company nominated person in the absence of John Steward is Alex Astill*

*This procedure and guidance apply whenever it is alleged that a person who works with children/young people has, in any connection with her//his employment or voluntary activity with a child//young person;*

- ***Behaved in a way that has or may have harmed the child/young person***
- *possibly committed a criminal offence against related to a child/young person*
- *behaved towards a child/young person in a way which indicates s/he is unsuitable to work with children/young*

*This procedure applies to situations when;*

*There are suspicions or allegations of abuse a person works children/young in either a paid or unpaid capacity - the permanent, temporary agency staff – member, contract work, consultant, volunteer, residential staff, approved Foster carer, childminder or approved adopter...*

.....

The definition of physical abuse in the policy is;

***Physical abuse [p.67]***

*Acts by others resulting in misuse of medication, physical injury without satisfactory explanation, injury inflicted with intent, or through lack of care (neglect)*

*Indicators*

...

- ***Hair loss is confined to one area (Scalp may be sore and tender to touch)***

And;

***Procedures for responding to abuse [69]...***

And;

***Where the alleged perpetrator is a member of staff [p.71]***

*Where the alleged perpetrator is a member of staff, **the Home Manager** should assess the allegation **in conjunction with a Line Manager following consultation with the LADO , inform the subject of the allegation/s.** LADO should always first consult Police/ Children's social services/Children's Social Care if either the agency is likely to be involved/a strategy meeting discussion is needed, in order to agree the content timing of any information given. The company **Safeguarding Lead should also be alerted by the Home Manager.***

*[Emphasis Added]*

48. It is not in dispute that the claimant was the Home Manager for these purposes.

#### **Claimant's role**

49. The claimant identified his job title within his claim form **[page 8]** box 5.2 as; Registered Home Manager at the High Leys Farm Children's Home. That is consistent with the contract of employment **[p.74]**

50. The respondent in its response, similarly, identified the claimant as employed initially as a Deputy Manager and latterly as a Registered Manager during the relevant period. The Deputy Manager at the relevant time the incident with Child A took place, was Jeremy Layton.

51. The claimant did not allege within his witness statement that he was not the Registered Manager at the Home when the incident with Child A took place. In fact, in his statement he refers to leaving the Home on 30 December 2019 from around 7.20 pm and that it was part of Mr Layton's job as Deputy to cover for the claimant in his role as Registered Manager; *"after being told by Jeremy Layton and Jackie Smith they could manage from around 19:20 hours to go and be with my partner and ill son to prepare for his operation early the following morning. Due to me being off for a few days following the operation and Jeremy Layton being a Deputy Manager as its states in the job description; "Main Purpose of job fully to deputise in the **Registered Manager's absence**".*

*[Emphasis Added]*

52. During cross examination of Mr MacDonald-Milner the claimant put it to him that he had not officially been approved as the Registered Manager as he was still waiting to have the 'fit persons' interview, which is part of the official registration process. Mr MacDonald-Milner maintained that he was the Registered Manager, that he understood that he had passed the 'fit person interview ('Ofsted's application process to be approved as the

statutory registered manager ), he drew the salary of a Registered Manager and he acted as the Registered Manager of the Home. The claimant did not refute those points,

53. The claimant however denied having had the fit person interview and alleged that he had mentioned this during the disciplinary hearing however Mr MacDonald-Milner did not accept that this has been mentioned. The claimant did not identify where in the disciplinary notes he had stated he was not the Registered Manager during his cross examination of Mr MacDonald-Milner but overnight located where he had mentioned this in the notes and alleged that Mr MacDonald-Milner had lied about this when giving his evidence to the Tribunal. Given the nature of the allegation, the Tribunal agreed to allow the respondent to recall Mr MacDonald-Milner to address the entry in the notes and this allegation.

54. The Tribunal find that the claimant had mentioned this during the disciplinary hearing [p.227]. The respondent's own notes record the claimant stating that his registration is pending. The Tribunal does not find on a balance of probabilities however that Mr MacDonald-Milner 'lied' as alleged by the claimant but rather that he simply could not recollect that this was mentioned for the following reasons;

- *The claimant himself could not recall where in the notes he had made this comment*
- *There was only one brief reference to it during an hour and a half meeting*
- *The notes are the respondents and Mr Macdonald-Milner readily conceded the point on being taken to it in the notes.*
- *It was not raised as an issue in the claim form and nowhere is this mentioned in the claimant's own witness statement which may have prompted Mr Macdonald -Milner to have checked this point before it was put to him under cross examination – the meeting having taken place 10 months before the Tribunal hearing.*

55. The Claimant does not dispute that even if he had not completed the formal process in full, he was nonetheless acting in the capacity of the Registered Manager, drew the salary of the Registered Manager and accepted that he was under the same duties and held the same responsibilities.

56. It does not the Tribunal find, reflect well on the claimant that despite clearly assuming the role for all practical purposes of the Registered Manager, that he laboured the point during the cross examination of Mr MacDonald-Milner and levied the accusation of lying at him.

57. We accept the evidence of Mr Macdonald- Milner that whether the claimant had passed the fit person interview or not, it would have made no difference to his decision. And indeed the claimant in his rather lengthy letter of appeal makes absolutely no mention of his status or complains that it should have made any difference to the decision regarding his personal culpability and responsibilities.

## Investigation

58. The disputed evidence of the respondent is that on 18 March 2020 a head teacher at the school operated by Edison education submitted a whistleblowing letter in which she raised concerns about the behaviour of senior individuals including Alexander Astill and John Steward [118A]. In essence her complaints, which did not involve the claimant, related to

under reporting of safeguarding incidents and not following safeguarding protocols. The letter appears in the bundle and it sets out a number of serious concerns.

59. The respondent decided to appoint an independent investigator, Elaine Simpson and as a result of her initial findings, Mr Steward and Mr Astill were suspended. A wider investigation was then launched.
60. Ms Simpson continued with her investigation assisted by Hilary Jones, Director of Care within another of the Edison Businesses, Unity Residential Care Services (Unity). That investigation would include an investigation into the earlier incident involving the claimant and Child A on 30 December 2019 and the safeguarding procedures which were or were not followed.

### The incident: 30 December 2019

61. It is not in dispute between the parties that there was an incident at the Home on 30 December 2019 involving Child A.
62. What is not in dispute is that the claimant and a Deputy Manager, Mr Layton were at the Home on 30 December 2019, and Mr Layton engaged in a playfight with Child A. In the course of which Child A lost two of his dreadlocks.

### 14 February 2020

63. It was not until 6 weeks after the incident with Child A, that the claimant sent an email to Kim Taylor, of LADO, and Mr Goddard, Allegations Manager at LADO, on the 14 February 2020 at 5:30pm [115]. This report was only made following a complaint by Child A to his social worker about the incident.
64. Within this email, the claimant makes LADO aware of what had taken place on 30 December 2019. He refers to Child A making an allegation against a staff member to his social worker, Emma Tong at her statutory visit with him the week before [ p.115];

*“The allegation is from 30.12.2019 where the young person, myself and a Deputy Manager were playing a game in the lounge area at High Leys Farm.*

*Following playing the game [Child A] then initiated play fighting with JL (Deputy Manager) during the playfighting both [Child A] and JL became miss balanced [sic] and **ended up on the floor in a heap this somehow resulted in some of [Child A’s] hair coming out**, this was also witnesses by another staff member JS who had come into the lounge area.*

*[Child A] **was upset about this** but accepted that accidents do happen at the time, JL completed a keycarer session following this and [ Child A] also spoke to myself in his bedroom later that evening. [Child A] also spoke to The Head of Care for the company **Alex Astill a few days after the incident.***

*I will complete a referral form and get this sent to you as soon as possible...”*

*[ Emphasis added]*

65. I would transpire and it is not in dispute, that Mr Astill the RI did not speak to Child A a few days after the incident, he would not become aware of it until after Child A complained to his social worker on 10 January 2020.

### Investigation

66. The investigation into this incident was carried out by Hilary Jones, Director of Care, Sarah Knapper and Sue Weston, Area Managers of Unity.

### Investigation meeting: Ms Smith – 6 April 2020

67. An investigation meeting took place with Jacqueline Smith who works at the Home, on 6 April 2020 [p.120]

68. Ms Smith confirmed that incidents are reported in the 'Sig' events book and then "*followed up by the other bits. body maps and de-brief.*" (Sig' is shorthand for 'significant'. The 'sig' books is where 'significant events' are recorded – it allows more detail to be sent out than the Accident Form).

69. The Home she stated, has a daily running safeguarding log and Significant Events are logged in it.

70. Ms Smith was asked whether she considered all staff are treated as equals within the organisation, to which she replied; "*No issues with this, I feel that staff are open and honest*". Ms Smith was also asked about the culture and whether the relationships and language is appropriate, to which she states; "*No issues*". She is not asked about the incident with Child A. She raises no concerns about Mr Layton.

### Investigation meeting : 8 April 2020 [128]

71. The claimant attended an investigation meeting on 8 April 2020 with Hilary Jones and Sarah Knapper and Sue Weston. He is asked about a number of issues and asked about the outstanding LADO referral for Child A – the notes record him describing the incident as follows;

*" Allegations was against JL [deputy manager] a bit of rough and tumble went wrong and some of child A's hair (dreadlocks) came out. Child A was fine with it initially but then spoke to his social worker and said it was on purpose."*

72. Ms Jones refers to the inappropriateness of the playfighting, referring to it as a power imbalance. The claimant confirms that a notification has gone off to LADO. Ms Knapper advises that if LADO decide to investigate then Mr Layton will need to be suspended and Ms Jones comments that suspension should have happened anyway.

### Concerns – 14 April 2020

73. On the 14 April 2020 the claimant sent an email to Simon Coles, a Board Director [141]. The email [141] starts by the claimant referring to wanting to inform him about "*some concerns*".

74. He states that he had been made aware that Ms Jones had been talking about him with other managers in the presence of staff and making comments that other staff have not said they felt supported by the claimant as manager, he refers to being forwarded an email he does not feel he should have been sent and about the morale of the staff at the Home during this investigation and that he feels it has become a “witch hunt” and the investigations are taking their ‘toll’ on everyone’s stress levels especially the managers.
75. The claimant alleges in his evidence before this Tribunal, that this email was a grievance to Mr Coles. There is no mention of these concerns being a grievance in his email to Mr Coles and as a manager, he would understand the relevance of raising a grievance as distinct from voicing mere concerns. He refers both at the commencement and conclusion of the email only to; “concerns”.
76. Further, there is no mention in this email of feeling of bullied and intimidated during the investigation meeting with him.
77. Mr Coles replies promptly, in that he responds that same day [p.142], he acknowledges the strain investigations can place on an organisation however, he refers to the safeguarding of the children being of the utmost importance and that processes must be followed. The email is polite and reassuring and invites the Claimant to contact him again if he remains concerned once the investigation has been concluded; “*please don’t hesitate to come back to me*”.
78. The claimant does not reply to Mr Coles. He does not express dissatisfaction with his response. He does not ask that his email is treated as a grievance.
79. The email to Mr Coles is sent before the next investigation meeting with the claimant, which takes place on the 14 April 2020. The claimant accepted under cross examination that the investigation meeting took place during the afternoon and he would also later, in an email on 1 May 2020, refer to the meeting on 14 April 2020 taking place ‘following’ the sending of the email to Mr Coles [153].

**Email from Kim Taylor of LADO and Hilary Jones and Elaine Simpson**

80. On the 9 April 2020 there is an exchange of emails between Ms Tong, Child A’s social worker and Kim Taylor, of LADO in which Ms Tong sets out the report from Child A to her on 10 January 2020, that his hair was pulled out during a restraint with Mr Layton a couple of weeks before. Ms Tong also sets out the attempts she had made to speak to the the RI, Mr Astill. She records that Child A had wanted her to speak to Mr Astill. The evidence of Mr Layton to Mr Craner during the appeal process, is that there was a close relationship between Child A and Mr Astill, which would seem to explain the request from him to his social worker to speak direct to Mr Astill about what had happened, rather than anyone else.
81. Ms Tong reports in her email that Mr Astill was not been aware of the incident when she spoke to him on 16 January 2020 and that she had not received a Significant Event form. She reports that Mr Astill had then replied later on 16 January stating that he had reviewed the Daily Logs and Accident Book and reports that it was rough and tumble;

*“On the 16 January 2020 Ms Tong received an email from Mr Astill in which he states that he has reviewed the daily logs and the accident book again. Child A had rough and tumble , with Jeremy in front and Lee . The games also included **pillar** [sic] fight...Child A fell over in the lounge ...was hit with pillars [sic] . [139]. He goes on to state that he had spoken to Child A and alleges that he said ‘ Jez is not as strong as me’ [139]*

*[ Tribunal stress]*

82. Ms Tong then refers to asking Ms Astill whether he has informed LADO, he had told her that he has not because Ms Tong wanted the paperwork and she tells him to inform LADO on 12 February. The claimant makes contact with Ms Tong on 14 February 2020 letting her know he has now made contact with LADO. This report is made therefore 6 weeks after the incident.
  83. Ms Tong also reports in her email to Ms Taylor, that on the 7 February 2020 Child A had told her that it was not playfighting. On the 4 March, he informed her that his hair was “ripped out“ [140]
  84. Ms Tong reports that she is not satisfied that the incident was accidental [140]
  85. On the 14 April 2020, Ms Simpson and Ms Jones receive an email from Ms Taylor of LADO [136]. It is forwarding the email from Child A’s social worker, Ms Tong dated 9 April 2020. Ms Taylor informs Hilary Jones and Elaine Simpson, that she is recommending that the matter is looked into again because she is not satisfied with the claimant’s account and asks who is going to lead on this.
- Meeting 14 April 2020**
86. There is a further meeting with the claimant, Ms Jones, Ms Weston and Ms Knapper on 14 April 2020 [131].
  87. Ms Knapper reads out an email between Child A’s social worker and Alex Astill. The claimant is asked why the report was only made in February 2020 to LADO and his response is that initially Child A was fine after the incident and child A only made the complaint when his social worker came to see him.
  88. The claimant is also recorded as stating that he was not aware of the requirement to report this until Alex Astill contacted him during his annual leave and this is when he sent the initial contact to LADO/ Kim Taylor.
  89. In this meeting, the claimant alleges that he did not see what happened which lead to Child A’s hair coming out because he was leaving the room, he heard a noise ‘like a banging’ and as he re- entered child A and the Deputy Manager were on the floor.
  90. The notes were provided to the claimant and he did make some amendments however the minutes record the claimant being reminded of his duties as Registered Manager. The notes do not record the claimant challenging the description of his role and he does not amend this section of the notes. He also does not amend a section in which he is recorded as stating that a significant (Sig) event form was not completed at the time because he did



not think it was significant enough as it was ‘playfighting’ however he states an Accident Form was completed which he agrees to forward to the investigators. He does not send it.

91. The claimant in response to a question from the Tribunal, stated that the only amendment he made to the notes of the 14 April 2020 which he considers could have made a difference to the outcome of the process, is point 2. Point 2 is a comment he alleges was omitted where Hilary Hones had told him that a number of people had been suspended including Alex Astill (and 3 others) . He informs the Tribunal that this is relevant because; *“I defended Alex Astill and I believe this was the main reason I was dismissed.”* However, as the claimant accepted, this amendment does not say anything in defence of Mr Astill. It merely alleges that the claimant was told about his suspension and the suspension of others. When asked further to clarify his position by the Tribunal, the claimant stated that it is to do with lies and inaccurate record keeping. That he was dismissed for defending Mr Astill is not something he alleges in his witness statement, it is not something he alleged in his claim form, it is not something he ever mentioned at appeal and it was not put to Mr MacDonald-Milner when he cross examined him. I find that there is no evidence to support this assertion which he accepted himself under cross examination.
92. The claimant before this tribunal, alleged that he was bullied and intimidated in the meeting on the 14 April however, under cross examination he stated that that allegation did not relate to this meeting but another which took place on 4 May 2020.

### Suspension

93. The claimant was then suspended on the 17<sup>th</sup> April 2020 [145]. The claimant is informed that there is to be an investigation into ;
- Failure to report or record any matter which it is the employee’s contractual duty (either express or implied) to report.
  - Lack of management oversight

### LADO report 28 April 2020 [151]

94. A report is provided to Ms Jones from LADO which Ms Jones shared with Ms Knapper, Ms Weston, Ms Simpson and Ms Doyle involved in the wider investigation, on 1 May 2020 [149]. The LADO report includes their analysis;

*“There are concerns raises [sic] that this was not robustly considered in December. Contact was not made with LADO until February and full details not disclosed until April 2020. As such the matter had to be investigated by the place. At such time the place to consider if a referral to LADO is required.”*

### Investigatory meeting with claimant – 4 May 2020

95. The claimant is then invited by letter of the 30 April 2020 to a further investigatory meeting on 4 May 2020. He is informed that the allegations being investigated relate to his conduct and are alleged gross misconduct [147];
- *Failure to report, investigate and escalate an incident on 30 December 2019 in which two dread locks were pulled out of a child’s head by the deputy manager in your presence*

- *Behaviour, acts and omissions that could put vulnerable children and young people at risk*
- *Failure to follow the organisation's policies and procedure including the Safeguarding Policy*
- *The above may breach your contractual duties as explicitly stated in your employment contract; ' You must ensure that safeguarding underpins every aspect of your practice, that the safety of each young person in the Company's care is paramount. You must adhere to all of the Company's Policies and procedures, including but not limited to the Company's Safeguarding Policy, Whistleblowing Policy and Complaints Policy, and reporting practice that may put a young person at risk, immediately to your Line Manager, or higher if appropriate.'*

96. The claimant responds to this invitation on 1 May 2020 by contacting Simon Coles again and Laura Thompson [153]. He refers to the invitation from Ms Jones and refers to having previously raised "concerns" about Ms Jones and Ms Knapper. The claimant refers to it being agreed that he had not personally had any involvement with correspondence with Ms Tong or had been made aware by her that she wanted him to contact LADO until February 2020, despite having had conversations with Ms Tong since January 2020.
97. The claimant states that he does not consider it 'just' for Ms Jones and Ms Knapper to chair further meetings with him following the concerns he had raised with Mr Coles.
98. Mr MacDonald-Milner gave undisputed evidence under cross examination that other people had raised grievances during the investigation process and a separate person was allocated to deal with their grievances, but the claimant did not raise a grievance. Mr MacDonald-Milner also gave evidence that similar concerns were raised by other employees suspended, that the investigators could be 'brusque' but the decision was made to press on as it was a serious safeguarding issue and they were the right people to continue with it and the serious nature of the enquiries required it. He also referred to the Covid pandemic being a reason to have two investigators on location to do all the investigations.
99. There is still no reference by the claimant in his communication to Mr Coles to bullying or intimidation and no reference to wanting these concerns to be treated as a grievance. Ms Thompson responds [155] after taking internal HR advice, informing him that he needs to attend and that it is not a disciplinary hearing; " ... it is just to gather information."
100. Mr MacDonald-Milner is sent the claimant's email by Mr Coles and he also sends a reply on 2 May 2020 [159]. Mr MacDonald-Milner mentions being asked to respond by Mr Coles and states that, in consultation with the regulators, local authority and police, the respondent is required to conduct a full internal investigation into the incident, that it is a serious matter and requires his attendance; "where the safety of the children in our care is in question, we have to move expeditiously and if necessary, these meetings will be held with or without the attendance of those under investigation"

#### **The 4 May 2020 meeting**

101. The claimant attended the 4 May 2020 meeting [161]. Because it was an investigation meeting, the claimant was informed that he did not have the right at this stage, to be

accompanied. The claimant is asked at this meeting, about the 30 December incident. He confirms that a game was played with Child A, himself and Mr Layton called 'murder in the dark' during which the curtains are closed, and Mr Layton was blindfolded. He refers to that game finishing and Child A then playfighting with Mr Layton and that the claimant as he was leaving the room, shouting back to '*pack it in*' and when he turned, they were on the floor. The claimant states that he does not know if playfighting is in Child A's care plan. That playfighting is no longer allowed in the Home, had been stopped a 'couple of months before because it can; "*sometimes escalate things*".

102. The claimant states that he did not see Child A and Mr Layton fall to the ground.

103. The claimant is shown a photograph [214] of Child A's head. The claimant does not dispute that the photograph he has shown is the same as the one in the bundle and is of Child A after the incident. The photograph I find, clearly shows two roundish and quite significant bald spots on Child A's head.

104. When asked if he considered it was a significant injury he states; "*in a way yes but if we were outside playing football and accidentally got kicked would that be a significant injury*"

105. The claimant does not deny it was not reported to LADO and questions why it would need to be if it was an accident; "*It was an accident why would it be reported to LADO*".

106. The claimant is then asked about the logbook and Child A's Daily Log and he is told that the investigator cannot find those records for the date of the accident, to which the claimant replies;

*"I don't know, I didn't do it. JL (Jeremy Layton) would 've done it"*

107. The claimant is informed that the Daily Log for the date of the incident has been modified on 18 April 2020 by someone with Deputy Manager's access. The claimant denies knowing anything about this or authorising it. He provides no explanation.

108. In terms of the Accident Form, the claimant states that Mr Layton should have completed the Accident Form. The claimant accepts that he should have checked the reports were done but; [167] "*... my son had an operation and I was off the next day and the following day I believe I can't remember now*".

109. When the claimant is asked why he did not complete an Accident Form and a significant incident report form immediately and reported the incident to the Responsible Individual, the social worker for Child A and the family; he states that Mr Leyton should have done it.

110. When asked if it was reported to the Responsible Individual, Mr Astill and where are the records, he states;

*"Not sure."*

*Did you report?*

*“Don’t know. Not sure”*

111. When asked when the incident was reported to Child A’s family the claimant replies;

*“I’m not sure”*

112. The claimant is asked whether he considers that Mr Astill would have suspended Mr Layton if this had been reported to him, he does not assert that he believes such action would not have been appropriate but that it would be for Mr Astill to decide. However, this is despite the fact that he had already informed the investigators that he did not know if it had been reported to Mr Astill at all. The claimant had not reported it to Mr Astill and he therefore fails to explain how any decision could have been made by Mr Astill about the appropriateness of suspension in those circumstances.

113. The claimant is, the Tribunal find vague throughout the meeting about what action was taken, about what reporting was carried out despite his role as Registered Manager.

114. When asked about Child A’s injuries he states that there were two bald patches on his head, no bleeding , *“not really crying”* but that he was upset [167] about his hair. The claimant accepts that he did not offer Child A medical treatment and he was unaware if anyone else had done although he accepts;

*“Normally that’s what happened offer medical treatment, but I didn’t no.”*

115. The claimant did not document Child A feelings because he states he was not sure about it and Child A was just bothered about getting his hair sorted and that Child A was *‘probably’* offered a complaints form, but he would have to check [168].

116. The claimant is told that Child A had informed his social worker that he believed the claimant would *“stick up”* for Mr Layton but the claimant denies knowing why he would say this.

117. The claimant states in mitigation that he did not find out from Child A’s social worker until February 2020 that it wanted *“LADOing”* i.e. reporting to LADO and that she had opportunities to tell him and she had not raised this with him before. She had I find, based on the evidence, at the request of Child A tried to speak directly with Mr Astill as the RI.

118. The questions as recorded in the notes are thorough, robust and fair.

119. The claimant disclosed his own version of the notes [419] which he did not disclose until 1 June, after the disciplinary and appeal . When asked by the Tribunal to identify what he alleges are the material differences, he said he would need time to check and come back to this during the hearing however, he did not do so. The Tribunal consider it reasonable draw an inference that the respondent’s notes of this meeting are in all material respects accurate and uncontested.

#### **Investigation meeting – Jeremy Layton – 4 May 2020 [173]**

120. There is then an investigation meeting with Mr Layton. He explains to the respondent that during the incident with Child A, he lost his footing, he caught Child A and he fell with

him and as he fell, he put his hands out and caught the back of Child A's hair, which is how the dreadlocks came out.

121. In terms of the significance of the injury, it is put to Mr Leyton that the force that must have been required to pull dreadlocks must have been immense and he does not deny this;

*"I'm not being funny I'm a big guy - I'm 23 ½ stone . 6"2 when I fall I'm going to fall hard and it was an accident"*

122. He states the Child A was "*obviously a bit off hand with me to start with*" but denied that Child A was screaming, crying, fearful or bleeding and states that there was no complaint of hurt.

123. Mr Layton professes not to know anything about the modification to the Daily Log folder on 18 April 2020. His evidence is that he had completed the Daily Log but that he must have not uploaded it to the Box (the Box is an electronic record keeping system). He states that he did a body map but forgot to do the Accident Form and that the claimant had **not** asked him if he had completed **any** forms about the accident. The claimant according to his evidence which in the event is not disputed by the claimant, never checked that Mr Layton had completed the necessary reports and Mr Layton at this early stage is admitting he did not do them all.

124. Mr Layton states that he believes that the incident was reported to Mr Astill in January when the social worker had spoken to him about it and he denies being asked to complete an Accident Form or Significant Event form retrospectively.

125. Mr Layton states that he did not offer Child A a complaints form and he did not feel he needed to report it as the claimant was present and he felt someone other than him should have reported it and done the forms.

#### **Investigation meeting: Alex Astill – 7 May 2020**

126. There was an investigation meeting with Mr Astill on 7 May 2020, who it is in not dispute was not only the Responsible Individual at the relevant time but the claimant's line manager. This investigation was recorded and a copy of the transcript, which is not in dispute, is in the bundle.

127. During this investigation meeting with Mr Astill, he remarks on the photograph of Child A following the incident as "*horrific*" and "*there's clearly been an horrific accident*" [194].

128. He describes Child A has a heavy child of about 14 stone, but that Mr Leyton is "*huge*" and "*He's just a big clumsy -...he's a big bear*".

129. Mr Astill states that there was no report to LADO. He also confirms that Registered Managers have a duty to report themselves and then talk to the RI.

130. It was put to Mr Astill that Child A had reported the incident to his social worker on 10 January 2020, and that she had tried to contact Mr Astill twice that day, she spoke with him on 16 January 2020 and Mr Astill it is alleged, to have told the social worker that he did not

know anything about it and would look into to. He does not deny the contact with the social worker or telling her that he did not know about the incident. He was on leave and returned off leave to carry out a key carer session with Child A.

131. His evidence is he was given copies of an Accident Report, a body map and Significant Event form by the Home in respect of the incident involving Child A. When asked whether the Significant Event document and an Accident Report were done when the event happened; “Yes , *because we saw him, me and John Steward but John investigated it and he showed me and we said; “That’s quite good quality” I don’t want to sound patronizing, Jez haven’t [ sic] got the best grammar.”* [00:19:05]

132. When it is put to Mr Astill that the claimant had told the investigators that a Significant Event form was not completed (because he did not consider it necessary), Mr Astill still alleges that when the factfinder was carried out all the documentation had been done. He does not allege the claimant is not being honest but that he may be mistaken and;

*“All the evidence was there, Hilary. There was accident log or was it a body map? There was a daily log , there was a 24 hour run in log. There was a SIG event document. “* [00:49:34]

133. He is also referred to a text message he sent to the social worker in 16 January 2020;

*“16<sup>th</sup> January again, you sent her email that said “ Evening Emma, great talking to you today. I **have reviewed daily logs in the accident book again.** Child A had rough and tumble with Jeremy in front of Lee”* [00:38:57]

[Tribunal Stress]

134. The evidence of Mr Astill is that the relevant safeguarding documents were done on the 30 December, but this is wholly inconsistent with the evidence of the claimant and Mr Leyton. Mr Astill asserts that the claimant must have been confused.

### Laura Cox

135. The statement of Laura Cox presented to the tribunal, is unsigned and undated and does not contain her home address. It is not a sworn statement. Ms Cox did not attend the hearing. The statement largely contains accusations about Mr Layton who was of course not present to defend these allegations, and which were not raised with the respondent while he was employed, so that they could investigate them directly with him.

136. The claimant produced statements from witnesses with the clear intention it would seem to this Tribunal, of disparaging Mr Layton. Later in the investigation process Mr Layton would make disclosures about being instructed to create safeguarding documents, after the event , which may explain the attempt to undermine his character and his credibility.

137. The accusations by Ms Cox, relate to Mr Layton being a bullying, saying inappropriate things and that he “*would do all the paperwork after a significant event*”. If Mr Layton’s behaviour was such a concern as she describes, she fails to explain why she did not raise this with the claimant, who was his line manager or why she did not take steps to report it

to someone prior to these proceedings. The Tribunal not only does not find the evidence for that reason credible, in any event, it is not directly relevant to the issues in the case. Ms Cox was not prepared to attend this Tribunal to give her evidence under oath and have her evidence challenged.

138. Ms Cox was not interviewed as part of the disciplinary investigation. She was not proposed by the claimant as a witness and it is not alleged that she had had any direct evidence to give about the incident with Child A. The Tribunal are not prepared to attach evidential weight to her evidence in all the circumstances.

### **12 May 2020**

139. There is an email dated 12 May 2020 in the bundle [221] sent from an external HR advisor referring to an issue about missing money and that Richard (it is not in dispute this is a reference to Richard Craner) has it “*in hand*”.

140. Mr Craner’s undisputed evidence in response to a question from the tribunal, is that the petty cash at the Home did not match money at the bank and they were looking into that at the time. His evidence is that in some of the homes, the petty cash records were not great, he was new to the respondent and it was something he was working. They did not get to the bottom of this issue and drew a line under it. The claimant had not put it to Mr MacDonald-Milner that this issue played any part in the decision to dismiss, he did not allege this in his claim, he did not allege this in his witness statement and did not raise this at the appeal.

141. Although during the hearing, the claimant made an assertion that this was a reason for his dismissal, I find that there is no evidence to support a finding on a balance of probabilities, that this issue played any part in the decision making of Mr MacDonald-Milner or Mr Craner.

### **Disciplinary hearing: 15 May 2020**

142. The claimant was invited to attend a disciplinary hearing on 13 May by letter of the 12 May 2020 [215]. The claimant requested another date and proposed 15 May 2020. The hearing was rearranged to that date [224]

143. The claimant states that Mr MacDonald-Milner told him he could not record the meeting however, the evidence of Mr MacDonald-Milner under cross examination which was not disputed, was that the claimant would need consent and he named 3 other employees who asked to record the meetings and were allowed to do so.

144. The claimant was informed of the right to have a union representative. The charges were set out and concerned only the incident with Child A on 30 December 2019;

- *Failure to report, investigate and escalate an incident and incident on 30/12/2019 in which to dread locks were pulled out the child’s head by the deputy manager in your presence*
- *behaviour, acts and omissions that could put vulnerable children and young people at risk*

- *failure to follow the organisation's policies and procures [sic] including the safeguarding policy*
  - *the above may breach your contractual duties is explicitly stated in your employment contract "You must ensure that safeguarding underpins every aspect of your practice, and the safety of each young person in the company's care is paramount. You must adhere to all the company's policies and procedures, including but not limited to the company safeguarding policy, whistleblowing policy and complaints policy, and report any practice that may put a young person at risk, immediately to your line manager, or higher if appropriate"*
145. The hearing commenced at 1:30 pm and finished at 3pm. The timings recorded as the start and finish times are not contested. The hearing was chaired by Mr McDonald-Milner. The claimant alleges that Mr MacDonald-Milner bullied and intimidated him throughout the meeting.
146. At the commencement of the hearing the claimant mentions that he has raised 'concerns' with Mr Coles but confirms that this was **not** a grievance.
147. The claimant did not bring a representative with him but confirmed that he had spoken to his union and he confirmed that he understood the allegations against him. He had union advice and therefore should have known, which he should have in any event being a Line Manager, that he could identify other witnesses or produce documents if he wished to do so. He does not.
148. The claimant confirmed during this hearing, that a fair representation of his role is that he is a Registered Manager responsible for the safeguarding of children and escalating incidents to external authorities.
149. He is asked about the incident on 30 December 2019. He confirms that he was present, and that Mr Layton had fallen over. The claimant confirms that in terms of his knowledge of what is required of a Registered Manager, he has qualifications and was a safeguarding lead.
150. It is put to the claimant which he does not deny, that he had informed the investigators that there was an Accident Form completed after the incident but he had not sent it to them, in response to which he states that it was Mr Layton's job to do that because he was off after the incident due to his child's operation. He was absent on 31 December to take his child to hospital.
151. When it is put to the claimant that as Registered Manager, he should have dealt with the Accident Reporting forms, he states that his registration is pending. He does not dispute however before this tribunal that he was in practice the Registered Manager and treated and remunerated as such and held those responsibilities. It was, the Tribunal find a thinly disguised attempt by the claimant to shirk responsibility for the failure to properly report this incident.



152. The claimant states that he saw Mr Layton and Child A collapse and confirms that he did not consider it serious and that he did not know what had led to the hair being pulled out but; *“my presumption is they are both big”*.
153. The claimant also states that *“everyone knows the dreadlocks will come out easily”* and that there was no pain or screaming and Child A said it was an accident.
154. It is put to the claimant that Child A had informed his social worker that his hair had been pulled out during a restraint to which the claimant referred to the Child doing a lot of *“deflection from his own behaviour”*.
155. In terms of the Daily Logs the claimant states that this was; *“down to JL”*.
156. A Daily Log is discussed, [107], it is a version with Mr Layton’s initials against the entries and refers to child day being *“clearly slightly upset regarding parts of his hair coming out”*. The claimant asserts that that is not the right log.
157. The claimant does not dispute that he did not complete an Accident Form, a Significant Incident form or escalate it to the Responsible Individual, DSI or LADO. The claimant states that all the forms were done by Mr Layton and he is not sure whether Child A was offered a complaint form.
158. Throughout the hearing the claimant attempts to deflect responsibility for completion of the appropriate forms to Mr Layton. Given that Mr Layton was responsible for pulling out Child A’s hair, the claimant is asked by Mr McDonald-Milner how he thinks it looks, that he left him to do the reporting, to which the claimant shows a startling lack of professional insight and responds;
- “No clue”*
159. He later however concedes in this meeting; *“I see how it looks now”*
160. When asked again why he allowed the same individual who had pulled out the child’s hair follow up the reporting, he makes the following admission albeit it has taken this far in the process for him to do make it;
- “I am thinking now that I should have done”*
161. When Mr McDonald-Milner puts it to the claimant that he has said Child A had not suffered pain or anguish, the claimant denies that; *“I did not say that”*. Which it can reasonably be implied indicates that he was aware the Child A had suffered some pain or anguish.
162. The claimant is then asked about various versions of the Daily Log which have been located. He is told that on 14 February 2020 ( the date the claimant was told to refer this incident to LADO – and thus doubtless realised there would be a request for the documents) a Daily Log was uploaded to the Box which appears to be a form completed retrospectively with the initials JS [102/103] . He denies knowing anything about this.

163. The claimant is also presented with a 'statement of events' prepared by Mr Layton which he states he had sent to LADO and states that he cannot recall the date when the statement [110] was taken from Mr Layton

164. It is put to the claimant that it appears documents have been put in place only after Child A has raised concerns with the social worker. The claimant denies knowledge of the forms and again deflects it to Mr Layton.

165. At the conclusion of the meeting, the claimant still maintains that he would not have escalated the incident as a Significant Event because it was an accident and Child A was "okay with it". He also fails to accept that a suspension to protect Child A and the employee concerned would have been appropriate. He does however concede;

*"With hindsight I would stay and complete the paperwork"*

166. The claimant does not request that any further witnesses are spoken to and nor does he identify any other relevant documents. He is invited to put forward anything else he wants to be considered and while Mr MacDonald-Milner does not specifically invite mitigation, the claimant has taken union advice and puts forward his mitigation namely he refers to his clean disciplinary record. He has already mentioned the situation with his child and why he did not personally prepare the forms.

167. The claimant complains in his evidence in chief that that he was bullied and intimidated throughout this disciplinary hearing. There is nothing within the notes of the meeting to indicate anything of the sort. There is no indication that inappropriate questions were asked and the claimant does not comment during that meeting on feeling bullied or asks for an adjournment to contact his union representative. In his witness statement he fails to identify exactly why he felt bullied or intimidate. Further, he would appeal the decision and in what is quite a lengthy letter of appeal, he does not mention being bullied or intimidated.

168. During the appeal hearing, he does not refer to being bullied or intimidated, he does allege that he was asked leading questions [272] and near the close refers to the investigation and disciplinary hearing being "horrible" and that that they were 'rude and disrespectful'. He does not identify any specific instances of rudeness or disrespect. When pressed in cross examination to explain how he alleges he had had been bullied by Mr MacDonald – Milner, he referred only to not being allowed to record the hearing and the way he 'spoke' and his 'demeanour' but did not elaborate further.

169. The claimant makes no complaint about the information which he was supplied with before or during the investigation hearing.

170. I do not find on a balance of probabilities that the evidence supports the claimant's allegation that he was bullied or intimidated during this meeting. He may have felt uncomfortable and under some pressure, but that is not unusual in that sort of situation.

**Decision : 18 May 2020**

171. Mr McDonald-Milner adjourned the hearing to consider his decision. The claimant alleges that Mr MacDonald Milner adjourned for only 5 minutes before making his decision.

Mr MacDonald Milner under cross examination stated that it was more like 10 to 15 minutes because; *"I had a cup of tea and checked the accuracy of the minutes."*

172. The notes of the hearing in the bundle [225 – 235] record the following comment at p.235; *TMM: [Mr MacDonald Milner]: Let's take a break (2.40pm) come back at 2.55pm.*
173. The notes were taken by HR Manager Melaney Doyle. There are further brief entries after 2.55pm in which the decision to dismiss is given and the notes record the meeting ending at 3pm.
174. The decision was that the claimant had failed in his duty to report, investigate and escalate the incident with Child A.
175. On a balance of probabilities, the Tribunal find that the adjournment was for 15 minutes and not the 5 minutes alleged by the claimant. If he adjourned for 10 or 15 minutes and in that time checked the accuracy of the notes, that does not leave much time for deliberation.
176. Mr MacDonald- Milner was a credible witness in that the Tribunal found his evidence to be reliable. He answered questions in a forthright and considered manner. He denied that he had pre- determined the outcome of the disciplinary hearing. He considered the issues to be serious and the claimant's position had not really changed. He had prepared for the hearing and was aware of what the claimant had been saying during the investigation process.
177. When the claimant was asked during cross examination why he thought the decision was predetermined, his answer was; *" I just believe it was"*.
178. The evidence the Tribunal find was uncontroversial. The claimant had not markedly changed his position since the investigation meetings, albeit he had made some further concessions in terms of accepting that he should have completed the forms himself in hindsight. However the Tribunal find that the claimant continued during this hearing to largely defend his position and maintain his stance that because as he understood it ( albeit he had not seen the final moments and the actual act of hairpulling) it was an accident, he did not consider it was his responsibility (despite the Tribunal find the clear policies to the contrary) to report it. .
179. A letter was sent to the claimant dated 18 May 2020 [236] setting out the findings and stating that the respondent could not find any mitigating factors for a lesser sanction than dismissal.
180. The claimant's last day of employment was 15 May 2020. He was informed of his right to appeal and appealed the decision by letter of 19 May 2020.

#### **Interview with Ms Jacqueline Smith – 19 May 2020**

181. Ms Smith was interviewed by the respondent but not until 19 May 2020 [238]. She gave evidence that at the end of the 'murder in the dark' game on 30 December, she brought in drinks and that she was present when Mr Layton followed up that game with some *'rough and tumble'* with Child A and states that Mr Layton stumbled and put his

hands out and pulled out Child A's hair. She reports that Child A was not really upset . She further gives evidence that there is no culture of under reporting and that as far as she was aware Mr Layton filled in the relevant documents;

*" The documents were filled in as far as I'm aware as JL was doing it, there was an accident form, body map , I know the accident form was done as JL made a couple of mistakes and tore them out and a third one was done. I told him he couldn't do that and that he had to leave them in book and void them."*

182. It is also put to Ms Smith that a Significant Event form has been found dated 14 February 2020 with her initials on it, with the Daily Log and statement from Mr Layton however, during this meeting Ms Smith denies that she had signed it.

#### Evidence before this Tribunal

183. Ms Smith complains in her evidence in chief, that she was bullied into attending the interview on 19 May 2020, and that she was off sick at the time. She alleges that Mr MacDonald-Milner called her by telephone and threatened her, telling her there would be consequences if she did not attend. The claimant relies on this to support his accusations of being bullied by Mr MacDonald- Miller.

184. Under cross examination, Ms Smith stated that the person who spoke to her on the telephone and threatened her, sounded like Mr MacDonald- Milner however she conceded under cross examination that the male had never given his name.

185. During cross examination it became clear that Ms Smith was becoming increasingly confused and anxious. Her evidence initially was that she attended a meeting about her grievance the same day as the interview about Child A however, the Respondent disclosed during the hearing, the minutes of the grievance hearing with Ms Smith chaired by Mr MacDonald- Milner and those are dated 15 May 2020. Mr MacDonald- Milner was not present at the 19 May interview. Ms Smith then stated in response to questions from the Tribunal that in arranging the interview about Child A she was contacted by email (she believes by Laura Thompson) and that no one had spoken to her.

186. Ms Smith conceded that she could not recall the date of the grievance meeting or dates when calls were made to her and that she was and remains on medication and it was; *"all rolled into one"*.

187. In response to questions from the Tribunal about what was actually said to her by the male on the telephone, she said that the male had said that it would be; *"in your best interests"* to attend the meeting, whereas her allegation had been that she had been told there would be *"consequences"*. Had the comment it ' would be in her best interests' been made in connection with the investigation into her grievance, this has far less menacing connotations.

188. Ms Smith stated that the minutes of the investigation meeting on 19 May 2020 are correct and there is nothing within those notes which indicate that any inappropriate questions were asked and nor did Ms Smith during the cross examination identify anything.

189. Her grievance which was heard on 15 May 2020 by Mr MacDonald- Milner, does not relate to the Child A accident (and nor does she raise any concerns about Mr Layton). There is nothing within those notes that indicate any inappropriate line of questioning and nor does Ms Smith identify anything, she is thanked at the end of the grievance hearing for attending.
190. There is a version of the minutes of the investigation meeting of the 19 May 2020 with Ms Smith's amendments, her amendments comprise of 3 points with the heading "*Information Missing*". She complains in her evidence in chief that the minutes were inaccurately recorded, however, during cross examination she conceded that the information was actually not missing from the notes.
191. The Tribunal prefers on the balance of probabilities, the evidence of Mr MacDonald- Milner which was emphatic that he had not called her before the grievance zoom call and had never threatened her.
192. Ms Smith also made serious allegations about Mr Layton's behaviour in her witness statement prepared for the purposes of this hearing. including that he manipulated staff into not reporting incidents, however during the meeting with Hilary Jones on 6 April 2020 [120] when asked whether staff are treated equally, she had stated : "*No issues with this I feel that staff are open and honest*". Ms Smith's explanation was that she "forgot" to mention the issues with Mr Layton, however she did not raise it in her grievance either . With regard to the accuracy of those notes, she confirmed that she believed them to be accurate as far as she can recall but she did have what she described as "mental issues" at the time.
193. Ms Smith presented as a witness who was struggling to recall events accurately. That is not a criticism of Ms Smith, it is sometime since the events occurred but also as Ms Smith explained, she struggles with her mental health and giving evidence was clearly a difficult ordeal for her. I do not however on a balance or probabilities consider the evidence to be reliable generally but also not convincing regarding the alleged threatening behaviour by Mr MacDonald- Milner or the behaviours described of Mr Layton.

### **Emma Lazenby**

194. A statement was produced by the claimant during these Tribunal proceedings, for Ms Lazenby which is not signed. Ms Lazenby refers to accompanying Ms Jacqueline Smith to an investigation on 19 May 2020 and Ms Smith not receiving copies of the minutes "*within the allocated time frame*". She does not say when they were received and does not say what amendments she made to them. The evidence of Ms Lazenby the Tribunal do not find is of any real assistance or relevance to the issues in this case, and the general complaint about inaccurate notes is addressed directly by Ms Smith in her evidence.

### **Appeal: 19 May 2020**

195. On the 19 May 2020 the claimant appealed the decision to dismiss [249]. He summarised his grounds as follows;

- *I strongly refute the allegations made against me and will take the action necessary to clear my name and be reinstated in my position as home manager*

- *I am of the opinion that there is a double jeopardy in terms of this disciplinary process. The central tenet is that this matter was a safeguarding concern and the subsequent issues derived from the belief. On the assumption that I did not regard the matter as a safeguarding, clearly, I would not then followed safeguarding procedures.*
- *I have serious concerns about the conduct of a social worker in taking a picture of what she considered to be damage to a young person caused during a restraint, or worse, deliberately, neither communicating this to the appropriate authorities immediately, or someone within The Place Young People's Company. I should be taking action myself to ensure that her dereliction of duty is now reported to her line manager.*
- *At the time the incident incurred, for some time prior to and after the incident, I was under considerable stress at home. I accept that my oversight of paperwork may not have been a sharp as it could have been.*
- *The home was inspected on the 17<sup>th</sup>/18<sup>th</sup> February 2020 after the referral of the child A incident to Lado, and received a grade of good overall. The OFSTED inspector was happy with the paperwork around the incident*

196. The claimant within this letter of appeal complains that the reference to the incident as a restraint has no basis in evidence. He also states the dreadlocks were not pulled out but came out during the period of "rambunctious play". He refers to articles on the Internet where dreadlocks are caught and ripped out accidentally and that Child A, he alleges twisted his dreadlocks which can lead to traction alopecia making the deadlock susceptible to coming out quite easily.

197. The claimant appeared to resile from his concession during the disciplinary hearing about the appropriateness of having Mr Layton complete the paperwork. He asserts that if Child A alleged at the time his hair had been pulled out deliberately, he agreed it would have been inappropriate to have asked the staff member involved to complete the associated paperwork however, he and the staff treated it as an accident and therefore the Daily Logs and Accident Form "*could justifiably be executed by a member of staff involved in the incident*" [ 250]. He concedes however that "*it may be possible to argue that my oversight of the manager was not as sharp as it might been.*"

198. The claimant refers his youngest child been unwell and had needed numerous hospital admissions over this period.

### **Interview with Kathrine Taylor – 21 May 2021**

199. There are in the bundle copies of notes of a meeting with Ms Taylor on 21 May 2020 regarding Child A and another unrelated incident. The notes record her stating that she was not on shift at the Home on the 30 December 2019. With regard to the Child A incident, she is recorded as stating that she had seen Child A's bald patch and that it was "*horrendous*" and she was not aware whether JS or AA had investigated, and that the claimant had told her he was dealing with it.

200. In giving evidence before this Tribunal, in response to a question from the Tribunal, Ms Taylor in respect of the notes of the interview with her on 21 May 2020 [254] stated that

she was not on shift on 30 December, was not aware of what happened and never discussed it in a meeting with Hilary Jones but she did accept that she had been asked if Mr Astill or Mr Steward had investigated the incident involving Child A. She denies making the comments in the notes, about the bald patch. Her evidence is that she had apparently only seen the respondent's minutes of the 21 May 2020, in August 2020 when she asked for them for her own disciplinary hearing but informed the Tribunal that despite the alleged inaccuracies, she did nothing about it because she was more concerned about her own disciplinary .

201. Ms Taylor also alleges in her witness statement, that Mr Layton is a bully and that she had "*nothing but full support*" from the claimant. Despite the alleged fullness of the claimant's support for Ms Taylor in the workplace, it appears to the Tribunal however that either the claimant condoned the alleged bullying by Mr Layton or that Ms Taylor did not feel able to report it to him.

202. Under cross examination Ms Taylor, who was Home Manger at the Home, alleges she went to see 'some' managers about Mr Leyton but was told not to take it further. When pressed she provided the first name of only one manager and confirmed that she did not report her concerns to Head Office.

203. Ms Taylor under cross examination confirmed that she was dismissed for gross misconduct. She denied holding a grudge but went on to say the respondent did not allow her to put her point across.

204. The Tribunal attach little evidential weight to the evidence of Ms Taylor. In respect of the allegation against Mr Layton, If he was the bully as described and she had the full support of the claimant as his Line manager, it lacks credibility that she did not seek his assistance but does not allege that she did so. The conduct of Mr Layton in any event, towards staff is not directly relevant to the issues in this case. As for the notes of the interview with her on the 21 May 2021, the only real entry she takes issue with is her comment about the bald patch however, it was however 3 months until she saw the notes, she may therefore have not recalled her comment. Mr Astill does not refute his comment on seeing the photograph that it was 'horrific' so therefore it would not be surprising for Ms Taylor to have a similar reaction. In any event she did not challenge the notes for them to be corrected at the time.

**Appeal: 28 May 2020.**

205. The appeal hearing was chaired by Mr Richard Craner, Finance Director on 28 May 2020. The claimant confirmed to the tribunal that he is content that the appeal notes are accurate. The claimant was accompanied at this hearing by a colleague, Emma Lazenby

206. Ms Lazenby does not allege in her witness statement that the claimant was bullied or intimidated during the appeal hearing and nor does the claimant. He does not complain about how the appeal hearing was conducted other than to complain that Mr Layton had a second appeal hearing and a secret third whistleblowing meeting.

207. During the hearing the claimant states that the incident with Child A was horseplay and "*to be honest I didn't even see any dreadlock*", however he also asserts for the first time, that: "*I thought it was traction alopecia*". He later in the meeting accepts that that he saw

the bald patches.

208. The claimant informed Mr Craner that he was not aware that this was a significant event until February however, he was taken to the email exchange dated 16 January 2020 between Mr Astill and Ms Tong. Mr Craner now discloses to him an email to him from Ms Astill, forwarding on the email from Ms Tong which his directing him to “*sort this out*” [99]. Mr Craner puts it to him that this email shows that the claimant was aware prior to February of the complaint to Child A’s social worker, in response to which the claimant states;

*“I don’t know, I don’t know if it’s been missed by me. It might be the time when I was in hospital with [his child]. I did ask for additional time off. It may be missed”*

209. The claimant accepts however that he was in work on the 16 January 2020, but cannot he alleges, recall the email. Mr Craner’s evidence is that he did not believe him.

210. During this hearing the claimant alleges there are discrepancies in the disciplinary notes, but he accepts he had not identified what they were to Mr Craner .

211. In terms of the Accident Form the claimant informs Mr Craner [271]; *“I am unsure as to what happened I thought JL completed the paperwork”*

212. The respondent had located 3 versions of the Daily Log for the incident with Child A, when there should be only one. There is a version [108/109] with Mr Leyton’s initials on the relevant entries with absolutely no mention of the incident but refers to Child A being challenged by the claimant about his behaviour towards staff and that Child A was verbally abusive to the claimant.

213. There is another version [106/107] with Mr Leyton’s initials at the side of the relevant entry which consist of two paragraphs, (about 20 lines) and includes this description;

*“ Child A and JL fell over near the settee whilst playing and JL caught the back of Child As head, pulling a small bit of his hair out (LC and LS present at the time). Child A accepted this well although clearly slightly upset regarding parts of his hair coming out ... Reassurance and comfort given to Child A about his hair and Child A accepted this”*

214. This entry fails to record that in fact Child A had lost two dreadlocks and had two bald patches.

215. There is then another version in the bundle [102/103] with the initials of JS with a much shorter paragraph (about 8 lines);

*“ Child A cane downstairs when he knew LC and JL were in. Child A initiated a game of rough and tumble with JL and LC, play flighting and trying to see who is stronger. Child A and JL fell over whilst playing and JL caught the back of Child A’s head, pulling a small bit of his hair out. (LC and JS present at the time). Child A accepted this well and said “ it’s cause I’m stronger than you “...”*

216. The claimant cannot explain why various versions of the Daily Log have been created.

217. The claimant also states that he does not know why there is no Accident Report but accepts that if it were his son and something like this had happened to him at school, he



would expect an accident form to be sent home.

218. The claimant raises an issue about how easily dreadlocks may come lose ( traction alopecia), which was reasonably taken by Mr Craner to be an attempt to downplay the seriousness of the incident.

### Further appeal points

219. On 20 May 2020 [277] the claimant submitted further points for consideration by Mr Craner which in summary were;

1. He now questions for the first time whether the bruising actually occurred as a result of the incident on 30 December because the social worker did not take a photograph until 11 days later and therefore could be due to something else refers to child a been involved in numerous fights

2. Complains about the mentor he was allocated and that he did not check on him during the process.

3.The email on 16 January 2020 from Alex Anstil; he refers to trying to get a GP appointment that day and the social statutory visit which would have taken up most of his day and that he let did not leave work until 7 pm possibly without knowledge of the meeting of the email

4. He complains about the way the investigation disciplinary hearing was conducted; “.. I feel that during meetings with both Hilary Jones and Tommy McDonald Milner this was not just there to technique when completing factfinder/disciplinary meetings. I feel this was actually an attempt to not only intimidate but also an attempt to bully me into same things I did not only agree with that strongly refute by attempting to put words in my mouth” The only example he gives is he alleges attempts to get him to agree it was a significant incident, which he denied.

### Appeal hearing Jeremy Leyton 28<sup>th</sup> of May 2020

220. Mr Craner also conducted an appeal hearing with Mr Layton before deciding on the outcome of the claimant’s appeal .

221. It now becomes clearer what has gone on with the various safeguarding forms.

222. Mr Layton now alleges that despite what he had said before, the safeguarding paperwork was filled out because he remembers Alex Astill coming into the office and that he dropped the accident form on the floor. He is told that the respondent has not been able to find out an Accident form and he alleges he handed it to John Stewart and Alex Astill and that he thinks he gave them a copy of his daily notes with the accident form.

223. Mr Layton states that he cannot explain why they were three versions of the Daily Log.

224. The appeal is adjourned while Mr Craner checks some of the evidence. On reconvening [295] Mr Layton is asked about an email he sent to Mr Astill on 10 February 2020 attaching a Daily Log and key care session document; both dated 30 December 2019. Mr Layton states that he sent it to get another point of view. Mr Layton is also referred to an email from him to Mr Astill on 13 February attaching a Daily Log, key care

session and a statement from him, all of which are different. The Daily Log is the fuller version with more detail compared to the earlier versions. Mr Layton then informs Mr Craner that Mr Astill asked for more details.

*RC : That's changing and amending records. That's not no involvement.*

*JK: I did what they asked me to do .*

*RC: Why not tell me?*

*JL: I couldn't remember. It wasn't clear in my head.*

.....

*JL: I understand that its confusing. Where these has come from. I don't know . Why AA and Lee asked me to change things and put more detail I don't know. My head was not in a good place. I wish I had questioned more. **From my side** there is no collusion or cover up..”*

*[Tribunal stress]*

225. The appeal is adjourned for Mr Craner to carry out further investigations.

### **Reconvened hearing**

226. The appeal hearing with Mr Layton is reconvened on 2 June 2020. This is not another appeal, but the Tribunal accept Mr Craner's evidence, supported by the minutes that it is a reconvened hearing. Mr Layton does not have a second appeal.

227. Mr Layton now discloses to Mr Craner that the records of the Child A incident had been changed between the incident on 30 December and the disciplinary hearing and that he had been asked to report things in a *particular way*.

228. Mr Craner's evidence is that he felt that Mr Leyton wanted to say something else but felt unable to do so, therefore he concluded the appeal meeting and held a confidential meeting so that Mr Layton could talk more openly. Mr Layton informed him that the claimant had instructed him to alter his statement of events of the 30 December, that he had done this and replied to the claimant in an email confirming “*done*”. Mr Craner located the email [118] dated 19 March 2020 from Mr Layton to the claimant headed “*Sig event 222*”;

*“From claimant to the Mr Leyton: **The daily diary is different from your statement. Alter the statement so it goes along with the Daily diary.***

*Mr Leyton to the claimant; **Done** “*

229. Mr Craner considered that this showed an attempt by the claimant and Mr Layton, to manipulate the reporting to match the instruction from Mr Astill on 16 January 2020.

230. Mr Craner then dealt with Mr Leyton as a whistle-blower.

### **3 June 2020 meeting : Mr Layton**

231. Mr Craner met again with Mr Layton on 3 June 2020 [365]. The notes are headed; “*whistle-blower statement*”. This appears to the ‘secret meeting’ the claimant refers to be the secret meetings.

232. Mr Layton discloses to Mr Craner that Child A had been arrested on 11 February 2020, but that Mr Astill had instructed him and the claimant not to reveal this to anyone including

Ofsted because of the closeness of the relationship between Mr Astill and Child A. And on 30 December, regarding the incident involving Child A, they were told by Mr Anstil "what to write and how to write it".

### **WhatsApp Group**

233. Mr Layton now told Mr Craner about a WhatsApp group which had been set up [ 366] and disclosed to him several messages which had been exchanged [ 201- 212]. The WhatsApp group included; the claimant, Mr Astill, Mr Leyton and Mr Crawley (the other Deputy Manager). Mr Craner's evidence is that he received those messages after the appeal hearing with the claimant but before he issued the outcome letter, he did not discuss this new information with the claimant, but he alleges, he does not take them into account. He chose not to disclose them to the claimant to protect Mr Leyton.

234. The messages include on 10 February 2020 from Mr Astill;  
*" make sure when you are in u lee and Ben do  
Key carer session  
Daily log  
Sig report ( no bound book)  
Body map  
Rough and tumble, pillar fights  
Falling in the floor  
Lee and jacks as witnesses"*

235. There is another instruction from Mr Astill to the claimant [2020] on 11 February 2020;

*" Lee: write 3 statements  
Yours  
Jacks  
Jez  
For JA incident"*

### **Mr Astill**

236. Mr Astill gave evidence before this tribunal in support of the claimant. He gave evidence that to his knowledge the Child A incident was investigated, and all evidence was photocopied and added to the central log.

237. He makes various allegations about individuals involved in the investigation process, attacking their integrity and credibility however under cross examination, he conceded he had no evidence to support those allegations which the Tribunal attach no weight to and do not consider them to be of any direct relevance in any event. But appear to be more deflection.

238. Mr Astill was taken in cross examination to an email of the 13 February [100A] which lists the attachment as ; statement of events for incident with Child A, Child A daily log and Child key care, and is asked to explain why Mr Leyton would send those documents to him. He gave evidence that Mr Leyton needed support and wanted constructive feedback.

239. Mr Astill was then taken to the WhatsApp messages of the 10 February 2020 and asked why he is directing the claimant and Mr Leyton to create documents when his evidence is that he had seen the Daily Log and accident form on 16 January 2020. Quite incredibly Mr Astill denied under oath, that despite his name being on the messages and the messages sent to his direct reports (and in turn their reports); he denies sending those messages or even being part of this WhatsApp group.

240. Mr Astill made a quite fantastical attempt to allege that his mobile work phone gets passed around and shared, suggesting someone must have accessed his phone to send messages pretending to be from him. The tribunal was not convinced at all by his evidence and it was quite remarkable how he persisted with giving evidence which it was clear to this Tribunal, was untruthful.
241. Mr Astill's evidence became even more ridiculous when taken to the email from his work email account to Mr Crowley, Mr Leyton and the claimant on 31 January 2020 [ 99]. The email had been sent after Mr Astill had been chased by the social worker and after he had told her that he had seen the Accident Book and Daily Log for the incident with Child A ( when the Tribunal accept the respondent's case - he cannot have done because no such documents had been produced), instructing them to ' *sort this out tomorrow*'. He denied that he had sent this email despite his name being on the email and being an email to his reports.
242. The Tribunal have little difficulty accepting the respondent's position, that what Mr Astill was clearly doing was seeking the assistance of the claimant, a Registered Manager and his deputies to create documents which should have been created on the 30 December 2012 to mislead the appropriate bodies into believing that they had prepared at the time of the incident, the required safeguarding documents and records.
243. Mr Astill attempted to make some excuse before the Tribunal that the email did not have his sign off at the foot and that he was in London without his work laptop. He conceded however that his emails are accessible by his mobile phone and when sent by phone often do not contain the sign off . The emails appeared to be sent by a mobile phone because they were marked; " Outlook for Android"
244. Mr Astill conceded that the emails looked as if he was instructing the claimant etc to create documents;
- " I can see what it looks like"*
245. Despite this Mr Astill continued with what the Tribunal find was a wholly disingenuous and unsuccessful attempt to deny that he sent those emails.
246. Mr Astill accepted that the email and WhatsApp messages suggests that despite telling Ms Tong he had seen the Accident Form and Daily Log on 16 January 2020, he had not, and they were created after, to which he conceded;
- " I can totally see from respondent's what it looks like ..."*
247. Mr Astill confirmed under cross examination that he resigned on 21 May 2020 before the investigation was completed.
248. The Tribunal find on a balance of probabilities, that Mr Astill lied to the social worker after Child A had made a complaint, when he said he had checked and seen the paperwork. Via the WhatsApp group and email, he then instructed the claimant and Mr Layton to create the documents and pretend that they had been created at the time of the incident. Mr Layton had sent him the documents to check they accorded with the account of events Mr Astill had given the social worker.
249. Mr Craner by the end of the interview with Mr Layton on 3 June 2020, gives evidence that he had formed the view that there had been collusion between the claimant, Mr Layton, Mr Astill and Mr Crawley. That was a wholly objectively reasonable view to form on

the evidence he had.

250. This allegation however was not put to the claimant. Although the claimant had been asked about the 16 January emails and the versions of the Daily Log, Mr Craner accepts that the allegation of collusion was not explicitly put to him.

251. Mr Craner after being given the information from Mr Layton, does not meet again with the claimant.

### Rejection of Appeal

252. Mr Craner made the decision to reject the claimant's appeal. He did not disclose what he knew about the WhatsApp group.

### Appeal Outcome: 9 June 2020

253. The reason for rejecting the claimant's appeal is set out in a letter dated 9 June 2020 [393]; *"I have reviewed email records of the documentation produced at the time. I have found evidence that an email about the concerns highlighted by the social worker were forwarded to you on both 16 January and again on 31<sup>st</sup> of January. This email directs you to report something exactly as another person has written in their email. In addition to these two emails, there were various versions of the daily log and key care session emailed to you on both 11 February and 13 February. The daily log key carer session documents were altered and amended between 11 February and 13 February before you submitted to the LADO.*

*I cannot conclude that you ensured the appropriate safeguarding processes were followed, nor that you only found out about the social worker concerns on 14 February. While understand your personal circumstances to deal with during this time, this does not absolve you of your responsibilities safeguarding and reporting incidents as an RN.*

254. In terms of the bruising to Child A, Mr Craner refers to the photograph providing evidence of missing hair which is of itself serious, regardless of bruising.

255. Mr Craner concludes that the grounds of appeal do not change the original decision to dismiss.

256. In his evidence in chief, Mr Craner states that *" in my opinion and assessment of the evidence I concluded that;*

- a. *The Claimant had failed to ensure appropriate action taken at the time of the incident*
- b. *He then appears to have conspired with other staff to create false paperwork to try and cover it up and protect themselves.*

257. In response to a question from the tribunal, Mr Craner accepted that he had not explicitly put the second allegation about falsifying paperwork to the claimant during the appeal. When asked by the Tribunal whether it was part of his decision making, he stated;

*"It added to it – he lied and not reported – it added to my decision"*

### Claimant's evidence before the Tribunal on the allegation

258. The claimant was taken to the WhatsApp messages during cross examination; he did not deny he was part of the WhatsApp group and he did not support Mr Astill's account of

someone sending bogus messages on Mr Astill's behalf.

259. With regards to the instruction [201] from Mr Astill, ( the Tribunal find it was Mr Astill who sent it) on 10 February to create various documents, the claimant's response is that he did not see the message as far as he was aware.
260. When he is taken to another message on 11 February 2020 instructing him to write 3 statements, for him, Mr Leyton and Ms Smith "*For Child A incident*", his evidence is that he does not know if he received that however, he accepted that he had sent another message just before it to Mr Astill only about 35 minutes before [202] (about the police turning up for Child A).
261. When taken again to the email of the 16 January 2020 from Ms Astill [99] instructing him and his two Deputies to "*please sort this out – exactly as I have said.*"; the claimant gave evidence that he could *not recall* seeing this email.
262. The Tribunal found the claimant's evidence no more compelling than Mr Astill's. It is not credible that despite the messages and emails being from his Line Manager about a child in his care, he did not apparently see them or could not recall seeing them.
263. It is clear that documents however were created, and Mr Layton sent them in February to Mr Astill to check they accorded, the Tribunal find, with what Mr Astill was instructing them to say. The Tribunal find that the claimant was aware of and complicit with that plan and that the purpose was to protect their positions, not to protect Child A and they were prepared to mislead the professional bodies involved in order to do so.

### **Claim 2: Bonus Payment**

264. The respondent disclosed an undisputed document [438] headed 'Pay and Conditions for Service for Managers' which refers to a £1000 salary supplement in circumstances where a home receives a rating from Ofsted of Good.
265. The claimant explained at the outset of the hearing, that he was awarded a bonus of £1,000 because the Home had been awarded a 'good' rating on inspection in February 2020.
266. The 'bonus' was the Tribunal find, actually paid as an increment to a Manager monthly salary paid over the course of 12 months. The claimant duly received his salary including the increment in March, April and May 2020. He alleges that he remained entitled to the unpaid amount of £800 when his employment was terminated on 15 May 2020.
267. The claimant does not assert that is any provision in the contract of employment which deals with this alleged 'bonus' entitlement and there is no policy document which sets out what the 'bonus' arrangements are other than the document at [438].
268. The respondent defends the claim on the basis that the payment was not a 'bonus' but an enhancement to salary and therefore the claimant was not entitled to the rest of the sum on summary termination.
269. The document produced supports the respondent's evidence that this was a salary increment scheme and the Tribunal find that how it operated in practice was as described by the respondent.

### **Claim 3: 14 Hours: £225**

270. The claimant explained at the outset of the hearing that he is claiming unpaid wages equating to 14 hours work on the grounds that he worked in excess of 40 hours per week in November 2020. There was a practice he alleges, that hours worked in excess of 40 hours were paid or can be taken back as time off (TOIL).
271. The claimant alleges that he recorded his hours on a timesheet however, he had not included within the bundle any timesheets recording hours worked, any evidence of previous payments or any documents which evidence his claim to payment or TOIL in these circumstances.
272. The claimant alleges the sum due of £15 per hour x 14 hours which he asserts equates to £225.
273. The respondent refutes that there is any entitlement to this payment in that it denies that the claimant has a legal entitlement to receive a payment for additional hours worked beyond his normal working hours of 40 hours per week.
274. Mr Astill under cross examination, in response to a question from the Tribunal, gave evidence that if Managers exceeded 40 hours work per week, they could put in a request to the Finance Director to get those extra hours paid. However, his evidence was that payment was at the discretion of the Finance Director who may decide that the Manager should have managed his hours better and therefore may choose not to authorise any additional payment. Although the Tribunal found Mr Astill's evidence on matters relating to his direct involvement in the Child A incident, he had no apparent reason to give evidence which in fact did not support the claimant's case.
275. On a balance of probabilities, the Tribunal find this element of his evidence to be credible and not inconsistent with Mr Craner's. His evidence was not challenged by the claimant or the respondent.
276. Mr Craner gave evidence that the claimant was paid his full outstanding holiday on termination [414]. He gave evidence that the claimant was a salaried employee and not entitled to overtime. It was put to him in cross examination that managers can reclaim additional hours worked as 'time back' and Mr Craner accepted that there may be some flexibility for a Manager to manage his own hours to an extent but there is no custom and practice of paying overtime. Deputy Managers are paid overtime as they do shift work, but managers get a flat salary.
277. The claimant during his cross examination stated that he 'knows of managers who get paid overtime' however, he did not identify or put to Mr Craner any examples of when this had happened.
278. When asked by the Tribunal whether he had been paid for hours worked in excess of 40 hours on previous occasions, he stated that he knew other managers had (but did not identify who or when) but actually he had never received any additional payment beyond his salary.
279. The relevant provisions of the contract of employment are those at clause 6, 7.1, 7.2 and 8 (see above).
280. The Tribunal find that the claimant was paid a salary, he had no contractual right to overtime and under the contract of employment he was required to be flexible. Further, on a balance of probabilities, the Tribunal find that there was no practice in place of paying Managers if they worked in excess of 40 hours, at least not without prior approval

## Legal principles

### Unfair Dismissal

281. The starting point is the statute:

98 General.

*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it—*

*.....*

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

*.....*

*(3) In subsection (2)(a)—*

*(4) [ Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.*

### Summary of statutory requirements

282. Section 98 of the Employment Rights Act 1996 sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal.

### The reason for dismissal

283. It is up to the employer to show the reason for dismissal and that it was a potentially fair one i.e. one that fell within the scope of S.98(1) and (2) and was capable of justifying the dismissal of the employee.

284. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' :***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA.***

285. The burden of proof on employers at this stage is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness.



286. As Lord Justice Griffiths put it in ***Gilham and ors v Kent County Council (No.2) 1985 ICR 233, CA***: ‘The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason **could** justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to S.98(4)] and the question of reasonableness.’
287. In cases of dismissal for conduct, it is sufficient that the employer genuinely believed on reasonable grounds that the employee was guilty of misconduct.
288. If the Tribunal rejects an employer’s asserted potentially fair reason for dismissal, finding that the reason could not have been the one operating on the employer’s mind at the relevant time, the Tribunal is not obliged to go on and ascertain the real reason for dismissal if there is insufficient evidence to do so — ***Hertz (UK) Ltd v Ferrao EAT 0570/05. In these circumstances, the dismissal will be unfair.***
289. Tribunals must also take account of the genuinely held beliefs of the employer at the time of the dismissal. However, what a Tribunal must not do is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal. : Court of Appeal explained in ***Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA,***
290. The standard of the hypothetical reasonable employer is central to the S.98(4) assessment of reasonableness.
291. ***CRO Ports London Ltd v Wiltshire EAT 0344/14***: the EAT held that the Tribunal had wrongly reached its finding of unfair dismissal based on the evidence available to it instead of the facts available to the employer at the time of dismissal.

## Conduct

292. Conduct is a potentially fair reason for dismissal under Section 98(2)(b) of the Employment Rights Act 1996.
293. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98 (4) ERA, namely whether, in all the circumstances, including the size and administrative resources of the respondent’s undertaking, the respondent acted reasonably or unreasonably in treating that reason, i.e. conduct, as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.
294. In relation to conduct dismissals the leading authority on fairness is the case of ***BHS v Burchell [1978] IRLR 379***, which sets out a three part test namely –
- (1) Did the employer have a genuine belief in the employee’s guilt?
  - (2) Was that belief based on reasonable grounds?
  - (3) Were those grounds formed from a reasonable investigation?
295. The case of ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*** makes it clear that the test which the tribunal must apply is whether dismissal was within the band of reasonable responses that a reasonable employer in the circumstances might have adopted

296. That “band of reasonable responses test” also applies in assessing the reasonableness of the investigation carried out into a conduct matter: **Sainsbury’s Supermarkets v Hitt [2003] IRLR 23.**

### Disciplinary hearing

297. Where misconduct is admitted or the facts are not in dispute, it may not be necessary to carry out a full investigation: **Boys and Girls Welfare Society v McDonald [1996] IRLR 129.**

298. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant’s dismissal.

299. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: **Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439.**

300. The range of reasonable responses’ test applies both to the decision to dismiss and to the procedure by which that decision is reached: **Sainsbury’s Supermarkets Ltd –v- Hitt [2003] IRLR 23.**

301. Where a fair procedure has not been followed, a compensatory award for unfair dismissal may be reduced if the Tribunal finds that a claimant would have been dismissed even if a fair procedure had been followed – section 123(1) of the Employment Rights Act 1996.

302. The Tribunal must consider what would have happened had the unfairness not occurred and may reduce an award on a just and equitable basis: **Polkey v A E Dayton Services Ltd [1988] ICR 142 HL.**

303. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.

304. The amount of any compensation to be awarded may be adjusted by up to 25% to reflect any failure to comply with a material provision of the ACAS code.

305. The basic award and also the compensatory award for unfair dismissal may also be reduced, or further reduced, by a percentage if the Tribunal finds that a claimant has caused or contributed to their dismissal, under sections 122(2) and 123(6) of the Employment Rights Act 1996.

### Procedural Fairness

306. The House of Lords’ decision in **Polkey vAE Dayton Services Ltd 1988 ICR 142, HL** establishes procedural fairness as an integral part of the reasonableness test under S.98(4). As stated by Lord Bridge in that case, where an employer fails to take the appropriate procedural steps, the one question a tribunal is not permitted to ask in applying the reasonableness test is whether it would have made any difference if the right procedure had been followed. That question is simply irrelevant to the issue of reasonableness although very relevant to the issue of compensation.

307. Thus, if there is a failure to adopt a fair procedure at the time of the dismissal, whether set out in the Acas Code or otherwise, the dismissal will not be rendered fair simply

because the unfairness did not affect the end result.

308. Lord Bridge in *Polkey* itemised the procedural steps that will be necessary in the great majority of cases if an employer is to be considered to have acted reasonably in dismissing in a case of misconduct, investigating fully and fairly and hearing what the employee wants to say in explanation or mitigation
309. In addition, when determining the question of reasonableness, the tribunal should have regard to the procedures set out in the Acas Code, which is discussed under 'Acas Code of Practice' below.
310. The Court of Appeal made this clear in ***Taylor v OCS Group Ltd 2006 ICR 1602, CA***, stating: *It may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that S.98(4) requires the employment tribunal to approach their task broadly as an industrial jury. That means that they should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.*
311. Not every procedural defect will render a dismissal unfair. For example, in ***D'Silva v Manchester Metropolitan University and ors EAT 0328/16*** the EAT upheld an employment tribunal's conclusion that a flaw in the disciplinary process that rendered it 'not ideal' did not render the dismissal unfair.
312. When assessing whether the employer adopted a reasonable procedure, tribunals should use the range of reasonable responses test *J Sainsbury plc v Hitt 2003 ICR 111, CA*; *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 699, CA*.

## Appeal

313. House of Lords in ***West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL***, :the employer's actions at the appeal stage are relevant to the reasonableness of the whole dismissal process.
314. Nothing in principle prevents an employer's appeal panel upholding a decision to dismiss on a different basis from that on which the original decision was made. For the dismissal to be fair, though, the employer must ensure that whatever grounds remain still justify dismissal. In ***Perry v Imperial College Healthcare NHS Trust EAT 0473/10***

## Contributory fault

315. Section 123(6) of the Employment Rights Act 1996 (ERA) states that: '*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*'
316. There is an equivalent provision for reduction of the basic award contained in S.122(2) ERA which provides merely that; "*where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*"

317. **EAT in *Optikinetics Ltd v Whooley* 1999 ICR 984, EAT**, held that S.122(2) gives tribunals a wide discretion whether or not to reduce the basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal and that this discretion allowed a tribunal to choose, in an appropriate case, to make no reduction at all. This contrasts with the position under S.123(6) where, to justify any reduction at all on account of an employee's conduct, the conduct in question must be shown to have **caused or contributed to the employee's dismissal**. This required the tribunal to consider what was the reason operating on the mind of the dismissing officer.

318. In ***Nelson v BBC (No.2)* 1980 ICR 110, CA**, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

- *the conduct must be culpable or blameworthy*
- *the conduct must have actually caused or contributed to the dismissal, and*
- *it must be just and equitable to reduce the award by the proportion specified.*

319. It is a prerequisite of a reduction of either a basic award under Section 122(2) or a compensatory award under Section 123(6), that the Tribunal find the conduct in question to have been blameworthy: ***Sanha v Facilicom Cleaning Services Ltd* UKEAT/0250/18/VP**

320. ***Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL**: when assessing the compensatory award payable in respect of the unfair dismissal, tribunal is to consider whether a reduction should be made on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss.

### Unlawful deduction from wages: section 13 ERA

321. Section 13 deals with the right not to suffer unauthorised deductions and provides as follows;

*(1)An employer shall not make a deduction from wages of a worker employed by him unless—*

*(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

*(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.*

*(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*

*(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

*(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

*(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages **properly payable** by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

### What is properly payable

322. ***New Century Cleaning Co Ltd v Church* 2000 IRLR 27, CA**: majority of the Court of

Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition.

323. The Court of Appeal's decision in the *New Century Cleaning* case was followed in ***Balfour Beatty Power Networks Ltd v Tucker and ors EAT 182/01***. The EAT accepted that, on the basis of the *New Century Cleaning* case, in order to show that there had been a deduction in the total amount of wages properly payable within the meaning of S.13(3), the employees would have to demonstrate that they had a legal entitlement to the payment in the first place. The only possible basis for a legal entitlement was the contract of employment, since nothing else had been relied upon by the employees. As there was no express or implied term sufficient to create such an entitlement, the EAT concluded that the payment was a discretionary one designed to compensate the employees for the loss of the discretionary bonus that had been removed. It followed that, since the employees did not have a legal entitlement to the payment, it did not form part of the wages properly payable within the meaning of S.13(3) and, accordingly, there had been no unlawful deduction.

### Time Limit

324. Any Complaint to the tribunal must be brought accordance with section 23 ERA.

### Submissions

325. I shall now set out the submissions of both parties. I have considered the submissions in full. The following is a summary only.

### Claimant's submissions

326. The claimant made brief oral submissions. He submitted that he had a previous clean disciplinary record and that there had been no further action taken by LADO because he submits, they clearly did not see it as a safeguarding failure.

351. The claimant submits that the respondent was informed that he was not a Registered Manager that Mr MacDonald-Milner lied under oath and.

352. He repeated his position that the paperwork for Child A was left for the Deputy Manager to complete, that he was qualified to do it and he had done it many times before. He submits that he raised concerns with Mr Cole which were not dealt with in accordance with the ACAS process; there was no mediation or hearing.

353. He referred to his dismissal on 15 May 2020 but the investigation with Jacqueline Smith did not take place until 19 May and therefore further evidence had not been taken into account. I invited the claimant to explain difference that would have made the outcome. He referred to her evidence supporting his account that the incident was an accident. He had not put this point however to the respondent witnesses.

354. The claimant also submitted that he had major issues at home with his five-month-old child in hospital constantly, requiring an operation on 31 December.

355. With respect to the bonus; he submits that the bonus related to the Ofsted report, he worked towards that bonus for 12 months and feels he should be paid the rest of it.

356. The claimant did not address the evidence of Mr Astill or Mr Craner in relation to his claim for unpaid hours, he simply submitted that he worked extra hours and believes he should be paid for them.

357. He submits that Mr Leighton had two appeals but he had only one and that is unfair.
358. The claimant also submits that the evidence regarding the WhatsApp messages was received after he was dismissed and therefore should not be taken into consideration. He did not otherwise seek to comment on or address this evidence.
359. The claimant submits that was not given the chance to call evidence and that this was not offered during the investigation or disciplinary hearing and that he was never given the opportunity to call witnesses from the shift.

### Respondent's submissions

360. The respondent submits that with respect to any procedural flaws in a process, the Tribunal must consider those in context and consider the whole facts and whether they cause the claimant to be unduly prejudiced :**Taylor v OCS Group Ltd 2006 ICR 1602 CA**
361. The respondent submits that the claimant was employed as a Registered Manager of the Home and refers the Tribunal to his job description. He had it is submitted, legal accountability for safeguarding and child protection in the Home and he accepted that under cross-examination.
362. The safeguarding policy [62] provides that LADO should be alerted in all cases in which it is alleged that persons have behaved in a way which has harmed or may harm a child. The claimant knew the behaviour of a colleague had harmed Child A therefore this was beyond a mere allegation and it is clear that the claimant had a responsibility to report it.
363. At the outset the claimant confirmed he did not report to LADO or anyone else, he did not allege otherwise during the disciplinary or investigation meetings or on appeal. The claimant could have raised the incident with either the RI, the DSI Or LADO - but he did not raise with anyone. That failure to report is an act itself of gross misconduct.
364. The claimant also admitted he had not completed the relevant paperwork and in hindsight accepted he should have done so during the course of the disciplinary hearing [231]. He accepted that if this incident had happened to his own son, he would expect to see an accident report form [272]
365. The respondent it is submitted was within its right to pursue allegations of gross misconduct at the disciplinary and the appeal because the claimant failed to safeguard Child A and he was responsible.
366. The claimant was not dismissed because he had been directly involved in the harm to Child A, but because he failed to report it is a Registered Manager of the Home and comply with safeguarding procedures.
367. The claimant asserts a claim for a bonus payment which is predicated on the basis that he was the Registered M of the Home when it received a 'good' Ofsted report.
368. The respondent submits that record keeping is of paramount importance.
369. In terms of the investigation; the respondent submits is no evidence to support the allegations of bullying by those who carried out investigations

370. Mr Miller accepted the investigators appointed to investigate could be” brusque but they had a difficult job to do in connection with serious allegations
371. The respondent submits that the claimant was given opportunities by the tribunal on a number of occasions throughout the hearing to give specific examples of bullying behaviour but failed to do so.
372. The claimant did not disclose his recording of 4 May despite the tribunal order to do so.
373. The claimant confirmed in an email on 9 April 2020, that the respondent’s notes of the first hearing on of 8 April 2020 [126] seemed accurate and within that meeting of 8 April, he referred to ‘rough-and-tumble’ gone wrong. It was clear from the first investigation meeting with him that there have been harm caused to child A.
374. The claimant agreed with the minutes of the appeal hearing and he was accompanied.
375. The claimant went asserts that he had to leave the evening of 30 December 2019 to see to his son however, the respondent submits that in all likelihood had he not left the forms would not have been completed in any event and he still would not have reported it because he still maintain that it was not necessary because it was accident.
376. Mrs Smith was not interviewed prior to dismissal however the Tribunal is invited to consider the context, she was very seriously ill at the time and suffering with a mental health problem and the evidence she did give did not assist and has not altered the position.
377. In terms of considering whether the investigation went far enough, in the circumstances of the case and the claimant’s responses during the investigation showed, it was appropriate to process on.
378. The email from Mr Astill on 16 January 2000 [99] was instructing the claimant to produce the relevant people paperwork, if it was an incident not worthy of reporting there would have been no need to have provided it.
379. Had the paperwork been done in advance there would have been no need for Child A to have reported it to the social worker. If there was no restraint, appropriate reporting may have avoided such an allegation.
380. Respondent submits that the investigation easily went far enough in the circumstances to satisfy the Burchell test.
381. The respondent invites the tribunal to disregard the evidence of Katherine Taylor.
382. In terms of Jaqueline Smith, it is submitted that she was clearly confused, she was on medication and her recall was not as good as it could be and that the formal record of the meeting with her should be preferred. There is no supporting evidence against Mr MacDonald-Milner that he had threatened her and his evidence was clear. She was confused about who she had spoken to in arranging the first meeting. She alleged that the notes of the investigation meeting with did not contain all the information discussed at the meeting but admitted under cross examination that the three points she had included in her amendments to the notes were in fact referred to the respondent’s own notes. Although she raised a grievance, she did not raising a grievance against Mr Leyton.

383. Ms Laura Cox did not appear as a witness and it is submitted her statement should be dismissed on the basis it is nothing more than a character assassination of Mr Leyton who had had no opportunity to defend himself. She was dismissed for gross conduct and the motives of making these allegations therefore need to be considered but, in any event, her evidence had no direct bearing on the issues.
384. Ms Emma Lazenby did not appear before the tribunal and it is submitted her evidence as nothing to do with the case. Some of her evidence contains hearsay and we have heard directly from Ms Smith with regards to the notes of the interview with her.
385. With respect to the evidence of Mr Astill; the respondent submits that some parts of his evidence is credible while other parts are utterly incredible. He accepted there was no evidence to support the allegations against various individuals in paragraph 3 of his witness statement.
386. In terms of his evidence in relation to the reporting of the incident with Child A, the respondent submits that his evidence cannot be relied upon. His evidence about additional hours worked was that there is no contractual entitlement, and any decision about additional pay was the Financial Directors. The tribunal is invited to accept this as credible on the basis that he is not relevant to his own tribunal claim against the respondent.
387. With regards to the events as described Mr Astill between 6 January the 14 January the respondent asserts, he was clearly trying to fabricate documents after the safeguarding event and that his behaviour was dishonest hence why he resigned before the respondent had a chance to dismiss him.
388. The WhatsApp messages were not it is submitted, in evidence in the disciplinary or appeal hearing but submitted in consequence of the information put forward by the claimant.
389. Estimates that the heart of the case information the respondent believed that the claim was guilty of gross misconduct and had reasonable grounds for believing that on the evidence of the claimant himself during the investigation.
390. The investigation was sufficient and reasonable.
391. The claimant raised concerns which he now he says were grievance in the same day he received communication from the social worker that LADO were not satisfied with his account. It can be assumed that the meetings investigation meetings were uncomfortable because the social worker was questioning his account and integrity.
392. The evidence of Mr McDonald-Milner is that other employees had raised a grievance had those with dealt with.
393. The notes of Hilary Jones it is submitted, were not challenged there was no evidence of bullying no prejudice claimant. Outside of that any issue with the grievance is relevant only to a constructive unfair dismissal claim.
394. The respondent refutes that the decision was predetermined. Mr MacDonald-Milner's evidence was not challenged on that in cross examination. The respondent accepts that that adjournment was perhaps a short period of time, but it has to be looked at in context, there was no new evidence supplied by the claimant during the meeting and indeed if anything you make further concessions.



395. The claimant was given the opportunity at the disciplinary hearing [234] to raise questions about the evidence.
396. The respondent submits that there is no evidence now that the decision would be any different if the process be different.
397. With regards to the second reason put forward by Mr Craner on appeal for upholding the dismissal, namely that the claimant appears to have conspired with others to create paperwork, the respondent submits that given the nature of the appeal it was incumbent on Mr Craner to investigate how the reporting was carried out to test the claimant's version that he did not know the incident was a Significant Event until February and investigating, found the February documents which were supportive of the disciplinary decision. The emails were put to the claimant. The respondent submits the tribunal has heard nothing to suggest if the appeal was reconvened, the claimant would have given different evidence.
398. The respondent submits the claimant showed no remorse, no apology no acceptance and no indication therefore that this will not happen again.
399. The respondent submits that even if there were any additional steps in the process, it would make not have changed the outcome; if example the process had been delayed to deal with a grievance it would be no more than a couple of weeks maximum.
400. The respondent argues in terms of contributory fault, that the claimant's conduct directly lead to the dismissal it would not be just and equitable for the claimant to benefit from his misconduct.
401. in terms of the bonus; this is not a bonus but a salary supplement as a result of a good Ofsted report. The claimant confirms that he received this in his salary in March, April and May, up to dismissal. There is no evidence it should carry on the date of termination
402. In terms of payment for additional hours worked; there is no evidence by the claimant that he had such entitlement. Mr Astill states that this is a discretion and there is no contractual entitlement

## Conclusions and Analysis

### **(a) Could the respondent prove a potentially fair reason for dismissal on the balance of probabilities?**

403. The respondent maintains that the reason for dismissal was a genuinely held belief in the claimant's misconduct. The misconduct being the failure to take charge of the preparation of the appropriate records following the incident on the 30 December 2020 and the failure to report it to either LADO, the RI or DSI.
404. The claimant during this hearing at times alluded to other reasons for his dismissal ; that he sought to defend Mr Astill by the addition of the comment (point 2) in the notes of the 14 April 2020 investigation meeting and because of the issue over a discrepancy in petty cash at the Home. The Tribunal finds no evidence to support those allegations for the reasons set out in the findings.
405. The issues around the claimant's conduct remained consistent throughout the

investigation and disciplinary hearing.

406. The respondent's disciplinary policy provides that a failure to report or record any matter which it is in the employee's contractual duty to report are acts which may constitute gross misconduct.
407. The respondent's guidance on the role of LADO states that LADO should be alerted in **all cases** in which it is alleged that a person who works with children has behaved in a way which has or may have harmed a child. It does not exclude 'accidents.
408. The claimant confirmed that this obligation to report relates to him as a Practitioner as defined.
409. The respondents safeguarding policy places a responsibility on all staff to liaise with LADO and applies where there has or may be harm to a child. The policy specifically refers to hair loss as an example of physical abuse.
410. Where the perpetrator is a member of staff, the policy provides that the Home Manager (which the claimant accepted he was), should assess the allegation with his Line Manager following consultation with LADO. It is not in dispute, that there was no report at the time of the incident to LADO, the RI or DSI and this was admitted during the investigation and disciplinary process.
411. It is not in dispute that the claimant did not complete the safeguarding paperwork or report the incident.
412. The Tribunal accept that the respondent has in this case, established a potentially fair reason for dismissal, namely conduct and it qualifies as a substantial reason such that the inquiry moves on to section 98(4), and the question of reasonableness.'

**(b) If so, was the decision to dismiss fair, applying s.98(4) ERA 1996?**

413. The Tribunal has assessed the evidence in the light of the Burchell test. That requires that the employer had a *genuine belief* in the guilt of the claimant, that that belief *is a reasonable one and is based on a reasonable investigation*.

**Investigation**

414. The tribunal find that the respondent, specifically Mr MacDonald-Milner had a genuine belief that the claimant was guilty of misconduct when he dismissed him. However, was it a reasonable belief based on a reasonable investigation?
415. When considering whether the investigation was within the band of reasonable responses, the Tribunal find that the claimant was given the opportunity to state his case at a number of investigation hearings.
416. Despite later accusations of issues with the notes, there was nothing which the claimant said during these meetings which he alleges he had been forced to say. He gave evidence during cross examination that he was not complaining of any bullying during the investigations in April 2020 .
417. At the investigation on 8 April 2020, the claimant provides his evidence about the events of the 30 December 2019. He is given the opportunity at this stage to provide in

full details of the events. What the respondent is aware of from this meeting is that the claimant was aware that Child A's hair had come out following some 'rough and tumble' with a member of staff.

418. The concerns the claimant raised with Mr Coles on 14 April, about the investigators, were not identified as a grievance. If the claimant had wanted them to be treated as a grievance, he could have made that clear. Mr Coles does not dismiss his concerns, he replies providing reassurance to him about the importance of the safeguarding investigations, and it is a perfectly polite and sensible response. The Tribunal do not find that it was outside the band of reasonable responses for the respondent to have managed those concerns in this way during what was a difficult time during a serious investigation and not to have considered and treated it as a grievance.
419. LADO then express their concern and recommend that the incident with Child A is looked into. The claimant is then given another chance to address the incident with Child A at an investigation meeting on 14 April 2020.
420. During this hearing he made further important admissions; that he had not reported the incident, he had not actually seen how Child A's hair had come out but nonetheless did not consider it necessary to complete a Significant Event form and that an Accident Report form was prepared ( which he would fail to provide).
421. The claimant was given a full opportunity to explain the events. His amendment to the notes is not material and he confirmed under cross examination that he was not alleging that he was bullied in this meeting.
422. The claimant was then suspended on 17 April 2020. He does not complain about the act of suspension and in the circumstances, the Tribunal consider that it is within the band of reasonable response to take such a step at this stage. The claimant is informed what the investigation relates to namely, the failure to report and record and lack of management oversight.
423. The claimant then has a further investigatory meeting on 4 May 2020. He is told what the allegations being investigated are and that they may constitute gross misconduct and by this stage he is aware that LADO are not satisfied with his explanation. He did not raise any complaint about the last investigation meeting immediately it had taken place but now on being called to another investigation, when the charges are set out, he complains it is not just for the investigators to carry out the investigation. He refers only to the 'concerns' he had raised before. He does not raise fresh concerns. He had not alleged bullying and he does not invoke the grievance policy.
424. The claimant had not escalated those concerns into a grievance and those concerns did not call into question the ability of the investigators to conduct a professional and thorough investigation, it was within the band of reasonable responses in the context of the seriousness of these allegations, for the respondent to continue with those experienced investigators leading the investigation. This was within the band of objectively reasonable responses open to the respondent.
425. The investigation of the 4 May 2020 the Tribunal find, was a thorough investigation, the claimant was given a chance to state his case. The claimant has not identified any material inaccuracies in those notes, and they record a robust but fair line of questioning. The claimant had the audio recording of this meeting but had not taken steps to submit it into evidence, despite the direction of Employment Judge Hutchinson. The claimant has not identified any concessions he made which he

alleges were not made or made under any form of duress. If he considered there were any documents which should be considered or witnesses interviewed, he had the opportunity to suggest that, but he does not do so. The claimant was not prejudiced by the robust line of questioning even if it may have been ' brusque'.

426. The investigator's speak with Mr Layton and there is no real inconsistency in his evidence and the claimant's. He describes the incident and that he was tasked to do the forms, that he must have forgotten to upload the Daily Log and had forgotten to do the Accident Form and he had not reported it.
427. Mr Layton's evidence that he was not asked whether he had done the forms by the claimant, is not inconsistent with the claimant's own evidence.
428. Mr Astill is then interviewed. He describes the injury as shown on the photograph as ' horrific' and confirms that Registered Managers have a duty to report incidents to LADO themselves. There is no dispute that the claimant did not do this, albeit Mr Astill alleges that all the relevant paperwork was done.
429. There were no other interviews carried out prior to the disciplinary hearing.
430. Although Ms Smith who was present during the incident, was interviewed, the respondent did not interview her before holding the disciplinary hearing. It is not clear why she was not interviewed before; she was absent on sick leave, but she had taken part in her own grievance hearing on the 15 May 2020 therefore she could have been spoken to at the latest by that date.
431. Her evidence about the incident is largely consistent with what is reported by Mr Layton and the claimant, other than she believes that Mr Layton had completed the paperwork.
432. The claimant did not raise the failure to speak to Ms Smith before the disciplinary hearing with Mr MacDonald-Milner in cross examination as a factor he considered relevant to the fairness of his claim. Nonetheless it is such an obvious issue that it needs to be considered by this Tribunal indeed the respondent addressed it in their submissions.
433. The Tribunal is reminded that it is important for Tribunals to look at procedural flaws in context and to consider their implications for the overall reasonableness of the employer's decision to dismiss.
434. The Tribunal take into consideration that by the 15 May 2020, the claimant had not denied failing to report the incident with Child A, he had not denied not filling in the safeguarding records and neither did he nor Mr Layton deny that Child A had had his hair pulled out in the incident. The respondent had the photographs of the bald spots .
435. To not interview another witness who was present is not ideal, however where misconduct is admitted or the facts are not in dispute, it may not be necessary to carry out a full investigation (**Boys and Girls Welfare Society**).
436. The Tribunal find that a reasonable employer acting reasonably in those circumstances may well have decided to proceed in light of the evidence and admissions following the number of investigation meeting.
437. The Tribunal consider that it was within the band of reasonable responses to proceed with the disciplinary hearing in circumstances where admissions had by this stage

been made by the principal actors and the essential facts were not in dispute.

438. In terms of the Acas code of practice, although the claimant does not identify any specific section of the Code which has not been complied with, the Tribunal do not find that based on the claimant's case, there was any breach of the Code in the way the investigations were carried out. The claimant does not allege a breach of the respondent's own policy. Further, the investigation the Tribunal find within the band of reasonable responses and the Acas code requiring an employer to carry out *necessary* investigations of potential disciplinary matters without unreasonable delay to establish the facts.

### **Disciplinary hearing**

439. The claimant was notified of the allegations against him in writing. He makes no complaint about the information he was provided with before or during the hearing.

440. At the disciplinary hearing, the claimant understands the charges and he is given an opportunity to state his case in full and have a representative.

441. He accepts that he did not complete the appropriate paperwork and makes some admission that in hindsight he should have done the paperwork and not left it to Mr Layton. The misconduct was to all intent and purposes, admitted.

442. The claimant complains that he could not call witnesses but does not identify witnesses or documents he would want to be taken into account and nor did he raise this at the time, although he had the chance to do so. He did not identify to this Tribunal any further documents or witnesses which he was prejudice by not calling or adducing.

443. There is an adjournment before the decision is given, albeit a very short adjournment.

444. The Tribunal consider that the disciplinary hearing was a fair hearing, the claimant was given a fair opportunity to put forward his explanation and mitigation.

445. The Tribunal consider that the adjournment between the hearing and decision, of 15 minutes was very short to allow for deliberations. That is a potential cause for concern about the fairness in that it may indicate that the decision maker had not approached the hearing with an open mind, a basic requirement of a fair process and of natural justice.

446. Mr MacDonald- Milner was a credible witness and his evidence is that the claimant did not produce any new evidence and that it was therefore a straight-forward exercise when making the decision.

447. The Tribunal has considered all the circumstances and the context; the claimant had not introduced any new evidence. His position remained that was not a Significant Event, that he considered the incident with Child A to be it a 'complete accident' and he left the paperwork to Mr Layton and had not reported it to anyone at the time. There was little left to consider. It was not ideal however, considering the context, the Tribunal find that the employer acted reasonably in treating the reason shown as a sufficient reason for dismissing the employee.

448. The claimant's case rests largely on his assertion that it was reasonable for him to delegate to Mr Layton completion of the necessary paperwork recording the accident. However, it was his responsibility and the Tribunal accept that the employer was

acting within the band of reasonable responses when it formed the belief that as the Registered Manager or equivalent, he should have taken steps to ensure the paperwork was completed. He left it to be completed by the very person responsible for the injury to the child and did not follow up to make sure it was done and reported accurately. It is reasonable the Tribunal consider, to view the claimant's actions as a gross dereliction of his duty.

449. Further, although he appeared to waiver around whether this was a significant injury ,objectively the Tribunal accept that a reasonable employer acting reasonably would consider it as such. A large adult male had during some incident (which the claimant by his own admission did not fully observe), managed to pull hair from a child's head and not a few hairs but two clumps or two dreadlocks. The Tribunal accept that the decision of the employer, that was a serious incident was a reasonable one.
450. It seems astonishing to this Tribunal that it was deemed safe or sensible, for a 23-stone man to playfight with a 11 year old child in a care home setting, had he fallen accidentally more fully or awkwardly on to the child, that could have caused potentially much more serious injury. Mr Layton engaged in rough and tumble with Child A which was observed by the claimant who was present . That there was playfighting however was not a matter which was raised as part of the reason for the disciplinary proceedings and therefore not a relevant consideration in terms of the fairness of the dismissal.
451. It is concerning that someone who works with vulnerable children in this setting, should fail to appreciate the importance of the responsibilities of a Registered Manager and the need to record and report incidents of harm promptly, not only to protect the children but the carers. There was no real indication that even now, the claimant had reflected on his behaviour. However, the Tribunal is mindful that what is relevant is what was operating on the mind of the employer at the time the decision to dismiss was taken. .
452. As Mr Justice Langstaff, then President of the EAT, observed that it will almost inevitably be the case that in any alleged unfair dismissal a claimant will be able to identify a flaw, small or large, in the employer's process, and that it is therefore for the tribunal to evaluate whether that defect is so significant as to amount to unfairness. In ***Sharkey v Lloyds Bank plc EATS 0005/15***
453. In all the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably the Tribunal find in treating the conduct as gross misconduct; applying the objective standards of the reasonable employer and any flaws in the process up tot his stage, were not so significant as to amount to unfairness.

## Appeal

454. An employer's actions at the appeal stage are relevant to the reasonableness of the whole dismissal process.
455. Mr Craner conducted Mr Layton's appeal and a later meeting on 3 June 2020, during which Mr Layton disclosed information about what had happened around the creation of the safeguarding documents for the incident involving Child A. The evidence he had been given by Mr Layton was damning, not only of Mr Layton, but the Tribunal find more so for those in more senior positions, including the claimant as the Registered

Manager (or equivalent) and Mr Astill as the Responsible individual. Mr Layton had at least, disclosed what had happened.

456. Mr Craner's evidence is that he did not take this further evidence into account when deciding whether there was sufficient information to uphold the dismissal however, the Tribunal find that he was influenced by the further information however, the claimant had not had an opportunity to respond to it. Whether it would have made a difference to the outcome is not an issue for consideration at this stage: ***Polkey vAE Dayton Services Ltd 1988 ICR 142, HL***
457. The claimant raised new information at the appeal which Mr Craner considered did not undermine the fairness of the original disciplinary decision.
458. Mr Craner however, concluded that the claimant had conspired with other staff to create false paperwork and cover up their failure to record the incident originally.
459. The Tribunal find on a balance of probabilities, that Mr Astill, the claimant and Mr Layton in particular, had colluded to cover up the reporting failings and the Tribunal consider it reasonable to draw an inference that this was because they understood just how serious those failures were.
460. However, what concerns the Tribunal is to what extent the evidence that Mr Craner had by the date of the appeal outcome influenced his decision and undermined the reasonableness of the whole process because the allegation of falsifying these documents, was never expressly put to him.
461. Mr Craner's evidence is that putting aside the evidence of collusion, he would have upheld the dismissal based on his finding around the safeguarding issue and that may well be the case however, the first consideration is reasonableness of the process.
462. The Tribunal find that what was also operating on Mr Craner's mind was the collusion and that this formed part of his reason for upholding the decision to dismiss. That would not have been a problem but for the fact, the allegations were incredibly serious, and they were not put to the claimant. That is a breach of the Acas code and an important procedural step.
463. Given the seriousness of that allegation the Tribunal do consider that it was unreasonable and fundamentally so, to have reached a finding on that allegation without putting it to the claimant. It is after all, an exceptionally serious allegation and Mr Craner's own evidence was that is "*added to his decision*".
464. The Tribunal conclude that this failure to put this evidence to the claimant and for it nonetheless to be operating on his mind and form some part of his decision to uphold the dismissal and reject the appeal, does render the appeal process unfair and by extension the whole process. The claimant's claim of unfair dismissal is therefore well founded and succeeds. That is not however, the end of the matter because the Tribunal must now consider compensation.

**The claimant's claim that he was unfairly dismissed therefore succeeds.**

**Polkey Principle : section 123 (1) ERA**

351. The Tribunal have considered what decision the respondent would have reached on the issue of whether the claimant was guilty of gross misconduct and whether or not

to uphold or dismiss the appeal, had a fair appeal procedure been followed.

352. The Tribunal find that had Mr Craner put the evidence to the claimant about the WhatsApp messages and emails and allegation of collusion , and given him a chance to respond, the respondent would still, acting within the band of reasonable responses, upheld the decision to dismiss.
353. Even during this hearing, when the claimant was asked about the email and WhatsApp instructions from Mr Astill to produce documents after the Child A incident, his evidence was not credible. He simply denied recalling seeing those messages. There is no reason to believe his answers would have been any different at a further hearing with the respondent, and they were not convincing (neither were those of the witness he called to support him, Mr Astill).
354. Had the issue of collusion not formed part of the appeal decision, the Tribunal find that the respondent would have confirmed the decision to dismiss in any event and upheld the appeal. The Tribunal accept the evidence of Mr Craner that he would have upheld the decision to dismiss based on the issues around the failure to report and the recording of the incident regardless of the evidence of collusion. The offences were serious, and the grounds of appeal did not excuse his failings.
355. The Tribunal consider that had the right procedure been followed, and the claimant given the opportunity to respond to those latest allegations of collusion, or alternatively the issue of collusion had not operated on the mind of Mr Craner, that it would have made absolutely no difference to the outcome.
356. The Tribunal consider therefore that it would be just and equitable in the circumstances of this case, to reduce the compensatory award by 100%.

**The Claimant is not awarded any compensation by way of a compensatory amount: 100% reduction is applied.**

**Contributory fault : section 123 (6) ERA and section 122 (2) ERA**

357. Given the reduction under 123 (1) ERA, the Tribunal makes no reduction to the compensatory award under section 123 (6).
358. The Tribunal however turns now to the basic award.
359. Not only had the claimant failed in his responsibilities to complete the safeguarding paperwork and delegated it to his Deputy, who had been the person responsible for the harm caused to Child A (albeit it is not a finding of this Tribunal that the harm was deliberate), he then failed to check that these important safeguarding measures had been carried out and recorded correctly.
360. The claimant's conduct put a vulnerable child at risk, and he was in a position of responsibility, responsible for the safety and welfare of vulnerable children.
361. The claimant was reluctant throughout the internal disciplinary and investigation process, to accept responsibility for his failings. He failed to reflect in any meaningful way on his own conduct. He continued to argue it was an accident and because of that and despite the harm and upset to the child, it did not warrant being treated as a Significant Event. (which was a wholly unreasonable stance to take as evidenced nit least by the action which was later taken to cover up their tracks once it was reported



and put in place the appropriate records).

362. Further, the claimant failed to report the incident to his RI, DSI or LADO.
363. The claimant's actions were blameworthy and in direct breach of the various safeguarding policies and his contractual obligations.
364. That conduct *caused* the claimant's dismissal.
365. It would be just and equitable to reduce the basic award in this case by 100%.
366. Further, the Tribunal found on the evidence presented to it and this was the belief of Mr Craner, that the claimant had colluded with Mr Astill and Mr Layton to create documents after the event, not to safeguard Child A but to protect their position and cover up their failings. The claimant was prepared to mislead the respondent and the professional bodies involved, whose role it is to protect the children in their care.
367. To the extent this played a part in the decision to uphold the dismissal, that was caused directly by the blameworthy conduct of the claimant. It was grave behaviour which would have without doubt warranted dismissal. Even before this Tribunal, the claimant was not prepared to give the Tribunal an honest account of events or accept his culpability.
368. Mr MacDonald – Milner dismissed the claimant because of the lack of reporting and recording. Mr Craner upheld the dismissal for that reason but also because of the collusion around the documents. The claimant was blameworthy on both counts and his conduct directly caused his original dismissal and the decision to uphold it on appeal.
369. The claimant's losses are a direct result of his own conduct.
370. Mindful that the Tribunal have made a reduction under section 123 (1), the Tribunal apply no reduction to the compensatory amount for contributory fault however it applies a 100% reduction to the basic award under section 122 (2) because the claimant's conduct was so egregious and blameworthy, it would be just and equitable to make those adjustments.

**No compensation for the basic award: 100 % reduction is applied.**

#### **Claim 2: Bonus claim**

371. The reward the claimant received for the Home receiving a 'good' rating from Ofsted, was a salary increment to be paid as part of his salary, it was not a bonus as such. The claimant was not able to identify any basis for his assertion that he should be entitled to this increment as a lump sum on termination of his employment. He was not able to identify anything within the contract of employment or any other contractual document to that effect and nor did he allege any custom or practice.
372. The claimant has failed to establish any express or implied term sufficient to create a legal entitlement and thus the salary increment was not *properly payable* on termination, within the meaning of section 13 (3) ERA and therefore this claim must fail.

**This claim is not well founded and is dismissed.**

**Claim 3: Wages claim**

373. The terms of the claimant's contract of employment do not provide that he has a contractual entitlement to be paid for hours worked in excess of 40 hours per week. The express terms of his contract of employment are clear, that he was salaried and expected to be flexible in his hours. There is reference to overtime but there is no entitlement to this and it states that this may not be offered.
374. The claimant appears to be asserting that there was a practice of some Managers being paid for extra hours however, he provided no details of those circumstances, who this applied to, when and what the agreement had been in those cases.
375. The claimant conceded that he had never been paid for working more than 40 hours and he did not dispute the evidence of Mr Craner that he was a salaried employee and not entitled to overtime. He did not dispute the evidence of his own witness Mr Astill, that Managers may apply for extra pay but that this was discretionary.
376. The claimant has failed to demonstrate that he had a legal entitlement to the payment, in order to show that there had been a deduction in the total amount of wages *properly payable* within the meaning of section 13 (3) ERA and therefore his claim must fail.

**This claim is not well founded and is dismissed**

13 September 2021

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**Employment Judge Broughton**

Sent to the parties on:

16 September 2021

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For the Tribunal:

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