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# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Angela Goodwin  
**Respondent:** Elim Foursquare Gospel Alliance- a registered charity  
**Heard at:** East London Hearing Centre (by Cloud Video Platform)  
**On:** 3 September 2021 and 15 October 2021  
**Before:** Employment Judge Hallen (sitting alone)

## Representation

**Claimant:** Mr. Gary Holt- Friend of Claimant  
**Respondent:** Ms. Beth Davies- Counsel

*This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face-to-face hearing was not held because the relevant matters could be determined in a remote hearing.*

## JUDGMENT

The Judgment of the Tribunal is that the Claimant was dismissed for a fair reason namely capability and her dismissal was fair both procedurally and substantively. Her claim for unfair dismissal therefore fails and is dismissed. In addition, her claim for notice pay is not made out and is dismissed.

## REASONS

### Background and Issues

1. In this case Ms. Goodwin (“the Claimant”) claims that she was unfairly dismissed and claims compensation. She also claims notice pay.
2. The Respondent denies that the Claimant was unfairly dismissed and says the Claimant was fairly dismissed for capability (sickness absence), the procedure adopted was fair and reasonable and dismissal was within the band of reasonable responses.

3. The issues to be determined by the Tribunal were as follows: Was the Claimant dismissed for a potentially fair reason in accordance with s98(1) Employment Rights Act (“ERA”)? The Respondent relies on capability, which is a potentially fair reason for dismissal. Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and the merits of the case (s98(4) ERA). Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances? The Tribunal must be careful not to substitute its own view. If the Claimant’s dismissal was unfair, is the Claimant entitled to a basic award and/or compensatory award, and, if so, should there be any reduction in the compensatory award on the basis the Claimant has failed to take all reasonable steps to mitigate her loss, any reduction or limit in the award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with regard to Polkey? Should there be any adjustment to either award as a consequence of any failure to follow procedure under the ACAS code? The Claimant also claimed that she was entitled to a payment of notice pay being either 4 weeks or the statutory minimum payment of 2 weeks. The Tribunal had to ascertain if she was owed any notice pay at the termination of her employment pursuant to sections 88-89 ERA.

4. At the beginning of the hearing, the Tribunal changed the name of the Respondent from Elim Church Day Nursery to Elim Foursquare Gospel Alliance- a registered charity. This was the name on the Claimant’s contract of employment and both parties agreed to this amendment. The Tribunal advised the parties that it would hear evidence and determine liability and remedy issues at the hearing which was heard over two days as specified above.

5. There was an agreed bundle of documents made up of 130 which included the parties witness statements. The Respondent also submitted a counter schedule of loss and the employer handbook which was marked R1. The Respondent’s witnesses, Jade Chatfield, nursery manager and dismissing officer and Reverend David Redbond, appeal officer, gave oral evidence and were subject to cross examination. The Claimant gave evidence and was cross examined and her witness, Mrs. Sharon Holt gave evidence and was not cross examined. The Tribunal reserved its decision.

## **Facts**

6. The Tribunal preferred the evidence of the Respondent which evidence corresponded with the relevant contemporaneous documents over the evidence of the Claimant. The Tribunal did not find the Claimant to be a reliable witness especially as during cross examination she gave inconsistent evidence in oral testimony which was directly contradictory to the contemporaneous documentation in the trial bundle. For example, it was put to the Claimant that prior to dismissal, she had informed the Respondent that she was unfit to return to work, was awaiting another operation, could not say when that would be able to return to work and had told the Respondent that she could not undertake more than one hour of her daily four-hour shift even if the Respondent was able to offer her a phased return to work. However, at the Tribunal hearing, she answered the questions put to her about her unfitness to return to work at the time by suggesting that she was fit to return and could have done her pressurised job on crutches and or in a wheelchair. The Tribunal found her answers to such questions to be unpersuasive and contradictory to the documentary evidence that she presented to the Respondent at the time. As a consequence, the Tribunal did not accept her evidence which the Tribunal found to be an

effort on her part to say whatever she thought would be helpful to her case regardless of the evidence in the case.

7. The Respondent caters for pre-school children whose nurse fees are either Government or privately funded. The Respondent is part of a larger Church organisation, and the nursery is part of the Respondent's organisation. The nursery had 10 employees on its payroll at the time of the Claimant's dismissal. It had two managers, one assistant manager, six nursery practitioners and one cook, the Claimant.

8. The Claimant was employed as a cook on 15 January 2018, and she was dismissed by reason of capability on 14 August 2020 with one month's notice of dismissal which was not paid notice as she was not entitled to pay during her sick leave.

9. The Claimant went on long-term sickness absence from work on 29 October 2018 due to a foot operation. The Claimant remained absent from work until her dismissal date on 14 August 2020 a period of 21.5 months. This exceeded the total amount of time that she was actually at work which was 10.5 months from 15 January 2018 to 29 October 2018.

10. The nursery employed another cook, Sharon Holt, while the Claimant was absent from work. Initially, the Claimant provided sick notes up until 23 May 2019. The sick notes indicated the reason for the absence was "foot problem" and "painful feet". It was the Claimant's husband who dropped in the sick certificates, or the Respondent would find them dropped through its letterbox over the weekend whilst the nursery was closed. The Claimant would also on occasions provide the Respondent with updates regarding her foot condition by way of emails.

11. The Claimant stopped providing sick certificates in May 2019, although she would sporadically write to give an update by way of email. There was no explanation or communication as to why she stopped providing her sick notes. At the hearing, the Claimant said she had all of the sick notes for the entire period of her absence, but she did not bother to send them in after May 2019, as the Respondent did not appear to be too interested in receiving them nor was it concerned about her health. This appeared at odds with the Claimant knowing that she had to send them in during the early part of her sickness absence and her keeping the Respondent informed of how she was progressing during this early period. She alleged to the Tribunal that she did not receive the contract of employment at pages 36 to 42 of the bundle notifying her of the requirement to provide the Respondent with sick notes as set out in clauses 5.1 and 5.3. The Tribunal did not accept that she did not receive the contract. This was because she was aware of the requirement to send in sick notes and to keep the Respondent informed about her absence as set out in the above clauses. She would not have been aware of these requirements if she did not receive the contract and indeed, she did send in her medical certificates and keep the Respondent informed in the early months of her sickness absence.

12. After the sick note sent in May 2019, the Claimant wrote to the Respondent in August 2019 explaining she had an operation in her right foot which unfortunately caused an infection inside her cast. The Respondent found her email in the junk file and responded. The Claimant then wrote to the Respondent again on 11 September 2019 and 2 October 2019, explaining she had another infection, had to attend hospital and was unable to walk due to an ulcer which was extremely painful. The Respondent did not respond to these emails as for some inexplicable reason the Claimant's emails kept going into the junk folder and were not seen. The last time the Claimant gave the Respondent an update was 14

January 2020, but she did not provide an update regarding her health or indicate when she would be fit to return to work.

13. While the Respondent did not contact the Claimant directly during these months, it often asked the other cook, Mrs Holt, how the Claimant was as the Respondent knew they had a close friendship. The Respondent's witnesses gave evidence to the Tribunal which was accepted that the Respondent wished to leave the Claimant alone as much as possible so she could recover. Furthermore, the Respondent was aware that Mrs Holt and the Claimant were close friends, and she would often pass on information about the Claimant's progress to the Respondent.

14. On 28 April 2020, given that the Claimant had not contacted the nursery or provided any sick notes and was not receiving any pay, the nursery wrote to the Claimant as it assumed she no longer wanted to return to work.

15. In early June 2020, as the Respondent had not received a response from the Claimant, a letter was drafted to the Claimant on 24 June 2020 terminating her employment for some other substantial reason. However, before the Respondent could finalise and send it to her, a letter from the Claimant was hand-delivered through the letterbox late at night at the end of June 2020, in response to the Respondent's letter sent to her of 28 April 2020. The draft letter dated 24 June 2020 was never sent to the Claimant.

16. In her letter, the Claimant said that she remained on sick leave but was not able to give a date of return to work due to complications with her operation and delays due to the pandemic. Her letter also stated that she was not able to wear shoes, that further surgery was needed and had been arranged (although delayed) and she was unable to work a complete shift. The Claimant referred to the possibility of a job share with the other cook, Sharon Holt after her surgery but she was unable to give a date of when this would be or when she would be fit to return to work. The Claimant apologised for not writing sooner to update the Respondent on her sickness absence as the 'virus' had 'hit' and she 'didn't get around to dealing with the situation.'

17. As it was not clear to the Respondent from the Claimant's letter if she would be returning to work and when that would be, the Respondent wrote to the Claimant on 1 July 2020 inviting the Claimant to a capability meeting and advised her of her right to be accompanied. The letter stated that the Claimant had been on sickness absence 29 October 2018 and that she remained signed off work and would not be returning to work until an operation on her foot had been completed. There was no date given for the operation and that Claimant at that time had been off work for 20 months and there was no expectation that she would return soon. The Claimant was warned that the Respondent was considering terminating her employment on the grounds of capability and she was invited to a capability review meeting to discuss the issues on 14 July 2020.

18. The meeting took place on 14 July 2020. Anna Blogg, one of the other managers of the Respondent, and Jade Chatfield, the dismissing officer chaired the meeting. The Claimant stated during the meeting that she was still waiting for another operation on her foot and was unsure when this was going to be due to delays as a result of Covid-19. The Claimant explained that her foot was still painful, and she was unable to stand for long periods of time. She stated she would be unable to stand in the kitchen for a whole shift and suggested that she could maybe return to work for one hour per day, but even then, her representative, Mr. Gary Holt, said one hour may be too much and it could only be 30

minutes to start with. The Respondent acknowledged this proposal and explained it would discuss it with the head office.

19. During the meeting, it was acknowledged that there had been miscommunication from both parties. The Respondent explained to the Claimant that the reason why it had not been in contact with her very often was because the Respondent did not want to put more pressure on her while she was off sick, unable to walk and in pain. The Respondent's managers said that they would often ask Sharon Holt, the other cook, how the Claimant was, as they knew they were close friends. They apologised and the Claimant also acknowledged that she should not have stopped sending her sick notes.

20. The Claimant also explained the reason why she stopped sending her sick notes was because the other cook, Sharon, had told her that the nursery was going to send her a letter and she wanted to read the letter before sending more sick notes. Ms Chatfield explained that this was not the case. The Tribunal accepted the evidence of the Respondent in this regard. The minutes of the meeting taken by the Respondent do not show this and in any event as specified above at paragraph 11 the Tribunal accepted that the Claimant was well aware of her duty to send in sick notes for the entirety of her sickness absence but chose not to do so. Minutes of the meeting were sent to the Claimant after the meeting.

21. After careful consideration and taking into account the Claimant's account of her condition, it was clear to Ms. Chatfield that she was not fit to return to work and she did not know when she would be fit to return as she was unable to provide a date for her return. Given that she had been off sick for nearly two years and was still not able to provide any evidence of a return date, it was decided that her employment contract would be terminated due to her being unable to carry out the duties outlined in her job description.

22. An undated letter was sent to the Claimant on or around 23 July 2020 after the capability meeting on 14 July 2020. The letter confirmed that the Claimant had been off work sick for 20 months and that she was still awaiting an operation on her foot. The Claimant had confirmed that it was still difficult for her to stand for long period of time without sitting down and she was still unable to wear shoes. The Respondent had considered her proposal of returning for a short period of time working for one hour a day but that unfortunately this was not practicable for the nursery operation. The Respondent notified her that her employment would be terminated with one months notice on 14 August 2020. The letter also gave her the right to appeal against her dismissal.

23. The Claimant appealed her dismissal, and an appeal meeting was arranged with Reverend Redbond, the appeal officer, the Claimant and her representative, Mr. Gary Holt. The Claimant appealed her decision on 23 July 2020, and she was invited to attend an appeal hearing. There was an issue arranging the date, as the Claimant explained she had booked a holiday during the week the Respondent had suggested. It was unclear to the Respondent how the Claimant could go on holiday while being off sick with her condition.

24. The Claimant's appeal was heard on 18 August 2020. The appeal officer chaired the appeal hearing and the Claimant was represented by Mr. Holt the husband of Sharon Holt. During the meeting he listened carefully to the Claimant's concerns and her grounds of appeal. One of the questions the Claimant's representative asked was why a medical examination of the Claimant had not been requested. Reverend Redbond responded confirming it was not necessary as the Claimant could not confirm that she would return to work at any time soon and that she may need a further operation. Reverend Redbond

questioned what additional information a medical examination would have provided in these circumstances. It was clear to the Respondent at the time from what the Claimant had already told the Respondent of the impact of her condition had on her ability to return, in particular that she could not stand for long periods and that her feet were still painful. The Respondent also knew that she was unable to work a full shift, that only 30 minutes seemed manageable and that she was unable to provide a work return date.

25. Reverend Redbond also explained that the nursery had been making enquiries regarding the Claimant's health with the other cook, Sharon Holt as the Respondent knew they were close friends rather than directly with the Claimant as the Respondent did not want to put more pressure on the Claimant whilst sick. However, Reverend Redbond explained to the Claimant that she should have also continued to send her sick notes as specified in her contract of employment. The Claimant also queried why the position of cook was no longer needed as she had heard from Sharon Holt, the other cook, that she had been made redundant following a restructure as a result of Covid-19. Reverend Redbond explained that unfortunately the number of children attending the nursery had significantly dropped and other members of staff were able to prepare meals and perform this role. The minutes of the meeting were sent to the Claimant and her representative after the appeal.

26. On 1 September 2020, Reverend Redbond wrote to the Claimant to confirm the outcome of her appeal. He explained this was because the Claimant's proposal to return for 30 minutes was not practicable for the operation of the nursery and, as the Claimant was unable to provide a return-to-work date, the decision to dismiss her was upheld. The Claimant's employment was terminated on grounds of capability.

27. The Claimant has referred to the other cook, Sharon Holt, and her dismissal from the Respondent's employment by reason of redundancy. Sharon Holt the other cook was recruited while the Claimant was on long-term sickness absence to cover for the Claimant's duties whilst she was on long term sick leave. Due to the Covid-19 pandemic and following the Government's announcement regarding the closure of education settings in late March 2020 and the potential financial impact that this would have upon the nursery, Reverend Redbond informed Ms Chatfield that he was considering the prospect of possibly closing the nursery entirely. However, after careful consideration, Reverend Redbond decided that a restructure was necessary in order to ensure the viability of the nursery and to prevent job losses. There were a number of discussions between Reverend Redbond and Ms Chatfield to find the best resolution for the staff and the nursery. As part of the restructure roles were reviewed and it was unfortunately decided that the nursery did not need a cook anymore as the number of children attending the setting had dropped considerably due to the Covid—19 pandemic which meant that the nursery staff could prepare meals and there was no need for a dedicated cook. In the past, the Respondent had also operated without a cook.

28. The Respondent gave evidence which the Tribunal accepted that Sharon Holt's dismissal was unrelated to the Claimant's dismissal as she was actively working and was dismissed by reason of redundancy, while the Claimant had not attended work since October 2018, was not receiving any pay from the Respondent and was not able to provide a return-to-work date. Therefore, the restructure had no impact on the Claimant's dismissal, as she was dismissed by reason of capability. The Respondent gave evidence which was accepted by the Tribunal that had the Claimant been fit and able to return to work after April 2020, she would have been dismissed in any event on or around 26 June 2020 by reason of redundancy as a result of the pandemic and the restructure.

## Law

29. The Tribunal had to ascertain whether the reason for dismissal fell within section 98(1) of the Employment Rights Act 1996 (ERA) and whether the Respondent had shown the dismissal was by reason of the Claimant's capability and/or some other substantial reason that justified the dismissal of the Claimant in the position that he held.

30. If the Respondent could show that the reason for dismissal was capability and/or some other substantial reason and a potentially fair reason for dismissal, the Tribunal had to decide if the employer acted reasonably or not in dismissing for that/those reasons. The statutory test for fairness is set out at section 98(4) of the ERA;-

31. *"The determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating as sufficient reason for dismissing the employee and .....shall be determined in accordance with equity and the substantial merits of the case."*

32. In *DB Schenker Rail (UK) Limited v Doolan (2010) UKEAT-0053-09*, the EAT observed that in respect of ill health capability dismissals the Respondent must show:- *It had a genuine belief that ill health capability was the reason for dismissal; It had reasonable grounds for its belief; It carried out a reasonable investigation.*

33. Where an employee has been absent long term, the Tribunal must also consider whether the employer can be expected to wait longer for the employee to return (*Spencer v Paragon Wallpapers Limited (1977) ICR301*). Further, in the case of *East Lyndsey District Council v Daubney* it was held that it was not a function of employers or Employment Tribunals to act as medical appeal tribunals to review advice received from medical advisers, the decision whether or not to dismiss an employee was not a medical question but had to be taken by employers in the light of all of the available evidence available to the employer at the time of dismissal.

34. In the case of *BS v Dundee City Council (2013) CSIH91* as applied in *Monmouthshire County Council v Harris (2015) UKEAT/0010/15* indicated that the following factors may be relevant in how long an employer may be expected to wait:- *The likely length of absence; The fact that the employee has exhausted sick pay; The cost of continuing to employ the employee, the size of the employee and the size of the employing organisation.*

35. If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, *Polkey v A E Dayton Services Ltd [1987] IRLR 503, HL*. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event. The question for the Tribunal is whether this particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the Claimant in any event had the unfairness not occurred.

## **Conclusion and Findings**

36. Pursuant to the guidance in the case of *DB Schenker* cited above, the Tribunal had to ascertain firstly whether capability was the genuine reason for dismissal. With regard to the fairness of the dismissal, the questions for the Tribunal were whether the Respondents reasonably believed that the Claimant's dismissal was due to capability, whether that reasonable belief was based upon a reasonable investigation and whether the Respondent had reasonable grounds for reaching that conclusion. The Tribunal noted that it did not have to concern itself with whether the Respondent could have done everything that it possibly could have done but whether the decision to dismiss the Claimant for capability was reached upon reasonable grounds after a reasonable investigation and whether dismissal was within the band of reasonable responses open to a reasonable employer. The Tribunal had to be careful not to substitute its own view for that of the employer.

37. In this case, the Tribunal was satisfied that the genuine reason for the Claimant's dismissal was capability. On the basis of the evidence that was adduced to the Tribunal, the Tribunal concluded that the Respondent genuinely believed that the Claimant was not fit to perform her role. The Claimant had in her role as the cook at the nursery a physical role that required her to spend 4 hours per shift on her feet undertaking various strenuous tasks which required her to be mobile. At the time that the Respondent wrote to the Claimant on 1 July 2020 the Claimant had been off work continuously for 20 months. In her letter to the Respondent at page 56 which followed the Respondent's letter to the Claimant of 28 April 2020 at page 55, it was clear that the Claimant was unfit to work due to her injured foot and that she would remain unfit to work on a continuing basis until after she had further surgery on her foot. In her letter at page 56, the Claimant could not give a date for the operation but that it was clear to the Respondents that this would not be for some considerable period of time. As a consequence, the Claimant was invited to a capability review meeting on 14 July for the Respondent to review the position after having warned the Claimant that her employment could be terminated on the grounds of capability.

38. It was clear to the Tribunal that the Respondent genuinely believed that the Claimant was incapable of fulfilling her duties when it wrote the letter to the Claimant of 1 July and the Respondent's witness, Ms Chatfield gave clear evidence to the Tribunal that at this time her genuine belief was that the Claimant was unfit to undertake her duties. The Claimant did not genuinely challenge Ms Chatfield's belief in respect of her incapability and the Tribunal accepted Ms Chatfield's evidence that the genuine reason for the Claimant's dismissal was capability.

39. The Tribunal then had to go on to consider whether the dismissal was fair by reason of capability, and this involved the Tribunal considering whether the Respondent undertook a reasonable investigation prior to coming to the decision to terminate the Claimant by reason of capability. The Tribunal noted that the Claimant asserted that the Respondent did not carry out a reasonable investigation on the basis that the Respondent failed to communicate with her adequately, failed to take into account medical evidence and failed to consider alternatives other than dismissal such as a phased return to work.

40. With regard to the issue of communication, the Tribunal noted that prior to the Respondent's letter to the Claimant of 28 April 2020 there was limited communications between the Respondent and the Claimant as to her ongoing sickness absence which by the time of the letter had lasted some 18 months. This explained why the Respondent had asked the Claimant the question of whether or not the Claimant was planning to return to



work due to her long-term sickness absence. However, by the time the Claimant responded to the inquiry contained in the letter as to whether she was planning to return to work or not which response was contained at page 56, the Tribunal came to the view that the Respondent thereafter communicated with the Claimant in a reasonable manner. Indeed, the letter of 1 July 2020 at page 58 constituted a reasonable attempt by the Respondent to address the ongoing sickness absence of the Claimant which by the date of the letter had lasted twenty months. It was reasonable for the Respondent, after the Claimant's letter at page 56 stating that she was unfit to undertake her duties and would remain so pending an operation on her foot, to meet with the Claimant at a capability review meeting on 14 July 2020. It was also reasonable for the Respondent to warn the Claimant that the Respondent was considering the termination of the Claimant's employment by reason of capability. This letter was a reasonable attempt on the Respondents part to ascertain the Claimant's state of health, her continued proposed length of absence and when she would be fit to return to work to undertake her normal contractual duties.

41. It was also clear to the Tribunal that at the capability review meeting on 14 July 2020 conducted by Ms Chatfield, the Respondent communicated reasonably with the Claimant and gave her a full opportunity to explain her condition and confirm when she would be able to return to work to undertake her contractual duties. At this meeting, it was clear to the Respondents that the Claimant would not be able to undertake her contractual duties for some considerable period of time as she did not have a date for a further operation to her foot and was unable to say when that would be. The Claimant also confirmed that she could not stand, could not walk, and could not wear proper shoes. The Claimant at this meeting stated that she could not return to her role for the foreseeable future and might be able at some stage in the future be able to undertake one hour per day with a stall to sit upon and be able to undertake part of her duties. The Claimant at the meeting was significantly impaired and was not in a position to return to fulfil her duties nor was she in a position to give the Respondent a clear idea of when she would be able to fulfil her duties.

42. The Claimant at the Tribunal hearing attempted to give the Tribunal different evidence to that contained in the contemporaneous documents confirming that she was able to undertake her duties. However, the Tribunal chose to accept the evidence contained in the contemporaneous documents contained in the trial bundle. The Tribunal did not accept that the Claimant was a truthful witness in this regard and accepted that the Respondent was entitled to accept the evidence given to it at the capability review meeting. This evidence from the Claimant herself was that she was unable to undertake her duties as a cook and that there was no return date in sight, and she was not able to give a possible return date. In the Tribunal's view it was not unreasonable for the Respondent to take the Claimant at her own word that she was unable to undertake her duties and that there was no potential return date in sight.

43. The second limb of the Claimant's argument that her dismissal was unfair was that the Respondent did not consider medical evidence before taking the decision to dismiss her. However, the Tribunal noted and agreed with Reverend Redbond's (the appeal officer) question raised at the appeal meeting on 18 August 2020 which was what difference would a medical examination have made to the outcome given what the Claimant had told Ms Chatfield at the capability review meeting on 14 July. The Claimant was herself unable to answer this question and Reverend Redbond concluded that it would not have made any difference to the outcome. The Tribunal noted that the overwhelming evidence presented by the Claimant to the capability review meeting and the appeal meeting on 18 August, was

that she was unable to undertake her duties, would continue to be unable to undertake her duties and that there was no end in sight even if a further operation had been able to resolve the Claimant's foot injury.

44. The Tribunal concluded that it was not unreasonable for the Respondent to trust the Claimant's own conclusions in this regard and take her word that she was incapable of undertaking her duties and that any medical evidence obtained would not have altered the situation. In all likelihood, the medical examination would have come to the conclusion that the Claimant was unable to undertake her duties and would remain unable to undertake her duties for a considerable period of time. At the time of the dismissal there was no operation arranged to deal with the Claimant's foot injury and that even if one was arranged, it would be a considerable period of time before the Claimant could return to work. It was reasonable therefore for the Respondent to have taken the decision to dismiss the Claimant without having obtained medical evidence based upon what the Claimant had already told the Respondent at the time. The tribunal concluded that this was a reasonable conclusion for the Respondent to have reached on the basis of the evidence that it had before it at the time of the capability review meeting on 14 July and at the time of the appeal meeting on 18 August 2020.

45. The third limb of the Claimant's argument that her dismissal was unfair was that the Respondent failed to consider alternative options other than dismissal due to capability. At the capability review meeting, she cited that she could return to work at some stage in the future undertaking one hour per day possibly sitting on a stool. There was no actual suggestion of when this could be, and it was unlikely that this could have happened until after the Claimant had had a further operation on her injured foot. At the time of the capability meeting and the appeal meeting, there was no date that the Claimant could give the Respondent of when such operation was to occur. The Respondent through Ms Chatfield had decided that this was not reasonably practicable given the needs of the nursery and the fact that the offer from the Claimant was purely a hypothetical one. It was clear from the evidence presented by the Claimant at the capability review meeting that her condition was such that she could not at that time return to work. Indeed, at the time of her appeal, the Claimant could not return to work to undertake the hypothetical suggestion of one hour per day. In the circumstances, the Tribunal concluded that the Respondent was entitled reasonably to refuse such hypothetical request on the part of the Claimant.

46. The Tribunal also considered whether it was unreasonable for the Respondent to continue to wait any longer for the Claimant to return to work to undertake her duties. The Respondent had already waited for 20 months and at the time of the Claimant's dismissal, it was clear to the Respondent that the Claimant's continued absence would remain to be long term and uncertain. There was no indication of when the Claimant would be able to return to undertake her contractual duties. The Tribunal noted that the Respondent was a small employer with limited resources albeit the Respondent was not paying the Claimant sick pay or statutory sick pay at the time. However, the continued long term sickness absence of the Claimant was unsatisfactory for the Respondent and continued to be unsatisfactory with no proposed return date in sight. Therefore, it was not unreasonable for the Respondent to conclude that it could not wait any longer for the Claimant to return to work.

47. The Tribunal noted that the Respondent's handbook did not contain a written procedure with regard to dealing with long term sickness absence. However, on reviewing the procedure that was followed, it was clear to the Tribunal that the Respondent had

arranged a capability review meeting with the Claimant on 14 July after giving her an opportunity to attend that meeting with a representative and produce whatever evidence she needed to produce to confirm the status of her sickness at the time and when she would be fit enough to return to work. The Claimant was aware of the purpose of that meeting and was also aware that the outcome of the meeting could be dismissal. In addition, the Respondent gave the Claimant a right of appeal and she attended an appeal hearing at which she presented her evidence. The Tribunal noted that the Respondent dealt with the appeal in a reasonable manner and overall the procedure that was followed was a fair one.

48. Given the above, the Tribunal came to the conclusion that in this case dismissal was within the band of reasonable penalties and dismissed the claim for unfair dismissal. For the sake of completeness, if the Tribunal had found the dismissal to be unfair, the Tribunal would have come to the conclusion that the Claimant would have been fairly dismissed on procedural grounds on the basis of capability had the Respondent obtained a medical report prior to dismissal. The Tribunal concluded that a medical report would have confirmed that the Claimant was unfit to return to work, was awaiting an operation on her foot and even after that operation it was unlikely that she would be able to return to work for some considerable period of time. In effect the medical report would have made no difference and the Claimant would still have been dismissed. In addition, the Tribunal would also have concluded that the Claimants position of cook would have been redundant as of 26 June 2020 as the Respondent had no further need for a cook given the restructure of the nursery and the deletion of the position.

49. With regard to the claim for notice pay, the Tribunal noted that the Claimant received four weeks notice of dismissal from 14 July to 14 August 2020. As the Claimant was not receiving statutory sick pay or contractual sick pay, the Respondent was not obliged to pay the Claimant for such notice period. As the notice given to the Claimant was one week more than the statutory notice that the Claimant was entitled to, (two weeks), the Respondent was not obliged to pay the Claimant for the statutory notice pursuant to section 88 to section 89 of the Employment Rights Act 1996. Therefore, the Claimants claim for paid notice was dismissed.

**Employment Judge Hallen**

**19 October 2021**