



Case Number: 3322497/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Ms L Cassell

and

Respondents
R1 – Cracker Jacks Day Nursery Limited
R2 – Ms Fiona Lewis

Hearing held at Reading on 22, 23, 24, 27, 28, 29 March 2017 (Hearing)
30 March 2017 (In chambers)

Representation Claimant: Ms A Reindorf, counsel
Respondents R1 & R2: Mr O Hyams, counsel

Employment Judge Mr SG Vowles

Members Ms A Brown
Ms B Osbourne

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents in a bundle provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Pregnancy / Maternity Leave Discrimination - section 18 Equality Act 2010

2. The Claimant was not subjected to unfavourable treatment because of her pregnancy or because she was on maternity leave. This complaint fails and is dismissed.

Unfair Dismissal – section 98 Employment Rights Act 1996

3. The Claimant was dismissed on 13 October 2015 and that was the effective date of termination. The dismissal was unfair. This complaint succeeds against the 1st Respondent.

Wrongful Dismissal - article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

4. The Claimant was not guilty of gross misconduct such as to justify summary dismissal. The dismissal was wrongful. This complaint succeeds against the 1st Respondent.

Remedy Hearing

5. The case will now be listed for a remedy hearing.

Reasons

6. This judgment was reserved and written reasons are attached.

REASONS

Submissions

Claimant

- 1 On 11 February 2016 the Claimant presented complaints of pregnancy/maternity discrimination, sex discrimination, unfair dismissal and wrongful dismissal to the Tribunal.
- 2 The claim was clarified at a preliminary hearing held on 25 April 2016 and a case management order was made.

Respondent

- 3 In a response dated 14 March 2016 on behalf of both Respondents the claim was resisted.

Evidence

- 4 Evidence on oath on behalf of the Claimant was heard from Mrs Laura Cassell (Nursery Manager) and Mr Matthew Cadmore (Claimant's husband). It also read witness statements from Ms Tara Vaughan (Nursery Nurse) and Ms Kerry Jeffery (Nursery Nurse) but attached little weight to these statements in view of their refusal to attend the hearing.
- 5 Evidence on oath on behalf of the Respondents was heard from Ms Rebecca James (Nursery Nurse), Mr Lee Corless (Appeal decision), Ms Annalise White (Nursery Nurse), Mr Simon Maher (Nursery Nurse), Ms Esther Markman (Nursery Nurse), Ms Gemma McCarthy (Deputy Nursey Manager) and Mrs Fiona Lewis (Nursery Owner).
- 6 The Tribunal also read documents in a bundle provided by the parties. The documentation was extensive, over 1,400 pages. It provided background and context but much of it was not relevant to the issues to be determined by the Tribunal.

- 7 From the evidence heard and read the Tribunal made the following findings of fact.

Findings of fact

Background

- 8 The 1st Respondent is a small, private day nursery based in Slough, Berkshire. It is owned by Mr Kit Lewis and Mrs Fiona Lewis (2nd Respondent) and was set up in November 2011. At the relevant time, it employed 16-18 staff.
- 9 The Claimant is an experienced Nursery Manager who was recruited by Mr and Mrs Lewis on 7 November 2011 as the Nursery Manager at the outset. She was responsible for the day to day running of the nursery including management, support and development of staff, overseeing children's care and development, maintaining legal frameworks, working with parents and maintaining standards of care and customer service. She reported directly to Mr and Mrs Lewis. Below the Claimant was Ms McCarthy (Deputy Manager) and then 3 room leaders each of whom was responsible for approximately 3 nursery staff.
- 10 Mrs Lewis' background was as a Senior Human Resources Manager. She also had some nursery experience including GCSE in child development and work experience in nurseries upon leaving school prior to taking up her career in Human Resources. Although she had no formal qualifications in child care, she worked at and in the nursery on an occasional basis. In the business plan dated 19 June 2011 Mrs Lewis is described as being responsible for the management of the nursery setting to include statutory compliance, human resources, hygiene, health and safety and financial management.
- 11 It was common ground between the parties that the relationship between the Claimant and Mrs Lewis, from November 2011 until the Claimant went on maternity leave on 3 August 2015, was a close and friendly one. The Claimant was godmother to Mrs Lewis' son and Mrs Lewis, on one occasion, took the Claimant on an all expenses paid holiday to New York. It was agreed that during this period Mrs Lewis had absolute trust and confidence in the personal and professional competence and performance of the Claimant.

OFSTED inspection July 2013

- 12 The Ofsted gradings are:
- | | |
|----------|-----------------------------------|
| Grade 1: | Outstanding |
| Grade 2: | Good |
| Grade 3: | Satisfactory/Requires Improvement |
| Grade 4: | Inadequate |

- 13 In July 2013 the nursery received an unannounced Ofsted inspection which had been prompted by a parent complaint about a child falling off a crate at the nursery. Both the Claimant and Mrs Lewis were interviewed by the Ofsted inspector during the course of the inspection. Following the inspection, Ofsted produced a report in which the previous grading of "Good" was reduced to "Inadequate". This reduction was of serious concern to Mrs Lewis and the Claimant because the grading is available to the public and would be seen by parents whose children attended the nursery or who were considering placing their children at the nursery.
- 14 On 27 July 2013 the 1st Respondent made a written complaint to Ofsted about the inspection and the report. On 10 September 2013 Ofsted responded to the complaint. On 25 September 2013 the 1st Respondent responded to the Ofsted response by way of a further complaint.

OFSTED inspection February 2014

- 15 On 18 February 2014 there was a further Ofsted inspection. In the report that followed the grading had improved from 'Inadequate' to 'Good'.

Complaint to OFSTED

- 16 During this period, the Claimant had made an anonymous complaint to Ofsted about an alleged assault by Mrs Lewis on Stacey Cotterall, one of the nursery staff. Ms Cotterall had herself also made a complaint to Ofsted about the matter. The incident had allegedly occurred on the day of the Ofsted inspection on 16 July 2013. These complaints resulted in a further unannounced visit by Ofsted to the nursery on 17 September 2013.
- 17 On 7 November 2013 Stacey Cotterall resigned but the 1st Respondent refused to accept her resignation and dismissed her summarily for gross misconduct.

Pregnancy

- 18 On 2 January 2015 the Claimant informed Mrs Lewis that she was pregnant with her first child.
- 19 On 19 January 2015 Ms McCarthy commenced employment as the Deputy Manager.
- 20 On 1 August 2015 a "baby shower" was held for the Claimant which was organised and paid for by Mrs Lewis.
- 21 The Claimant commenced her maternity leave on 3 August 2015. During the course of her leave, she kept in touch with Mrs Lewis and the nursery. She

attended Mrs Lewis's birthday lunches on 12 and 19 September 2015. She also visited the nursery with her new baby on 3 and 30 September 2015. In addition, Mrs Lewis had visited the Claimant at her home on 2 and 19 September 2015.

Investigation

- 22 At around the beginning of October 2015 Mrs Lewis, after conversations with members of staff during the course of the Claimant's maternity leave, became to have concerns about the Claimant's attitude towards the nursery, its staff and towards Mrs Lewis in particular. Mrs Lewis said that members of staff had complained to her that the Claimant adopted a regime of harsh management whereby holiday requests, ante-natal appointments, medical appointments and other requests for absences had been unreasonably refused. Also that the Claimant had spoken to the staff in derogatory terms about Mrs Lewis such that she had deliberately instilled in them a fear of Mrs Lewis as their employer. Accordingly, Mrs Lewis instructed Mr Gary Armstrong (of HR Legal Partners), a former HR colleague, to conduct an investigation by interviewing members of the nursery staff about the conduct of the Claimant. During the first two weeks of October 2015, Mr Armstrong interviewed Esther Markman, Rebecca James, Gemma McCarthy and Zita Osmani and he made audio recordings of the interviews.
- 23 Mr Armstrong then produced an "Interim Investigation Report" which ran to 22 pages and summarised the interviews. His summary findings were as follows:

"SUMMARY FINDINGS:

1. *That Ms Cassell resented being held to account by the Board of Directors in terms of every aspect of the business and saw their roles as a mere interference rather than assigning them with the credit and respect they deserved.*
2. *That Laura Cassell as a result perpetrated a culture of fear within the nursery.*
3. *Members of staff have been bullied and harassed in the work place by Laura Cassell to such an extent there is a need for counselling for at least one staff member if not more.*
4. *There has been a campaign of what seems to be sabotage on the part of Laura Cassell alongside a sustained and long standing campaign of subversive and disruptive conduct designed mainly if not solely to cause distress and reliance on Laura Cassell and thus entrench her into her role. In accordance with this, I believe it is highly likely that Ms Cassell either*

instigated or purposefully made ill founded and untrue allegations to social services and made false allegations or statements to OFSTED.

5. *Purposefully ring fencing Ms Lewis away from the rest of the staff by dishonestly portraying her in an aggressive way thus creating a hostile, intimidating environment and thus a safeguarding risk where necessary communications were hindered and where senior members of staff go unchallenged.*
 6. *There has been a sustained process of undermining and marginalising the Board of Directors by disclosing matters that were only known to Ms Cassell to other members of staff. These matters were private, and personal to the Directors and in some circumstances entirely defamatory. It is my finding that these disclosures were solely for the purposes of undermining confidence in the board and thus engendering a reliance upon her based on fear.*
 7. *There is a culture led by Laura Cassell of nepotism and favouritism detrimental to the business and practice of the nursery.*
 8. *That work necessary for the improvement of practice and or the business was deliberately hindered, ignored and incomplete. Furthermore work was created in such a way that was over complicated.”*
- 24 At the end of the report, Mr Armstrong said: *“I believe there is a clear disciplinary issue to answer in respect of my Summary Findings”.*

Dismissal – 13 October 2015

- 25 On 12 October 2015 Mrs Lewis sent a text to the Claimant as follows:

“Hiya I’ve received a very serious complaint which unfortunately involves you. I will need to meet you urgently to discuss this – I will be in Reading at the Holiday Inn on the Basingstoke Road tomorrow so I need you to meet me there at 5.00pm. I think it’s a good idea that you arrange for someone to look after Wills maybe Matts at home or your mum and dad can help. You know I wouldn’t bother you if this wasn’t urgent and important. See you tomorrow Thanks Fi x”

- 26 On 13 October 2015 the Claimant attended the meeting as requested. She attended with her husband who waited outside in the car with her 7 week old son. She entered the meeting room and found Mrs Lewis and Mr Armstrong with their laptops and the interim investigation report on the table. The meeting was audio recorded and a transcript produced which was headed *“Investigation Meeting with Laura Cassell – 13.10.2015”*. It was a short meeting during which

Mrs Lewis said that she wanted to talk about a complaint which had been made during the last 3 weeks and which she said were concerning and alarming for her. The Claimant asked if she could have somebody accompany her at the meeting and that was refused. She complained that she was being “bombarded” and that she had been given less than 24 hours’ notice of the meeting. The meeting ended as follows:

*“(Fiona) so, I want to get this dealt with as soon as possible.
(Laura) through message, no, well that’s fine. I’ll take this away and I’ll respond to you – thank you
I’m not going to be bombarded by you
(Fiona) Well, I’ll tell you what’s going to happen Laura, no no no, I’ll tell you what’s going to happen Laura, you are going to listen
(Laura) unfortunately not Fi, you can’t keep me here, I’m going to have to walk out
(Fiona) Right, so what we’re going to do is we’ll do it in writing
(Laura) that’s fine
(Fiona) but you are effectively dismissed with immediate effect, the letter will say what the content is ok?
(Laura) What without any investigation to find out....
(Fiona) so you won’t....
(Laura) to find out?
(Fiona) well you’re not prepared to discuss it are you?
(Laura) No ! because you’re bombarding me, I have no witness here
(Fiona) you don’t need a witness for a discussion
(Laura) that’s not fair, you can’t bombard me
(Fiona) but now you want to cut to the chase, you’re dismissed
(Laura) ok, fine I’ll I’ll...
(Fiona) So you won’t make contact with the staff, you won’t make contact with anybody Laura.
(Laura) Find, I’ll respond to you
(Fiona) Are we clear?
(Laura) I will respond to you
(Fiona) No, we’ll write to you don’t worry.... Thanks”*

- 27 On 15 October 2015 Mrs Lewis wrote to the Claimant to confirm the dismissal and the letter included the following:

*“Dear Laura
During the last 3 weeks staff members have approached me and have also made comments in front of me which I found to be extremely concerning and alarming.*

As these comments were about you and involved myself and Kit, I asked Gary Armstrong to investigate independently of me so that the facts could be

established in a fair and impartial manner. He took statements and provided an interim report based on the findings.

The findings from the report were frankly shocking and deeply disturbing as you will appreciate having read them.

- 1. It would appear that you have systematically bullied, intimidated, harassed and victimised staff behind my back...*
- 2. ... defaming myself and Kit ... You have turned staff to compete against one another...*
- 3. ...*
- 4. ... you have embarked upon a personal vendetta against me...*
- 5. You have affected the personal lives of staff in such a vicious and vindictive way...
....creating a fabric of lies and false allegations so that people are dismissed if they are a threat to you personally...*
- 6. You have behaved in an erratic and appalling manner towards the staff...*
- 7. You have been grooming the staff...*
- 8. Treated other staff who you see as weak less favourably...*
- 9. You have deliberately isolated each individual person...*
- 10. You have placed people in appalling and comprising [sic] positions...*
- 11. You have acted in a calculated and determined way to do nothing short of restrict and bring down our business in the most toxic and appalling way...*
- 12. ...*
- 13. When you were presented with the interim findings as part of the investigation you then suggested that you had been bombarded and refused to take part in the investigation meeting and attempted to walk out of the meeting. It was quite clear that you treated the process with scant regard and with a fair degree of arrogance in that your primary approach was not to engage but to control it moving forward. It was at this point that I decided to terminate your employment as such behaviour has completely destroyed the relationship of trust and confidence and we therefore no longer could continue with your employment*
- 14. This letter confirms that you were dismissed summarily on 13th October 2015 on the grounds of gross misconduct due to bullying, breach of implied trust and confidence and some other substantial reason justifying termination of employment.*

....

Due to our concerns about your behaviour:

- 1. We have contacted Thames Valley Police...*
- 2. If you should take any other action to publicly disclose any further wrongful or untrue information and or allegations about us personally or about our business then we will pursue you through the courts for defamation...*

3. *You will not be permitted to make contact with us, the nursery staff or anyone connected with the nursery by virtue of your employment, whether past or present including parents. ...*
4. *We will in due course be contacting Ofsted to report a change of manager and we will share appropriate information about these matters. ...”*

Appeal

- 28 On 2 November 2015 the Claimant produced a response to the interim investigation report. It was detailed and consisted of 90 paragraphs over 38 pages.
- 29 Mrs Lewis appointed an independent HR consultant, Nancy Batchelor, to conduct the appeal with Mr Lee Corless, a friend of Mrs Lewis who had previously run his own nursery, to act as note-taker.
- 30 In the meantime, Mr Armstrong had prepared witness statements for Ms Markman, Ms James and Ms McCarthy taken from his recordings of his interviews with them on 7/8 October 2015. Two of these statements were sent to the Claimant on 13 January 2016 and one of the statements was not sent until just after midnight on the day of the appeal meeting.
- 31 The appeal meeting took place on 15 January 2016. Mrs Lewis had instructed Mr Corless to audio record the meeting. He did so covertly and did not inform Ms Batchelor or the Claimant that he was doing so. The fact that he had recorded the meeting was not disclosed to the Claimant until documents were disclosed during the course of these Tribunal proceedings.
- 32 Following the appeal meeting Ms Batchelor wrote to Mr Armstrong on 24 January 2016 to inform him that she no longer wished to be involved in the appeal process. She did not give a reason.
- 33 Mrs Lewis thereupon decided that the appeal process would be taken forward by Mr Corless. He wrote to the Claimant on 26 January 2016 to ask her to confirm the accuracy of his handwritten notes of the appeal meeting. He did not mention that he had also made an audio recording. Later, he invited the Claimant to a new appeal meeting on 12 February 2016 but the Claimant declined to attend because she said that she had no confidence that he would find in her favour and she was intending to pursue an Employment Tribunal claim.
- 34 On 26 February 2016 Mr Corless sent his appeal outcome to the Claimant. It was a detailed letter over 11 pages. His conclusions were highly critical of the Claimant's conduct. It included matters which were in the interim investigation report and in Mrs Lewis's dismissal letter and also additional matters which he

said that he had uncovered during the course of his investigations. He rejected the appeal and upheld the decision to dismiss.

- 35 In the meantime, on 11 February 2016, the Claimant had presented her ET1 claim form to the Tribunal.

Decision

Unfair Dismissal

- 36 Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by her employer.
- 37 For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.
- 38 Firstly whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.
- 39 Secondly whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4), in particular did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.
- 40 Thirdly the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses.
- 41 The ACAS Code of Practice on Disciplinary Procedures (2015) sets out the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.

- 42 The Tribunal took account of section 207 Trade Union and Labour Relations (Consolidation) Act 1992 as follows.

207- Effect of failure to comply with Code

- (1) *A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.*
 - (2) *In any proceedings before an [employment tribunal] or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining the question.*
 - (3) *In any proceedings before a court or [employment tribunal] or the Central Arbitration Committee any Code of Practice issued under this Chapter by the Secretary of State shall be admissible in evidence, and any provision of the Code which appears to the court, tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining the question.*
- 43 In this case, the Tribunal found that there was wholesale disregard of the basic requirements of the ACAS Code of Practice. The Code includes the following:
5. *It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*
 6. *In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*
 7. *If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.*
 8. ...
 9. *If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to*

answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.

11. The meeting should be held without reasonable delay whilst allowing the employee reasonable time to prepare their case.

12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

13. Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- a formal warning being issued; or*
- the taking of some other disciplinary action; or*
- the confirmation of a warning or some other disciplinary action (appeal hearings)*

...

18. After the meeting decide whether or not disciplinary or any other action is justified and inform the employee accordingly in writing.

...

26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.

27. The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case.

28. *Workers have a statutory right to be accompanied at appeal hearings.*
29. *Employees should be informed in writing of the results of the appeal hearing as soon as possible.*
- 44 The Claimant was given less than 24 hours notice of the meeting held on 13 October 2015. She was not informed of the purpose of the meeting, other than it involved “*a very serious complaint*”. She was not provided with anything in writing before the meeting. She was not provided with any written account of the allegations against her when it would have been a simple and straightforward matter to have provided her with the interim investigation report which would have allowed her the opportunity to read that document before the meeting and given her an opportunity to prepare a response to the contents of the report.
- 45 Although the meeting notes referred to an “*Investigation Meeting*”, it quickly turned into a disciplinary and dismissal meeting. The Claimant was provided with a copy of the interim investigation report at the meeting, but she was given no opportunity to read it and indeed it would have been difficult, if not impossible, for her to read and understand the contents of such a lengthy report during the course of a meeting. Additionally, during her evidence to the Tribunal, Mrs Lewis said that she wished to put to the Claimant not only the contents of the report but also other matters which caused her concern about the Claimant’s conduct which were not included in the report and it seems have never, at any stage, been put in writing.
- 46 If the meeting truly was an investigation meeting, there should have been some procedure whereby the Claimant was warned that it was to be turned into a disciplinary meeting and that she should thereupon have been given the opportunity to know the allegations against her in advance and to be accompanied. Her complaint that she did not have someone there with her during the course of the meeting was ignored.
- 47 In the dismissal letter and in the appeal outcome letter, mention was made of the Claimant’s conduct at the meeting as being one of the reasons why she was summarily dismissed. However, upon reading the transcript of the meeting, there was no evidence of what the 1st Respondent has described as “*... treated the process with scant regard and with a fair degree of arrogance in that your primary approach was not to engage but to control it moving forward.*”
- 48 A disciplinary policy and procedure dated November 2013 was included in the Tribunal bundle of documents, but the Claimant claims not have seen it. In any event it was clear that this procedure was not followed in this case.

- 49 The Tribunal found as a fact that neither prior to, nor at, the meeting of 13 October 2015, had the Claimant been given any opportunity whatsoever to know what the allegations against her were, to provide any response, or to consider what evidence or witnesses she might wish to produce in order to answer any allegations. It was a process completely devoid of any procedure, fair or otherwise.
- 50 Procedural defects in a disciplinary hearing can be remedied on appeal provided that the appeal procedure is sufficient to cure earlier unfairness - Taylor v OCS Group Ltd [2006] IRLR 613 CA.
- 51 In this case, however, the appeal process was characterised by more unfairness and tainted by dishonesty.
- 52 In paragraph 4 of the investigation report by Mr Armstrong, it was stated:
- “From the complaints it was clear to Ms Lewis that it would better for an external body investigate the issues and then present evidence to the board of directors as she was too close to the issues and had been personally involved.”*
- 53 However, it is clear from the content of the report that Mrs Lewis was consulted extensively by Mr Armstrong although the consultations and interviews with her were not recorded. Her views were liberally referred to throughout the report and she had clearly played a significant part in the production of the report. Bearing in mind that the main allegation against the Claimant was that she had turned staff against Mrs Lewis and created a culture of fear of her amongst them, it was wholly inappropriate that she should then be involved in the production of the report. She then went further and decided to conduct the investigation/disciplinary meeting herself and to personally summarily dismiss the Claimant.
- 54 Then, during the appeal process, the 3 witness statements, which were served on the Claimant less than 2 days before the appeal meeting, were subject to scrutiny by Mrs Lewis. She had spoken to the 3 witnesses and gone through their statements with them. She said in her evidence:
- “I went through the statements in draft form with Gemma, Rebecca and Esther and made changes to them if they told me that something was wrong and needed to be changed. Gary then sent the corrected versions to Laura.”*
- 55 It follows that not only were the 3 witness statements prepared by Mr Armstrong after the dismissal, but those statements had been corrected by Mrs Lewis before they were sent, late, to the Claimant.

56 During the course of the Tribunal hearing, Mrs Lewis, Ms McCarthy, Ms James and Ms Markman, were cross-examined about the contents of their witness statements and it was clear that there were significant disparities between the transcripts of their original recorded interviews with Mr Armstrong, the contents of the interim investigation report which summarised their accounts, and the witness statements which were finally produced for the appeal meeting.

57 Upon Ms Batchelor withdrawing from the appeal process after the appeal meeting in January 2016, Mrs Lewis appointed her friend, Mr Corless, who had no previous HR experience, to then conduct the appeal process. Mr Armstrong sent a copy of Mr Corless's handwritten notes of the meeting to the Claimant and she replied as follows:

"Unfortunately, these notes are brief and leave out a lot of the detail of my responses and some of the questions and statements made by Ms Batchelor and are not a comprehensive record of the meeting. My responses in particular are not well recorded, they come across as very blunt and leave out a lot of the detail. While that is perhaps understandable as Mr Corless is not a professional note taker, it is a shame that our request to have the meeting recorded was declined.

I am not in a position to amend the notes, they will need to remain as they are but with the clear understanding that they are not agreed as a comprehensive note of the meeting."

58 Mr Armstrong replied to the Claimant:

"We find it surprising that you would not wish to ensure that the notes better reflect your position and the grounds of your appeal. After all this is your opportunity to put forward your side of events and thus ensure that the Chair doesn't miss anything."

59 He did not reveal that, notwithstanding the Claimant's request at the start of the meeting to have it recorded, and her request having been declined, it had in fact been covertly recorded by Mr Corless. The fact of the covert recording was not revealed to the Claimant until the Employment Tribunal's proceedings were underway. This amounted to dishonest conduct by Mr Corless and Mr Armstrong.

60 Although lengthy documents, the interim investigation report, the dismissal letter, and the appeal outcome letter were inconsistent in setting out the allegations against the Claimant and the reasons for dismissal. New allegations were added in the appeal outcome letter which the Claimant never had the opportunity to address. In any event, all of the allegations and findings in the

three documents were so vague as to be incapable of any meaningful response.

- 61 The Tribunal agreed with the Claimant's submission that the allegations were based on unsubstantiated gossip, grumbles, distortions and untruths. The hand of Mrs Lewis could be seen behind all of the matters alleged against the Claimant. In particular, it was perverse, when some of the witnesses said they were "terrified" of Mrs Lewis, for her to place the blame for that state of affairs upon the Claimant and absolve herself from any responsibility whatsoever.
- 62 Additionally, having read the accounts given by the various witnesses, it was clear that the contents of the interim investigation report, the dismissal letter and the appeal outcome letter, even if they did occur, and that was a matter of some dispute, were grossly overstated in those documents.
- 63 The Tribunal found it wholly reasonable for the Claimant to have lost all confidence in the conduct of the Respondents towards her and to refuse to take any further part in the appeal which ultimately was conducted by the unqualified note-taker, Mr Corless.
- 64 Mrs Lewis was involved at every stage of the dismissal process. She prompted an investigation, took part in the investigation, had a hand in drafting the investigation report, conducted the investigation meeting, dismissed the Claimant at that meeting, amended witness statements before the appeal, and appointed her friend to conduct the appeal when the independent consultant withdrew. Her involvement was wholly inappropriate and paid no regard to the requirement for impartiality described in the ACAS Code of Practice.
- 65 The Tribunal found the dismissal to be procedurally unfair.
- 66 The Tribunal also found that the dismissal was substantively unfair as there was no fair reason for the dismissal. There was insufficient investigation or reliable evidence upon which the Respondent could have reasonably concluded that the Claimant was guilty of misconduct which would have justified dismissal. The Respondent was unable to explain what the term "*some other substantial reason*" was directed at in the dismissal letter.
- 67 The dismissal was outside the range of reasonable responses.

Pregnancy/Maternity Leave Discrimination

- 68 Equality Act 2010

Section 18 Pregnancy and Maternity Discrimination

- (1) *This section has effect for the purposes of the application of Part 5 (work) to a protected characteristic of pregnancy and maternity.*
 - (2) *A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –*
 - (a) *because of the pregnancy, or*
 - (b) *because of illness suffered by her as a result of it.*
 - (3) *A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.*
- 69 For discrimination claims under the Equality Act 2010 the burden of proof is set out in section 136 of the Act. If there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision concerned the Tribunal must hold that the contravention occurred. But that does not apply if the person shows that he or she did not contravene the provision.
- 70 There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.
- 71 If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.
- 72 The Respondent's treatment of the Claimant was unreasonable and manifestly unfair. The Tribunal reminded itself, however, that discrimination cannot be inferred from unreasonable conduct alone. It is widely understood that it is unlikely in discrimination cases there will be direct, overt and decisive evidence that a Claimant has been treated unfavourably because of a protected characteristic. Decisions may, therefore, be based upon inferences drawn from actual findings of fact.
- 73 The Claimant submitted that the following matters were sufficient to shift the burden of proof regarding pregnancy/maternity discrimination to the Respondent under section 136 of the Act:-

- 73.1 Mrs Lewis had invited the Claimant to go into business with her as a partner in a recruitment agency but the idea fell away without explanation when the Claimant disclosed her pregnancy.
- 73.2 The Claimant's dismissal and the events leading up to it took place during the Claimant's maternity leave.
- 73.3 Mrs Lewis had visited the Claimant at home when her baby was a few days old and it was suggested that it was at this point that Mrs Lewis realised that the baby had replaced the nursery as the Claimant's first priority.
- 73.4 Mrs Lewis treated Annalise White, a young pregnant woman with a medical complication, in a despicable manner.
- 74 The Tribunal did not find that this amounted to reliable evidence upon which it could find, or infer, that any detriment, or the dismissal, was related to or motivated by the Claimant's pregnancy and/or maternity.
- 75 It was not in dispute between the parties that upon announcing her pregnancy, the news was received with congratulations by Mrs Lewis and by all the other staff at the nursery. Additionally, Mrs Lewis went out of her way to organise and pay for a "baby shower" for the Claimant. Also, the Claimant was paid her full salary during her maternity leave when there was no contractual entitlement, and she was told that she could have a free place for her child at the nursery upon her return to work.
- 76 The Tribunal could find no evidence of any animosity whatsoever by the Respondents towards the Claimant's pregnancy or maternity leave. Quite the contrary, there was evidence that her motherhood was celebrated and welcomed at the nursery. The matters relied upon by the Claimant referred to above were based upon speculation and no reliable evidence existed to support them.
- 77 Although the Tribunal has found above that the Respondents' treatment of the Claimant, the process leading up to dismissal, and the dismissal itself were all unreasonable and unfair, that did not form a basis for a finding of discrimination.

Wrongful Dismissal

- 78 The test for wrongful dismissal is different to the test for unfair dismissal. In the former the reasonableness or otherwise of the employer's actions is irrelevant. The question is whether the employee was guilty of conduct so serious as to

amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.

79 The Tribunal looked objectively at the evidence placed before it and could find no evidence of gross misconduct such as to justify summary dismissal. The complaints by the staff had been encouraged by Mr Armstrong and Mrs Lewis and, as set out above, appeared to be no more than gossip and grumbles and disagreements common in most workplace environments. There was nothing in the evidence which would justify the overblown and emotive descriptions set out in the investigation report, dismissal letter and appeal outcome.

80 The dismissal was wrongful.

Sex Discrimination

81 This claim, although mentioned briefly in the Case Management Order, was not pursued at the hearing. It would not, in any event, have been applicable to treatment within the protected period under section 18(7) of the Act.

Polkey/Contributory Conduct

82 The Tribunal does not consider that any further evidence is required but it would benefit from more focussed submissions on these matters. That could usefully be done at the remedy hearing. The parties should come to the remedy hearing prepared to deal with these matters.

Employment Judge Vowles

Date: 21/04/2017

Sent to the parties on:

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For the Tribunal Office