EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 8000094/2024

Hearing held in Glasgow on 26 September 2024
3 October 2024 and 4 October 2024

Employment Judge M Whitcombe

Ms L Jennings	**Claimant** **In person**
Culture and Sport Glasgow trading as "Glasgow Life"	**Respondent** **Represented by:** **Ms N Macara (Solicitor)**

JUDGMENT

The claimant was not unfairly dismissed.

REASONS

Introduction and background

1. This is a claim for unfair dismissal, brought by a claim form (ET1) which the Tribunal received on 1 February 2024. The claimant was formerly employed by the respondent from 9 July 2018 until 30 August 2023 as a Lead Acro Coach/Performance (Gymnastics). The respondent is a registered charity and a subsidiary organisation of Glasgow City Council. It manages the arts, music, sports, events, festivals, libraries and learning programmes for Glasgow City Council.

2. The claimant was dismissed for what the respondent found to be gross misconduct over the weekend of 13 and 14 August 2022 at the Yate International Gymnastics Training Camp. The key factual allegations were that:

    a. on 13 August 2022 a young gymnast "X" should have been taken to hospital on NHS advice, but was not; and
    b. on 14 August 2022 the claimant shouted at X, prevented X from calling her mother by removing her mobile phone from her, and instructed or encouraged others not to comfort X when X was distressed.

Issues

3. The issues were summarised in the case management order of EJ Tinnion dated 4 April 2024. At that hearing the claimant withdrew a complaint of automatically unfair dismissal for "whistleblowing" contrary to s.103A ERA 1996 and it was later dismissed under rule 52.

4. The issues arising in the remaining complaint of "ordinary" unfair dismissal had evolved and narrowed by the end of the hearing. By the time the parties made their submissions the issues, and some relevant concessions, were as follows.

The reason for dismissal

5. It was common ground that the respondent genuinely and honestly believed that the claimant was guilty of misconduct, and that that belief was the reason for her dismissal. A potentially fair reason for dismissal falling within s.98(2)(b) ERA 1996 was therefore established.

Investigation

6. Did the respondent conduct a reasonable investigation into the alleged misconduct? Was it flawed because:

   a. no investigatory interview was conducted with a child "K", who the claimant argued would have confirmed that X had been behaving in a 'dysregulated' manner on 13-14 August 2022;
   b. no investigatory interview was conducted with Marie Gardner (coach) who the claimant argued was a witness to the incident on 14 August 2022 and would have confirmed that the claimant did not shout at X or otherwise act inappropriately;
   c. no investigatory interview was conducted with Lynn Jackson (a safeguarding officer for another gymnastics club), who the claimant argued was a witness to the incident on 14 August 2022 and who would have confirmed that the claimant did not shout at X or otherwise act inappropriately;
   d. the respondent failed to comply with its own disciplinary policy requiring it to conduct an initial fact-find before any disciplinary investigation.

Grounds for a belief in guilt

7. Did the respondent have reasonable grounds for a belief in the claimant's guilt?

8. Did the conclusion that the claimant was guilty of gross misconduct fall within the range of reasonable responses? That is said to include the following subsidiary points.

a. Was it unreasonable to hold the claimant culpable for not taking X to hospital, given that the 'chaperone' was also available and involved in the incident, and that the claimant tried to take X to hospital but X refused to go and could not be taken without her consent?
b. Did the respondent fail to give any or any sufficient weight to the conduct of X on 14 August 2022?
c. Did the respondent give any or any sufficient weight to the fact that the claimant did all that she reasonably could on 13 August 2022?
d. Did the respondent give any or any sufficient weight to:
    i. the fact that the claimant did not have a rest break between 13 and 14 August 2022;
    ii. the fact that the claimant had been feeling unwell;
    iii. a supportive witness statement from Lynn Jackson prepared on the claimant's behalf for the disciplinary hearing?
e. Was there a breach of natural justice in that a witness, Richard Campbell, had also been involved in the decision to require the claimant to respond to allegations of misconduct?
f. The claimant had no opportunity to cross-examine the witnesses whose evidence the respondent relied on when forming its belief that the claimant was guilty. This appears to be a point of procedural fairness rather than an aspect of the question whether a conclusion of guilt fell within a reasonable range.
g. Was the respondent's decision to dismiss influenced by a separate disciplinary process called out by another organisation (Scottish Gymnastics, the national governing body for gymnastics in Scotland) and, if so, did that mean that the respondent's decision to dismiss fell outside a reasonable range?

Sanction

9. I will add to that list the overarching question whether the sanction of dismissal fell within the range of reasonable responses. Both sides clearly had the issue of sanction in mind, although it was never explicitly part of the list of issues.

Most remedy issues deferred

10. The respondent was concerned that there was insufficient time to complete the hearing, though my own view was that the respondent wished to spend rather too long on the evidence in chief of its own witnesses when most of their relevant evidence was already set out in reports, meeting notes and disciplinary outcome letters. To ensure that the case would be completed within the 3 days available we agreed that this hearing would deal only with questions of liability and contributory fault. If the claimant succeeded, then all other issues of remedy would be dealt with at a separate remedy hearing.

Evidence

11. I was provided with a joint file of documentary evidence running to 871 pages. I have only considered the pages that were referred to (directly or indirectly) in evidence or in cross-examination.

12. I heard from the following witnesses in the following order. All of them gave evidence on oath or affirmation and were cross-examined.

    a. Jane Macadam (Sport Performance Manager, investigating officer);
    b. Andrew Olney (Director of Libraries, Sport and Communities, chair of appeal hearing);
    c. Willie Dunne (then Sports Revenue and Projects Manager, but now retired, chair of disciplinary hearing);
    d. Laura Jennings (the claimant).

13. All of the witnesses appeared credible and seemed to be giving their honest recollection of the relevant facts. While the detail, interpretation and implications of events on 13 and 14 August 2022 were all disputed, there was very little dispute about the facts of the respondent's investigation or the relevant hearings.

Relevant facts

14. Where facts were disputed I made my findings on the balance of probabilities, in other words, a "more likely than not" basis. Where something appeared more likely to be true than untrue, then for the purposes of this judgment it was treated as being true. The converse also applied.

Complaint

15. On 19 August 2022 Lindsey Booth, Head of Wellbeing and Safe Sport at Scottish Gymnastics, drew the respondent's attention to the fact that she had received a complaint from a parent of X regarding incidents on 13 and 14 August 2022 during a training event in Yate.

Suspension

16. Later on 19 August 2022, the claimant was notified of her suspension on full pay pending a formal disciplinary investigation. The reasons for the suspension were summarised in a subsequent letter from Rod Smith, Performance Gymnastics Head Coach, dated 22 August 2022.

17. The issues were summarised concisely in the following way. "The allegation is that whilst on a trip to Yate International Training Camp from 11th to 14th August 2022:

- You shouted at a young gymnast [X] which resulted in her crying.
- You prevented the young person from calling her mother by removing

the phone from her possession.

- You instructed or discouraged others from comforting the young person whilst she was distressed."

18. The claimant was warned that abusive behaviour towards service users or customers was potentially gross misconduct. The claimant was instructed not to discuss the issues with staff or service users while the investigation was ongoing.

Investigation

19. Jane Macadam was appointed to investigate. Her first meeting with the claimant took place on 1 September 2022. The claimant was represented by Eddie Murphy of Unison. The claimant declined to discuss the substance of the allegations, and her representative made a number of procedural criticisms, one of which was that there should have been an initial fact-finding exercise before the respondent decided to suspend the claimant. The claimant explicitly refused to be interviewed and said that she would only answer questions that she wanted to answer. It does not appear that she answered any.

20. A second and more effective meeting with the claimant and her Unison representative took place on 30 September 2022. It resulted in a set of minutes to which the claimant added marginal comments.

21. The investigation report came to just under 250 pages in total. It gathered and appended the following evidence.

a. The complaint from the parent of X to Scottish Gymnastics.
b. Notes of the interview with the claimant on 1 September 2022.
c. Notes of the interview with the claimant on 30 September 2022.
d. The version of the above notes with the claimant's comments.
e. The claimant's emailed response to additional questions dated 21 February 2023.

f. Notes of an interview with Richard Campbell, Sport Participation Manager, dated 9 November 2022.

g. Notes of an interview with Rod Smith, Head Gymnastics Performance Coach and the claimant's line manager, dated 14 November 2022.

h. Notes of an interview with Tamara McDonald, a volunteer at the Glasgow Gymnastics Club who attended the Yate camp as a volunteer chaperone, dated 3 March 2023.

i. A statement from Rod Smith, taken by Scottish Gymnastics on 13 October 2022.

j. A statement from X, taken by Scottish Gymnastics on 27 August 2022.

k. A statement from Tamara McDonald, taken by Scottish Gymnastics on 26 August 2022.

l. A statement from X's parent, taken by Scottish Gymnastics on 19 August 2022.

m. An email from Dick Murray, who was acting as a member of the safeguarding team for a different gymnastics club attending the Yate camp. The email had been sent to Scottish Gymnastics on 5 September 2022. Jane Macadam thought that the email was sufficiently detailed for the respondent's purposes and decided not to seek to interview Dick Murray.

n. Screenshots provided by the mother of X, showing a conversation between her and X, and a conversation between her and the claimant.

o. A copy of the suspension letter of 22 August 2022.

p. A copy of a letter to the claimant headed "Points of Concern", dated 6 September 2022, in which Richard Campbell, Sports Participation Manager, responded to queries raised by the claimant or her representative at the initial meeting of 1 September 2022.

q. A letter dated 16 January 2023 in which the claimant was notified that the scope of the investigation had been broadened to include the question whether the duty of care in relation to the health and welfare of X had been met on 13 August 2022 and 14 August 2022. The claimant's additional views on that issue were invited. The response was the claimant's email of 21 February 2023, referred to above.

r. The respondent's person specification for the post of "Performance Coach (Gymnastics)".

s. The City of Glasgow Gymnastics Club document, "Roles and Responsibilities of the Chaperone".

t. The City of Glasgow Gymnastics Club Code of Conduct for Chaperones, Coaches, Officials and Volunteers.

u. The Scottish Gymnastics Association Code of Conduct and Child Wellbeing and Protection Policy and Guidance.

v. Many more appendices which were not referred to during the hearing of this claim.

22. Jane Macadam did not consider it necessary to interview any of the other young gymnasts on the trip because they were not present in the viewing area and changing room where the allegations relating to 14 August 2022 took place. Their ages ranged from 9 to 14 and she saw little value in asking them for their interpretation of events when there were already statements from adults (Tamara McDonald and Dick Murray) who directly witnessed the interaction between the claimant and X in the viewing area and, to a more limited extent, the changing room.

23. Neither the claimant nor her Unison representative asked Jane Macadam to interview or seek any other form of evidence from any of the young gymnasts on the trip, or any other person who might have had additional relevant evidence to give.

24. Jane Macadam's conclusion was that there was a disciplinary case to answer and that a formal disciplinary hearing should be arranged in accordance with the respondent's procedures. That was confirmed in a letter to the claimant dated 2 June 2023.

Disciplinary hearing

25. The claimant was invited to a disciplinary hearing by a letter dated 2 June 2023. There were seven numbered allegations as follows:

"

a. You shouted at a young gymnast, which resulted in her crying.
b. You prevented the young person from calling her mother by removing the phone from her possession.
c. You instructed or discouraged others from comforting the young person whilst she was distressed.
d. The Duty of Care to the young person was not met in relation to their health and welfare on the evening of Saturday 13 August 2022 and Sunday 14 August 2022.
e. Your actions are inconsistent with your role as a Lead Acro Coach/Performance Coach (Gymnastics).
f. Your actions are in breach of Glasgow Life Code of Conduct, specifically section 1.2, 1.3.4, 1.3.5, 2.1. 2.3.1 and 2.12.
g. Your actions are in breach of Glasgow Life Code of Discipline, specifically section 1, 6.15 and 6.19."

26. The claimant was warned that dismissal on grounds of gross misconduct was one of a range of potential outcomes.

27. While the claimant was instructed to refrain from discussing the matter with other staff or service users, the letter also stated, "*Management will not be calling any witness to the hearing. If you wish to call witnesses or make any written submissions, I should be grateful if you would provide details of this in advance of the hearing no later than 12 midday on Monday 12 June 2023…*". Neither the claimant nor her trade union representative sought to call any witnesses.

28. The disciplinary hearing took place on 21 August 2023, chaired by Willie Dunne, Sports Revenue and Projects Manager. The claimant was represented by Jim Gallagher of Unison. Jane Macadam presented her investigation report. The claimant was then given an opportunity to present her own case. Point by point, that generally took the form of brief questions from the claimant's representative followed by a similarly brief answers from

the claimant. The claimant's answer would then be followed by comment or submissions from the claimant's representative. Jane Macadam and Jim Gallagher both summed up their respective cases at some length.

29. The claimant criticised the failure to interview any others present in the viewing area, saying that there had been "no attempt to source anyone". However, there was no request for the respondent to investigate further and the claimant had not requested that anyone else should attend the hearing or be contacted prior to the hearing. The claimant relied on some additional evidence in the form of an email from Lynn Jackson (who did not attend the hearing in person), some further screen shots, a plan view sketch of the building layout in Yate, a further statement from the claimant herself, a CV summarising training, employment history and experience and some testimonials.

30. The outcome of the disciplinary hearing and the respondent's reasoning were set out over 10 pages in a letter dated 30 August 2023. All 7 charges formulated in the invitation letter were found proved. The claimant was dismissed without notice for gross misconduct.

Appeal

31. The claimant appealed by way of an email dated 11 September 2023. There were 7 grounds of appeal, but they were rather different from the way in which the case is now put. With some rephrasing, they were effectively:

    a. lack of a fair hearing;
    b. evidence was not recorded in the notes or outcome letter;
    c. 4 allegations were identified in the investigatory report and during the hearing, yet 7 were upheld;
    d. allegations 5, 6 and 7 were not really allegations, but rather policy points;
    e. the references to the policies of Scottish Gymnastics were not relevant;
    f. the outcome failed to deal with the claimant's counter-allegations of

breach of the duty of care owed to her by the respondent;

g. the chaperone owed the relevant duty of care to X, not the claimant.

32. Willie Dunne prepared a report for the purposes of the appeal.

33. The appeal hearing took place on 11 January 2024, before a panel chaired by Andrew Olney. The claimant was once again represented by Jim Gallagher of Unison. Neither side called any witnesses. The claimant was informed that her appeal had been unsuccessful in a letter dated 22 January 2024.

Policies and procedures

34. The respondent has a "Code of Discipline, Disciplinary and Appeals Procedure". The stated aims include the promotion of fairness and consistency in the treatment of individuals, to ensure that satisfactory standards are maintained, and to provide a fair method of dealing with shortcomings. It states that discipline need not be punitive and is also intended to teach and correct. Employees are entitled to representation at every stage.

35. As is common, the Code contains a non-exhaustive list of examples of gross misconduct, which might lead to summary dismissal for a first offence. At paragraphs 6.15 and 6.19 it includes abusive behaviour towards the public and serious breaches of the respondent's Code of Conduct.

36. The Employee Guide summarises the same principles in slightly more accessible language. It reminds staff of the need to follow the Code of Conduct. It also explains that the purpose of an investigation is to identify facts and to establish whether it is necessary to proceed to a disciplinary hearing. An investigation is only required in cases where the facts are not clear. If the facts are clear than an investigation will be unnecessary. Separately, it states that before a "precautionary suspension" takes place an employee's line manager would discuss the matter with them, and that "*you*

will generally be asked your version of events and why you behaved or reacted in a particular manner." I understand those passages to be the basis of the claimant's argument that a fact-finding exercise was necessary prior to suspension. The Guide reminds employees that they can call witnesses at a disciplinary hearing, and that they should identify them to the "Discipline Chair" who would make the necessary arrangements. The Guide also suggests that it is possible to rely on statements from witnesses who are not called to give evidence in person. The purpose of an appeal hearing is said to be to "review" the decision taken at the disciplinary hearing and whether the action taken was appropriate. Staff are reminded that it is their responsibility to ensure that witnesses attend the appeal hearing.

37. Consistently, the respondent's Appeals Policy and Procedure makes it clear that where there are disputes of fact it is open to an appellant to call witnesses. It is the responsibility of the side calling a witness to approach them, secure their attendance and ensure that they are willing to give evidence at the appeal. The procedure also requires management to submit a report and the appellant to submit written reasons for the grounds of appeal. The appeal panel is required to reject the appeal if the decision to dismiss was "reasonable in the circumstances", and to reject it if "the decision was not reasonable". It was also possible for the panel to find that the original decision was "reasonable in the circumstances", but to substitute a lesser penalty considering mitigating factors. The other features of the appeal procedure are not relevant for present purposes and neither side made any submissions on them.

38. The respondent relied on the following parts of the Code of Conduct.

39. 1.2 A warning that all employees must comply with the Code and that a breach might give rise to disciplinary action.

40. 1.3.4 **Accountability** Employees are accountable to [the respondent] as their employer. [The respondent], in turn, is accountable to the public.

41. 1.3.5 **Openness** Employees should be as open as possible in all the decisions and actions that they take. They should give reasons for their decisions and should not restrict information unless this is clearly required by Company policy or by the law.

42. 2.1 **Standards** Employees are expected to give the highest possible standard of service to the public, and where it is part of their duties, to provide appropriate advice to the public, other partners and fellow employees with impartiality. Employees will be expected to bring to the attention of the appropriate level of management any significant impropriety or breach of procedure which would impact on the provision of the service.

43. 2.3.1 **The Public** Employees should always remember their responsibilities to the community which they serve and ensure courteous, efficient and impartial service delivery to all groups and individuals within that community. Each member of the public should be dealt with fairly, equitably and consistently in line with the Company's Equalities Policy.

44. 2.12 **Conditions of Service** All employees are governed by the Company's Conditions of Service.

Legal principles

The reason for dismissal

45. The respondent has the burden of proving a potentially fair reason for dismissal. In this case it is agreed between the parties that the reason for dismissal related to the conduct of the claimant, and therefore fell within section 98(2)(b) ERA 1996.

Fairness – general principles

46. Where the employer has proved a potentially fair reason for dismissal, the test of fairness and reasonableness derives from s.98(4) ERA 1996:

…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.

47. Prior to a change effected by the Employment Act 1980, the employer also had the burden of proving fairness, and some of the older authorities must be read with that in mind. The test of fairness now contained in s.98(4) ERA 1996 does not impose any burden of proof on either party.

48. Whether the employer acted reasonably is a question of fact, not law, and tribunals have a wide discretion to base their decisions on the facts of the case before them and on good industrial relations practice, without regard to a lawyer's technicalities (***UCATT v Brain*** [1981] ICR 542, CA). The reference to "*equity and the substantial merits of the case*" shows that the word "*reasonably*" is to be construed widely (Lord Simon in ***Devis v Atkins*** [1977] ICR 662, HL).

49. It is well-established at Court of Appeal, Court of Session and EAT level that a tribunal must not substitute its own view for that of the hypothetical reasonable employer. The law recognises that different reasonable employers might respond in a range of reasonable ways to a given situation. The correct approach is for the tribunal to assess the reasonableness of the decision to dismiss by reference to a band, or range, of reasonable responses (see e.g. ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, endorsed in many cases including ***Foley v Post Office*** [2000] ICR 1283, CA, which ended a brief but important challenge to the previous orthodoxy).

50. The process must always be conducted by reference to the objective standards of the hypothetical reasonable employer (Mummery LJ in ***Foley*** at 1293 B). If *no* reasonable employer would have dismissed, then the dismissal is unfair. If *some* reasonable employers would have dismissed, then the dismissal is fair.

51. The "range of reasonable responses" test applies not only to the selection of sanction or the ultimate decision to dismiss, but also to the procedure by which that decision was reached (***J Sainsbury plc v Hitt*** [2003] ICR 111, CA).

52. Reasonableness is assessed on the basis of facts or beliefs known to the employer at the time of dismissal, which for these purposes will normally include any internal appeal process (***O'Brien v Bolton St Catherine's Academy*** [2017] ICR 737, CA, ***West Midlands Co-operative Society Ltd v Tipton*** [1986] ICR 192, HL).

53. Compliance with an employer's own procedures will be an important indicator of fairness, and the converse is also true. However, compliance with or breach of internal procedures is certainly not *determinative* of fairness (see ***Fuller v Lloyd's Bank plc*** [1991] IRLR 336, EAT, ***Sharkey v Lloyds Bank plc*** [2015] All ER (D) 199 (Dec) and ***NHS 24 v Pillar*** UKEAT/0005/16)). The tribunal must assess the overall gravity of any procedural shortcoming.

Principles of fairness in dismissals for misconduct

54. The classic test in ***British Home Stores v Burchell*** [1980] ICR 303, EAT remains good law, if allowance is made for the change in the burden of proof since then (see above). The three-part test raises the following issues:

    a. whether the employer did have a belief in guilt (in practice, this is little different from the need to prove a potentially fair reason for dismissal);
    b. whether the employer had reasonable grounds on which to sustain that

belief;

c. whether the employer carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

55. There is no hard and fast rule as to the level of inquiry the employer should conduct to satisfy the ***Burchell*** test. Much will depend on the circumstances, including but not limited to the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. The more serious the allegations against the employee and the more serious the potential effect on them, the more thorough the investigation conducted by the employer ought to be (***A v B*** [2003] IRLR 405, EAT), so an investigation leading to a warning need not be as rigorous as one likely to lead to dismissal. The fact that an employee, if dismissed, might never again be able to work in their chosen field is a relevant factor. Serious criminal allegations must always be carefully investigated, and the investigator should put as much focus on evidence that may point towards innocence as on that which points towards guilt. That is especially so when the employee is suspended and cannot communicate with witnesses. The point was developed by the CA in ***Salford Royal NHS Foundation Trust v Roldan*** [2010] ICR 1457. If found guilty the employee in that case faced criminal charges and a risk of deportation. That reinforced the ET's finding that procedural errors rendered the dismissal unfair.

56. When assessing the question of reasonableness, the employer has to consider any defences advanced by the employee, but the extent to which it was necessary to investigate them to satisfy the ***Burchell*** test would depend on all the circumstances (***Shrestha v Genesis Housing Association Limited*** [2015] EWCA Civ 94), paragraph 23).

57. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out some of the basic practical requirements of fairness that will be applicable in most conduct cases. It is not legally binding but it is admissible in evidence and I must take its provisions into account where they are relevant. Neither

side referred to any in submissions.

Appeals

58. Paragraphs 26 to 29 of the ACAS Code of Practice recommend that employees should be provided with an opportunity to appeal disciplinary action taken against them. Fair appeals are an integral part of procedural fairness and while unfairness in an appeal will not inevitably lead to a finding of unfair dismissal, it will be a relevant matter. Appeals can be relevant in another way too: defects in pre-dismissal procedures or in a disciplinary hearing might be rectified by a suitable appeal. In those circumstances the tribunal's task is to assess the fairness of the whole disciplinary process, including the appeal (***Taylor v OCS Group Ltd*** [2006] ICR 1602, CA). The procedural fairness, thoroughness and impartiality of the appeal stage will all be important, but it is not helpful to resolve the question by a crude categorisation of the appeal as being either a "review" or a "rehearing".

Contributory fault

59. There are two relevant statutory provisions.

a. Section 122(2) ERA 1996 provides that where the tribunal considers that any conduct of the claimant 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.

b. Section 123(6) ERA 1996 provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the *compensatory award* by such proportion as it considers just and equitable having regard to that finding.

60. The language of section 122(2) is therefore less restrictive than that of section 123(6), which requires causation before any reduction can be made. When applying section 122(2), the tribunal must identify the conduct which is said to give rise to possible contributory fault, decide whether that conduct is culpable or blameworthy and decide whether it is just and equitable to reduce the amount of the basic award to any extent (***Steen v ASP Packaging Ltd*** [2014] ICR 56, EAT).

61. Reductions in the compensatory award depend on findings that the conduct was culpable or blameworthy, that the conduct caused or contributed to the dismissal, and that it would be just and equitable to reduce the award by the proportion specified (***Nelson v BBC (No.2)*** [1980] ICR 110, CA). Any reduction must be based on my own findings and view of the conduct concerned, so there is no deference to the respondent's view or to any hypothetical reasonable range of views on those questions (***London Ambulance Service NHS Trust v Small*** [2009] IRLR 563, CA).

Submissions

62. The claimant made her submissions orally. The respondent made its submissions almost entirely in writing. Little useful purpose would be served by setting them out here. Instead, I will deal with the main points while setting out my reasoning and conclusions.

Reasoning and conclusions

The reason for dismissal

63. It was common ground that the respondent genuinely and honestly believed that the claimant was guilty of misconduct, and that that belief was the reason for her dismissal. A potentially fair reason for dismissal falling within s.98(2)(b) ERA 1996 was therefore established.

Investigation

64. I have concluded that the investigation fell within a reasonable range for the following reasons.

a. Jane Macadam captured the evidence of several people in a good position to give first hand evidence of the interaction between the claimant and X in the viewing area. One of them was X, and the other two were adults with no apparent motive to fabricate evidence (Tamara McDonald and Dick Murray).

b. While there were other adults present, there was nothing in the statements and interviews of the above witnesses to indicate to the respondent that other witnesses had cogent evidence to give and should therefore be contacted.

c. While the claimant did obtain and rely on an email from Lynn Jackson, she did not request that the respondent interviewed her fully or that she should give oral evidence at the disciplinary hearing. She had that option. The same applies to Marie Gardner, who was identified in Lynn Jackson's email. Neither the claimant nor her trade union representative requested that any other witnesses should be contacted, interviewed or brought to the disciplinary hearing. A reasonable employer could conclude in those circumstances that all relevant evidence had already been gathered.

d. It is difficult to see what useful material the evidence of child K might have added, or why a reasonable employer would have considered it necessary to interview her. She was present in the gym itself, but not in the viewing area. Evidence regarding X's emotional state prior to the relevant interaction in the viewing area and toilets is not of great significance. It would not justify shouting, or causing X to cry, even if she had already been crying. Further, and as noted above, neither the

claimant nor her trade union representative asked for K to be interviewed. In those circumstances, a reasonable employer could decide that it was unnecessary to seek K's comments.

e. I do not think that reasonableness required the respondent to carry out a preliminary "fact find" before even commencing a formal disciplinary investigation. The comments in the disciplinary procedure section dealing with suspension are obviously intended to deal with straightforward situations. Given the nature of the allegation in this case, some reasonable employers could have concluded that the issue could not be resolved by an informal discussion. Some reasonable employers would think that the important facts were bound to be disputed (as they were) and that only a formal investigation would do.

65. I find that the investigation fell within the range of investigations that reasonable employers would have carried out. I do not think that many, still less all, reasonable employers would have interviewed the additional witnesses identified by the claimant, especially in the absence of a request to do so.

Grounds for a belief in guilt

66. The respondent's submission was that the evidence of three witnesses was sufficient to support a reasonable believe in guilt. I agree. All three were apparently credible. The evidence of those witnesses amounted to reasonable grounds for a belief in guilt and while the claimant disputed many of the relevant facts, the weight of the evidence was against her.

67. **The first allegation** was that the claimant had shouted at X, and that it resulted in her crying.

a. X said that the claimant had shouted.at her: "*then she started*

screaming at me…she was shouting at me…Then she was screaming at me…then I was crying and I was in the bathroom".

b. Tamara McDonald said that the claimant had shouted at X: "*,,,the coach came running out of the gym to shout at her – talk – no to shout. She shouted…She shouted at her that she shouldn't come run to me just because I'm nice and that how dare she speak to her like that…[x] was crying at this point…I could hear the shouting from outside the toilet. I was in the reception area and you could hear her raised voice."*

c. Dick Murray said that the claimant had shouted at X: "*…stood over [X] and shouted words to the effect of 'we will talk when you can talk properly', 'I will not be spoken to like that', 'you need to change your attitude'…[X] replied quietly…Coach started shouting again words to the effect 'you are not ready to talk', 'you will not speak to me like that', 'get out of this area', 'get out of here and go to the toilets'…Coach shouted at her words to the effect of 'get into the toilets and don't talk to anyone'…[X] got up and went into the female toilets/change with the Coach following her, still shouting at her….there was more shouting from the Coach. [X] appeared from the toilets and…had obviously been crying".*

d. The claimant did not suggest any reason why any of those three witnesses might fabricate or exaggerate their account but argued that they might all have mistaken a firm but appropriate tone for shouting. A reasonable employer could conclude that a shared misperception of that sort was unlikely, and that the claimant's explanation was not credible.

e. The email from Lynn Jackson dated 22 July 2023, obtained by the claimant, took matters little further. She referred ambiguously to "*a bit of a heated argument*" but neither confirmed nor denied shouting. She said that what she had heard had not caused her any concern, but her

email lacked the narrative detail of those from X, Tamara McDonald and Dick Murray. A reasonable employer could find it far less persuasive.

68. For those reasons, I find that there were reasonable grounds for the respondent to conclude that the claimant had indeed shouted at X and that it had caused X to cry.

69. **Allegation 2** was that the claimant had prevented X from calling her mother by removing the phone from her possession. Those facts were effectively admitted, although at this hearing the claimant argued that the phone was not "removed" if X willingly handed it over. Reasonable employers could take a different view: that a child who hands over a phone when an adult in a position of authority requires them to, have had their phone "removed" from their possession for all practical purposes. Further, X's statement said that the claimant had said "*give me your phone*" and then tried to "*snatch*" the phone out of X's hands. The rest of X's narrative painted a clear picture of compulsory removal. In those circumstances, there was a reasonable basis on which to find the charge proved.

70. **Allegation 3** was that the claimant had instructed or discouraged others from comforting the young person while she was distressed. Once again, the essential facts were admitted.

a. X had said that Tamara McDonald had been sitting with X until she was instructed to move to another couch by the claimant, and that the claimant had said that no one was allowed to come to speak to X to see if she was OK.
b. Tamara McDonald corroborated that account, saying that the claimant had told her that she was not to speak to X.
c. Dick Murray also heard the claimant say to X, "*you will not talk to anyone*" and "*I want you on your own*".

71. The claimant's point was that there was nothing inappropriate about that because her words and actions had been an appropriate way of supporting

X to regulate her emotions. The claimant explained that she wanted the other people to leave X on her own so that she could calm down prior to a "restorative conversation". The involvement of others could have made the situation worse, in the claimant's view.

72. The weight of the evidence supported a different conclusion. There were reasonable grounds for thinking that X, Tamara McDonald and Dick Murray had all described the claimant shouting at X and telling X off. It was also well established that X was upset during the encounter. There was a reasonable basis for concluding that the instruction not to comfort or speak to X was more of a punishment than a supportive or restorative technique. There was a reasonable basis for a belief in guilt so far as allegation 3 was concerned.

The relevance of X's behaviour to allegations 1-3

73. In order to deal with one argument raised in the list of issues, I do not accept that all reasonable employers would have regarded the conduct of X herself as relevant, or exculpatory. Whatever X's conduct in the gym, it would not explain or justify shouting at her, removing her phone or instructing others not to comfort her. The respondent had reasonable grounds for a belief in the claimant's guilt of allegations 1-3.

74. **Allegation 4** was that the claimant had failed to discharge the duty of care owed to X on the evening of 13 August 2024. By the end of the hearing, the claimant accepted that she owed a duty of care to safeguard X's health and welfare at the relevant time, though she had often argued otherwise during the internal process. It was common ground that X had been showing symptoms of possible heat exhaustion or dehydration. There was no dispute that NHS 24 had been contacted and that their advice had been clear: X should be taken to hospital. That did not happen, apparently because X herself was unwilling to go. Instead, X was given a rehydration drink prepared in accordance with a recipe found on the internet.

75. Given the potential implications of a failure to follow the medical advice

received, there were reasonable grounds for the respondent to conclude that the claimant had failed to exercise reasonable care for X's health and welfare on the evening in question. There were reasonable grounds for thinking that the duty of care was not discharged simply because X expressed unwillingness to go to hospital. A coach could be expected to use their powers of reasoning and persuasion to procure X's agreement or acquiescence, and to ensure that X attended hospital in accordance with medical advice.

76. The claimant's own evidence during the investigation was that she had said to X that "*if she were to go to bed there was a chance she might not wake up*". A reasonable employer could regard that as an inappropriately frightening thing to say to a child who was already feeling unwell.

77. For those reasons, I find that there were reasonable grounds for the respondent to conclude that the claimant had failed to discharge the duty of care owed to X on 13 August 2022. I reach the same conclusion in relation to 14 August 2022, because the cumulative effect of the facts in allegations 1-3 is a failure to show sufficient concern for the emotional wellbeing of a child in the claimant's care.

78. Given other arguments raised in the list of issues, I should add I do not accept that all reasonable employers would conclude that the claimant had done all that she reasonably could, for reasons which will be clear from the paragraphs above. Since the claimant accepted that she owed a duty of care to X throughout the trip, the argument that no reasonable employer could have found the claimant culpable given that Tamara McDonald was also involved has no merit.

79. As for **Allegations 5, 6, and 7,** the claimant suggested at one point during her evidence that it had been unfair for the disciplinary hearing to consider and make findings on 7 allegations when the investigation had identified 4. However, the claimant ultimately accepted that this was really a semantic point. Allegations 5, 6 and 7 represented the application of policies and procedures to the findings made in respect of the first four factual allegations.

The claimant did not criticise the respondent for applying those policies.

80. **Allegation 5** added little of substance, in that it alleged that the claimant's actions had been incompatible with her role. If charges 1 – 4 were found proved, then it might be thought a matter of common sense that the claimant's actions were incompatible with a coach's role. If an objective basis is necessary, then the respondent highlighted passages in the SGA Code of Conduct for Coaches and Officials, which said, uncontroversially, that coaches should not cause a gymnast to lose self-esteem by embarrassing, humiliating or undermining them, or reduce a gymnast to tears as a form of control. It also said that the safety and welfare of gymnasts should be given the highest priority, and that coaches should behave in an exemplary manner. If those points fail to cover exactly what charges 1-4 describe, then the general message is clear enough. There were reasonable grounds for the respondent to conclude that the claimant's actions had not been those expected of someone with her coaching role.

81. **Allegation 6** concerned breach of the respondent's own Code of Conduct. The paragraphs identified in the disciplinary process are not all relevant to the factual allegations. The point in 1.2 is circular, in that it is a provision of the Code of Conduct which requires compliance with the Code of Conduct. Paragraph 1.3.4 is concerned with accountability, but I do not think that there was any clear accountability issue in this case, or a reasonable basis to conclude that the claimant was in breach of that provision. The same can be said of 1.3.5 which is concerned with openness. It is unclear how the respondent thought that the claimant was guilty of a lack of openness, and I find that there were no reasonable grounds for that conclusion. However, 2.1 is relevant because it reminds staff that they must provide the highest possible standard of service to the public. Given the respondent's findings on charges 1-4 there were reasonable grounds for finding a breach of paragraph 2.1 of the Code of Conduct. The same can be said of 2.3.1 which highlights the need to give what I summarise as courteous and fair service to the public. In my assessment there were no reasonable grounds on which to find a

breach of paragraph 2.12 which requires employees to comply with the respondent's Conditions of Service and HR Policies and Procedures. No relevant terms or additional policies have been identified.

82. For those reasons, I find that the respondent had reasonable grounds for a belief that the claimant was in breach of paragraphs 2.1 and 2.3.1 of the Code of Conduct, but none of the other provisions mentioned.

83. **Allegation 7** was that the claimant's actions breached paragraphs 1, 6.15 and 6.19 of the respondent's Code of Discipline. Paragraph 1 is generic (see above) but there were reasonable grounds for believing that the claimant was guilty of a breach of paragraph 6.15 (abusive behaviour towards X, a member of the public) and 6.19 (serious breach of the Code of Conduct paragraphs 2.1 and 2.3.1, see above).

84. I will now turn to the other arguments made by the claimant. They appeared in the list of issues as aspects of the question whether there were reasonable grounds for a belief in guilt, but they might be better analysed as points of procedural fairness.

External influence

85. There was no evidence to support the claimant's argument that Scottish Gymnastics had influenced the outcome of the respondent's disciplinary process. The claimant accepted that she simply had a suspicion of influence.

86. I reject the argument that the dismissal fell outside the reasonable range wholly or partly for this reason.

The opportunity to cross-examine

87. I reject the argument that dismissal fell outside the reasonable range because the claimant was denied the right to question relevant witnesses. She could have questioned any witnesses who appeared at the disciplinary or appeal hearings, but she did not seek to call any. The claimant was also aware that

it might be possible to ask witnesses questions in writing. She had answered questions in that manner herself. I find no unfairness in relation to an opportunity to cross-examine witnesses. The real issue is that the claimant did not exercise her right to call any, or request that they should be called. The arrangements offered by the respondent fell within a reasonable range. They gave the claimant a reasonable opportunity to call and to question witnesses of her choosing.

Mitigating factors – rest breaks and feeling unwell

88. The list of issues effectively identified an argument that dismissal fell outside the reasonable range because the claimant did not have a rest break between 13 and 14 August 2022 and had been feeling unwell on 14 August 2022. It is argued that these were mitigating factors which all reasonable employers would have given weight.

89. However, the claimant said in evidence that her actions on 13 and 14 August 2022 had not been affected by lack of rest or feeling unwell. In those circumstances they were not mitigating factors of significance, to which all reasonable employers would have given weight. At least some reasonable employers would have found them to be entirely irrelevant factors.

Richard Campbell

90. The list of issues identifies an argument that there was a breach of natural justice in that the claimant's line manager Richard Campbell had the following involvement in the proceedings.

    a. He made the decision to suspend the claimant and was the author of a letter dated 6 September 2022 which replied to "points of concern" raised by the claimant at the investigation meeting on 1 September 2022. He clarified the process and the basis of the decision to suspend the claimant and carry out an investigation.
    b. He was interviewed as part of the investigation on 9 November 2022.

91. I reject that argument. Richard Campbell was not a disciplinary decision maker except in relation to the decision to suspend. He took that decision before he was interviewed as part of the investigation. It was reasonable to interview him as part of the investigation for several reasons, including his knowledge of the training the claimant had received and various issues the claimant had raised with him in 2022. I see no basis for an allegation of bias on the part of Richard Campbell himself, still less against those who conducted the disciplinary hearing or the appeal.

Sanction

92. A reasonable employer could look at the situation in the following way.

    a. On 13 August 2022, a young gymnast, away from home and in the claimant's care, had become unwell to the extent that NHS24 advised that she should be taken to hospital. X did not go to hospital in accordance with that advice. The claimant made a potentially alarming reference to X "not waking up" if she did not drink a rehydration solution.

    b. The next day an incident occurred during training following which the claimant shouted at X, removed X's mobile phone so that she could not call her mother and instructed others, including the chaperone, not to speak to X or comfort her. Adults present had been concerned about the claimant's actions.

93. A reasonable employer could conclude that the claimant had failed to exercise reasonable care for X's health and welfare, and had treated X abusively, discourteously and unfairly. That is because a reasonable employer could reject the claimant's argument that she was simply using a firm tone and using her training to support X in regulating her emotions, for example by removing the stimulus of a phone or conversation with others. A

reasonable employer could conclude that there had been breaches of paragraphs 2.1 and 2.3.1 of the Code of Conduct and paragraph 6.15 and 6.19 of the Code of Discipline.

94. The claimant's insight into and attitude towards those events was important. If, following reflection, she had regretted any of her actions or identified ways in which she would seek to handle a similar situation differently in future, that would have been relevant to a reasonable employer's decision on the appropriate disciplinary penalty. However, the claimant did not think that she had done anything wrong, and alleged that the witnesses had simply misconstrued what they saw and heard, that she could not have done any more on 13 August 2022 and that her actions had been appropriate on 14 August 2022. The claimant did not admit any fault at all and did not demonstrate that she had learned from the experience.

95. In those circumstances, a reasonable employer could conclude that the claimant had no real insight into her actions or regret. That was an important factor. While reasonable employers would give weight to the claimant's 5 years of service and unblemished disciplinary record, some reasonable employers would conclude that the claimant's misconduct was at a level which warranted dismissal for a first offence. Therefore, I find that the sanction of dismissal fell within the range of reasonable sanctions in all the circumstances.

Overall conclusion

96. For those reasons, I find that the dismissal of the claimant was both procedurally and substantively fair. The respondent formed reasonable grounds for a belief in guilt after a reasonable investigation. The procedure adopted fell within a reasonable range. Some reasonable employers would have dismissed.

Contributory fault

97. Although this issue is now irrelevant given my conclusion on fairness, I will set out my findings anyway.

98. I make my own findings of fact as to the relevant misconduct, rather than applying a "reasonable grounds" standard to the evidence. The issue is the blameworthy conduct of which the respondent was aware at the time of dismissal, including the appeal.

99. I find that the claimant behaved as alleged in charges 1-3, that she was not merely using a firm tone and appropriate techniques to help X to compose herself, and that her treatment of X was abusive, insensitive, upsetting and in breach of the duty of care owed by a coach in her position. I also find that the claimant failed to exercise reasonable care for X's health and welfare on 13 August 2022. For the reasons already explored above, X could and should have been taken to hospital. The claimant's handling of both situations fell below the standard of conduct which could reasonably be expected of a coach. She showed no remorse, insight or learning by the end of the disciplinary process. The claimant sought to argue that her actions were justified and appropriate, and that the chaperone and the respondent were both to blame, the latter because of an alleged lack of training. That argument was not pursued at this hearing.

100. My conclusion is that the claimant was highly culpable. That culpable conduct caused her dismissal. It would be just and equitable to reduce both the basic award and the compensatory award by 100%. That is the approach that I would have taken if I had found that the claimant had been unfairly dismissed.

Employment Judge:	**M Whitcombe**
Date of Judgment:	**11 October 2024**
Entered in register:	**14 October 2024**
and copied to parties	