



EMPLOYMENT TRIBUNALS

Claimant: Mrs I Ishtiaq
First Respondent: City of Bradford Metropolitan District Council
Second Respondent: Governors of Menston Primary School

Heard at: Leeds **On:** 15, 16 and (deliberations only)
17 February 2016

Before: Employment Judge Maidment (sitting alone)

Representation

Claimant: Miss L Quigley, Counsel
Respondent: Mr S Gallagher, Solicitor

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is well founded and succeeds.
2. Applying the principles derived from the case of **Polkey**, the Claimant would have been fairly dismissed with a 100 per cent degree of certainty at the point of the appeal panel's determination.
3. It is just and equitable to reduce both the Claimant's basic and any compensatory award by a factor of 35% on the basis respectively of her pre-dismissal conduct and blameworthy conduct contributing to the Respondent's decision to terminate her employment.

REASONS

The Issues

1. The Claimant's sole complaint in these proceedings is of unfair dismissal. It is accepted that the Claimant was dismissed for a reason relating to conduct. It will then be for the Tribunal to examine whether the decision to terminate her employment on such ground was on reasonable grounds after a reasonable investigation. Procedural issues might be relevant to fairness but it was confirmed on behalf of the Claimant that it was not suggested that there was

any purely procedural breach relied upon in terms of the conduct of the disciplinary and appeal hearings and certainly no breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009. It will then be for the Tribunal to consider whether dismissal fell within a band of reasonable responses.

2. The Tribunal made it clear that it would hear at this stage any evidence which related to arguments which might be relevant to the principles derived from the case of **Polkey** and any submission of contributory fault. However, matters of pure remedy, i.e. the Claimant's actual losses and attempts to mitigate her loss, will be considered at a separate remedy stage if and when such stage is indeed reached.

The Evidence

3. The Tribunal was provided with an agreed bundle of documents numbering some 504 pages.
4. The Tribunal having identified the issues took some time to privately read into the witness statements so that when each witness came to give evidence they could do so by confirming their written statements and then being quickly open to be cross-examined.
5. The Tribunal heard firstly on behalf of the Respondent from Mr Iain Jones, head teacher, Marie Wilson, deputy head, Mr Peter Finlay, vice chair of governors and from Ms Annet Nottingham, chair of governors. The Tribunal then heard from the Claimant herself.
6. Having considered all the relevant evidence the Tribunal makes the findings of facts as follows.

The Facts

7. The Claimant had been employed as a teacher at Menston Primary School from 1 September 1997. This is a village school serving what has been suggested to be a relatively affluent catchment area with a two form entry to take children from the age of 4 up to the age of 11 years. It has approximately 420 pupils. Mr Iain Jones has served as head teacher for around 11 years whereas Mrs Marie Wilson is a more recent recruit having joined the school in September 2013. Mr Finlay who chaired the disciplinary panel in respect of the allegations against the Claimant has been a governor for around 28 years and as a retired sub post master has significant standing in and knowledge of the local community. His children were educated at the school. Ms Nottingham, chair of governors and the individual who chaired the appeal panel in respect of the Claimant has been a governor for around 12 years. She is in full time employment as an Associate Dean at Leeds Beckett University and was matched to Menston Primary School on her application to become a school governor made to the local education authority. She had prior to such appointment no connection to the school or locality.
8. The Claimant had previously served the school as head of sports and PE but in more recent years has worked as an ordinary teacher and indeed from December 2013 over 2 days a week, Wednesdays and Fridays.

9. On Wednesday 4 February the Claimant was one up to 4 teachers (accompanied by 4 parent helpers) who took around 40 children from Year 4 (8 and 9 year olds) on a school trip to Skipton Castle. One of the other teachers on the trip was Amy Dawson a newly qualified teacher who shared teaching responsibilities for a particular class with the Claimant.
10. No incident of note or concern regarding any pupil was raised during the trip. However, the following day, 5 February 2015, Miss Dawson reported a concern to Lorraine Gregson, assistant head teacher who in turn reported this to the school's senior leadership team at a routine meeting at the end of the working day. Mr Iain Jones, as headmaster, was in attendance at that meeting.
11. The incident reported to him involved the Claimant and her treatment of an 8 year old boy, Pupil A, whilst on the trip to Skipton Castle. His evidence to the Tribunal was that what was reported to him was contrary to everything he stood for and expected from his staff who are in a position of trust.
12. Miss Dawson duly completed an incident report. She referred to the Claimant having pulled Pupil A aside but of then having herself to deal with an issue at the toilet block. She described walking back down a path with 3 other children and on reaching the bottom of the path overhearing the Claimant say to Pupil A: *"your teacher has told you to behave a number of times today and you haven't listened"*. Pupil A replied but Miss Dawson did not hear the response. She said at that point the Claimant *"pushed"* Pupil A and said *"go away and you can cry as much as you want"*. The Claimant and Miss Dawson then walked towards the terrace to meet the other groups of children. Miss Dawson had noted Pupil A to be crying when the children were then playing on the terrace. She asked him what the matter was and reported that he had said: *"Mrs Ishtiaq shouted and pushed me"*.
13. Mr Jones contacted the school's Human Resources service on 6 February and was advised that the first course of action would be to report the concern to the Local Authority Designated Officer ("the LADO") to make a preliminary decision on whether to treat the matter as a formal safeguarding matter or whether it could be dealt with internally. Mr Jones spoke to the LADO firstly by telephone and subsequently received an email on 12 February saying that this was not a police matter and he could complete his investigation. Mr Jones had not mentioned any concern to the Claimant who had attended work and taught as normal on Friday 6 and Wednesday 11 February, including the class of which Pupil A was a member. He said that he needed to balance the reasonableness of informing the Claimant with his need to keep the school running. He said there had been no previous evidence of the Claimant exhibiting undue physicality with pupils in her charge. Indeed he said that any suggestion of undue physicality struck him as out of character in terms of the Claimant's ordinary conduct as a teacher.
14. The Tribunal notes that from a subsequent interview with Pupil A on 13 February 2015 conducted by Marie Wilson, Pupil A described receiving from Mr Jones a head teacher's reward, most likely on Friday 6 February. Such rewards are given for pieces of work of particular merit and Pupil A was being rewarded for a report he had written of the visit to Skipton Castle. It has never been suggested that such report included anything negative regarding the trip or the Claimant. Pupil A when interviewed on 13 February referred to seeing Mr Jones and is recorded as stating: *"Mr Jones talked to me and he said none of the teachers should shout or push you, but we always have it on*

Wednesdays". Mr Jones could not explain what could possibly be meant by the *Wednesdays* comment. As regards, however, speaking to Pupil A regarding any incident of shouting or pushing Mr Jones said that he did not recall himself what had been reported by Pupil A. When it was put to him that he (Mr Jones) stated those words he said that he didn't think so and that he was there to talk about Pupil A's work. When questioned about this meeting at the Claimant's subsequent disciplinary hearing on 18 May 2015, Mr Jones had no clear memory of the conversation on 6 February with Pupil A. On balance, given the clear reporting of the conversation on 13 February 2015 against an absence of recollection on Mr Jones' part, the Tribunal can only conclude that Mr Jones did refer to shouting and pushing by teachers to Pupil A on 6 February.

15. Mr Jones arranged for the school's HR business partner to attend the school on 12 February and they met with the Claimant to inform her of her suspension from work referring to an allegation that she had "*exhibited unprofessional behaviour towards a pupil*" and acted in breach of the teachers' professional code of conduct. The Claimant was not told of the identity of the pupil where a concern had been registered and indeed from the way the allegation was put, as confirmed in the subsequent letter of suspension of 13 February 2015, believed that 2 separate pupils were involved. Nor was she aware of the allegation relating to the trip to Skipton Castle. The Claimant was given the opportunity of a referral to Occupational Health if she wished such support/counselling, but decided not to take up such offer. Mr Jones subsequently wrote to the Claimant on 16 February 2015 confirming that the external authorities had turned the matter back to the school to investigate the allegations and that he had asked Marie Wilson to undertake the investigation. He said that he had asked Mrs Wilson to start the investigation at the earliest opportunity and said that the Claimant herself would be contacted in the near future inviting her to an interview with the full details of the allegations being investigated.
16. In fact, the Claimant was already aware of Mrs Wilson's involvement following a telephone call from her on the morning of 13 February. She asked the Claimant if she could come into the school for a brief meeting to give her more information. The Claimant had an issue with childcare but later that morning reverted to Mrs Wilson to say that she had managed to make arrangements. The Claimant's position was that she wanted to meet with Mrs Wilson at the earliest opportunity. She said that Mrs Wilson was not however then able to do so because she had insufficient time and matters would have to wait until after the imminent half term break. Mrs Wilson recalled that the Claimant was happy to wait to receive information regarding the nature of the allegation in writing and reflected that in her written note of the conversation.
17. Mr Jones on 12 February had drawn up and provided Mrs Wilson terms of reference for the investigation where the allegation of unprofessional behaviour was broken down into the Claimant firstly allegedly shouting at Pupil A and secondly pushing him. The terms of reference referred to the need to redact the names of Pupil A and any other pupils who may need to be interviewed. A list of possible people to interview were then provided and listed as being Pupil A, Miss Dawson and the Claimant herself although it was then noted that the list was not exhaustive and that additional witnesses might be interviewed depending upon what the investigation uncovered.

18. On the morning of 13 February Mrs Wilson had spoken to the parents of Pupil A who had agreed to come in to the school early in the afternoon so that Pupil A could be spoken to about the trip to Skipton Castle in his mother's presence. However, before they attended Mrs Wilson spoke to Miss Dawson.
19. Mrs Wilson asked her to explain what had happened. In particular, Miss Dawson explained her view of what had happened after she came back having dealt with an incident in the toilet. She said:
- "... I was standing at the bottom of the path about 1.5m away from Ishrat. Ishrat was facing me and Child A was between us. Child A was already crying at that point. Ishrat said "your teacher has told you to behave on numerous occasions today but you have not been listening". Child A was crying. He responded to Ishrat but I couldn't hear what he was saying. Child D was at that point stood about 1m away. Ishrat said "get away" to Child A with a disgusted look on her face and she pushed him and he stumbled. He was crying more and Ishrat said "and you can cry as much as you want". After the stumble he carried on walking a few steps and then stood still with his back to us all. When we went back to the terrace about 3 minutes later, Child A was stood by a bench. I approached him and asked what was the matter, as he was still crying. He said "Mrs Ishtiaq shouted at me and pushed me"*
20. When asked by Mrs Wilson whether anyone else observed this, Miss Dawson responded that there were children around naming 9 children and said that other adults were not able to see due to their position. She confirmed the time of the alleged incident and said that she had not witnessed anything else to make her concerned. No further questions were asked of Miss Dawson. This interview took place from 11.40 to 12 noon.
21. At 2.30pm Mrs Wilson met with Pupil A and his mother. A note was taken of their conversation at the start of which Mrs Wilson asked Pupil A some questions to enable him to understand the difference between a true and untrue statement. She then asked him what had happened at Skipton Castle without any elaboration or reference to any specific incident at all. Pupil A was noted as responding:
- "We were at the castle and went where the toilets were. I ran down a hill. Mrs Ishtiaq said to me "stop right there" in a mean voice. Miss Dawson said the same but in a nice voice. Mrs Ishtiaq said "why did you do that? You could have bumped into someone" in a mean voice. I started crying. Mrs Ishtiaq shoved me over to the wall"*
22. Mrs Wilson then asked how hard the "shove" was. The notes of the meeting show that he demonstrated by "shoving" Mrs Wilson. Her evidence before the Tribunal was that it was a 2 handed push but that was not evident from the notes of the interview. Pupil A then said *"I went forwards to the wall. I managed to stop myself before I hit my head. Mrs Ishtiaq said "you can cry as much as you want. I am telling your parents"*. He then referred to starting his next activity and Child D asking him if he was okay saying *"I bet Mrs Ishtiaq told you off. I'm going to tell your mum"*. Pupil A said that he had responded to Child D saying that he was okay.
23. When asked if any other adult had come to speak to him he replied in the negative and said that afterwards when they were playing a game of tig Mrs Ishtiaq was mean to Child D saying:

"She shouted at him, but the way she shouted at me and shoved me was scarier. About 2 days later I got a head teacher's award. Mr Jones talked to me and he said none of the teachers should shout or push you, but we always have it on Wednesdays".

24. Pupil A replied in the negative to a question as to whether or not anyone had seen him cry. He said he was embarrassed and didn't tell his mother because he was scared she would tell the school and *"Mrs Ishtiaq would get more strict"*.

25. Mrs Wilson wrote to the Claimant on 2 March 2015 inviting her to attend an investigation interview on 12 March. It was clarified that the allegation related to the school trip to Skipton Castle on 4 February 2015 although Pupil A was still at this point unnamed. This meeting took place as arranged with a note taker from the school also present. Early in the meeting Mrs Wilson disclosed the identity of Pupil A in the context of the allegation that she had shouted at him and made him cry. The Claimant expressed that it was a relief to know who it was, referring to the time during which she had been unaware who the complaint was about. She recounted that during the trip Pupil A's behaviour had been problematical. She said that he had come out of the toilet screaming and shouting despite previous warnings. She said:

"I used my teacher's voice as a form of disciplining the child. It may have appeared as raised voice because I asked him to behave but I strongly deny the allegation or of touching him or anything". She went on to refer to Miss Dawson being nearby and saying something like:

"He's been silly throughout the day".

26. The Claimant said that she had spoken to Pupil A about his behaviour and reminded him that a parent's evening was coming up warning him that she would speak to his parents and they probably wouldn't be happy. She said that at that point he did turn away and did look upset. She said it was upsetting that he had alleged *"some kind of pushing which implies I have used some kind of force"*. At this point Mrs Wilson disclosed that Miss Dawson had in fact made the allegation. There was then a discussion regarding the allegation of pushing which the Claimant denied saying:

"... I am aware of my teacher's code of conduct and how to conduct myself professionally and as a parent we do not use smacking or pushing in terms of disciplining ... you just don't push a child and as a parent I would be deeply offended if someone touched my child. As a teacher I will be breaching my code of conduct".

27. The Respondent has made reference to the school's code of conduct which under the basic principles sets out that a child's welfare is paramount and that staff should behave in a professional manner and treat all children and adults with respect. Under the heading of *"Relationships within school"* it is stated that *"adults must not behave in a way which could lead a reasonable observer to question conduct, intentions or suitability to care for other people's children"*. Separately the school's safeguarding children policy referred to nothing being more important than *"the physical, emotional and spiritual welfare of our pupils"* with a statement of primary responsibility for the care, welfare and safety of the pupils in the school's charge. In a separate policy statement the school's ethos was set out as being one which *"promotes a positive, supportive and secure environment that gives pupils the sense of*

- being valued*'. The Claimant confirmed her awareness and understanding of such principles.
28. The notes of the 12 March meeting were provided to the Claimant who responded with some comments and suggested corrections.
29. Mrs Wilson spoke further to Miss Dawson on 26 March following her meeting with the Claimant. Miss Dawson was asked if she could recall saying at any point to the Claimant that Pupil A had been silly throughout the day. She responded: *"not that I can recall"*. She did recall at one point speaking to Pupil A when Pupil D was present saying to Pupil A that he needed to be sensible and respectful of the guides. She described Pupil A as being excited to be on the trip but *"I wouldn't say he was being naughty"*. She could not remember commenting to the Claimant about Pupil A's behaviour but said at one point when she was asking Child A to stop being silly she thought she had made eye contact with the Claimant and exchanged a look.
30. The Claimant wrote to Mrs Wilson by letter of 7 April stating that she felt astounded and deeply hurt at the allegations, affirming herself to be an honest, reliable and reputable teacher, referring to *"such outrageous allegations"* and again expressing deep hurt that *"my action of disciplining the child concerned has upset the child and thus spiralled into a set of hurtful accusations"*. She also within the letter asked if there was any way in which video footage could be obtained from Skipton Castle *"that could therefore demonstrate my innocence"*. She said that Skipton Castle did have CCTV footage.
31. Mrs Wilson said before the Tribunal that she did not take any steps to enquire about the availability of CCTV evidence at Skipton Castle. She said that it was her view that it was the Claimant's responsibility to obtain any such evidence and that she had taken advice on the matter. Mrs Wilson's view of the 7 April letter as a whole was indeed that it was *"defensive and hostile and clearly critical of those who levelled "such outrageous allegations"."*
32. Mrs Wilson then completed an investigation report with various correspondence and notes of interviews as well as school policies appended to it. She summarised the evidence of Pupil A, Miss Dawson and the Claimant. In her conclusions she noted that the Claimant had admitted the way she spoke to Pupil A could be interpreted as a breach of the code of conduct and that despite being given information that 2 witnesses reported that she pushed Child A the Claimant vehemently denied this allegation. She said there were no other witnesses to the incident as other adults and children were out of view. She recommended that the evidence be placed before a disciplinary panel.
33. When cross-examined about the quality of her investigation, Mrs Wilson accepted that she had not asked Miss Dawson about the level of force used by the Claimant and conceded that Miss Dawson during the investigation had not described herself that the Claimant had been shouting and that no clarification had been sought on the level of her voice. She said that she did not revert to Miss Dawson with Pupil A's version of events. She agreed that she had not asked why Miss Dawson had not immediately reported the incident and agreed that it was her own assumption that it had been hard for Miss Dawson to do so, her being a newly qualified teacher. She agreed that her forming the impression that the Claimant's letter to her of 7 April was

hostile was probably a negative construction and that she could see that it was possibly not a reasonable approach by her to take the Claimant's strong denial of the allegations as a negative factor against her.

34. She said that she had taken Miss Dawson's word for it that no other adults were present who would have been able to see any incident. She said that she did not check with any of the other individuals present because she was aware that the more people who were asked about the incident the less chance there would be of maintaining confidentiality regarding the incident. Again, when asked why she had not spoken to any of the other children, she said that the issue was one of confidentiality. She said that she would have been required to involve their parents and that there were no secrets within the village community. The more parents who were spoken to the less chance again there would be of maintaining confidentiality. She agreed that she had not considered any further examination of the location at which the incident had occurred and was unaware that the wall next to which the incident occurred was 42cm in height. This was in circumstances she accepted where there could be an impression from the statements, particularly from Pupil A, regarding him nearly banging his head on a wall that he was allegedly shoved towards a much higher wall.
35. Mrs Wilson's report was made available to Mr Jones on 17 April. Having read this he arranged a meeting with her and an HR advisor where the content of the report and options were discussed. He said that he was concerned that if the events occurred as described then there had been a clear breach of general safeguarding standards. In his view the matter ought to be referred to a disciplinary panel and he arranged for a letter to be sent to the Claimant advising her of that decision. The hearing was arranged for 18 May and the Claimant was given a right to be accompanied. Mr Jones prepared to present the management case himself at such hearing before 3 governors and Mrs Wilson, on her evidence to the Tribunal, saw her role as supportive of Mr Jones.
36. When asked in cross-examination regarding his view of the failure to interview other children suggested by Miss Dawson to have been present at the time of the incident, Mr Jones said that in his view they were never going to interview everyone as part of the investigation because that "*could almost muddy the waters*". He agreed that it was not a huge number of individuals named. He said that in his view there was no reason why the other adults present could not have been spoken to, but he did not know if any had witnessed the incident albeit he accepted that he would not know unless and until they were spoken to.
37. The disciplinary hearing took place on 18 May before Mr Finlay and 2 other governors. Miss Dawson was brought into the meeting and asked some questions by the panel. When Mr Finlay raised a difference between the statements Mrs Wilson is noted as saying:
- "I have no reason to disbelieve [Miss Dawson]. She has not changed anything since first interviewed. When interviewing Child A I established he knew the truth and knew what telling the truth meant".*
- After Miss Dawson gave an account of the incident Mrs Wilson is noted as having stated:
- "... you will see that the 2 statements agree".*

On being asked how hard it was being said by Miss Dawson that the Claimant had pushed Pupil A. She responded:

“He was pushed to the wall. It is difficult to put in words. He basically stumbled to stop himself going into the wall.”

She then referred to a 2 handed push.

38. The Claimant then had an opportunity to ask questions of Miss Dawson. When she asked Miss Dawson why she had not said anything to the Claimant at the time or to another teacher, Mrs Wilson interjected that Miss Dawson could not answer that question as she was a newly qualified teacher.
39. The Claimant produced some photographs of Skipton Castle taken from its own website but following an adjournment to view the photographs it was agreed that they did not help in showing where the alleged incident had taken place. The Claimant on reconvening referred to having tried to get CCTV footage but that there was not any of the area in question. The questioning of Miss Dawson then continued. At one point Mrs Wilson interjected that Miss Dawson had said that the Claimant shouted at Child A and made him cry following which Miss Dawson stated that the Claimant shouted at Pupil A. Shortly thereafter a Human Resources Advisor also present at the meeting is recorded as having to keep reminding Mrs Wilson to let Miss Dawson answer the questions herself. When the Claimant queried whether Pupil A’s parents brought the matter up, Mr Jones responded that this was not relevant, that there was a parent’s evening on 11/12 February and that Mrs Wilson did the interviews on 13 February.
40. The Claimant raised why in her report of the incident there were not interviews of any other children. Mrs Wilson said that she had asked Child D a subtle question enquiring as to what kind of day he had at Skipton Castle and that he did not volunteer anything. The Claimant referred to Child D asking if Child A was okay in the statement but not referring to any push.
41. The Claimant then made her own statement after Miss Dawson had left the hearing. She denied inappropriate behaviour. She referred to her significant length of service. She referred to the length of time before Pupil A was interviewed and the lack of any earlier disclosure. She said that she may have used a teacher’s voice to discipline Pupil A but she did not push or assault him. She said that it was her job to *“keep him safe”*. She referred to the accusation of physical contact as being *“a gross lie”*. It was further explored whether the Claimant had raised her voice. After such question Mr Finlay enquired whether it was an isolated incident when the Claimant dealt with children, i.e. shouting/pushing being an issue. Mr Jones responded as follows:
- “I have had to speak to [the Claimant] previously. She can over react. Sometimes when the children have gone home parents have complained that [the Claimant] has been mean and I have been asked what I am going to do about it. In the end I wrote to [the Claimant] saying that it was not in keeping with the expectation of the school. I said I had concerns in that you do not seem to realise the negative effect you have on children”.*
42. There was then a statement by Mr Jones of the management case. He referred to this as being *“a very very serious matter”*. He said that 2 of the statements, i.e. those of Pupil A and Miss Dawson, agreed that the Claimant had shouted against the Claimant’s contrary account. Similarly it was 2

against 1 in respect of the accusation of “pushing to the point of stumbling”. He went on to say:

“I have real concern about [the Claimant]. She has frightened, upset and humiliated children in front of one another, is less than considerate with boys and can be supercilious. I have concerns when she reprimands them and her sanctions cause real concerns. [The Claimant] is not learning from previous incidents. Nurturing the children must come first. This is not a first incident it is just a repetition of unkind treatment, her flat denial of pushing has now become a development issue ... This is a sad day. A serious day. Consider the rationale. Our children are to be nurtured and kept safe – this is non negotiable”.

43. The Claimant then had a final opportunity to summarise her case following which there was an adjournment before the governors reconvened the hearing to confirm the unanimous decision that the allegations had been found to be proven. The recommendation was stated to be the Claimant’s dismissal and the Claimant was given the right of appeal the time for which would run from the date of the outcome letter.

44. Indeed, the outcome was confirmed in a letter which went out signed by and in the name of Mr Finlay dated 6 June 2015. This set out the conflicting evidence. It was stated that Miss Dawson was found to be a credible witness whose evidence on the key aspects was corroborated by Pupil A, specifically allegations relating to shouting and pushing. The panel believed that as a newly qualified teacher Miss Dawson would naturally have reservations about challenging the Claimant. The panel rejected the Claimant’s evidence that neither Miss Dawson nor Pupil A were telling the truth. They took the view that a newly qualified teacher would not take the risk of concocting serious allegations against an experienced member of staff. It was stated that the panel had tried to reconcile the disparity in evidence by suggesting whether it was possible that some other form of contact with Pupil A could have been mistaken as a push but that this was not a conclusion open to it on the evidence.

45. The letter goes on to state:

“While giving your evidence you protested your innocence and argued that the type of behaviour alleged against you was “out of character” and not the type of behaviour you would direct to a child.

The Panel were taken aback by the head teacher’s response when the Chair of the Panel asked him if you had previously been involved in any similar incident.

The head teacher informed the panel that in the past he had to speak with you about your interactions with children; he explained that you caused children to become so upset that parents complained that you were being mean and asked what he was doing about it.

The head teacher described efforts he made to guide and give you support in order to change your behaviour and said he eventually wrote to you explaining that your actions were not in keeping with the expectations of the school. More worryingly, the head teacher said this latest incident appeared to be an escalation of behaviour towards children and referred to you still using inappropriate terms such as “sanctioning”.

You admitted incidents had occurred in the past and suggested you had learnt from those incidences. After hearing from the head teacher the Panel had to reject your evidence that the allegations were “out of character”, and then doubted whether you were an honest, candid or credible witness. The Panel was satisfied that it was more probable than not that you committed the alleged acts and Miss Dawson and the child gave true statements”.

46. It is then recorded that the panel unanimously concluded that the Claimant had shouted at and pushed a small child and that she had tried to conceal her actions by accusing Miss Dawson and the child of lying. It was recorded that the Claimant had presented no mitigation and the Panel considered the implications of the Claimant accusing others when faced with serious allegations. It was concluded that dismissal was the appropriate sanction.
47. Mr Jones, in giving evidence to the Tribunal, was referred to a number of documents relating to previous instances where the Claimant’s behaviour had been called in to question. The Tribunal noted that prior to the Claimant’s appeal hearing, which the Tribunal will describe, she requested disclosure of documentation from Mr Jones to confirm the suggestions he had made at the disciplinary hearing and the Claimant asked for these to be presented at the appeal stage.
48. Before the Tribunal, Mr Jones said that he had not gone to the disciplinary hearing with the intention of raising such matters, but did so in response to a question from Mr Finlay which he had not anticipated. He considered however that he had then chosen to elaborate and revisit such matters when he presented the management case. He had accepted already in cross-examination that as headmaster he was in a position of influence vis-à-vis the governors. He conceded that none of the previous incidents in fact involved suggestions that the Claimant had shouted at pupils or been over physical. He agreed that some of the incidents he had referred to had taken place some significant time previously. When referred to a development plan produced for spring 2013, where there was a direction to increase the level and frequency of praise especially that given to boys, Mr Jones accepted that the Claimant had taken on board this advice and her manner of presentation. He said that the documents did show a willingness on the Claimant’s part to correct her behaviour. He agreed that the one reference to anyone being frightened dated back to 2012. He accepted having read through the various documentation that he had however told the disciplinary panel that the Claimant had not learnt from previous incidents, that he had presented her as a risk in terms of other things being likely to happen and that he had said that he had concerns which he asked the panel to consider. He conceded on questioning that the detail now presented to him from the contemporaneous documentation painted a different picture to that which he had presented to the governors at the disciplinary hearing.
49. Mr Finlay’s evidence to the Tribunal was that the evidence effectively given by Mr Jones to the disciplinary Panel had a “*slight bearing*” on the disciplinary panel’s decision. However, the wording of the dismissal letter, it was put to him, indicated that this was a significant factor on the question of credibility, i.e. in the panel’s decision to believe Miss Dawson and/or Pupil A in preference to the Claimant. Mr Finlay believed that they would have reached the same decision if they had had the background documentation which showed that Mr Jones’ portrayal of the previous incidents was somewhat misleading, but agreed that it was less likely that they were going to be able to

believe the Claimant given the way the management case was ultimately put and that this did have a negative impact on the Claimant's credibility. He was clear that the panel was left with the impression that there had been something similar in the past.

50. Mr Finlay also agreed that the panel had been given the impression that the Claimant posed a risk and that the suggestion that she had been reprimanded in the past but not learnt from it was effectively the raising of a red flag of alarm by Mr Jones. He agreed with the proposition that a shove on a pupil by a teacher was not an automatic dismissal offence and considered that if the panel had been given information that the Claimant had previously listened to and responded positively to advice regarding her behaviour they might have factored that in before making the determination on the appropriate sanction.
51. Mr Finlay also accepted the proposition in cross-examination that there was good reason to speak to others on the Skipton Castle visit to determine whether they had witnessed anything. He was unaware that the panel could themselves have asked for other people to have been spoken to and agreed that had other people been spoken to the outcome could potentially have been different. He accepted that the panel had not picked up on any inconsistencies between the accounts given by Miss Dawson and Pupil A. He agreed that the panel was not clear about the vulnerability of Pupil A in terms of the wall, its location and height.
52. The Claimant submitted notification of her wish to appeal on 23 June 2015 setting out a significant number of grounds of appeal relating to the investigation report, the process of investigation, the conduct of the disciplinary hearing and level of sanction. The Claimant complained of delays in the investigatory meetings taking place. She referred to a belief that Pupil A had been interviewed on at least 3 occasions but full disclosure of what he had said had not been provided. She referred to discrepancies between the statements such as Pupil A confirming that Miss Dawson and the Claimant had both been present when he was admonished, Pupil A believing that there was no one else present at the time but Miss Dawson stating that other children were and Pupil A saying that after the incident he was not approached by anyone whereas Miss Dawson described a conversation with him. She pointed out that it was surprising in her view that when asked about the trip the first and only point Pupil A could make regarding his experience on the trip was to do with the alleged incident. She referred to the head teacher's reward meeting, expressing the view that Pupil A had been told to make the comments against her. She said that she had obtained photographs (which were subsequently presented) of the site showing the relatively short height of the wall and the improbability of Pupil A being at risk of hitting his head on it.
53. As regards the disciplinary hearing she complained regarding the views expressed by Mr Jones about her past conduct. She also complained about Mrs Wilson and, to an extent, Mr Jones seeking to answer questions for Miss Dawson. She presented ultimately with her appeal various character references and notes of a visit she and her sister had made to Pupil A's family at their home as well as a note of a visit to Pupil A's family made by an elder from the local mosque.
54. The appeal was held on Tuesday 21 July 2015 chaired by Mrs Nottingham who was accompanied by 2 further governors. Mrs Wilson and Mr Jones were also in attendance. The Claimant was again unaccompanied.

55. Mrs Nottingham explained to the Tribunal that her view of the appeal was that it would be conducted as a complete re-hearing. Whilst she had within her pack a copy of the decision made by Mr Finlay's panel to terminate the Claimant's employment she did not have the notes of the previous disciplinary hearing. She did not see the task of the appeal panel to include, for instance, an exhaustive consideration of the Claimant's complaints regarding the handling of her case up to that point. She intended to conduct a fresh hearing and for the panel to straightforwardly come to their own decision about the Claimant's culpability and any appropriate sanction.
56. At an early stage of the appeal hearing Mr Jones sought to introduce 2 further additional documents, Pupil A's work which had resulted in the head teacher's award and an email. On consideration the panel rejected their inclusion on the grounds of lack of relevance.
57. The Claimant commenced by referring to the evidence against her and the delay in gathering this. She also referred to the head teacher's award and to Pupil A mentioning this 10 days later and the comment that he was told by Mr Jones that "*no teacher should shout or push you*". The panel's HR advisor said that: "*we have dismissed this*". The Claimant then referred to the photographs of the wall in terms of the lack of potential for Pupil A to have hit his head. She also referred to the documentation she had obtained from Mr Jones regarding previous behavioural issues. The Claimant was told to concentrate on key issues.
58. The Claimant then referred to Pupil A's family saying that Pupil A had been interviewed 3 times and their having been surprised by the decision to dismiss. The Claimant then called as a witness Karen Kowielki, a former colleague who spoke favourably of the Claimant's general behaviour and then likewise Elizabeth Bryan, another former colleague.
59. The Claimant then specifically refuted Miss Dawson's version of events and maintained that she had not pushed Pupil A.
60. Miss Dawson was then called as a witness and the Claimant given an opportunity to ask her questions. Miss Dawson said that she had seen Pupil A being pushed. Miss Dawson confirmed that she and the Claimant had got on well and that the Claimant was helpful to her and other newly qualified teachers. However as regards her evidence in respect of the Claimant's behaviour towards Pupil A, Miss Dawson stated: "*I was quite disgusted. I couldn't believe what I saw. It was disgusting*". When further asked by the Claimant what she had seen, Miss Dawson described the boy as having moved and "*stumbled parallel and closer*". The Claimant asked: "*what is the truth?*" and Mrs Nottingham is noted as commenting that Miss Dawson "*is telling us what she believes. We are not in a court*". She later sought to get the Claimant to focus on what had happened at Skipton Castle rather than more general evidence regarding her character.
61. Mrs Wilson then in attendance at the appeal summarised the investigation and the evidence gathered. She said that Miss Dawson had been clear that there were other children around at the time of the incident but said it was not likely that they had seen what happened. She said that she was not sure if Pupil D had been present. When asked by the Claimant how she was perceived as a colleague by her, Mrs Wilson said that as a colleague she had no issues regarding the Claimant.

62. The Claimant then raised some questions with Mr Jones in particular regarding the comments he had made at the disciplinary hearing regarding her previous behaviour.
63. The Claimant and Mr Jones then had an opportunity in turn to sum up their positions. At the close of the hearing Mrs Nottingham explained to the Claimant that they would consider the decision which would be confirmed in writing and that the panel would consider events at Skipton and that *“that is the focus for us, nothing else”*.
64. As already alluded to the panel did not form any judgment on whether or not the first hearing had been conducted appropriately. Whilst Mrs Nottingham was clear that it had been explained to the Claimant that this was a re-hearing she agreed that the Claimant was not told that the decision would not include a determination of her points of appeal.
65. Mrs Nottingham said that the panel did not look at the issue of Mr Jones’ possible influence on the previous panel regarding his stated view of the Claimant’s past behaviour. The panel in their subsequent decision letter of 24 July 2015 note that at the appeal Mr Jones was not placing *“great store”* on this evidence and had not intended to do so on the previous occasion, albeit the appeal panel was unaware that the matters had been raised also by Mr Jones as part of his closing summary of the management case. The appeal panel’s decision states that they have discounted the significance of that evidence and concentrated their deliberations on the events at Skipton Castle noting that Mr Jones had conceded that the behaviour issues were largely *“development issues”* suggesting that each had been addressed in turn and progress was being made. It was stated then that the panel *“laid no great weight against those issues”*. Mrs Nottingham expressed the view to the Tribunal that all of the panel had felt somewhat unsettled by the fact and manner of the Claimant’s approach to Pupil A’s parents after her dismissal and the way in which she had forcefully cross-examined Miss Dawson at the hearing.
66. As regards Mrs Wilson’s investigation, Mrs Nottingham conceded that there had been no question asked of Mrs Wilson as to why she had not interviewed any others. Mrs Nottingham’s evidence was that other people could have had valuable evidence but she accepted the judgment made by Mrs Wilson not to interview them and the panel’s view was that there had been a thorough investigation. She reiterated Mrs Wilson’s own previous evidence that if 9 parents had been interviewed with their children the whole school would know about the issue although she accepted that the outcome could have been different if witnesses had been spoken to.
67. Ultimately the panel concluded, based on the evidence before it, that an incident had taken place involving the Claimant and Pupil A which gave rise to a concern in the mind of Miss Dawson. Miss Dawson had set out her view of events in an incident report completed the following day. They believed there was no explanation for Miss Dawson making the report of the incident if it had not occurred. They concluded that her evidence was clear, straightforward and without apparent taint. Her evidence had been consistent and her recollection seemed clear even at the appeal stage.
68. They did not accept the Claimant’s submission that Pupil A’s evidence was fundamentally flawed. They thought the right questions had been asked and he gave his evidence openly in the presence of a parent. In certain key

respects they felt the evidence was consistent with that of Miss Dawson. They noted that he was not the primary complainant and the importance of speaking to him was to determine whether Miss Dawson could have been mistaken to any significant extent. It appeared to them that she was not.

69. The panel decided to discount the evidence gathered from Pupil A's family by the Claimant, her sister and others. It was noted that Pupil A's mother had been present at the interview of Pupil A conducted by Mrs Wilson and had not raised any objection to what had been said.
70. It was noted that others had interrupted to answer questions asked of Miss Dawson at the disciplinary hearing but the panel stated they were able to assess Miss Dawson's evidence objectively on the basis of what she told them and how she answered the Claimant's questions. There was no repetition at the appeal of the behaviour for which Mr Jones and Mrs Wilson were criticised in respect of the disciplinary hearing.
71. The Claimant's contention that Miss Dawson's account was a fabrication was rejected. They felt that whilst Pupil A may have been over excited and acting outside the bounds of acceptable behaviour, the way he was managed was wholly inappropriate and this was recognised as such by Miss Dawson. They were satisfied that the Claimant's behaviour fell well below the standard expected of a senior teacher in terms of her skills, the respondent's code of conduct and teaching standards. They considered that the criticisms made by the Claimant of the investigation process were not well founded and, taken in the round, the investigation was reasonable in all the circumstances and was carried out in a timely fashion. They felt that emerging from the investigation was a body of evidence upon which a decision could be made and that evidence had been tested both at the disciplinary stage and now at this appeal. The panel considered themselves entitled to take a view as to which version of events to accept and that in this instance they accepted Miss Dawson's.
72. It was stated that the protection and care of children was a fundamental principle to be observed by all schools and that anything which potentially damaged that relationship was a matter of significance. It was stated that: *"There seems to have been a loss of control. We have been offered no explanation as to why this might be the case, given that you have simply denied that the events occurred at all ... we have concluded that this is a behaviour which can only be described as gross misconduct because it goes to the root of the relationship between the school and its pupils and of course their parents. The school is in a position of trust and every effort must be made to ensure that a high standard is maintained"*. Before confirming a unanimous decision to confirm the Claimant's dismissal it was noted that there was no compromise between the Claimant's position and that of Miss Dawson's and, with there being no sign of reflective remorse suggesting that a mistake may have been made, they could not see how trust and confidence could be sustained.

Applicable Law

73. In a claim of unfair dismissal it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct under Section 98(2)(b) of the Employment Rights Act 1996 ("ERA"). This is the reason relied upon by

the respondent and the Claimant does not argue that there was any other reason for her dismissal.

74. If the respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

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

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

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

75. Classically in cases of misconduct a Tribunal will determine whether the employer genuinely believed in the employee’s guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard.

76. When considering the standard of reasonableness, Elias J, in the case of **A – v- B 2003 IRLR 405**, said as follows:

“Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him..... the standard of reasonableness required will always be high where the employee faces loss of his employment. The wider effect upon future employment, and the fact that charges which are criminal in nature have been made, all reinforce the need for a careful and conscientious enquiry but in practice they will not be likely to alter that standard.”

77. The Tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. The Tribunal has to determine whether the employer’s decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

78. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

79. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the

employee would still have been dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of Polkey applies widely and indeed beyond purely procedural defects.

80. In addition, the Tribunal shall reduce any compensatory award to the extent it is just and equitable to do so with reference to any blameworthy conduct of the claimant and its contribution to her dismissal – ERA Section 123(6).
81. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any kind conduct on the employee's part that occurred prior to the dismissal.
82. In the case of any reduction to an unfair dismissal award related to the Claimant's conduct, the Tribunal has to determine for itself on the balance of probabilities whether or not the claimant was guilty of the relevant conduct.
83. Having applied the above principles to the facts as found, the Tribunal reaches the conclusions set out below.

Conclusions

84. It is accepted on behalf of the Claimant that the Respondent has shown that the reason for her dismissal was a reason related to conduct and therefore a potentially fair reason. Indeed, the Tribunal is satisfied that the Claimant's employment was terminated arising out of the view the Respondent took of her conduct towards Pupil A on the school trip on 4 February 2015 to Skipton Castle.
85. The Tribunal next looks to consider the reasonableness of the Respondent's investigation into the allegations of misconduct levelled against the Claimant. It is the Claimant's case that such investigation was unreasonable in circumstances where the Respondent failed in particular to speak to 9 potential witnesses albeit it is accepted young children, who might have witnessed the alleged incident of the pushing of Pupil A.
86. It is said on behalf of the Claimant that when asked to explain the lack of any interviewing of such potential witnesses, Mrs Wilson effectively tried to come up with something "*on the hoof*" and her explanation was ultimately lacking and unjustifiable in her maintaining that she would not have felt it appropriate to speak to 9 other children in circumstances where this would also necessitate the involvement of their parents and would be more likely to lead to a breach of confidentiality.
87. Indeed, such an explanation is the Tribunal considers without reasonable basis in circumstances where the stakes were so high for the Claimant in terms of not just the potential loss of job but of a continuing career as a teacher and where if the Claimant's confidentiality was a concern there could have been a check with the Claimant as to whether or not she had any objections to wider disclosure being made. In fact the Claimant was asking that other witnesses be interviewed at the disciplinary stage and again at her appeal. Furthermore, Pupil A had been spoken to and his parents involved such that there was clearly already a risk of the matter being discussed more widely and indeed a likelihood of that occurring in the circumstances of a village school and, the Tribunal has heard from the evidence, an atmosphere

of almost inevitable rumour and gossip about the goings on at the local primary school.

88. As alluded to on behalf of the Claimant, Mrs Wilson's explanation for a lack of wider investigation was more likely her immediate reaction struggling for an explanation in cross-examination and the reality of the situation, the Tribunal finds, is that the Respondent at the time did not recognise any need to interview the other children or indeed the other adults who had been present on the school trip.
89. To an extent this is indicative of a lack of wider enquiry in circumstances, as the Tribunal will elaborate on, where it was not appreciated by Mrs Wilson that her role was to look for evidence which might exculpate the Claimant as much as evidence which might damn her.
90. However, the Tribunal must consider whether it was objectively reasonable and indeed outwith a band of reasonable responses not to interview the children and other potential witnesses. The Tribunal rejects the proposition that simply because the Respondent chose to interview Pupil A it must therefore have been reasonable to speak to 9 other pupils. Pupil A was the alleged "*victim*" of the Claimant's alleged misconduct and the other children at most were individuals who had been stated to have been in the vicinity of the alleged incident. Neither the Claimant nor anyone else was able to point to specific children being able to give an account of specific likely witnessed events. Indeed, the Respondent at the disciplinary stage and most definitely at the subsequent appeal stage placed its primary reliance upon the evidence of Amy Dawson who, whilst obviously the person making the allegation, was also the only potential other adult witness (other than the Claimant herself) to the incident complained of. Again, whilst other adults were on the trip there was no indication that the incident might have been seen by any of them. The evidence was that they were separate from the location of the incident.
91. It has been conceded by the Respondent's witnesses, in particular Mr Finlay and Mrs Nottingham, that it is possible that if other witnesses had been interviewed they might have provided evidence which could have made a difference to the outcome. That does not however in itself render the failure to speak to those other potential witnesses a failure which takes the Respondent's investigation outside the band of reasonableness. It is a statement of the obvious that additional evidence from witnesses who had seen something might have made a difference. However, there was no basis for the Respondent believing or on which it ought reasonably to have believed that there was any such eye witness evidence which it was failing to consider. The interviewing of any further potential witnesses would have been speculative.
92. Furthermore, the most likely further evidence to be forthcoming would have been from one or more of a number of 8/9 year old children who had been in the vicinity of the events described by Miss Dawson. The Tribunal does not consider the Respondent's delay in speaking to Pupil A to be unreasonable in circumstances where external advice needed to be taken before any internal action could be commenced but the inevitability of that was that it would not have been reasonably practicable for the Respondent to interview any further witnesses until a period of some days (over a week) after the school trip. This did and would reasonably inevitably call into question the ability of children of this age to remember events in which they were not directly involved. The view might also reasonably have been taken that the children, as opposed to

Miss Dawson, were not in a position to make a qualitative assessment of anything they had seen. This was not an issue of straightforward physical contact but one where the context and interpretation was all important.

93. What difference might interviewing the children have made? If any of them had seen the Claimant push Pupil A and had described witnessing such events in a convincing manner then that might obviously have bolstered the Respondent's belief in the Claimant's misconduct. On the other hand if they had witnessed nothing then that would take the Respondent no further in circumstances where its reliance would continue to be placed upon what Miss Dawson and Pupil A himself had said. If the children or any of them had seen something then again the Respondent's interpretation of events was likely to have reasonably focused upon the evidence of Miss Dawson.
94. Whilst an 8/9 year old child is capable of giving a reliable and reasoned account of events witnessed, the account of such a child particularly where the child was not directly involved in events and some time after the events would have to reasonably be treated with some significant caution. In the circumstances, it would not necessarily have been outwith the band of reasonable responses in terms of the Respondent's investigation not to have interviewed Pupil A (who obviously was in fact interviewed). The Tribunal cannot conclude that the failure to interview the other children or indeed any other witness of itself rendered any investigation unreasonable.
95. The Tribunal is concerned in terms of the investigation with the lack of openness in Mrs Wilson and indeed Mr Jones' approach and again a lack of appreciation that the role of the investigation was to seek out the truth rather than to prove a case against the Claimant. The investigative interview of Miss Dawson shows a predisposition towards obtaining her account without any critical interrogation of it or seeking explanation for any discrepancies in her account when compared to what Pupil A had said. Saying that, the Respondent ultimately did not act unreasonably in failing to recognise and alter its conclusions based upon such discrepancies where there was in terms of the crucial events more corroboration than disparity between the accounts.
96. The approach of Mrs Wilson to the investigation is perhaps most clearly exposed by her attitude towards the obtaining of CCTV footage from Skipton Castle. It had not occurred to her to consider this or ask the question of Skipton Castle as to whether or not they had any footage of the relevant area. Indeed, when the Claimant raised this possibility Mrs Wilson's attitude was that ascertaining whether or not there was any footage of the incident was the Claimant's responsibility and not the Respondent's. She therefore did not progress this avenue of investigation. As it transpires, of course, there was no footage and that was clear certainly by the time of the disciplinary hearing as referred to by the Claimant herself at such hearing.
97. The Tribunal can also see and cannot avoid a conclusion that there was bias in the presentation of the management case to the disciplinary panel. Whilst the nature of the procedure adopted within the Respondent inevitably produces an adversarial element in that a case in support of disciplinary allegations is advanced to a panel which the Claimant or any employee accused of misconduct must counter. This is not a case where a panel straightforwardly acts as an inquisitorial body seeking to come to its own unguided conclusion. The presentation of a management case in support of findings of misconduct is not an aspect of inherent unfairness but it created in these particular circumstances significant unfairness to the Claimant. In

particular, whilst Mr Jones had not come prepared to the hearing with the intention of disclosing past misdemeanours of the Claimant and did so initially in response to a question addressed to him by Mr Finlay, he went on in the management case to put significant weight on the Claimant's past conduct. Indeed, the case he presented was not accurate and was not supported by the evidence which lay behind the events which he described. Furthermore, the Claimant herself had no advance warning that such matters might be raised and no opportunity to seek to disabuse the panel as to the veracity of Mr Jones' remarks. This was particularly significant in the context of the Respondent as a school where its headmaster was effectively lobbying lay governors. The Tribunal can easily conclude that the pressure on the panel of governors at the disciplinary stage would have been significant and is unsurprised by an outcome of dismissal in circumstances where Mr Jones expressed a "*real concern*" about the Claimant and painted a picture of escalation in terms of her poor treatment of pupils in circumstances of an individual who had not learned from previous mistakes and was therefore likely to "reoffend". This would have and did come across strongly to the disciplinary panel as the school's headmaster, the person who perhaps could be regarded as being in the best position to judge such matters, not being able to view the Claimant's continued employment as anything other than a risk and a risk which was unlikely to be able to be managed. Mr Finlay's evidence before the Tribunal was that had he been aware of the true background to the incidents of previous "*misbehaviour*" described by Mr Jones then this could have impacted both on the credibility they attached to the Claimant's evidence of the events at Skipton Castle and also the appropriate sanction where the view may potentially have been different had it been considered that the Claimant was likely to be able to exhibit appropriate conduct in the future if the appropriate warning/developmental action was taken.

98. There was also within the disciplinary stage an unreasonable negative pre-disposition towards the Claimant which was evidenced personally in Mr Finlay's own witness statement where he had referred to the Claimant "*polarising*" opinions within the school and the school community. This feeling was exacerbated within the disciplinary panel most unreasonably by their view that the Claimant had cross-examined Miss Dawson in what they regarded to be an over rigorous manner. There appeared to be a lack of appreciation that the Claimant was effectively fighting to save a job/career and also that if the Claimant was being wrongly accused and was entirely innocent then her inevitable position would be that Miss Dawson was either fundamentally mistaken or inventing the allegation. If the Claimant was innocent, the starkness of the disparity in evidence was not her fault and required her indeed to seek to vigorously challenge Miss Dawson's account. On a reading of the notes of the disciplinary hearing the Claimant does not appear to the Tribunal to have acted inappropriately in how she spoke and what she said to Miss Dawson.
99. To an extent, albeit the Tribunal accepts to a lesser extent, this critical view of the Claimant continued and permeated the appeal process. Again that separate panel to an extent viewed the Claimant's cross-examination of Miss Dawson with some concern and distaste the Claimant being told that this was not a court of law when she was seeking to reasonably challenge Miss Dawson's account. The Tribunal also considers that whilst there was a basis for the panel having some concern that the Claimant had approached

Pupil A's parents directly, there was a lack of recognition that by this stage the Claimant had lost her job and was at risk of losing her career. She would be expected to go to significant steps to seek to overturn the dismissal decision and the focus ought to have been more on what Pupil A's parent said rather than on the panel's distaste of the occurrence of these further discussions with Pupil A's parents.

100. Furthermore, Mr Jones' view of the Claimant was still firmly before the appeal panel. Whilst they did not have the notes of the disciplinary hearing where Mr Jones had presented his summing up of the management case referring to the Claimant's previous conduct, they did have Mr Finlay's dismissal letter which refers to it and indeed does not disclose to the appeal panel that this was a positive management case advanced by Mr Jones and not simply an immediate response to an unexpected question asked of him. Whilst Mr Jones told the appeal panel that he did not place much stock in the instances of past behaviour and whilst the Claimant did at the appeal stage have an opportunity to address the historic performance issues raised against her, the headmaster's view had already been made more than clear and was evident to the appeal panel. The Claimant was effectively in a position of having to raise counter arguments against potential interpretations placed upon previous incidents where she had been spoken to, for instance, about her teaching style. The Tribunal cannot avoid a conclusion that Mr Jones' views played some part in the appeal panel's considerations in circumstances particularly where the appeal decision does not straightforwardly dismiss such matters but states that the panel placed "*no great weight on them*".
101. The effective bias and the lack of opportunity for the Claimant to have the allegations against her investigated in an open non prejudicial manner are sufficient to render her dismissal unfair. They cannot be said to be in any real sense cured by the appeal re-hearing and in all the circumstances the Claimant was unfairly dismissed.
102. However, at the appeal stage, the Tribunal certainly accepts that much less significance was placed upon Mr Jones' view than at the earlier disciplinary stage. There was clearly a conscious decision by the appeal panel to focus on the events on the school trip to Skipton Castle and indeed the fact that they did so is borne out in the evidence of Mrs Nottingham.
103. The appeal hearing was somewhat curious in that given that it was intended to be and was indeed conducted as a re-hearing, there was no perceived need within the appeal panel to specifically address each individual point of criticism made by the Claimant of the original dismissal decision. Since the decision was being taken afresh, the appeal panel considered that they ought to concentrate on determining whether or not the Claimant should remain dismissed. Nevertheless, it is clear from the notes of the appeal hearing that the Claimant was given a full opportunity to air her criticisms of the original process and that these matters were considered at the appeal stage. The primary purpose of an appeal is, from a dismissed employee's point of view, to seek to persuade a new decision maker to come to a different conclusion and a fresh and fair hearing at an appeal stage can potentially cure any earlier defects.
104. Whilst the Tribunal's conclusion is that this dismissal was unfair, the Tribunal looks to see whether had effectively the taint of Mr Jones' representations, albeit in any event much less at the appeal stage, been removed and a more open investigation been pursued would and with what

degree of certainty would the Claimant have been fairly dismissed. In that regard, the Tribunal reverts to its conclusions regarding the reasonableness of the investigation. Fundamentally, it was not unreasonable for the investigation not to have included at any stage of the process the interviewing of any additional witnesses. There were no other avenues of investigation reasonably to be explored.

105. The appeal panel did have reasonable grounds for concluding that the Claimant had acted inappropriately towards Pupil A and in particular with regard to the physical contact it was alleged she had had with him. There was a stark conflict of evidence between Miss Dawson and the Claimant but it was not unreasonable for the appeal panel to prefer the evidence of Miss Dawson, particularly in circumstances where there was no basis advanced upon which the Tribunal could conclude that her evidence was either unreliable or potentially untruthful in terms of any adverse motivation she might have. They found Miss Dawson's evidence before the panel itself to be compelling and truthful and arrived at that conclusion after the Claimant herself had most effectively questioned Miss Dawson regarding her version of events.
106. On such reasonable conclusion that the Claimant had committed the misconduct alleged (the physical shove would have been sufficient for the Respondent without any requirement of further risk to the physical safety of Pupil A), the Respondent would then have acted reasonably in terminating the Claimant's employment in circumstances where dismissal would clearly on the Tribunal's view have fallen within a band of reasonable responses. Obviously, the school context is all important and the Respondent was entitled to view excessive physicality by a teacher directed at an 8 year old pupil to be an action justifying dismissal in circumstances not least where the Respondent had promoted policies making it absolutely clear that each teacher's primary responsibility was for the welfare of children and where the professional code of conduct of teachers reflected the same to the Claimant's clear and undisputed knowledge as herself a most experienced primary school teacher. Whilst with 17 years unblemished service and this being a one off incident, a decision to dismiss might have been viewed as harsh the Tribunal could not consider it to be outside a band of reasonable responses and the Tribunal is clear that regardless of the unfairness otherwise found in the way the Claimant was treated, the Respondent would have arrived at this conclusion and, again, fairly so.
107. On this basis, whilst the Claimant's dismissal was unfair, the Tribunal can only conclude that the Claimant's fair dismissal would have resulted in any event at the appeal stage such that at that stage there was a 100% chance that she would have been fairly dismissed and therefore no compensation ought to flow beyond the date of the appeal panel's determination.
108. That finding does not affect the Claimant's entitlement to a basic award. However the Tribunal is further asked to consider the issue of the Claimant's pre-dismissal conduct and, in the context of a compensatory award, her blameworthy conduct contributing to the dismissal and to reduce such awards accordingly.
109. The Tribunal has heard from the Claimant who clearly continues to deny the use of any physical force. The Tribunal has not heard from Miss Dawson but can see clearly from the witness account she gave particularly at the

disciplinary and appeal hearings that she firmly stood by her view that the Claimant had pushed Pupil A.

110. The Tribunal can conclude on the balance of probabilities that the Claimant did behave outwith the standards ordinarily to be expected of a primary school teacher in her dealings with Pupil A on the school trip to Skipton Castle. The Tribunal cannot avoid the conclusion that something did occur for Miss Dawson to, it is considered, genuinely raise a complaint about the Claimant's conduct. Again, the Tribunal can see no basis for Miss Dawson inventing a complaint to harm the Claimant. The Claimant herself alluded in evidence to the possibility of whilst not shouting her voice being raised and to her addressing Pupil A in "*a teacher's voice*" such that, allied with Miss Dawson's complaint, the Tribunal can and does conclude that the way the Claimant dealt with an aspect of Pupil A's behaviour on the trip was disproportionate and beyond the standards to be expected of an experienced teacher.
111. What the Tribunal finds itself unable to do is to come to any conclusion of a qualitative nature regarding any physicality which the Claimant displayed towards Pupil A. It cannot for itself on the evidence come to any conclusion as to whether or not on the balance of probabilities the Claimant shoved Pupil A in a manner which represented an unacceptable use of force in breach of safeguarding of children policy. Even in a school context there are potentially distinguishable degrees of physicality. The question at this stage is not as to whether or not the Respondent reasonably concluded that the act occurred but whether the Tribunal on the evidence before it can on the balance of probabilities regard as proven the use of such physical force. The Tribunal cannot. The Tribunal is clear that the finding of physicality exhibited by the Claimant was the major reason for her dismissal and that her more general behaviour and demeanour whilst a factor was not the most significant factor in the Respondent's decision to terminate her employment. On this basis the Tribunal views it as just and equitable to reduce both the Claimant's basic and any compensatory award by a factor of 35% on the basis respectively of her pre-dismissal conduct and blameworthy conduct contributing to the Respondent's decision to terminate her employment.

Employment Judge Maidment
17 February 2016

Date Sent: 3 March 2016