DJT

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Gallahan	**AND**	Walsall MBC

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Birmingham **On:** 27, 28 & 29 March 2017

Before: Employment Judge Dimbylow

Appearances:
For claimant: Ms S Garner, Counsel
For respondent: Mr D Maxwell, Counsel

JUDGMENT having been sent to the parties on 30 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim. This is a claim by Miss Margaret Jane Gallahan (the claimant) against her former employer Walsall MBC (the respondent) for unfair dismissal.

2. The issues. The main issue for me to determine was to answer the question, was the claimant fairly or unfairly dismissed? The respondent asserted that the dismissal was fair, because of "some other substantial reason" in that the working relationship between the claimant and Mr Vlahakis (the Headteacher of the school where the claimant worked) had irretrievably broken down due to the trust and confidence that should exist between them having been destroyed by the claimant. There were some further; but related issues for me to deal with, which were set out in exhibit R5 and there is no need for me to repeat them here.

3.1 The law relating to dismissal. The relevant provisions, in relation to the fairness of any dismissal, arise out of the Employment Rights Act 1996 (ERA) and are the following (s.98):

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

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

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

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(ba) is retirement of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

3.2 Thus, there is an initial burden of proof upon the respondent in a claim for unfair dismissal to establish a potentially fair reason for dismissal pursuant to s.98 (1) and (2). Conduct is a potentially fair reason. Although I did not have to deal with the case based on a dismissal because of conduct, it is worth noting the law and procedure on it, as it played a significant part in the development of the case, as will be seen later in the narrative of my fact-finding exercise. The burden of proof here, in establishing the reason, is on the respondent; and is upon the balance of probabilities. Should the respondent establish a potentially fair reason, then the test on overall fairness is neutral; there is no burden of proof on either side. Overall fairness is determined having regard to the requirements of s.98 (4). This would include

the tribunal examining the investigation, disciplinary and appeal processes. The issue of what would have happened if a fair procedure had been followed also fell to be considered, as did contributory conduct by the claimant.

3.3 The tribunal has received judicial guidance on how to apply the law relating to unfair dismissal claims. The tribunal has to determine whether the claimant was fairly dismissed in all the circumstances, for the reason advanced, taking into account the size and administrative resources of the respondent. Guidance on the statutory test as to whether a dismissal for **misconduct** (and I recite it for reasons I referred to earlier) is fair, or not, is contained in a number of cases and in particular:

(i) British Home Stores v Burchell [1978] IRLR 379

(ii) Iceland Frozen Foods v Jones [1982] IRLR 439

(iii) Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23

In short, the test to be applied is this:

(i) Did the respondent (through the dismissing panel of governors and appeal governors) genuinely believe in the facts found?

(ii) Did the respondent (through those governors) have reasonable grounds upon which to sustain that belief?

(iii) Had the respondent (through Miss Patel) carried out a reasonable investigation giving rise to those reasonable grounds and belief at the stage upon which the belief was formed?

(iv) Thereafter, was the decision to dismiss within the band of reasonable responses open to the respondent, in all the circumstances of the case?

3.4 As to contributory conduct, the ERA sets out the law in relation to the basic award at sections 118 to 122, and the compensatory award at sections 123 and 124. Both awards can be reduced because of contributory conduct. The basic award includes, at s.122(2):

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

And s.123(6):

"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of

the compensatory award by such proportion as it considers just and equitable having regard to that finding."

3.5 If I held the dismissal to be unfair, I was asked to determine whether the claimant contributed to her dismissal insofar as it might affect the basic award and any compensatory award and if so to what extent. The test applied is as set out in the case of Nelson v BBC (No.2) [1979] IRLR 346. These factors must be satisfied if I am to find contributory conduct:

1 The relevant action must be culpable or blameworthy.

2 It must have actually caused or contributed to the dismissal.

3 It must be just and equitable to reduce the award by the proportion specified.

Culpable or blameworthy conduct could include conduct which was "perverse or foolish", "bloody-minded" or merely "unreasonable in all the circumstances". This has to be dependent upon the facts of the case. Wide forms of conduct are envisaged. I have approached the subject with a completely open mind. I know from Nelson that the conduct in question does not have to amount to a breach of contract or a tort and can be given a broad interpretation.

3.6 The principle arising out of the case of Polkey v AE Dayton Services Ltd [1988] ICR 142, HL fell to be considered; but I do not propose to say much about the law on it here, save that if I were to find the dismissal procedurally unfair, I may go on to decide what would have happened if a fair procedure had been followed, make a percentage assessment of any chance that the claimant would have lost her employment, and in appropriate circumstances make a reduction in the amount of any compensation awarded.

3.7 I also had regard to the ACAS Code of Practice on Disciplinary and Grievance procedures.

4. The evidence. I received oral evidence from: Mr Max Constantine Vlahakis, the Rev Mark Russell Kinder, and Mr Ross Thomas Doodson for the respondent; and the claimant and Mrs Gail Hobbs on her behalf. I read a witness statement from Davika Cleere on behalf of the claimant. This witness did not attend to give evidence to me. Although the respondent objected to the statement being used in evidence, I had already read it by the time the claimant told me she would not be attending. I attached little weight to it as the witness was not present and able to be cross examined. I also received documentary evidence which I marked as exhibits as follows:

C1 Claimant's witness statement
C2 Mrs Hobbs' witness statement
C3 Schedule of loss
C4 Claimant's submissions and bundle of authorities
C5 Witness statement of Davika Cleere (not called by the claimant)
R1 Agreed bundle of documents (251 pages)

R2 Witness statement of Mr Vlahakis.
R3 Witness statement of Mr Doodson
R4 Witness statement of the Rev Kinder
R5 Agreed list of issues
R6 Respondent's submissions and bundle of authorities.

5. Findings of fact. I make my findings of fact based on the material before me considering contemporaneous documents where they exist and the conduct of those concerned at the time. I have taken into account my assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts.

6. The claimant was born on 6 March 1967 and is now 50 years of age. She commenced work for the respondent on 5 February 2003. Although there was another respondent to the proceedings this claim was dismissed against the Alumwell Junior School (the School) on withdrawal by the claimant and with the respondent's consent. The effective date of termination of the contract of employment was on 18 January 2016. The claimant went to ACAS and the two dates on the early conciliation certificate are 6 April and 6 May 2016. The claim form was presented on 3 June 2016. The response from was lodged on 4 July 2016. The claim was resisted. At the same time the respondent applied to adjourn the case from the dates originally fixed for 24 and 25 August 2016; and flagged up that a longer hearing may be required. In due course that was agreed; and it was listed for 4 days commencing on Monday 27 March 2017. However, with careful case management and having agreed to a split trial with liability only being determined first we were able to deal with the case in 3 days.

7. The claimant was born in the USA. She was educated through High School. After leaving school she worked as what she described as a "learning mentor" for children; and these were specifically children of wealthy parents who could take their children out of the normal school system and provide education privately whilst enjoying the benefits and company of horses. The claimant had to make sure that they did their school work whilst outside the normal system. The claimant also had other work experience, including that as a dog groomer. She came to the UK, as I understand it, for a brief time in the 1990s and worked in Lichfield at Queens Croft. She also had and has a recurring theme of going to help to run summer camps in the USA; even up to 2016, as a camp counsellor. She went back to the USA for a while; but returned to the UK in 2002. She has lived here ever since. She saw the School advertising a job vacancy; she applied and was successful.

8. The claimant was employed first as a Learning Mentor and later as a Pastoral Manager by the Governing Body of the School. This role changed over time; but for about 4 years she had responsibility for music and extra curricula sports provision. Her role involved: teaching music, teaching some physical education, something called "Forrest School" and she ran all the extra curricula School sports teams (there were 8 different sports). As

Pastoral Manager, she was also on the School Safeguarding Team; was involved with child protection, and with families and children who were at risk.

9. Mr Vlahakis is the Executive Head Teacher of the Cadmus Federation, previously known as the 'Alumwell/Butts' Federation. The Federation of Schools are now made up of 'Alumwell Juniors', 'Butts Primary' and 'Palfrey Juniors', who joined in July 2016. Until the summer of 2016 he was also the Head Teacher in Alumwell Juniors, though as he was responsible for two schools his title was Executive Head Teacher. He joined the School in January 2005 and it federated with Butts Primary in 2014. At the School there were about 50 staff (including some 16 teachers) and 9 at Butts Primary. However, both parties agreed that for the purposes of this claim, Walsall MBC was the correct respondent and the employer of the claimant. The representatives, in their submissions, agreed that I should regard the respondent in terms of the School as a medium sized employer, in all the circumstances, and I was prepared to adopt that proposition as a fact.

10. Mr Vlahakis has been a Registered Ofsted Inspector for about 4 years. It is a job that relies on professional reputation as he is moving schools in and out of categories of support based on professional judgment. In addition, the Local Authority have brokered his professional services from the School and Federation to support others in difficulty and this has led to him becoming a "National Leader of Education", a nationally recognised position supporting schools and other Headteachers. He is also the Chair of "Walsall School's Forum" a role that is central to ensuring fair funding across Walsall Schools. This is a position voted upon by his colleagues from across the schools and council members; and as such his professional reputation is considered paramount to the position. Within the Federation he is supported by a Senior Leadership Team who now have the day-to-day responsibility for the effective running of the School. At the time of the claimant's employment he had day-to-day responsibility for the running of the School. The role of the Governing Body is to act as a "critical friend" and to agree and set the strategic directions of the School. They do not have responsibility for the day-to-day management of the School or the staff. The schools in the Federation are community schools which means that the legal employer is the Local Authority, although the Governing Body have delegated powers of authority and responsibility. One of those responsibilities is determining whether a person should cease to work in the School.

11. The relationship between the claimant, Mr Vlahakis and the School was not controversial (on the face of it) until September 2015 when the claimant returned from the summer holiday. Their relationship had been largely cordial at work with, for example, Mr Vlahakis inviting the claimant to stay at his home for Christmas in 2014, after she had split up with her partner; and supporting her at the time of implementation of "Single Status" at Walsall Council, which involved an equal pay claim for the claimant. However, there were underlying matters troubling the relationship; being what I would regard as mutual suspicions. These came about because of events which arose in 2011; when the claimant made a complaint against Mr Vlahakis of a safeguarding nature, which in the end led to him being vindicated. Mr Vlahakis wrongly believed

that the claimant had been warned by the School's Governing Body about her conduct over this allegation; but I find on the evidence that that was not established. On the other hand, the claimant maintained that she never knew the outcome of the complaint or whether Mr Vlahakis was vindicated. With the mutual lack of knowledge as to the outcome for both parties, Mr Vlahakis found it difficult to work with the claimant thereafter. Nevertheless, they remained professional in their relationship; and he supported the development of the claimant's role in the School.

12. On the surface the relationship was functioning and even in January 2015 the claimant was sent a note thanking her for her work from Mr Vlahakis (page 226 of the bundle) and he provided a glowing reference for her in March 2015 (221-222) in relation to work in a Summer Camp in the USA.

13. There came to be what I would describe as a watershed moment in the claimant's relationship with Mr Vlahakis and I relate it as follows. On 16 July 2015, the claimant was told by a teacher (Hannah Jones) at the School that Mr Vlahakis was arranging to purchase a drum kit. The claimant found it strange because in her view Mr Vlahakis had been in the School for many years but had never shown any interest in music at all. As a result of being told this fact, she responded by saying that perhaps he was doing this because he had a "thing" for one of the teachers in the band (Elena Sheehy). In response to that comment, Ms Jones told her that Ms Sheehy's mother was a close friend of Mr Vlahakis; and this would explain the situation in the way that they (Mr Vlahakis and Ms Sheehy) interacted with each another. A short while later Ms Jones, who is a very close friend of Ms Sheehy, informed Mr Vlahakis of the claimant's comment.

14. No one spoke to the claimant about this event prior to the School breaking up on Friday 17 July; and over the summer break, she went to the United States to visit her family and undertake summer camp. She planned to travel back on 31 August 2015. Her intention was to go straight from Birmingham Airport to the School in readiness for the preparatory day before the School officially started on 2 September. On 31 August, the claimant was travelling back from Atlanta to Birmingham and at 7.37pm UK time she sent an email from the airport to warn Mrs Kerry Boam (the Deputy Head Teacher) that she may be late into work (122). This was because her sister (who works for Code Red in Ormond Beach, Florida) had been following the movement of hurricane Charlie as well as the tropical storm Charlie which had been travelling up the East Coast of the USA. Her sister informed her that she thought this might have an impact on her flight. However, the flight was not delayed and the claimant arrived in School at 9.45am on 1 September, which was about 30 minutes late for the preparatory day. She would have arrived earlier but there was an issue with her luggage which had been delayed at Birmingham Airport. The preparatory day was not the official start of the School year; it was a teacher training day to enable the staff to get ready for the new school term which commenced the following day. She stayed at work until 5.30pm on 1 September.

15. On 2 September at the end of the school day, around 4.00pm, Mrs Boam called the claimant into her office (in the presence of Lisa Upton – Assistant Head Teacher) and informed her that she would need to get union representation as a complaint had been made against her. She told her that a member of staff at Bryntysilio had made a complaint against her during the annual year residential trip which had taken place on 6 to 10 July 2015. Mrs Boam stated also that the claimant had said something about Mr Vlahakis and this would be investigated.

16. The claimant was directed to go and see Mr Vlahakis; and on arrival at the office he began by asking the claimant several questions regarding tool boxes in the cabin area at the School. He thought that she had left the tool box unlocked; someone had accessed it and used the tools to break into the School. She assured him she had locked the boxes before they broke up. She told him the filing cabinet and old cash box where she kept the keys had been ransacked. He told her that if someone committed a crime with the stolen tools she would be held liable. It seemed to her that she had returned to a completely different school to the one that she had left on 17 July 2015.

17. Following the discussion about the break in at the School, he raised the subject of the flight and accused the claimant of lying over its lateness. The claimant heard nothing about these matters any further until 11 September 2015. On that day, Carol Sewell (the branch officer from Unison-which was the claimant's union) to whom she had never previously spoken rang the claimant at school to say that she had been advised by the School to inform her that she was being investigated for "gross misconduct"; but as an alternative she could leave on good terms. At this stage, she had not received anything in writing from the School and had not been provided with any further details about what allegations were being made against her. She said she could not consider anything as she had not been told what she had said or to whom.

18. Ms Sewell contacted the claimant again on 28 September 2015 and the claimant was informed that she was being accused of saying something personal about Mr Vlahakis. Throughout the period from 2 September to 28 September 2015 the claimant carried on working at the School. On 14 October 2015, she was informed by way of a letter (133) that she was the subject of an investigation into the following matters:

(i) Making untrue allegations against Mr Vlahakis in bad faith;
(ii) Providing false information regarding her return flight and this was to obtain authorised paid leave;
(iii) Failure to ensure that tools were locked away which resulted in a perpetrator breaking into school over the summer and using the tools to gain access to other areas of the school;
(iv) Bringing the Federation into disrepute.

This communication was from "S4S" (Services 4 Schools Limited) which provides HR services for schools, filling the gap in an area where the Local Authority used to provide such advice and guidance. The investigator at that

organisation was Miss Anila Patel; she set up a meeting on 22 October 2015 at the School with the claimant. That meeting took place and she told the claimant she could be represented.

19. On 30 November 2015 the claimant was informed by letter of 27 November (134) that there was no case to answer in terms of the third and fourth allegations; but there was in relation to allegations one and two. However, in the letter dated 14 October 2015 (133), which set out the initial allegations; the allegation regarding the claimant's return flight stated that she was alleged to have provided the false information about her return flight to obtain authorised paid leave. However, in the letter of 27 November it had been changed to providing false information regarding her return flight and there was no longer a suggestion this was done to obtain paid leave. The letter also confirmed that there would be a new allegation of unprofessional conduct as the claimant was accused of contacting a witness to the disciplinary process.

20. In relation to the new allegation of unprofessional conduct, this related to the claimant contacting Ms Anthea Cooper (head of Bryntysilio Centre) in October 2015. She was told that as Ms Cooper was a witness in relation to the disciplinary investigation she should not have contacted her. However, at the time the claimant contacted her she had not seen the letter of 14 October 2015 from S4S (in which the claimant was told not to discuss any aspect of the matter with anyone) nor had she been notified in writing as to the precise allegations against her. In interview with Miss Patel the claimant confirmed she had a genuine belief it was the case that Mr Vlahakis had a "thing" for Ms Sheehy. She asserted she was not trying to cause trouble and had not said this in bad faith. It is worth reciting part of the exchange between the two, recorded on page 91 which had this:

> 37. **Did you make a comment about why you thought Max wanted to join the band?** I might have said something along the lines that he was joining due to there being a lot of young staff in the band.
>
> 38. **What did you mean by that?** I said this because Max has made inappropriate comments to younger staff previously.
>
> 39. **Have you heard these directly?** Yes. Also people have told me things that have been said and I was concerned that they might get themselves into trouble.
>
> 40. **Have you raised these concerns with anyone?** In 2010 it transpired that Max was having an extra marital affair with a teaching assistant and I told the deputy. It was looked in to at the time.
>
> 41. **Have you any examples of the inappropriate comments towards younger staff?** There was one occasion where a member of staff was kneeling on the floor, Max went close up to

her so his waist was the same level as her face [and] said "while you're down there". I think she did make an informal complaint about him. I was also told that at last year's Christmas party, Max told everyone that he had slept with 80% of his staff. I did not directly hear this but it is what I was told. There was a game amongst the teaching assistants where they would try and guess the 1 in 5 that he wasn't sleeping with.

The trade union representative (MH) with the claimant then spoke:

"What Meg is trying to say is that she wasn't the only one that made comments about Max. His behaviour was known amongst the whole school."

Then the claimant:

"There is strong feeling amongst the longstanding staff that favouritism is in play. My only intent with that comment was to protect the younger teachers."

42. **Did you say it was only because he wanted to get close to Elena?** I don't recall.

43. **Did you allude to Max and Elena being close i.e. in a relationship?** Not in a relationship.

44. **Being close?** He spends a lot of time in her room.

45. **Do you think it was appropriate to have a conversation about the Executive Headteacher?** It was not intended to malign him. My intent was to protect people.

MH: Do other staff talk about Max?
Claimant: Yes.

46. **Are these comments made constantly?** No I was just trying to avoid a problem for him.

47. **Do you have any issues or gripes against Exec Head?** I do really like Max. Like everyone he has his strengths and weaknesses. I have complained about him from time to time but I have also defended him in situations. When I was talking to Hannah Jones, I was trying to keep him out of trouble. If you are spending lots of time in one room, people may perceive things because of what has happened in the past.

48. Is there anything you want to add with regards to this allegation?
MH: I would like to reiterate that Meg likes Max.

[Then the claimant] I am not sure Max reciprocates this because I was involved in an allegation against him for manhandling a disabled child. This was handled by HR and dealt with. I think

> our relationship has never really recovered since then. I didn't do anything out of malice, it was about safeguarding."

21. The claimant went further, explaining to me at the hearing, in her evidence in chief:

> "People will gossip, speculate and talk about other staff. This is part of School life and all I was doing at the time was providing a spur of the moment comment that I genuinely believed to be the case, though it was half in jest. I did not make the comment to try and damage Mr Vlahakis, nor did I make the comment to try and start a rumour about Mr Vlahakis and Ms Sheehy. I simply made a comment, provided an opinion to another member of staff which I did accept was inappropriate to make."

22. In due course, the case proceeded to the disciplinary stage; there being three cases to answer, as set out in a letter from Mrs Boam dated 27 November 2015 (133-134) which I set out as follows:

> "**Disciplinary Investigation Outcome – Disciplinary Hearing**
>
> I write to inform you that the investigation into your conduct has been concluded. Having considered the evidence gathered during the investigation, I have decided that there is a case to answer and that the following allegations should be put before a disciplinary panel at a disciplinary hearing:
>
> - Making untrue allegations about the Executive Headteacher and in bad faith
> - Providing false information regarding your return flight
> - Unprofessional conduct with reference to contacting a witness party to the disciplinary investigations.
>
> The first allegation above was initially investigated as misconduct until the facts of the case were apparent. Given the admission by you and subsequent allegations in your evidence, this may now be viewed as Gross Misconduct but it will be for a panel to decide on the seriousness of the allegation and whether, if upheld, they determine it sufficiently serious to be classed as Gross Misconduct.
>
> The second allegation will again be determined by the panel after they have listened to both sides' evidence and presentations. The panel may decide that your conduct is sufficiently serious to be considered Gross Misconduct.
>
> The final allegation will be considered as misconduct.
>
> Due to the potential for two of the allegations to be considered as Gross Misconduct, I must advise that a possible outcome of the hearing is dismissal."

23. The procedure was then explained to the claimant; and she was told she could be accompanied (which happened). The claimant was given the necessary documentation to meet and understand the case that was described against her in that letter. The claimant made a personal statement in advance (136-142). I was also able to see the minutes of the disciplinary hearing which took place at the Village Hotel, Walsall on Monday 18 January 2016. The respondent's version of the minutes is at 149-163. The Governors' panel comprised Mr Steve Orton as Chair, the Rev Mark Kinder, and Mrs Jan Forrest. The S4S HR representative was Mrs Emma Richards. The investigating officer was Miss Patel was there; and from management, Mrs Boam was presenting on behalf of the School. Mr Vlahakis was there for part of it as was Mrs Angela Hill, a witness in support. The claimant's representative then was Mrs Gail Hobbs. The clerk was Mrs Irene Brettell.

24. The claimant later produced an amended set of notes. These were made after some time for reflection; and added nothing to my understanding of the case. The significance of the things said by the claimant was plain to me. At the end of the meeting, the claimant was told the outcome and it was confirmed by Mr Orton by letter (180-181) which included this:

> "1. Making untrue allegations about the Executive Headteacher and in bad faith
>
> The panel found that the comment you made to Hannah Jones was inappropriate and unprofessional. We find that you somewhat misguidedly believed at the time for it to be true. However, after Hannah immediately corrected you, and throughout the investigation, you didn't seem to recognise the seriousness of what you said, nor its impact, and so did not seek to modify your comment, seek to withdraw it, or adequately quantify it. If your concerns were so serious that you felt you needed to protect staff, including Max, you should have taken them to SLT, a procedure which you knew. Instead you made further allegations that were unrelated and unfounded, and not in response to direct questions. We therefore found that it was inappropriate and made in bad faith, and so substantiated.
>
> 2. Providing false information regarding your return flight
>
> Whilst you may have had just cause at the time to believe you may have been delayed, following your sister's advice, since returning from your trip you have made further statements about missing flights from Paris. You allege not to recall this conversation with Mrs Boam. However, we found that it was more likely to have happened than not. Further, it is entirely reasonable for management to expect staff to make travel plans so that they are in work on time. When these don't go to plan staff are expected to be honest and open, and we do not feel on the evidence presented that you had been. We therefore found that this allegation is substantiated.

> 3. Unprofessional conduct with reference to contacting a witness party to the disciplinary investigations
>
> You admitted to contacting a witness party to the disciplinary process. You had agreed with the investigating officer to receive the Terms of Reference by email but failed to read these properly. These documents clearly stated not to contact anyone other than your union, and it was your responsibility to read them. It is wholly inappropriate to contact a witness regarding allegations made against you, even if you did not disclose the contents. We did recognise however that this was a stressful time for you. Nonetheless, this allegation was still substantiated.
>
> On the above allegations the panel concluded that you should have received a final written warning."

25. However, that was not the end of the matter. The letter went on to confirm what was a significant shift in emphasis during the meeting. It goes on to say:

> "However, in addition to these findings and based on the evidence present by Max Vlahakis, Executive Headteacher, we also recognised the impact your words have had on him and the working relationship. We therefore found that the trust and confidence necessary to sustain the employment relationship has irretrievably broken down. On this basis, the panel concluded that you should cease to work at the school and should be dismissed from your post."

26. Whilst the respondent's investigation and disciplinary process had been exemplary for the most part, during the hearing the claimant was presented with a new issue over which she had been given no notice. Mrs Boam introduced it and I refer to pages 161-162 where she stated:

> "In addition to the above [the disciplinary items], we are concerned that the employment relationship has irretrievably broken down. In her interview MG made some rather serious statements about MV. Both Max and I have to have trust and confidence in our staff. It is just not acceptable to fabricate statements about the conduct of the Executive Headteacher, when there are no reasonable grounds to do so. MG knew the process to follow if she had concerns – she has used it before – but she raised none of these to anyone in SLT as she knew them to be untrue.
>
> MV has stated that he categorically cannot and will not work with Meg moving forward, and the result of this places not only his reputation at risk but also the entire Federations. We must be able to have trust and confidence in our staff and making false statements that have the potential to cause serious harm to Senior Managements reputation makes it impossible to maintain that trust.

> Even during today's hearing MG alluded to further allegations against MV. She specifically said 'I could have said a lot worse'. She has also said several times that she wanted to have her say to 'make it better'. The purpose of AP's investigation meeting with MG was to provide any information relevant to the allegations but she also had the opportunity to amend her statement and she provided four additional witnesses with whom Anila met, this is her opportunity to have her say. She has not however made it better.
>
> Whatever the panel decide in respect of the above allegations, we would also ask that they consider whether or not the statements made by MG throughout this process have destroyed the trust and confidence so much so that the employment relationship has irretrievably broken down."

27. The claimant was told of her right to appeal and she exercised it. The appeal was rejected. It was heard on 12 February 2016 and I saw the minutes of it at pages 193-218. The claimant was notified of the outcome at the end orally and this was confirmed in a letter which was undated but probably sent within 7 days of the meeting (219-220). That letter is short and succinct; and it recites the dismissal reasons:

> "You were dismissed from your post on Monday 18 January 2016, by the Staff Dismissal Committee of the Governing Body for the Alumwell/Butts Federation. The grounds for dismissal were that the trust and confidence necessary to sustain the employment relationship had irretrievably broken down – confirmed as 'some other substantial reason', by Mr Orton."

And it also set out the basis of the claimant's appeal; reciting the following:

> "Your appeal was against all three findings for the allegations above and for the dismissal itself. The Appeal Committee's remit was to consider whether the Staff Dismissal Committee's findings and dismissal was fair, based on the evidence presented.
>
> The Appeal Panel had the opportunity to consider your appeal in full against the reasons for your dismissal. The evidence that the panel heard during proceedings did not contradict the original Staff Dismissal Committee's decision. The Appeal Panel found that the professional working relationship had broken down and that this relationship was unable to be repaired.
>
> The role of the Executive Headteacher requires the full trust and confidence, both in and from all staff members to ensure the professional operation of the school. The Appeal Panel found that, in the case heard by them, this trust and confidence was no longer evident and therefore, based on the fact of this breakdown, the dismissal was fair."

The appeal hearing was chaired by Mr Doodson, who gave evidence to me at this hearing. I have now set out the basic facts and main chronology of events.

28. The submissions. Both counsel put these in writing. They were both professional and helpful to me; and I thank them for their contribution to my understanding of the case. They both spoke to their written submissions and therefore there is no need for me to recite the contents of them here. In short, they agreed that section 98 ERA was at the core of my decision-making process. They agreed that the reason must be established by the respondent, that it must be a potentially fair reason under section 98; and the burden of proof here is on the respondent to prove it on the balance of probabilities. Overall fairness is my remit under Section 98(4); I may consider anything that I take to be relevant in coming to a decision, recognising there is no burden of proof on either party in this aspect of the case, it is entirely down to me.

29. My conclusions and reasons. I now apply the law to the facts. Firstly, the respondent has established pursuant to section 98(1)(b) a potentially fair reason for dismissal on the balance of probabilities; and that is "some other substantial reason" because of the irretrievable breakdown of the relationship between the claimant and Mr Vlahakis. I then turn to the second part of the analysis which is more complicated; and I ask myself: was the decision overall fair, given the size and administrative resources of the respondent? As suggested by the parties, regard to those circumstances is in relation to the School. The parties recognised it would be regarded as a medium sized business because of the number of people employed and its budget, which was somewhere in the region of £2million per annum. I must determine the case in accordance with equity and the substantial merits of it. Did the respondent act reasonably or unreasonably in treating the reason (some other substantial reason) as sufficient to dismiss the claimant? The investigating officer Miss Patel saw two ways forward at the end of her enquiries (42): Option 1 – "Management advice" and Option 2 – "Proceed to a Hearing". She gave details about both options. The Commissioning Manager for the investigation (Mrs Boam) took the decision to go with Option 2. I did not hear evidence from her with an explanation as to why she chose Option 2; but it is likely to be contained in the narrative set out by Miss Patel (42).

30. However, that narrative does not refer to "irretrievable breakdown" or "some other substantial reason"; it talks about the claimant's: "professional conduct, and whether or not the trust and confidence necessary to sustain the employment relationship can be sustained and therefore there is sufficient evidence to proceed to a disciplinary hearing". The claimant saw that document in the pack presented to her for the disciplinary process and hearing.

31. The investigation was reasonable and dealt with the terms of reference. Then, once the matter went forward, the claimant knew the case that she had to meet, and she had a further letter confirming (which I have already quoted from). At the disciplinary hearing, she was represented by a person of her choosing; and I know that she had help from Unison. She had the opportunity

to put forward her case. The Rev Kinder and his colleagues applied their minds to the issues identified in the investigation and which were placed before them; and came to a decision of a final written warning. So far so good. The ACAS Code of Practice has been followed in an exemplary way.

32. However, as I pointed out in my factual narrative there was a sudden change in emphasis during the disciplinary hearing. Mrs Boam introduced "irretrievable breakdown" on the back of the disciplinary issues before the Governors. The claimant was not warned of this in advance; it was a new subject. She was unable to prepare for it. This had not been part of the investigation process and remit. The claimant was taken by surprise, or I could say, ambushed. The Rev Kinder explained how this came about. Part of the way through the disciplinary hearing, Mr Vlahakis entered the room to be questioned and in his statement to me the Rev Kinder said this:

> "He [Mr Vlahakis] said that, by her words, Miss Gallahan had jeopardised, in his view, his good name and the reputation of the entire federation. He said that he did not think that he would be able to trust her again.
>
> I asked Mr Vlahakis whether there was any way in which he might be able to work with Miss Gallahan in the future. I suggested mediation as a mechanism to try to work through the problem. Mr Vlahakis was quite clear that he would not be able to do that. He asked how he could trust an employee who makes such false and disparaging statements. There were a few further questions from Mrs Richards. One of the questions Mrs Richards asked of Miss Gallahan was why did she say what she did to Ms Jones if she was trying to protect Mr Vlahakis and why the issue had not been raised with anyone else such as the School Leadership Team. Miss Gallahan said that she knew now that the allegations were not true but then went on to say "I have nothing to lose. You know I could have said a lot worse". When Miss Gallahan was asked what this might be, her representative, Mrs Gail Hobbs, told her to stop speaking any further on the point."

And in paragraphs 12, 13 and 14 of his statement, the Rev Kinder told me about Mrs Boam's closing summary or summing up and how the issue effected the panel's thinking:

> "12…….She also mentioned Miss Gallahan's comment that "I have nothing to lose. I could have said a lot worse". She also asked that the panel, apart from dealing with the allegations that gave rise to the disciplinary hearing, to consider whether or not the statements made by Miss Gallahan had served to destroy the trust in confidence between herself and Mr Vlahakis such that their working relationship had irretrievably broken down.
>
> 13. It appeared to the panel, when we were deliberating on this matter that there was a profound breakdown in the relationship between Miss Gallahan and Mr Vlahakis. It was plainly obvious that Mr Vlahakis was

> very upset about the allegations that had been made about him. He was visibly shocked and upset and stated that he felt that his own school reputation was being undermined. He said that he was unable to work with Miss Gallahan because of the allegations that she had made against him but, what particularly exercised the mind of the panel was Miss Gallahan's comment that she had nothing to lose and could say more. That seemed to me to have the overtone of a threat.
>
> 14. We found that the evidence regarding the disciplinary matters were sufficient to uphold the allegations against Miss Gallahan but there were mitigating circumstances and she was thus issued with a final written warning. However because of the relationship between her and Mr Vlahakis, especially the threat of further allegations, we felt that it was impossible for the working relationship to be sustained. Our conclusion was that the working relationship had broken down to such an extent that Miss Gallahan was dismissed for that reason."

33. Unfortunately, I could not follow the thinking of the Governors when they changed their emphasis. It started with: "That seemed to me to have the overtone of a threat". This changed into: "…the threat of further allegations", without any further explanation or investigation. At this point the Governors were on new ground, exploring a different issue; but taking no action to inquire of the claimant what this was about; or considering an independent investigation, such as that which had been commissioned for all the other (conduct) matters. The Governors carried out their own investigation there and then; and decided on it. Their roles became somewhat blurred. The procedure at this point had changed; from being reasonable, to becoming unreasonable. The ACAS Code of Practice had not been followed for the dismissal issue of some other substantial reason. I concluded at this point the decision to dismiss on this new ground was both procedurally and substantively unfair having regard to equity and the substantial merits of the case.

34. I noted that the Governors considered how upset Mr Vlahakis was. No doubt the claimant was upset too. She may have said things that did not help her case. This may have been exacerbated by the new issue being introduced without any investigation or notice preceding it. However, part of my remit is to judge reasonableness at all stages of the process. As I indicated earlier, this is often cited in conduct dismissal cases, where the range of reasonable responses test is used; arising out of the case of Sainsbury Supermarkets Limited -v- Hitt. I do not see why that should not apply here. I agreed with some of Ms Garner's submissions at this point. She posed the question: 'Was it in the range of reasonable responses for the Governors to allow the new issue to be put before them; or put before them without further consideration or investigation?' My answer to that was: 'No, it was outside the range". She also submitted I should answer the question: "Was it outside the range not to allow the claimant to make representations on the 'some other substantial reason' point?" in the claimant's favour. Again, I answer it by saying: "No, that would not be in the range of reasonable responses". Given the change of tack, the Governors could have considered

rolling up their sleeves and thinking in more detail about those matters raised by Ms Garner: mediation and redeployment. The Governors were not aware of the possible limitations on the latter. During the proceedings at the tribunal I was advised that this was not possible; but this was never properly explored at the time. The disciplinary process became rather rushed in the end; and the panel of Governors lost focus. This was not entirely their doing of course; and they had people before them that were presenting the case; and they had facilities to take advice. The procedure lacked transparency at the end; and I found the dismissal at this point unfair. However, that is not the end of the matter because I should consider all stages of the process. The claimant appealed; and that process can remedy the earlier defects.

35. Mr Doodson is the Chair of Governors at a school in Walsall. He became involved in this matter because Alumwell and Butts Schools Federation did not have an appropriate available Governor to chair the appeal hearing and he was therefore asked to do it. The appeal hearing took place on 12 February 2016 and it was heard by him and colleagues Mrs Mary Clarke-Mortiboys and Councillor Aftab Nawaz. In advance of the appeal hearing the appeal panel received the relevant documents concerning the claimant's appeal; which included the minutes of the disciplinary hearing, the written appeal and investigation report. Prior to the appeal hearing Mr Doodson had no prior knowledge of the claimant and I accept that he and his colleagues brought independent and impartial minds to the process. There had been no further or supplemental investigation by Miss Patel or any of her colleagues at S4S. Mr Doodson confirmed to me: "The reason for dismissal was because of the breakdown in the relationship between Miss Gallahan and Mr Vlahakis".

36. Mr Orton was the Chair of the dismissal committee, and he presented the management case to the appeal panel, explaining that the trust and confidence between Miss Gallahan and Mr Vlahakis had broken down and that that was the reason for her dismissal from employment. Mr Orton said that Mr Vlahakis had made it clear during the course of the hearing in January 2016 that he would not be able to work with Miss Gallahan because he had lost faith and confidence in her. Mr Orton commented that Miss Gallahan was of the view that she could work with Mr Vlahakis. However, Mr Vlahakis was clear that he would not be able to work with her.

37. The notes of the appeal meeting are helpful. Mr Doodson was trying to keep everyone on track, and at page 212 where it records this:

> "SO advised that he was only calling KB with regard to the flight, the Chair asked him to make sure it was tied to the trust and relationship breakdown, he would repeat that to KB on her arrival.
>
> KB was invited into the meeting at this point.
>
> The Chair reiterated that they weren't looking at individual details with regard to historical issues and conduct, what they were looking to discover was if there was a relationship that could be saved."

Despite this warning, the panel did hear about the detail of the matters (conduct) not leading to dismissal. They were discussed before KB entered the room as well. I could see that Mr Doodson took his task seriously and made enquiry of Mr Vlahakis and this is noted:

> "The Chair interjected, he highlighted that [if] MG would withdraw all comments she had made, he asked if that would affect MVs view point or how he was feeling about the situation. MV said no and he gave his reasons, there was a difference between withdrawing the comment and the comment itself. Just withdrawing something didn't say it was right or not, or how it had affected him. Thinking around the last hearing he had thought in his mind should I have somebody with me when walking about the building, he couldn't have that as a Head, the most worrying statement was there's a lot worse out there that he would have to deal with. His job role involved openness and honesty he liked to be able to talk to people in that way, he felt they had that relationship at one point the whole process had shocked and taken him aback, the knowledge she had about his relationship with Elena she would have known that was incorrect, it was quite a slanderous statement which still upset him now, he knew there were difficulties over a number of years and had tried really hard to find a way through them. The last lot came from nowhere he didn't know where they came from, prior to that they were getting on well.
>
> SO asked MV in his view there was no way he could work with MG through mediation or a formal process to work together. MV said he couldn't work with people he couldn't trust not to twist things, that when he was visiting and talking with staff it wasn't implied he was having a relationship with them. They were proud to have an organisation where people looked after one another, he now felt he had to be on his guard, he didn't know how any mediation could fix that lack of trust that had broken down."

38. This demonstrated to me that the appeal panel were considering the non-dismissal conduct wrapped up with the 'some other substantial reason', that is the relationship and the failure of it. The lines between the two things were blurred; and it was not entirely clear to me how the separation of these things happened, if at all. The appeal panel based its decision on the same evidence as that which was before the disciplinary panel. That is, without any further investigation. This meant accepting the change in tack during the disciplinary hearing, that is, being made without notice, and relying on the claimant's conduct in the disciplinary hearing when faced with a new issue. Thus, at the appeal stage the panel conducted its own investigation, contained within the appeal meeting. That is exactly what the disciplinary panel had done. The appeal panel's outcome is plain in the letter it sent; but its thinking is not transparent to me. I cannot see that the conduct complained of in the disciplinary process, particularly the gossip between the claimant and Ms Jones, has not crept into the 'some other substantial reason'. I would also say that the claimant was lured into making some of the comments that were used against her by dint of the questions that were put to her during the

meetings. I conclude that there was a lack of transparency in the process up to and including the appeal. Thus, the decision to dismiss the appeal did not remedy the defect that I found was already in place from the disciplinary process and outcome.

39. The mutual duty of trust and confidence is an obligation at the heart of the employment relationship. It is not a convenient label to stick on any situation wherein an employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is unavailable or inappropriate. I agreed with Ms Garner's submissions here. The respondent's approach suggested there was a switch from conduct to SOSR; and the lack of transparency leads me to conclude it was possibly a "convenient label"; especially without any warning being given or investigation taking place. Therefore, I found and concluded that the claimant was unfairly dismissed.

40. However, that is not the end of the matter, as I had to go on to deal with two other things. Firstly, under Polkey, what might have happened if the procedure had been fair? I find that this rather is too speculative; neither representative had made great play about it. What would have happened if there had been an investigation into the new issue? I do not know. Further, would mediation have happened and what would the outcome have been? I am not sure. It is unlikely that it would have worked, given Mr Vlahakis' opposition to continuing the working relationship; but it may have worked. How long would it have taken to have gone through the process? I had no evidence about how long it would have taken or what sort of notice would be required at the end, if it had failed. As to redeployment, nobody knew the facts about that prospect when they were making the decisions at the disciplinary hearing or at the appeal. However, it is a difficult subject, and I do not blame the lay governors for not understanding the position; but they had other people to advise them. I attach no blame to them; but it was not discussed. Thus, when I look at those matters under Polkey principles, I cannot say what would have happened if a fair procedure had taken place and would make no reduction in any award.

41. The next issue for me was consideration of contributory conduct, and that was an important feature in this case. The claimant was not always helpful as a witness in her own cause. She was inconsistent, for example stating that some of the things that were said by her were just rumours; but then saying they were true. I agree that there was a veiled threat made by the claimant. I found that the claimant had no insight into how her repeating gossip might have had an adverse effect on her relationship with Mr Vlahakis and other people at large. The claimant presented to me as someone with an immature approach to the subject of rumour and gossip. When sharing gossip with Ms Jones she should have known that she was likely to have passed it on. Therefore, she must take some responsibility for what happened consequently. The claimant's thinking was very hard to follow. I could not understand her thinking on how the spreading of rumours or unsubstantiated gossip protected anybody. It was regrettable that she did the things that she

did; and I find that there was culpable or blameworthy conduct on the part of the claimant. I conclude she behaved at least foolishly by repeating gossip to Ms Jones. There was also unreasonable conduct in the way she behaved at her employer's business and with her colleagues. She repeated other items of gossip. The equivocal way she dealt with some of the issues in the disciplinary process influenced the decision makers at the disciplinary and appeal stages; and although they made mistakes (which I have already articulated), the claimant contributed to those people making the mistakes. Therefore, I find that the claimant contributed to her dismissal. It is just and equitable to reduce the amount of any compensation to be awarded.

42. I then heard further submissions from both parties about contribution; having had the benefit of my fact finding. I indicated my current thinking was somewhere in the region of 30% to 40%. Ms Garner suggested I kept to the lower end of that scale. As far as the respondent was concerned Mr Maxwell argued that I was being too generous to the claimant, given my findings, especially about what the claimant said had helped to create the mistake at the disciplinary and appeal panels. Having heard the brief supplementary submissions, I concluded the justice in the case rested with a finding of 40% contribution. That dealt with liability. Thereafter, the parties agreed the issue of remedy and fees; and a consent judgment was arrived at.

Signed by _____ on 15 May 2017
Employment Judge Dimbylow

Reasons sent to Parties on

16 May 2017