EMPLOYMENT TRIBUNALS

Claimant: Ms A Starkie

Respondent: Warrington Borough Council

Heard at: Manchester **On:** 12 and 13 November 2018

Before: Employment Judge Langridge
(sitting alone)

REPRESENTATION:

Claimant: Mr S Flynn, Counsel
Respondent: Mr L Rogers, Solicitor

The Judgment of the Tribunal was given to the parties at the hearing on 13 November 2018. The claimant requested written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, which are set out below.

REASONS

1. This is a claim for unfair dismissal and breach of contract arising from the respondent's decision to dismiss the claimant summarily on 13 February 2018 on the grounds of gross misconduct. The conduct in question related to an incident on 22 March 2017 when the claimant was feeding a child (referred to in this judgment as Child 1) in the dining hall at the school where she worked. The claimant denied that she was guilty of any misconduct and took issue with various aspects of the respondent's decision, its investigation into the incident and its handling of the evidence. For its part, the respondent relied on a detailed investigation report and witness statements as supporting its belief in the gross misconduct in justifying its decision.

Issues and relevant law

2. The first question for the Tribunal was to determine the reason for dismissal. The respondent, who carried the burden of proving that the reason was a potentially fair one under section 98 Employment Rights Act 1996 ('the Act'), relied on conduct under section 98(2)(b) and asserted that this was genuinely the reason for dismissal. In this case no dispute arose that this was the reason relied on by the respondent.

3. The next stage was to consider the question of fairness in accordance with section 98(4) of the Act, which required the Tribunal to take into account equity and the substantial merits of the case, the size and administrative resources of the employer, and the relevant circumstances. The Tribunal had to avoid bringing its own view of the dismissal decision into consideration, but instead had to decide whether the respondent's decision to dismiss fell within the range of reasonable responses which an employer might apply when considering the conduct and imposing a sanction. In applying this test the Tribunal had to ask whether the respondent's decision was one that was open to it as a reasonable employer, or whether, conversely, no reasonable employer acting on these facts would have come to the decision that this respondent came to.

4. The leading case on fairness in conduct cases is British Home Stores v Burchell [1978] IRLR 379 which set out three elements to consider: firstly, whether the respondent's belief in its reason for dismissal was a genuine one; secondly, whether that belief was held on reasonable grounds; and thirdly, whether the respondent had carried out a reasonable investigation. The Tribunal also took account the principles laid down in Foley v Post Office [2000] IRLR 827, as well as Sainsbury v Hitt [2003] IRLR 23 and Iceland Frozen Foods v Jones [1982] IRLR 439.

5. Applying these principles to the arguments in the present case, the Tribunal had to address the following issues of law:

5.1 Was there a reasonable basis on which the respondent could conclude that the claimant was guilty of gross misconduct?

5.2 Did the respondent actually believe that the claimant was guilty of gross misconduct, and was it entitled to hold that belief on the strength of the evidence gathered?

5.3 When the respondent decided that dismissal should be the outcome, was it entitled as a reasonable employer to take that view, and was that sanction within the range of responses open to it? Alternatively, was it a decision which no employer, acting reasonably, could have reached on the evidence?

6. Another important set of legal principles derives from two authorities relied on by the claimant: Salford v Roldan [2010] EWCA Civ 522, in which the Court of Appeal reinforced an EAT decision in A v B [2003] IRLR 405 to the same effect. The relevance to this case is that the relevant circumstances for the purposes of determining fairness under section 98(4) include the gravity of the charge and its potential effect upon the employee's career. It is therefore particularly important that employers take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to work in his or her chosen field of employment is potentially at risk.

7. Where serious allegations of criminal misbehaviour are involved and are disputed, in A v B it was said that:

> "It 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 of 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".

8. The judgment goes on to refer to the importance of the investigation focussing no less on potentially exculpatory evidence than on evidence which supports the allegation.

9. In Roldan (paragraph 73) the Court of Appeal built upon the EAT's judgment and dealt with a point which has particular relevance to the present case, where the evidence consists of diametrically conflicting accounts. The Court referred to the possibility that each party, in giving their accounts, was genuinely seeking to tell the truth but was perceiving events from their own vantage point:

> "Even where that does not appear to be so there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved".

10. One example referred to is conduct that is potentially out of character for the accused employee to have done.

11. The relevance of these authorities is that while every employer is expected to meet reasonable standards of investigation and reasoned decision-making, it is incumbent upon an employer who is going to make a potentially career-destroying decision to think very carefully about whether those standards have been met.

12. On the facts of this case, there was no dispute that the respondent's decision-makers believed they were entitled to dismiss. The focus for the Tribunal was therefore on the reasonableness of the investigation they relied on, and in particular the evidence obtained from that. The question was whether the evidence supported a reasonable belief that the claimant was guilty of the misconduct alleged.

13. Other issues which the Tribunal had to determine included whether, if it were held that there was some procedural unfairness in the case, there might have been a different outcome had a fairer or better procedure been followed, following well-established principles in Polkey v AE Dayton Services. That was relevant to any remedy rather than the core question of unfairness.

14. The other claim brought by the claimant was whether the respondent breached her contract when it failed to give her notice to terminate. The evidential burden rested with the respondent to prove that it was entitled to treat the claimant's conduct as gross misconduct and a repudiatory breach of contract. This required the Tribunal to take a different approach from the unfair dismissal claim. The latter claim did not permit the Tribunal to decide whether the claimant was guilty of innocent of the alleged misconduct, but rather to decide whether the respondent had reasonable evidence of its own belief in her guilt. By contrast, for the purposes of the breach of contract claim it was necessary for the Tribunal to decide, on the balance of probabilities, whether it believed that the claimant was guilty of that repudiatory conduct. As the respondent did not call any witnesses with direct knowledge of the facts, that decision could only be made on the strength of the Tribunal's assessment of the claimant's evidence and the indirect evidence of the witness statements gathered in the respondent's investigation.

15. The following findings of fact are relevant to both claims, though the Tribunal was mindful of the different legal approach to be taken when drawing its conclusions from those facts. The findings of fact represent a summary of the key aspects of the evidence but do not attempt to cover every point that was put before the Tribunal.

Findings of fact

16. The claimant is a qualified teacher and her employment with the respondent began on 1 January 2011. At the time of her dismissal on 13 February 2018 she had seven years' experience in the school working with vulnerable students with special educational needs, and in some cases serious disabilities. The claimant had experience in feeding techniques and was familiar with one pupil, Child 1, having taught him for year, although at the time of the incident on 22 March 2017 she was not in the habit of feeding him at dinnertime. She had, however, helped him when eating snacks.

17. Two allegations arose in respect of the claimant's conduct at work, in early 2017.

18. On 17 March 2017 an incident involving the claimant was said to have taken place in the hydro pool. This was said to have been witnessed by a supply teacher though not reported by him at the time, for reasons which were not explained to the Tribunal. The relevance of this is that, when the supply teacher eventually reported the issue in June 2017, it led to a second disciplinary allegation being raised against the claimant alongside the primary allegation which arose from events on 22 March 2017. The addition of this second allegation had an impact on the timing of the investigation into the first one.

19. The first and main allegation against the claimant related to events which took place on 22 March 2017, the key elements of which are set out below.

20. The claimant was seated at a long table in the school's dining room from approximately 11.45am with around nine children. Another member of staff, Clare Edmonds, was also at the table. Ms Edmonds was at the time a teaching assistant with 16 years' experience. She was familiar with Child 1. This was the first occasion that the claimant had supported Child 1 through dinner.

21. Ms Edmonds was seated at the same table as the claimant and Child 1, positioned on the opposite side and diagonally across to the right of the claimant. Child 1 was on the claimant's left side, and he was turning towards her during dinner in order to be fed. From Ms Edmonds' position she had a clear view of the claimant's interactions with Child 1. Alongside both the claimant and Ms Edmonds were other children on each side of the table, and a further child was seated at the far end of the table nearest the door.

22. At around 12 o'clock another colleague, Lyndsey Pantoni, joined the claimant and Ms Edmonds at the table, sitting directly opposite the claimant. She was also there to supervise and assist children to eat their lunch.

23. Throughout dinnertime Child 1 had been upset and agitated. At times he was trying to head-butt the table or punch himself. He was noisy and screaming in a manner which was usual for him because he otherwise had no ability to communicate. His screams sounded like a baby's cry and were quite loud. Child 1

was unable to articulate the reason why he was upset and agitated, but there were potential explanations for this. For example: the usual teaching assistant was not there; Child 1 was in a different seat from usual; and he was faced with a new menu which he was not expecting. Neither Ms Pantoni nor a visiting physiotherapist (Beata Zurawicz) saw Child 1 or were aware of these behaviours at the start of dinnertime at 11.45am.

24. At around 12 noon Ms Zurawicz was standing outside the dining room by the double doors. She saw something through a narrow glass panel in the closed side of the doors. She believed she saw the claimant forcing food into Child 1's mouth. She believed Child 1 was unable to move his arms, and tried to free them, and she believed the claimant pushed his arms back. She saw the claimant's arm around Child 1's shoulder. She said the claimant was pushing his cheek in order to push food, which he tended to store in his cheeks, into his mouth. Ms Zurawicz felt uncomfortable. She was unfamiliar at that time with the school, having visited only two or three times in the space of as many weeks. She was also unfamiliar with the specific methods used to manage Child 1's behaviour, bearing in mind that the school adopted a very 'hands-on' approach which was not necessarily the case elsewhere. She was also unfamiliar with the particular methods used to manage feeding. From her vantage point Ms Zurawicz's view was restricted, partly because there was a limited view through the glass panel and partly because Child 1 was visible to her mostly from his back or his side.

25. Neither Ms Pantoni nor Ms Edmonds, the two colleagues closest to the claimant and Child 1, saw anything that day such as to cause them any concern. Had they done so they would have reported it, but they did not. Another colleague, Sophie Williams, was walking through the dining room and in a position to see what was happening at the time, but she too did not see anything that gave her cause for concern and did not make any report.

26. Ms Zurawicz, while uncomfortable, did not immediately report it either. She was overheard telling a physiotherapist colleague that she "did not like" the way the claimant fed Child 1. That led to another colleague involving the Assistant Head Teacher, Aidan Yates, who came to speak to Ms Zurawicz. In other words, Ms Zurawicz did not take steps to report this herself, but rather responded to an approach made to her. She then wrote a statement. The claimant wrote her own contemporaneous written account the following day, 23 March, when she was suspended.

27. Based on the available evidence the Tribunal's finding is that Child 1's agitation and distress on 22 March was not caused by the claimant mishandling him or force feeding him. He may well have been screaming with food in his mouth, but the claimant was not force feeding him; she was in fact trying to calm him to help him eat. She sought to reassure him using the recognised 'hand over hand' technique and had her arm around his shoulders in a firm manner, which was also a recognised method appropriate to use with Child 1.

28. Following the claimant's suspension on 23 March, a delay of approximately eight weeks followed before the investigation was underway and before an investigator was even appointed. The Tribunal was given no explanation from the respondent for this delay. The school took no steps to protect the confidentiality of

the process during this time, and staff at the school were discussing the issues freely between themselves.

29. In a letter dated 18 May 2017 the respondent wrote to the claimant to say that an investigation was taking place, giving the identity of the investigating officer, and inviting her to an interview on 26 May which the claimant attended.

30. On various dates in May and June interviews took place with other witnesses. Ms Zurawicz had already been interviewed on 12 May, before the letter to the claimant, so the investigating officer must have been appointed by then. Ms Edmonds had also been interviewed that day. In this interview with the investigator, Ms Zurawicz gave a statement which differed from her contemporaneous account, in that she described the claimant using a headlock on Child 1.

31. On 16 May Janette Lybert was interviewed, as was Sophie Williams. Mr Yates was interviewed on 25 May, and the claimant on 26 May. A drawing produced by the claimant to show the layout of the room was obtained from her much later, on 12 July. Anna Barnett, the colleague who went to see Mr Yates to say that she had overheard some concerns, was interviewed on 5 June, and Ms Pantoni on 15 June. Those are the witnesses who were the most directly relevant to the alleged incident.

32. The timetable for proceeding with the investigation was then somewhat derailed by the notification in early June of a new allegation relating to the claimant's alleged treatment of a child in the hydro pool. This was the incident apparently witnessed by a supply teacher on 17 March 2017, over two months earlier. On 7 June the claimant was advised of this new allegation, and numerous other statements were obtained from many other witnesses over a period extending until October 2017. In the meantime the claimant had been invited to a disciplinary hearing, but for reasons relating to the availability of all parties involved, including the claimant’s union representative, this could not take place before 10 January 2018.

33. One of the items of evidence obtained in the investigation was a statement from the Head Teacher, Miss Duffy. While she was not in the dining room on 22 March 2017, her statement was very supportive of the claimant’s character. Neither her evidence nor the statements obtained from Ms Lybert, Ms Williams, Mr Yates or Miss Barnett were taken into account by the time of the disciplinary hearing because the respondent replied solely on the statements of four people: the claimant and Ms Edmonds, whose accounts were broadly consistent with each other; and Ms Zurawicz and Ms Pantoni whose accounts were broadly consistent with each other but completely opposed to the claimant and Ms Edmonds.

34. Ms Pantoni gave her statement at a relatively late stage on 15 June 2017, three months after the incident, by which time staff were already discussing the issues in the school. No steps had been taken to protect the confidentiality of the investigation, which had not been initiated for eight weeks after the incident. Ms Pantoni’s statement was striking in its animosity towards the claimant, whom she assumed had been dismissed by then, not suspended. That assumption suited her because she was pleased at the idea that the claimant would not be returning to the school. She gave the so-called dismissal as a reason why she herself had not reported the incident on 22 March. Ms Pantoni’s statement went on to introduce other matters, such as an allegation about the claimant's behaviour towards another child, and ‘pushing his two front teeth in’ in the manner in which she fed him. This

allegation, potentially very serious if true, was not reported to the school contemporaneously and it seems not to have been acted on at all.

35. One of the other interviews conducted in the investigation was with the LADO (Local Authority Designated Officer), Ms Cowan, on 12 July 2017. The questions asked of the LADO were about her knowledge of the allegations, which she said she was aware of, but otherwise this was an exercise in seeking opinion about the implications of the allegations if they were substantiated. In responding to this request for opinion Ms Cowan made strong statements about the claimant's culpability. For example, she said, "There is also a concern about the adult that this allegation has been made against. There is a pattern of behaviour that had not been addressed, behaviour that had been going on for months, maybe years, and gone unreported". She added that "left unchecked she [the claimant] would have continued (I surmise that she would)". She went on to say in her statement that "if one were to be cynical or to add the two allegations together you could conclude that this is a woman working with children to purposely hurt them. Good question: has she chosen to work in school with children with disabilities or developmental issues because she is more likely to get away with it?" Ms Cowan made clear that she supported the claimant's dismissal.

36. These statements and others relating to the second allegation were gathered and presented in an investigation report dated 21 November 2017. All of the witness evidence, including that mentioned above, was pre-read by the disciplinary panel, chaired by Mrs Southward.

37. The disciplinary hearing took place on 10 January 2018 when the claimant was accompanied by her union representative and had an opportunity to respond to the allegations. No witnesses were called to give evidence to the disciplinary panel. The hearing was adjourned to obtain supplementary evidence relating to the second allegation, though that turned out not to be material to the dismissal because it was not later upheld.

38. During the hiatus between the two disciplinary hearings in January and February the witnesses relevant to the first allegation were not approached to clarify their evidence or provide further detail, even though the statements presented directly conflicting accounts of what had happened in the dining hall on 22 March 2017.

39. The claimant was invited to the resumed disciplinary hearing on 13 February 2018 and this led to her dismissal without notice.

40. In the dismissal letter of 15 February the respondent set out brief reasons for the decision. It said the panel felt that Ms Zurawicz's account of the incident was reliable and supported by Ms Pantoni. In reaching this conclusion the respondent took no account of Ms Pantoni's bias against the claimant, evident from her statement, nor did the respondent provide any detailed explanation for preferring the evidence of two witnesses against the evidence of two others. It did not attach any weight to the evidence of Ms Edmonds, nor did it take into account the evidence of other relevant witnesses such as Ms Williams and the Head Teacher, so as to evaluate the conflicts in the accounts or consider whether the alleged conduct was out of character for the claimant.

41. On 26 February the claimant submitted an appeal against the dismissal decision and was invited to a hearing on 30 April. At that hearing the respondent's appeal panel considered whether the disciplinary panel had reached a correct decision, and it found that it did. Broadly speaking, the appeal panel's approach to the evidence and the weighing up of the conflicts was the same as that of the disciplinary panel, and the appeal was dismissed.

Conclusions

42. Applying the Burchell test, the Tribunal examined what evidence the respondent relied on, the adequacy of the investigation through which this was obtained, and whether the evidence supported a reasonable belief in the alleged misconduct. This was a question not only of assessing what the respondent knew but also what it ought to have known at the time of making its decisions.

43. It is uncontroversial to say there was a direct conflict in the evidence about the incident of 22 March 2017. The following are examples of some substantive points which emerged from the evidence, and which gave the Tribunal cause for concern about the respondent's approach.

44. Ms Zurawicz initially gave a contemporaneous account of what she saw through the glass panel in the dining room door, but the statement provided two months later to the investigator differed in an important respect, by including reference to a headlock. The contemporaneous record made no mention of this, which amounted to a significant omission. When asked about this during her evidence to the Tribunal, Mrs Southward explained it away as being a "different use of language", but the Tribunal did not accept that interpretation as a rational or reasonable one. Ms Zurawicz said in her first account of the incident that she "felt uncomfortable" about what she had seen, and "did not like" the way Child 1 was being fed, neither of which expressed any strength of feeling. It was clear to the Tribunal that during the progress of the investigation and in the way the evidence was gathered, the interpretations of what had happened escalated. This was illustrated by the investigating officer describing Ms Zurawicz as "very distressed" about the episode by the time she gave her statement on 12 May, two months after her more mildly-worded contemporaneous statement.

45. Another difference in the accounts relied on by the respondent was that Ms Zurawicz said she heard no screaming, although this was known to be a common way for Child 1 to express himself, and yet Ms Pantoni did. Ms Zurawicz claimed to have heard a comment made by the claimant, and yet she could not hear screaming. These discrepancies were important and a reasonable employer should have addressed them. This respondent did not, and simply accepted the accounts at face value, where they supported the allegations.

46. Another difference in the witnesses' accounts was that only Ms Pantoni said that Child 1 was kicking under the table. Ms Pantoni was also the only person who said the claimant had "clamped his mouth shut", about which Ms Zurawicz made no mention. The Tribunal recognises the possibility that one witness saw some things that another witness did not or could not see from their vantage point, which on its own would not necessarily mean the accounts are unreliable. However, the relevant question for the Tribunal was to consider whether the respondent was reasonably entitled to accept the evidence against the claimant without acknowledging the existence of those conflicts or taking any steps to test them. The respondent's

approach was simply to accept the damaging evidence and brush away the direct evidence of the claimant and Ms Edmonds without any conscientious attempt to evaluate and weigh up the conflicts.

47. Ms Edmonds, a very experienced teaching assistant with knowledge of Child 1, wholly supported the claimant's account of what happened and she in turn was deemed credible by the Head Teacher, but that exculpatory evidence was ignored for no reason. The claimant's own evidence was likewise discarded in favour of that of Ms Zurawicz on unclear grounds. The respondent relied simply on the fact that she was an external colleague and a professional person. In the judgment of the tribunal, that was a wholly irrational basis on which to draw the conclusion that her account was the only reliable one. The claimant was no less a professional person than Ms Zurawicz. Both she and Ms Edmonds were very experienced in dealing with pupils like Child 1, and both had specific experience and training which Ms Zurawicz did not.

48. Other aspects of the evidence also gave the Tribunal cause for concern. Ms Williams had been in the dining room, albeit she was walking past and not seated at the table. She saw nothing to concern her, but this evidence was ignored. Mrs Southward sought to persuade the Tribunal that Ms Williams "would have been" distracted or unable to see anything, but in adopting this stance Mrs Southward was simply making an assumption, because that is not what Ms Williams' evidence said and nobody went back to her to ask, 'Are you sure you had a good view such that, had anything untoward been happening, you would have seen it?'. Ms Williams' statement to the investigator said that Child 1's back was towards Ms Zurawicz, which would have meant Ms Zurawicz could not see his face or mouth during the feeding, but the disciplinary panel ignored that. Instead they took the view that Ms Zurawicz must have been able to see the child's mouth, not that she actually could. Again, the panel was dealing in supposition. The respondent was entitled to take into account that Ms Zurawicz had no reason to invent what she was saying, but it did not even identify the possibility that witnesses might be truthful and yet disagree with each other's accounts.

49. Other differences in the evidence rested with the diagrams showing the layout of the room. Several different diagrams were produced by witnesses, and perhaps none of them taken on its own was wholly accurate, but what was striking is that the disciplinary panel took no steps to clarify which was the most accurate version of this layout. This was important because it went to the question of the point of view of those who said they could see something, or those like Ms Williams who were in a position to have seen something, had it happened. In fact the panel concluded that Ms Zurawicz's viewpoint was better than Ms Edmonds' on no rational grounds at all. Ms Edmonds was seated at the table with a full view of the claimant's actions.

50. A further concern which ought to have attracted the panel's attention was Ms Pantoni's evident bias against the claimant. She made this animus very clear in her statement to the investigator, yet that was overridden by the disciplinary panel on the ground simply that Ms Pantoni was familiar with Child 1. The Tribunal concludes that this was a wholly irrational and unreasonable basis on which to discount the possibility that Ms Pantoni was an unreliable witness. During her evidence to the Tribunal Mrs Southward initially said this issue had been "looked into". However, when clarification was sought it became apparent that this was not the case; it had simply been discussed.

51. According to the diagrams of where witnesses were positioned on the day of the incident, Ms Pantoni seems to have been positioned so as to have the clearest view of anybody, being seated directly opposite the claimant. Despite this, on the day in question and for some weeks afterwards she did nothing and said nothing to report it. During the course of this hearing Mrs Southward conceded that this failure to report was a serious failing, and further conceded that it undermined Ms Pantoni's credibility. But at the time of reaching its decision, the panel gave the point no such consideration.

52. The disciplinary panel ignored Ms Pantoni's allegation about another child's front teeth being damaged by the claimant in another incident, which was never reported by her. This allegation therefore had the appearance of being a gratuitous attempt to harm the claimant and ensure that she achieved her aim of the claimant not returning to work. The panel failed to weigh this bias in their consideration of the evidence.

53. The panel made a presumption that Child 1 had not been trying to head-butt the table, but the only reason they did so was that this was absent from Ms Zurawicz's statement. The panel unreasonably failed to recognise that this might have happened before Ms Zurawicz appeared at the dining room door. The panel also made an assumption that Ms Edmonds' concentration on the children at the table meant she "would have been" occupied with them, but this was another example of the repeated assumptions being made by the panel, as was apparent from Mrs Southward's evidence to the Tribunal. She was not relying on the written evidence she had before her when the decision was made, and neither she nor her colleagues went back to any witnesses to ask questions. Before discounting the exculpatory evidence of Ms Edmonds on the grounds that she "would have been" occupied with or distracted by the children, the panel ought reasonably to have asked her that question. The panel assumed that Ms Edmonds saw nothing, and the same assumption was made about Ms Williams, yet it was not willing to entertain the possibility that Ms Pantoni may also have been distracted by the children in her charge.

54. In her evidence to the Tribunal Mrs Southward speculated about another aspect of the evidence, taking the view that there could have been red marks on Child 1's face which dissipated. However, no attempt was made to examine Child 1 or to gather any such evidence at the time, notwithstanding Mr Yates' involvement shortly after the incident.

55. The respondent's disciplinary panel made no findings that any witnesses were being untruthful, and in fact Mrs Southward gave evidence to the Tribunal that she felt Ms Edmonds was indeed telling the truth to the investigation. Yet the panel ignored that evidence, and did not address their minds to the possibility that everyone was genuine but some witnesses may have been mistaken about what they saw. That was the very point made by the claimant in defending herself, that this was a case of mistaken understandings or perceptions. The respondent unreasonably failed to give any consideration at all to that defence.

56. These concerns about the conflicts in the evidence, and the reliability of the various accounts, should have been obvious to any reasonable employer. They were (or should have been) readily apparent to the disciplinary and appeal panels from the evidence available to them when reaching their decisions. In the Tribunal's

judgment these obvious conflicts in the evidence demonstrate that had the panel members addressed their minds to them, they could and should have thought through the evidence more conscientiously rather than being so quick to draw adverse inferences against the claimant. Unfortunately that conscientious exercise was not carried out, and this fundamental failure to evaluate the evidence fairly renders the dismissal unfair.

57. It should also have been evident to the respondent's decision-makers that some participants in the investigation were not independent. Ms Pantoni's evidence has been referred to above. An investigator who was truly independent and acting reasonably should have dealt with Ms Pantoni's obvious bias when obtaining her statement, but the respondent's investigator simply accepted without challenge what she was told. As for the statement obtained from the LADO, Ms Cowan, the Tribunal concludes that this was an extraordinary and highly prejudicial expression of opinion about facts which at that stage had not been proven. It was clear from the evidence given at the Tribunal that the respondent read and took into account everything that was said in Ms Cowan's statement, both when deciding that the claimant was guilty of the misconduct and when deciding what the penalty should be. It seems hard to conceive that somebody in as professional a position as the LADO would have been ignored by the panel at that stage. A reasonable employer would have questioned why the LADO was expressing herself in such emotive terms, and why she was referring to a "pattern of behaviour" without any evidence whatsoever to support that.

58. In exploring these inconsistencies in the case against the claimant during the oral evidence given to the Tribunal, Mrs Southward sought repeatedly to explain away the difficulties. She said the lack of any mention by Ms Zurawicz of Child 1 screaming "would have been" because his mouth was full, but she was again making an assumption rather than relying on any evidence before the panel to that effect. She explained away the discrepancy about whether his mouth was clamped shut, by saying it was "one person seeing one thing and another person seeing another". It did not occur to Mrs Southward or her colleagues that Ms Pantoni may have exaggerated what she had to say because of her obvious animosity towards the claimant.

59. The unexplained eight week delay before the investigation was under way had an unfairly prejudicial impact on the claimant, in two respects. Firstly, it meant that statements were not taken promptly after the incident on 22 March, allowing for memories to fade or accounts to be tainted by discussion with others. A reasonable employer would have taken account of the fact that the initial delay before the investigation was underway impaired the reliability of the witnesses' memories, with statements being taken weeks or months later. In her evidence Mrs Southward said that Ms Edmonds' memory was "somewhat clouded", but she singled out Ms Edmonds and did not say the same of Ms Pantoni, who gave her evidence three months after the event, nor did she suggest that Ms Zurawicz might have a clouded memory when making a more detailed statement after two months.

60. The ACAS Code of Practice urges employers to carry out investigations promptly for this very reason, and this initial failure to gather the evidence promptly contributed to the unfairness of the dismissal. While the respondent was duty-bound to investigate the second allegation raised only in June 2017, there was no reason for the wholly unreasonable initial delay in gathering the evidence.

61. This delay also allowed the confidentiality of the case to be compromised and members of staff were able to discuss the case over many weeks before the investigation was initiated. The school took no steps to protect confidentiality during this time and despite being aware of this, the disciplinary panel ignored the breach of confidentiality and its implications for the reliability of what the witnesses had to say. A reasonable employer would have taken into consideration the fact that staff were discussing the case between themselves, and would have questioned whether this influenced Ms Pantoni's evidence. Gossip among staff would be one explanation for why she had nothing whatsoever to say about the incident in March, but by June she had a quite different account to give.

62. Some of the above criticisms of the respondent's approach to the discrepancies in the evidence reflect what Mrs Southward said in her oral evidence. The Tribunal is mindful of the importance of examining this case from the perspective of what the respondent knew at the time, or what it ought to have known. The point is this: the respondent did not address its mind to any of these discrepancies when it was tasked with evaluating the conflicting evidence, and it should have done.

63. In their written and oral evidence to this Tribunal the respondent's decision-makers were barely able to articulate to the Tribunal why they preferred the evidence of two witnesses over two others. In the Tribunal's view no reasonable employer would have concluded, as the respondent did, that Ms Zurawicz being external and a professional person was a sufficient basis on which to tip that balance. When the facts are considered in light of the principles in Roldan and A v B then it becomes all the more extraordinary that the respondent was so eager to believe Ms Zurawicz at the expense of the claimant's career. A reasonable employer could have been expected to test the discrepancies in the evidence, and could be expected in a case of directly conflicting evidence to bring witnesses to the disciplinary hearing to be questioned, or at least to have them re-interviewed. It is not for the Tribunal to prescribe specifically how this should have been done, but certainly the respondent was duty-bound to have found a way to address these inconsistencies and to have reached a more conscientious and reasoned conclusion on the evidence. The respondent did none of those things. When asked about this Mrs Southward said, "At the time we were comfortable with the statements", which seems an extraordinarily complacent position to adopt.

64. In summary, it is the Tribunal's conclusion that the substantial discrepancies in the evidence should have been tested by the respondent, and weighed up against the exculpatory evidence, before reaching a conclusion which not only took away the claimant's job but also had potentially career-ending consequences for her.

65. Tellingly, Mrs Southward said she believed Ms Zurawicz's account was accurate and "as a result we had the enquiry and the allegations". This, along with a number of other comments made in her evidence, satisfied the Tribunal that the respondent's starting point was to believe in the genuineness and honesty of Ms Zurawicz. Everything that came afterwards had to fit into that narrative, which meant the respondent brushed away and explained away anything that did not fit the narrative. It completely ignored the possibility that Ms Zurawicz was truthful but mistaken in what she believed she saw. It discarded exculpatory evidence of direct witnesses and also the Head Teacher's evidence of good character. She may not have been in the room on 22 March 2017 but that did not mean she had nothing

relevant to contribute. If the balance was so finely held then her evidence could easily have tipped it in the claimant's favour.

66. For these reasons the Tribunal concludes that this dismissal was unfair both substantively and procedurally. The handling of the investigation and dismissal, and the conclusion reached, did not fall within the band of reasonable responses. On the facts of this case the Tribunal is not persuaded that the decision to dismiss could fairly have been reached even if the procedural stages had been handled differently.

67. Relying on the findings of fact set out in this judgment, and taking its own view of the evidence before it, the Tribunal further concludes that the claimant did not commit the misconduct alleged. By dismissing her summarily the respondent breached the claimant's contract by failing to pay her notice.

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Employment Judge Langridge

Date 18 April 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

27 April 2019

FOR THE TRIBUNAL OFFICE

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