EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
LINDA FRAME	**AND**	**THE GOVERNING BODY OF LLANGIWG PRIMARY SCHOOL (R1)** **NEATH PORT TALBOT COUNTY BOROUGH COUNCIL (R2)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 24TH / 25TH / 26TH / 27TH / 28TH / SEPTEMBER 2018

1ST / 2ND / 3RD / 4TH / 5TH / 8TH / 9TH /10TH / 11TH / 12TH OCTOBER 2018

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

APPEARANCES:-

FOR THE CLAIMANT:- **MR J SMALL**

FOR THE RESPONDENT:- **MR J WALTERS (R1 AND R2)**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim of unfair dismissal is dismissed.
2. The claimant's claim of wrongful dismissal is dismissed.

Reasons

1. This is the judgement of the tribunal in the case of Linda Frame v The Board of Governors of Llangwig Primary School (LPS) and Neath Port Talbot County Borough Council (NPT). She brings claims of unfair and wrongful dismissal arising from the termination of her employment as the Head Teacher of Llangiwg Primary School. The effect of the Staffing of Maintained Schools (Wales) Regulations 2006 is that whilst appointed by the first respondent (LPS), and whilst the first respondent recommended her dismissal to the second respondent (NPT), she was actually employed by and dismissed by the second respondent. However the effect of the Education (Modification of Enactments Relating to Employment) (Wales) Order 2006 is that the correct respondent to the unfair dismissal claim is the first respondent (LPS); whereas the correct respondent to the wrongful dismissal claim is the second respondent (NPT). There is no dispute between the parties as to the correctness of this interpretation of the regulations.

2. The tribunal has heard evidence on behalf of the claimant from the claimant herself, David Geraint Davies and Rex Phillips. On behalf of the respondents evidence was given by Alan Tudor Jones, Amanda Baker, Andre Mundy, Alison Annear, Chris Millis, Evelyn Morgan, Huw Roberts, John Burge, Kath Gibson, Meryl Jane Hunt, Naomi Erasmus, Nicola Hire, Peter Nedin, Philip Jones, Rebecca Clarke, Rhodri Phillips, Sarah John (Bell), Sharon Davies, Sharon Jones, Sophie Griffiths (Davies), Stephen Davies, Susan Davies, and Susan Phillips. The position of each of the witnesses whose evidence it is necessary to refer to will be set out in the body of the decision.

Summary

3. The claimant is a teacher with over 39 years' experience, and she became the head teacher of the first respondent in 2007. She was summarily dismissed on 20 April 2017 as a consequence of two allegations of misconduct following an unsuccessful appeal into one set of allegations (Wraparound). Following a further unsuccessful appeal into the second set of allegations (Senco) she was informed that had she not already been dismissed she would have been summarily dismissed on 2 August 2017. As is set out in greater detail below the claimant originally faced three sets of allegations a) the medication patch allegations; b) the Wraparound allegations; and c) the Senco allegations. Allegations a) the medication patch allegations, did not lead to or contribute to her dismissal (and her appeal in respect of the disciplinary penalty that was imposed was itself successful) and are, therefore not directly relevant (although they are evidentially relevant for the reasons set out below); allegations b) and c) were ones for which she was initially dismissed, but allegations b) and c) were subsequently separated at the appeal stage. As the effect of the standard teaching contract is to preserve employment pending any appeal the claimant was not in fact dismissed until the conclusion of the allegation b) (Wraparound) appeal which was heard first. Thus by the time of the Senco allegations appeal she had already been dismissed and they are only directly relevant for remedy purposes (Polkey) if she succeeds in her claim that dismissal for the Wraparound allegations was unfair. The Wraparound allegations are, therefore the primary focus of this decision.

Medication Allegations

4. In order to understand the sequence of events it is necessary to start with the "medication" allegations, although as set out above the claimant was not dismissed by reason of them. For completeness sake the original disciplinary panel found her to have committed a serious breach of safety standards in the maladministration of a prescribed medicine and she was given a final written warning, but her appeal against this was successful.

5. Events began on 3 June 2015 when the claimant was asked by Amanda Hinton, the safeguarding officer of the second respondent, to carry out an investigation into an allegation that the mother of one of the schools pupils, child A, had been given another child, child B's medication by a member of staff.

6. Child A had started at the school in October 2014 and was undergoing statutory assessment by the second respondent. In January and February 2015 the claimant and child A's mother and grandmother discussed concerns about child A. The claimant was aware that child B suffered from a similar condition and spoke to child B's teacher Sarah Thomas to see whether he was taking any medication for it. She confirmed that he wore patches. In February/March 2015 the claimant spoke to child B's grandfather. Subsequently child B's grandfather bought some of child B's medication to the school and gave a box containing a patch to the school's receptionist Rebecca Clarke. This medication was given to child A's mother.

7. The extent of the claimant's involvement in this process is disputed. Rebecca Clarke (school secretary) alleges that the claimant told her that she had asked child B's grandfather to bring some of Child B's medication to the school for Child A to try. He did so and she wrote the instructions as dictated to her by him. The medication was subsequently passed to Child A's mother. If this correct whilst the claimant was not physically involved in the provision of the medication, she had instigated and was intimately involved in the process. The claimant denies that this is true. On 3 June 2015 claimant was asked to investigate, but was then suspended on 5 June 2015 after it was alleged that she had personally given the medication to child A's mother along with a note in her handwriting as to how to administer the medication. It is not in dispute that that specific allegation was incorrect.

8. The claimant alleges not merely that this allegation is untrue but that it was deliberately fabricated in order to further the respondent's "agenda" against her. The claimant alleges that the respondent had "illegally" been gathering evidence against her prior to these events, based on an email sent by Naomi Erasmus on 13th June 2015. It is said that Naomi Erasmus is the "guiding force" behind the events which were designed to secure the claimants removal. (The basis of this and conclusions in respect of it are discussed below.)

9. The respondent appointed Mr Alan Tudor Jones to investigate the allegations in respect of child A's medication. He produced a report in July 2015. Mr Tudor Jones conducted an investigation into the circumstances leading to the family of a four year old girl (child A) seeming to be in the possession of prescribed medication meant for

a nine year old boy (child B); investigating any possible serious breach of safety standards in regard to potential maladministration of prescribed medication with the potential of serious health consequences to a child; investigating any serious breach of confidentiality in regard to sharing child B's personal medical information; investigating any potential breach of the Chair of Governor's instruction, and interference with the investigation into the preceding allegations. Mr Tudor Jones conclusions were that there was evidence the claimant had been involved in the process by which both the information and the medication had been transferred in respect of child B to child A but that she did not physically pass the medication to the mother of child A. Further that on the balance of probabilities she had attempted to interfere with the disciplinary investigation in that she obtained the telephone number of the grandfather of child B. He recommended that she had a case to answer in respect of the disciplinary allegations and that there was a case to answer in respect of gross misconduct in a serious breach of safety standards in regard to potential maladministration of prescribed medication with the potential serious health consequences to a child; a serious breach of confidentiality in regards to sharing pupils personal medical information; and gross misconduct in attempting to interfere with the disciplinary investigation in regard to the allegations.

10. Following receipt of his report, on 4 August 2016 (over a year later) it was determined the matter should be referred to a disciplinary committee. The significant delay arose as a consequence of the respondent's decision to await the outcome of all of the disciplinary investigations rather than proceed with them individually. At the subsequent disciplinary hearing in November 2016 the panel found the claimant to have committed misconduct and imposed a final written warning. The claimant's case in essence is that this conclusion was unwarranted on the basis of the evidence before the disciplinary committee. Her appeal against this disciplinary sanction was upheld.

11. As is evident from the different conclusions drawn at the disciplinary hearing, and on appeal there are a number of different ways it is rationally and reasonably possible to interpret the evidence in relation to these allegations. Although not directly relevant for my decision, in my judgement the conclusion of the disciplinary panel was on the evidence reasonably open to it; indeed on the evidence they could in my judgement have reasonably drawn much more serious conclusions and could reasonably have dismissed the claimant. Put simply on the evidence it would have been open to them to have concluded that she had arranged the transfer of the prescribed medication; and had made false allegations against other members of staff including Ms Clarke. That they did not, and the fact that her subsequent appeal was successful, is not relevant for my decision save, as is set out below, that it helps to inform to some extent the answer to the question of whether the claimant was the victim of an agenda/conspiracy.

<u>Wraparound</u>

12. The second investigation concerned child care provision called Red Dragon "Wraparound". The Wraparound provision as operated at Llangiwg Primary School

was essentially an after school club. The first Wraparound provision had operated from early 2010 but had concluded at the end of the summer term. It was resurrected in 2011 and continued to operate until the events leading to the claimant's dismissal. Before dealing with the facts in dispute there are a number of matters that are not in dispute:-

i) Many children who attended the club had been at the school in the morning and stayed on between 11.40/45 a.m. and 3.00pm.

ii) The club was not registered at any stage with the CSSIW. (*One of the fundamental disputes in the case is whether the time between 11.40 and 1.00pm does or does not fall within the Wraparound provision. Any such Wraparound provision is permitted to operate for up to 2 hours per day without being registered. Any period longer than 2 hours does require registration and in the absence of registration the provision is unlawful. Thus the determination of whether the club was operating lawfully or unlawfully depends at least in part on the resolution of the question of whether the time between 11.40/45 am and 1.00pm did or did not count as part of the wraparound provision.*)

iii) All the staff were declared to be self-employed independent contractors and were paid cash in hand without deduction of tax or national insurance.

iv) The club was generally(*) run on an entirely cash basis and monies paid to it or from it did not pass through any of the school's bank accounts; it did not appear on any of the schools existing budgets and no separate budgets or accounts were created or prepared for it. (* *At least by the appeal it was accepted that there had been some payments by cheque at some point, although there were no specific records, and that at least some money had therefore passed through the school's bank account. Save for that the club was essentially run on a cash basis*).

13. The evidence which I accept is that the first concerns as to the running of the Wraparound provision were raised by Sarah Bell. She is employed as a Primary Support Officer. In her witness statement she describes the standard system for running a wraparound provision. It would be accounted for in the schools delegated budget (that given to the school by the local authority each year). From that budget all payroll costs are met including those employed in the wraparound provision. There is no other mechanism for paying staff. She was not aware that Llangiwg was operating a wraparound provision, there being no provision for it in the delegated budget, until 29th April 2015 when she spoke to a lunchtime supervisor Amada Jones, who told her she was working in the wraparound provision. This prompted Ms Bell to ask how she was being paid as the staffing budget had been signed by the claimant only a few days earlier and it had no provision for wraparound staff. She received an evasive answer, and the same day emailed the claimant who replied the following day saying that there were three members of staff who were paid in cash from the parents' subscriptions.

14. The Wraparound concerns were initially investigated by Mr Stephen Davies a Senior Auditor with NPTCBC. His investigation began in June 2015 and he reported on 6th

July 2015. His conclusions were that the Wraparound provision was being provided from 11.40 – 3.00pm as those who were at school for this period were charged £6.00 whereas those who only attended from 1.00-3.00pm were only charged £4.00. As such the provision was being operated illegally (para 3.1). Further the payment of staff cash in hand without deduction of tax or national insurance was illegal (3.4). There were no adequate HR records and was not possible to say whether appropriate CRB/DBS checks had been done on all staff since 2011(3.9) The financial records were inappropriate and not reconcilable and the money received from parents was kept in a tin. This had resulted in £1,863 simply being kept in a money tin in a lockable drawer which may not have been insured. He concluded that the claimant was ultimately responsible for running the provision and that the way it was being operated amounted to gross misconduct.

15. Following receipt of Mr Davies report a decision was taken to appoint Mr Phillip Jones (Servoca Managed Services) to investigate. He conducted a significant number of interviews including three with the claimant, and with twenty one other witnesses running in total to over one hundred and fifty pages of interview notes, and produced an 89 page report. He was tasked with investigating four allegations:

   i) Serious breach of National Minimum Standards for Regulated Childcare standards posing potential safeguarding risks to children a staff.

   ii) Serious breach of employee payment protocols, making potentially illegal cash in hand payments without taking into account tax and national insurance.

   iii) Serious breach of cash handling protocols.

   iv) Non-compliance with the authority's safer recruitment policy and procedure.

16. Mr Jones set out in detail in his report the differing recollections of the various witnesses as to the areas of dispute. He did not make specific findings or recommendations but set out the evidence so as to allow the governing body to decide if disciplinary action should be taken. What is apparent from the report is that there unquestionably a substantial body of evidence which, if accepted, supported all of the allegations.

17. On 4th August 2016 a decision was taken that the allegations should proceed to a disciplinary hearing.

<u>Disciplinary Hearing</u>

18. There are a number of procedural disputes in relation to the disciplinary process which I will set out here and which are discussed in detail below.

19. The claimant alleges that that decision to proceed to a disciplinary hearing was procedurally flawed as two governors were not present at the 4th August 2016 meeting; and moreover because a local authority representative was, and participated, which is not provided for within the regulations, and is thus procedurally invalid. Secondly it is contended that in subsequent correspondence Mr Nedin (the Chair of the disciplinary panel) should not have involved himself in the question of whether the statutory guidance should be followed (this should have been determined by a representative of R1) and that he was wrong to decide that the statutory guidance did not need to be followed as no other governor was available. Furthermore at the hearing itself Rebecca Clarke, Nicola Hire and Naomi Erasmus did not give evidence. As is set out below there is also a question of whether or not safeguarding issues are raised which are dealt with in more detail below.

20. The Chair of the Disciplinary Committee was Mr Peter Nedin. He was appointed to this role as he was the Chair of Governors at a different school entirely unconnected with Llangiwg. Indeed the disciplinary panel as a whole was independent from and unconnected with the school. The hearing took place on the 15th and 22nd November 2016. The panel concluded that there was no evidence of any agenda or conspiracy against the claimant and, dealing solely at this stage with the Wraparound allegations, that its operation fell below the minimum standard that could reasonably be expected; that attaining that standard was the responsibility of the school head teacher and that " *Mrs Frame clearly chose to operate a child care scheme without due regard to legislation, procedures, financial controls* …." In consequence they concluded in respect of the Wraparound allegations that allegations 1 and 3 were proven and constituted gross misconduct for which the appropriate sanction was dismissal; and that allegations 2 and 4 were proven acts of misconduct for which the appropriate sanction was a final written warning. Accordingly they decided to dismiss her in respect of allegations 1 and 3 (For completeness sake they also found all of the Senco allegations proven, that they all amounted to gross misconduct and that the appropriate sanction for all was also dismissal).

21. The conclusions of the disciplinary panel were communicated by a letter of 23rd November 2016 which simply set out the allegations and the conclusions. It did not set out the panel's reasoning in any detail, and it is not possible from it to understand why, in particular the panel drew the distinction between those allegations they found to constitute gross misconduct and those which constituted misconduct (this is discussed in greater detail in the conclusions below).

22. The claimant appealed but her appeal was unsuccessful and her dismissal confirmed. My conclusions in respect of both the original disciplinary hearing and the appeal are set out below.

Conclusions

Agenda/Conspiracy

23. It is convenient to begin with the allegations of agenda/conspiracy which the claimant alleges lay behind her dismissal. The claimant preferred to describe this as an "agenda", the respondent a "conspiracy". The precise description is of little consequence. At paragraph 27 of the Particulars of Claim Naomi Erasmus is alleged to be the guiding force behind the conspiracy/agenda although at times in the hearing it was not at all clear who was alleged to be part of the agenda/conspiracy. However in the claimant's closing submissions it is alleged that it began within the EPS who were "..*of the clear view that the claimant was incompetent in her role" which resulted in the agenda which "was started by the actions of those in the EPS and that agenda was conveyed to the senior management team of NPT"*. The specific point at which the senior management of NPT became involved was when issues in relation to a child JF arose and when NPT "escalated" matters against the claimant.

24. It is certainly a bold allegation. For it to be true a large number of senior managers of NPT, together with other professional staff must have agreed/conspired to make and pursue false allegations against the claimant and destroyed documentation relevant to the SENCo allegations. If true it must follow that at least Ms Erasmus is lying as if the claimant is correct she would have found no cause for concern. In addition Ms Annear and Ms Sophie Davies (or perhaps some unknown person between June and September 2015) were responsible for the destruction of the file contents as it was only once Ms Annear and Ms Davies attended the school and reported their concerns, in part because of the absence of that documentary material, that the investigation was ordered. Whilst not impossible this appears to me extremely improbable and it was of necessity open to both the disciplinary and appeal panels to reject it. If rejected the only conclusion is that the situation was as described by Ms Erasmus, Ms Annear and Ms Davies and as set out more fully in the report. In addition for this to be true a very powerful motive might be expected but in reality nothing has been put before me which would begin to explain why they should do so. However the fact that an allegation is improbable does not in and of itself make it untrue and it must be judged on its merits.

25. That being the case it is necessary to consider the position of Ms Erasmus. She completed a Doctorate in Educational Psychology in 2013 and commenced work for R2 (initially as maternity cover) in September 2013. One of schools to which she was allocated was R1. She visited approximately twice per term. Her evidence is that she became concerned very early on because of a request made by the claimant for copies of four children's Conners ADHD reports in order to place a referral to the Community Paediatrician. In outline the usual process for such a referral is the school to undertake School action measures, in essence to see whether a pupil's behaviour can be controlled or moderated by such action. This is necessary as in the event of failure of those measures a record of those measures and the reasons for success/failure is necessary to allow the EPS to administer the Conners Rating Scale and approve a reference to the Community Paediatrician, which is then made by the

school. If such a referral is made the ultimate diagnosis and decision is made by the Community Paediatrician.

26. The reason for Ms Erasmus's concern was that the school had apparently misplaced reports some of which had been completed a year earlier, and that one request was in respect of a child not known to the EPS. If this evidence is correct, and I accept that it is, it is not in my view surprising that Ms Erasmus was concerned. It is not necessary at this stage to set out Ms Erasmus further concerns but I accept her evidence as to it. In summary Ms Erasmus has set out in her witness statement a series of incidents between the autumn of 2013 and early 2015 all of which I accept as genuine and accurate. It follows that I am entirely satisfied having heard her evidence that Ms Erasmus's concerns were entirely genuine and well founded. Indeed one of difficulties for the claimant is explaining why Ms Erasmus should have acted as she did unless her concerns were genuine. I do not therefore accept the claimant's categorisation of Ms Erasmus's behaviour as an agenda. She had in my judgement entirely genuine and well-founded concerns as to the procedure she found in the school. She was not only entitled but obliged to voice them and the respondents were not only entitled to but obliged to investigate them when they came to a head.

27. The specific matter which brought matters to a head in this regard was concern about a child JF. As is set out above it is the claimant's case that these concerns were escalated unnecessarily and as part of an agenda/conspiracy against her. In summary Ms Erasmus was informed of an act of potentially inappropriate sexualised behaviour (ISB) and physical assault by JF on a female pupil. This was reported to Amanda Hinton (Safeguarding Coordinator). She raised the matter with the claimant and ultimately reviewed JFs file. It revealed a failure to follow procedure in the failure to complete any ISB reports and no plan in place to deal with it. On speaking to the claimant Ms Hinton formed the view she was not "engaged" with the process. She was sufficiently concerned to escalate this to a more senior manager Mr Huw Roberts. Put simply an incident of ISB had been brought to Ms Erasmus attention and she was sufficiently concerned to escalate it to the safeguarding team; on initial investigation by Ms Hinton she was sufficiently concerned to escalate it to a more senior manager. If the evidence each is giving is truthful and accurate (and I accept that it is in respect of both) then it is difficult to form any conclusion other than that they were applying their professional skill and experience to the information before them. To describe this as part of an agenda/conspiracy must involve either the assertion that they are simply lying or that if they are telling the truth that their concerns were not only unnecessary and exaggerated, but deliberately exaggerated because of some animus against Ms Frame. In my judgement neither of these is a tenable proposition.

28. It follows that I am unable to accept the fundamental proposition advanced the claimant that she was the victim of an agenda that began with Ms Erasmus, was pursued more generally by others in the EPS, and then taken up by the senior managers within NPT.

29. To return to the medication allegations, in their written submissions the respondents point to a body of evidence which is not exculpatory of the claimant. On the contrary if accepted it could clearly (as is set out above) in my judgement have justified the dismissal of the claimant on the basis that she was intimately involved in the provision of the medication and subsequently lied about it. In my judgement the evidence could if accepted have supported those conclusions. The fact that the respondent did not draw those conclusions but in fact chose not to do so is in my judgement direct and specific evidence of the good faith of those involved in the process at least at the disciplinary stage and appeal stage.

30. In my judgement the agenda/conspiracy allegation is not supported by the evidence and has in reality nothing to support it save for the claimant's belief in it. In my judgement the matters set out above are sufficient in and of themselves to dispose of the conspiracy/agenda theory which I do not accept. It follows that the fairness of the dismissal and the other issues before me must be judged solely against the evidence in respect of them.

<u>Wraparound</u>

31. It was for wraparound allegations that the claimant was dismissed. Both parties have set out in their written submissions the legal principles which apply. In drawing my conclusions I accept that the legal submissions of both parties are correct and have applied the authorities to which they have referred me as set out particularly at the relevant points below.

32. The allegations for which the claimant was dismissed related to the Wraparound provision. In the final analysis the claimant faced four allegations arising out of the wraparound provision. She was dismissed for failing to register the wraparound provision (allegation1) and for breaching cash handling protocols (allegation 3) and received (or would have received but for the dismissal) final warnings for breaching employee payment protocols (allegation 2) and breaching R2's safer recruitment policy (allegation 4).

33. The fundamental analysis is that required by *British Home Stores Ltd v Burchell [1978] IRLR 379*. The employer must conduct a reasonable investigation, and draw reasonable conclusions as to the misconduct and the appropriate sanction. At each stage, investigation, conclusions as to misconduct and sanction the range of reasonable responses test applies.

34. In dealing with the fairness of the dismissal I will begin by considering the substantive issue and then move on to the procedural matters although in the final analysis I have to draw overall conclusions encompassing all my findings (*Taylor v OCS Group Ltd [2006] ICR 1602 esp paras 47 and 48*) .

35. In relation to allegation 1 the claimant does not accept that it was factually open to the respondent to conclude that there was a requirement to register the wraparound

provision; or alternatively that if such a conclusion was open to them that the claimant's failure to register the scheme should have and could only reasonably have been regarded as arising from a genuine misunderstanding as to whether registration was in fact required.

36. In my judgement there was a wealth of evidence supporting the basic proposition that Wraparound was being run both unlawfully and unprofessionally. There is in my judgement no evidential support for the claimant's factual contention that the Wraparound provision only operated between 1.00pm and 3.00pm, and not between 11.40/11.45am and 1.00pm, and a substantial body of evidence to the opposite effect. Firstly it was advertised as running from 11.40/11.45 am. Secondly parents whose children attended from 11.40 /11.45 am were charged more than those who only attended from 1.00pm. If they were not being charged as part of the wraparound provision who was charging them and for what service? The children who were attending from 11.45 am were not in compulsory education and were only there as a matter of their parents' choice. That period of time self-evidently did not fall within the schools statutory obligation to provide educational services and/or if it did it could not lawfully have charged parents for doing so. Equally if the school was charging for the provision of education (albeit unlawfully) it would or should have appeared in the schools delegated budget. The only other possibility is that the period between 11.40/45 and 1.00pm was neither education nor Wraparound but simply a period of time during which parents were entitled to leave their children on the premises for a small fee. However even on this analysis the school was providing paid child care during that period, and given in particular the advertising it is in my unrealistic to regard the period from 11.40/45 to 1.00pm as separate from Wraparound. Also and for the avoidance of doubt this is not the claimant's case. As is set out at paragraph 54 of her Closing Submission she explicitly asserts that this period was "education". For these reasons in my judgement the conclusion that Wraparound was being run unlawfully was certainly reasonably open to the disciplinary panel, and in reality was all but inevitable on the basis of the evidence.

37. It follows that the factual finding of failure to register Wraparound (allegation 1 above) was one that was reasonably open to the disciplinary panel.

38. The other specific allegation for which she was dismissed was the failure to adhere to the cash handling protocols. It is not essentially in dispute that Wraparound was being conducted on an entirely cash basis. The parents paid cash, the staff were paid in cash and the money was kept in a money box. It was not paid into any of the schools bank accounts and did not appear in its delegated budget. In effect Wraparound was being operated without any formal record of its existence as part of the service being provided by the school. There is no suggestion that it ever produced its own separate annual accounts or that there was any formal record of how it was being administered.

39. The respondents invite me to take a broad approach to this issue and conclude that whatever the specifics, the claimant must have known (or at least it was open to the panel to conclude that she must have known) that this is simply not a permissible way to administrate a commercial service being provided by the school. It characterises it

as being "…*run in a disturbingly blasé and amateurish way*." It was they contend open to the disciplinary panel to conclude that this fell way below the standards expected of a head teacher and was sufficiently serious to constitute gross misconduct for which dismissal was a reasonable and permissible sanction.

40. The claimant points to the fact that the respondent has not identified any specific policy which prevents the Wraparound provision being administered in this way. In addition the claimant contends that it was illogical to treat allegation 3 as gross misconduct and/or to treat it as more serious than allegation 2. The failure to follow the employee payment protocol was in my judgement a separate though connected issue. The respondent's evidence is that it is not open to a school to employ people as self-employed (off the books). It is in essence a constituent element of the failure adequately to run or administer Wraparound and again in essence the respondent contends that it was not open to the claimant to act in this way and that as a head teacher she knew of the importance of accurate and transparent record keeping; and had no reasonable or proper basis for concluding that it was appropriate to engage staff in this way.

41. The evidence and arguments are more finely balanced than in respect of allegation 1, but in the final analysis it was in my judgement reasonably open to the disciplinary panel to conclude that to engage staff on this basis and pay them in cash was fundamentally inappropriate and the claimant must have known that it was. However that gives rise to the potential illogicality highlighted by the claimant. That summary conflates allegations 2 and 3. Is it logically possible to separate the method of employment from the method of payment and conclude that one is more serious than the other? To put it another way is it possible to separate the administration of Wraparound on a cash basis generally from the manner of paying the staff? There may be theoretical ways of doing so. However the task before me is not theoretical, but rather to analyse the disciplinary panel's conclusions and examine why they considered one to be more serious, and if so whether the reasons bear examination. The difficulty is that while there is evidence as to the panels conclusions there is very little evidence as to why they reached those conclusions.

42. It follows that in my judgement there is merit in the claimant's contention that to draw a distinction between allegations 2 and 3 is illogical and that in order to resolve that apparent illogicality it would be necessary to understand the panel's reasoning, evidence for which is not in fact before me.

<u>Procedural Issues</u>

43. As set out above the claimant alleges that there were a number of procedural failings which render the dismissal unfair. At this point I will deal only with those that relate to the original disciplinary hearing and those that relate to the appeal will be considered later.

44. <u>Delay</u> - The claimant submits that the disciplinary process was the subject of such unreasonable delay as to make the decision to dismiss her unfair in and of itself. The

medication patch investigation was concluded in July 2015; and the Servoca wraparound investigation in December 2015. However the respondent decided to await the outcome of the Senco investigation before dealing with all the allegations together. The claimant contends that there is no reason each of the allegations could not have been dealt with separately. If this had occurred the medication allegations could have been dealt with at some point in the autumn of 2015, the wraparound allegations in early 2016, leaving only the Senco allegations until the autumn of 2016.

45. The respondent submits that the delay, although substantial does not in and of itself render the dismissal unfair. The claimant faced three sets of serious allegations each of which was individually capable of leading to her dismissal. In those circumstances, the most sensible course, and certainly one well within the options reasonably open to them, was to defer commencing the disciplinary process until the investigations in relation to each of the allegations was complete.

46. In my judgement although the delay was very lengthy the claimant was not prejudiced in her ability to meet the disciplinary charges given that they were essence , and certainly in respect of the Wraparound and Senco allegations for which she was dismissed, based on documentary evidence.

47. A connected issue is the claimant's suspension. She was suspended for the whole of the period from 5th June 2015 until her dismissal, and she contends that was unnecessary and that there was a failure regularly to review the suspension. Specifically she contends that as she was suspended because of the allegation that she had personally passed on the medication, and that at the latest the suspension should have been lifted once Mr Tudor Jones report had been received and that it was apparent that, whatever else remained in dispute, that allegation had no factual foundation.

48. The respondent's answer is essentially the same as that in respect of the delay. She was facing very serious allegations which called into question her capacity to fulfil the role of head teacher. Until those allegations had been resolved suspension was inevitable and that the fact that the investigation and disciplinary process took a significant amount of time does not alter that fundamental fact. Similarly the length of the suspension did not fundamentally affect her ability to answer the disciplinary allegations.

49. In my judgement the respondent is correct. The essential issue for me is the fairness of the dismissal. Unless there is evidence, which in my view there is not, that the suspension either taken individually or together with the delay had an effect on the claimant's ability to answer the underlying allegations the length of the delay and the suspension are not in this case significant factors.

50. Evidence - In terms of the conclusions the claimant contends that the conclusions reached by the disciplinary panel were not reasonably open to them as three witnesses, Rebecca Clarke, Nicola Hire and Naomi Erasmus, did not give evidence in person. This meant that the panel could not assess their reliability and the claimant had no proper opportunity to challenge them. In relation to the question of the extent

to which the fairness of the process is impaired by the absence of oral evidence I have been referred to *R v Chief Constable of South Wales , ex p Thornhill [1987] IRLR 13; Ulsterbus v Henderson [1989] IRLR 251; Santamera v Express Cargo Forwarding [2003] IRLR 273; and R (on the application of Bonhoeffer)v GMC [2012] IRLR 37.* A disciplinary panel is not a court of law, and there is no principle that fairness necessarily requires the opportunity to challenge witnesses. However, the more serious the charge, and in respect of disciplinary charges which *"..if proved are likely have grave effects on the career and reputation of the accused party…"* (*Bonhoeffer*) the more seriously the tribunal will have to consider the effect of the absence of the witnesses and the extent to which it was critical to secure their attendance to resolve fundamental points of conflict.

51. In relation to Rebecca Clarke as the claimant was not dismissed for the allegations to which her evidence related, the failure to hear her oral evidence was of little relevance. Similarly Naomi Erasmus's evidence related to the early stages of the Senco allegations, and was also relevant to the issue of agenda/conspiracy. However In my judgement there was a wealth of evidence before the disciplinary panel, both oral and documentary upon which to base their conclusions in respect of both and the absence of Ms Erasmus's oral evidence did not in my judgement fundamentally affect the disciplinary panel's ability to draw rational conclusions as to those issues. The only directly relevant witness to the wraparound allegations was Nicola Hire. However, in relation to the critical question of whether it was being run illegally there was no dispute that the claimant correctly understood that it could not operate for more than two hours per day. The question was whether the claimant was or was not correct in her assertion that wraparound was not being operated between 11.45 and 1.00pm. That was a straightforward question of fact and it is hard to see how Ms Hire's oral evidence could fundamentally alter any conclusions as that issue.

52. Looked at overall in my judgement the absence of the witnesses did not fundamentally affect the fairness of the process.

53. <u>Governors</u> - The claimant contends the investigation was unfair as Mr Jones was not permitted to interview the governors. The claimant submits that whatever the failings in the management of Wraparound that its existence was not a secret and that several of the governors either had children who attended or had themselves visited it. She had requested that the governors be interviewed during the Servoca investigation but was informed that this was outside its remit and neither at that stage, nor at any point later were any of the governors interviewed about the state of their knowledge of Wraparound. Put simply if the governors were aware it was being operated and had raised no issues with the way it was being administered it was unfair to conclude that she was guilty of misconduct or, even if she were, that it was sufficiently serious to justify dismissal.

54. The respondents answer to this is that what was in question was not the fact of the wraparound provision but how it was being administered. The governors could not have known that it was being run unlawfully, nor has it ever been alleged that they or any of them or had any specific knowledge of its financial, accounting or employment

procedures and it is not suggested that they did (see Particulars of Claim paragraph 65 and 66 in particular). In those circumstances there was nothing in the governors' state of knowledge to investigate and that this is simply a red herring.

55. In my judgement the respondent's submissions are correct. Whilst there is unchallenged evidence several of the governors were necessarily aware of wraparound there is no evidence that any of them was aware of how it was being administered, and in my judgement the failure to interview them had no bearing on the issues before the panel.

56. Decision to proceed to a disciplinary hearing - The decision to move to a disciplinary hearing is alleged to be procedurally irregular. The reason for that is that section 9.19 of the Welsh Governments Statutory guidance for governors firstly requires that a decision to proceed to a disciplinary hearing must be made by at least two governors; and two governors with no prior knowledge or involvement in the allegations. The claimant asserts that the protection provided by these provisions was broken in both respects in that only one governor, Ms Hunt made the decision and that she had a degree of prior knowledge of at least the medication allegation. Moreover the chair of the disciplinary panel Mr Nedin should not have involved himself in the decision to proceed with the hearing, or alternatively should not have decided that it was permissible to do so in the light of those breaches.

57. The respondent contends that the guidance is precisely that, and that it was sensible in this case for the decision to be taken by one governor given that governing body was small and any governor who participated in the decision would be unable to be part of any subsequent disciplinary or appeal panel. It was therefore open to Mr Nedin to decide to proceed despite the failure to adhere to the guidance and that no prejudice has resulted from it, in that it is essentially fanciful to conclude that even had the guidance been followed that any other decision was likely given the seriousness of the allegations and weight of evidence in support of them.

58. In my judgement the respondent is correct. The failure to follow he guidance did not fundamentally prejudice the claimant as, in my view it is inconceivable that any panel, however composed could reasonably have concluded that the allegations should not proceed to a disciplinary hearing given their seriousness and the evidence in support of them.

59. Constitution/Child Protection - Finally there is the issue of whether the disciplinary panel was properly constituted. The statutory provisions are complex but the dispute can be simply stated. The composition of the disciplinary panel (and appeal panel) differs depending upon whether the allegations do or do not include child protection allegations. If they do the panel must include an independent member who cannot chair the panel. Whilst child protection is not itself defined the claimant's positon was and has always remained that none of the allegations involved child protection issues. If this is correct the investigation was appropriate and the disciplinary panel was properly constituted. However when deciding that the allegations should go forward to a disciplinary hearing on 4th August 2016 the conclusion was that "*There is evidence to support a decision that the Child Protection allegation has some*

foundation…and that it will therefore require a Staff Disciplinary and Dismissal Committee hearing." The claimant contends that this conclusion (although she believes it be wrong) has a number of consequences. Firstly it requires an independent investigation. The investigation carried out by Mr Jones (Servoca) was expressly not an independent investigation; and secondly the disciplinary panel was not appropriately constituted. Once the respondent had reached this decision it was bound to convene an appropriate panel to consider the matter as raising child protection issues even though, in the claimant's view they did not. Thus the claimant's position appears to be that the respondent used a correctly convened disciplinary panel (at least in this respect) but that having wrongly concluded that child protection issues were raised it was in fact bound to convene a disciplinary panel that was not correctly constituted. This is in my view simply baffling. Put simply there is no dispute that as a matter of fact the disciplinary panel was properly constituted. By definition even if the respondent had convened a correctly constituted panel more by luck than judgment, once it had done so that panel was entitled to hear the case. Put another way, if the claimant accepts that the allegations did not raise any child protection issues, which she does, it follows that she can have suffered no prejudice by having a disciplinary panel that was in fact correctly constituted.

60. For the avoidance of doubt the task before me is to look at the process as a whole including the appeal before concluding whether it was fair overall, but it is helpful to consider the question in respect of the individual stages. In summary my view is that there was ample evidence before the disciplinary panel for it to reasonably conclude that the claimant had committed the misconduct alleged in respect of both allegations. In respect of allegation 1 it was reasonably open to it to conclude that it was gross misconduct and that dismissal was a reasonable sanction. In respect of allegation 3 it was also open to it in isolation to have concluded that it was gross misconduct and that dismissal was a reasonable sanction. However in respect of this allegation it is hard to see any logical distinction between this and allegation 2 for which the claimant received a final written warning and in my judgement the absence of any clear evidence from the governors as to why they drew that distinction is sufficient to render the dismissal on that ground potentially unfair. In all the circumstances I am not persuade that the procedural failings prejudiced the claimant, nor placed her in any evidential difficulty in meeting the allegations which were based on a wealth of documentary evidence.

61. In terms of the sanction the claimant submits that even if the disciplinary panel was entitled to conclude that Wraparound had been mismanaged, and that she was responsible for the mismanagement (neither of which she accepts for he reasons given above) that it should have been regarded as a capability not a conduct issue. The difficulty with that proposition is that it is not in reality an argument the claimant ever advanced. She contended that the allegations were untrue and that she was the victim of the agenda/conspiracy. That being the case if the panel, as they did, rejected those contentions and concluded that she was responsible it is very difficult to see what evidential basis they could have had for concluding that this was a capability issue. In my judgement this contention is not a reasonable or tenable criticism of the conclusion as to sanction.

Wraparound Appeal

62. As with the disciplinary hearing I will first consider the panel's substantive conclusions and then any procedural issues.

63. In contrast to the outcome of the disciplinary hearing the appeal outcome letter sets out in considerable detail the basis of the panel's decision to reject the appeal. They had, at the claimant's request treated it as rehearing. In relation to the essential issue as to how long the wraparound provision was being operated for, and therefore whether it was run lawfully or unlawfully they found "*Both Kath Gibson and Sara Thomas who appeared …confirmed that the hours of operation .. were 11.40 to 3.00pm for 3 to 4 year olds... and for children 2 and over.. 1.00pm to 3.00pm.. These accounts were consistent with the available documentation and on balance the committee felt that this was a true reflection of the operating times of the wraparound care provision….* " and, *"In summary the committee reached the conclusion that the facility was operating from 11.40 to 3.00pm, we found that the child care provision ran for more than 2 hours per day and you knew this. We feel that proper procedures were not put in place and it was not registered.*" They did not accept the claimant's case that the Wraparound provision was the responsibility of Ms Gibson and that any failings were her responsibility. Equally they concluded that the Governors were aware of the facility but left operational issues to the Head Teacher. In my judgement this conclusion, being based on the documentary evidence and oral evidence before them was necessarily a rational and reasonable conclusion open to them to draw. Similarly detailed findings were made in respect of the other conclusions, and it is not necessary to set them out in this decision.

64. Similarly they upheld the decision to dismiss in respect of allegation 3. In summary they concluded that "*From the evidence before us we found that you were aware that the monies were not being banked as you were utilising the funds yourself to pay various individuals in cash,…..and you accept that monies were stored at the facility with no proper audit processes in place or accounting . The committee accepted that this also posed other potential problems such as issues with insurance, lack of accountability and the possibility of theft and fraud.*"

65. In one respect the committee was notably generous to the claimant. Despite at her request treating the appeal as a rehearing, and despite the fact that its conclusion was that allegation 2 constituted gross misconduct and that they would have also dismissed for this, it concluded that in the light of the earlier decision they would uphold the sanction of a final written warning. This addresses the apparent inconsistency of the earlier findings, and explains what is, on the face of it, a generous conclusion.

66. In my view the factual findings of the appeal panel were clearly ones reasonably open to them on the evidence, as was the conclusion that they constituted sufficiently serious misconduct to justify dismissal.

67. The specific procedural dispute surrounding the composition of the appeal panel was whether it was properly constituted to hear appeals including allegations concerning matters of child protection. In essence it is the same point as that made in respect of the disciplinary panel .The panel concluded that it was not, and also that the medication and Senco allegations potentially raised child protection issues and so adjourned determination of those to a differently constituted panel. However it did not consider the Wrapround allegations to raise any child protection issues and was therefore prepared to and did in fact go on to hear them.

68. The claimant also contends that the appeal panel which finally considered the SENCO appeal was not properly constituted. This involves utilising precisely the opposite argument as used in relation to the Wraparound appeal. The claimant contends that the Senco allegations did not in fact raise any child protection issues, and that as it was constituted as if they did it was incorrectly constituted. From this she contends that if the panel which heard the wraparound appeal had known this they would not have separated the allegations. Accordingly their own conclusions as to the wraparound provisions are tainted by the procedural failings in respect of the later appeal. I confess I find this argument equally baffling. Even assuming that the basic point is correct, and the Senco appeal panel was not properly constituted, if the wraparound appeal panel was properly constituted it is difficult to see (at least I find it difficult) how their conclusions can be impugned by a failing in respect of a separate panel. In addition and as is set out below the SENCo appeal panel accepted the claimant’s submission that here were no child protection issues and the independent governor withdrew. In the light of this it is hard to see that even if the wraparound panel could have seen into the future and known this, it could possibly have concluded that it should not proceed.

69. In my judgement the Wraparound appeal panel formed conclusions as to the misconduct and the sanction which fell well within the range reasonably open to them.

70. Looked at overall in the light of the wealth of documentary evidence in support of the conclusions of both the disciplinary and appeal panels I am satisfied that the decision to dismiss was fair.

SENCo / Polkey

71. As set out above the Senco decision is only relevant for Polkey considerations in the event that I concluded that the dismissal in respect of the Wraparound allegations was unfair. I have concluded for the reasons given above that the decision to dismiss was fair and therefore strictly speaking it is not necessary to consider the Senco allegations. However for completeness sake and in case I am wrong in my conclusions as to the wraparound allegations I have set out my conclusions.

72. In many ways the Senco allegations were by far the most serious faced by the claimant. She was for the entirety of the relevant period prior to her suspension both the Head Teacher and the Senco (Special Educational Needs Co-ordinator) for the

school. She had therefore not only overall responsibility for ensuring that the school fulfilled its Senco responsibilities but was directly responsible for doing so in each of the individual cases referred to in the evidence before me. If a child's behaviour or educational attainment requires assessment and possibly in the final analysis medical intervention delay is obviously potentially harmful, and it follows that any unnecessary delay or failure to properly carry out the necessary administrative processes could potentially lead to serious harm. For this reason these allegations are of the utmost seriousness.

73. The evidence consists of the direct evidence of Naomi Erasmus, and that of Alison Annear and Sophie Davies who attended the school on 21st September 2015. It was their report which led to the investigation carried out by Sharon Davies. The investigation conducted by Ms Davies was in my view of exemplary thoroughness. The report itself was accompanied by in excess of 600 pages of appendices. All of that evidence was in my judgement entirely consistent.

74. Sharon Davies investigated an allegation of whether the claimant in her capacity as Head Teacher and as Senco had performed to "serious unsatisfactory standards of work" in four respects – a) Ensuring that SEN practice within the school complied with the Statutory Code of Practice; b) Ensuring that pupil assessment and or support was progressed in a proper and timely manner; c) misleading parents and others regrading progress upon referrals for assessment and/or support; and d) ensuring that health care plans were created and implemented in respect of pupils with health care needs.

75. The report is detailed and the documents accompanying it very extensive but the following points are extracted from the "Summary" of the report's conclusions and in my judgement are sufficient to demonstrate its conclusions. In relation to the first allegation the report's conclusions included "*there was a failure to intervene early with many children and provide the support that could have made a difference to the child's special educational needs"; "there is insufficient evidence that the SENCo properly liaised with her colleagues….and there was no one with overall oversight of SEN in the school";* "there were inadequate recording systems… and as a result there was no way of knowing what the child's journey through SEN had been". In respect of the second allegation the report's conclusions included ""*there were many instances where children whose needs had been identified as requiring additional intervention were not referred for long periods or were refered with inadequate supporting evidence which led to further delays in their assessment and support*." In respect of third it includes " "t*here is evidence the Head teacher gave undertakings that she did not see through*". Finally in respect of the fourth allegation " "*This is relevant to two children.. In both cases there is evidence that did not follow the guidance as set out by the Welsh Assembly.. nor did the school follow the very detailed guidance provided by the local authority.."*

76. In respect of the claimant's evidence to the investigation it was summarised as "*The Head teacher was unable to direct the Investigating Officer to evidence which countered the allegations made against her. Her prime concern throughout this investigation was to stress that she had been a victim of a witch hunt by some staff in*

her school , the Chair of Governors and Senior Local Authority officers. ,….She made it clear that she felt evidence had been shredded and files tampered with."

77. As set out above the conclusions of the report were supported by a wealth of evidence, whereas the defence of conspiracy/agenda put forward by the claimant is and was entirely unsupported.

78. In terms of the procedure, as s set out in the evidence of Susan Philips, which I accept, the issue of the composition of the appeal panel was raised before it. Having examined the issue of whether either of the sets of allegations raised any child protection issues, the submission of both parties was that they did not. The panel accepted this and according the independent governor withdrew. and The claimant essentially repeats the procedural allegations which she contends fatally taints the conclusion of the disciplinary hearing for the reasons given above. In addition she initially asserted, although the point was conceded in the final submissions, that the appeal was tainted by its adherence to the earlier decision that these were child protection allegations. I am not persuaded by any of these propositions for the reasons given above.

79. The claimant further submits that the conclusion that she was responsible for the Senco failings assumes that such failings in reality existed. She maintains that they did not and that it remains her case, as summarised in the investigation that she was the victim of a conspiracy agenda and that information contained in the files which would have allowed her to refute the allegations had been deliberately tampered with or destroyed. This was not accepted at the original disciplinary hearing or appeal.

80. In terms of the Polkey question I have to determine not merely whether as a matter of fact the claimant's employment would have been terminated in any event which self-evidently it would, but whether such a decision would have been fair. Both the original disciplinary panel and the appeal panel concluded that all of the Senco allegations were proven. As is the case in respect of the Wraparound allegations the conclusions of the original disciplinary panel are extremely sparse and it is very difficult, to put it mildly, to understand from the letter how they reached their conclusions. However, again as with the Wraparound appeal the appeal panel in respect of the Senco allegations set out their conclusions and reasoning in very considerable detail in its outcome letter of 24th July 2017. It is not necessary to set out the reasoning in detail in this decision but in my judgement the conclusions of the appeal panel were rationally based, well-reasoned and had self-evidently taken into account all of the issues raised before them by the claimant. I have no doubt that the conclusions they reached were rationally open to them on the evidence and that the conclusion that the claimant had committed the misconduct alleged and that it was sufficiently serious to justify dismissal fell well within the range of conclusions and sanctions reasonable open to them.

81. As these were failings of the utmost seriousness, in my judgement if it was reasonable to accept them as proven (as in my judgement it was) it was also reasonable to regard them as gross misconduct, and dismissal was a reasonable

sanction. The allegations if true revealing an appalling failure of the duty of care owed to the children involved.

82. It follows that in my judgement the decision to dismiss taken by both the disciplinary and appeal panels fell clearly within the range reasonably open to them and any dismissal would have inevitably been fair. Accordingly had the claimant not already been dismissed she would have been fairly dismissed at the conclusion of the Senco appeal.

Wrongful Dismissal

83. In determining the wrongful dismissal claim the task for me is to decide not whether the respondent reasonably considered that the claimant was in fundamental breach of contract, but whether as a matter of fact she was and that it had the right as a matter of contract to dismiss her without notice. That essentially turns on whether the claimant was guilty of misconduct and if so whether that was gross misconduct. The claimant submits that none of her conduct, even taken at its highest, constitutes a repudiatory breach of contract; a wilful or deliberate contravention of an essential term of the contract, or gross negligence. The respondent contends that both the Wraparound and the Senco allegations were not simply reasonably considered by the respondent to constitute fundamental breaches of her contract of employment but were so in fact.

84. I have been referred to *Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22* in which the Court of Appeal held that , " *In deciding whether misconduct can properly be described as gross, the focus is on the damage to the relationship between the parties . Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence.*"

85. In my judgement this can be put relatively simply. It is trite law that the term of mutual trust and confidence is implied into every contract of employment and that breach of it is a fundamental breach entitling the party not in breach to treat itself as no longer bound by the obligations of the contract. In my judgement the claimant was responsible for the administration of the Wraparound provision and ran it unlawfully, in that it was not registered when it was required to be, and used a system of cash payments and did not ensure that there was any accurate record keeping or accounts of what was in essence a commercial service being run by the school. Similarly she was both the Head Teacher and SENCo for at least a large part of the period covered by this claim and ran a system in which the record keeping and administration was shockingly lax. The evidence in support of those conclusions is simply overwhelming. Both of these are in my judgement fundamental failings and fall within the definition of gross misconduct set out above. The conduct was so serious that it inevitably destroyed the mutual relationship of trust and confidence and justified the respondent

dismissing without notice. Accordingly the wrongful dismissal claim must also be dismissed.

EMPLOYMENT JUDGE Cadney
Dated: 24 April 19

Judgment entered into Register
And copies sent to the parties on

.......26 April 2019............

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for Secretary of the Tribunals