



EMPLOYMENT TRIBUNALS

Claimant: Mrs Jaqueline Eather

Respondent: 1) The Governing Body of Deansfield Primary School
2) Royal Borough of Greenwich

Heard at: London South

On: 23rd March 2018 and in chambers on
29th May 2018

Before: Employment Judge Tsamados

Representation

Claimant: Mr C Payne of Counsel

Respondent: Ms O Dobbie of Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

- 1) The name of the first respondent is amended to the Governing Body of Deansfield Primary School;
- 2) The claim against the Compass Partnership of Schools is dismissed on withdrawal;
- 3) The Claimant was not unfairly dismissed by the first and second respondents and her complaint is dismissed;

REASONS

The Claim/Complaints

1. By a claim form presented to the employment tribunal on 4th October 2017, the claimant has brought a complaint of unfair dismissal against her ex-employer. The claimant is employed by a local authority to work at one of its schools. The correct title of the respondent school is the Governing Body of Deansfield Primary School. The local authority, the Royal Borough of Greenwich is the second respondent. The third respondent was not the correct respondent at the time of the claimant's dismissal and so the claim against it is dismissed on withdrawal. In the response received on 4th December 2017, the respondents denied that the claimant was unfairly dismissed.

The Issues

2. At the start of the hearing, the list of issues provided by the respondents, as amended, was adopted. The amended issues are as follows:
 - 2.1 What was the sole or principal reason for dismissal? The respondents contend that it was conduct. The claimant contends that there was a desire to oust her due to cost (paragraph 17 of her witness statement) or personal animosity from staff (as advanced during the hearing);
 - 2.2 In the event that the tribunal finds that the reason was conduct, was the dismissal was fair or unfair in all the circumstances of the case within the meaning of section 98(4) Employment Rights Act 1996 ("ERA") and by application of the BHS v Burchell test:
 - 2.2.1 Did the respondents believe that the claimant was guilty of the misconduct?
 - 2.2.2 If so, did the respondents have in mind reasonable grounds upon which to sustain that belief?
 - 2.2.3 At the stage at which that belief was formed on those grounds, had the respondents carried out as much investigation into the matter as was reasonable in the circumstances?
 - 2.3 Was the decision to dismiss outside the range of reasonable responses?
 - 2.4 In the event that the Tribunal finds that the dismissal was unfair:
 - 2.4.1 Did the claimant cause or contribute to her dismissal?
 - 2.4.2 Should there be a Polkey deduction?
 - 2.4.3 Should there be a deduction to the Basic Award for matters prior to dismissal?
 - 2.4.4 Has the claimant unreasonably failed to mitigate her losses?
 - 2.4.5 Has either party unreasonably failed to follow the ACAS Code?
3. It was agreed that the hearing would deal solely with liability and that remedy would be dealt with subsequently as necessary, save for issues of contribution (section 123(6) ERA), Polkey, section 122(2) ERA and any adjustments under the ACAS Code, which would be addressed at the liability stage.

The Evidence

4. The respondent provided a bundle of documents, which I refer to where necessary as "R1". I heard evidence from the claimant and, on behalf the respondents, from Ms Joanne Gordon, the Executive Head of Deansfield

Primary School, and from Ms Janis Anns (aka Blyth), the Head of School, Deansfield Primary School, by way of written statements and in oral testimony.

5. The respondents provided a chronology, cast list and a list of issues. The claimant provided a schedule of loss/statement of remedy sought. The claimant is seeking compensation only.

Findings of fact

6. I set out below the findings of fact I consider relevant and necessary to determine the issues I am required to decide. I do not seek to set out each detail provided to me, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and I have borne it all in mind.

7. The claimant qualified as a teacher on 1st August 1978. She was employed as a Class Teacher at the Deansfield Primary School ("the School") from 1st September 1995 until her dismissal by letter dated 5th May 2017.

8. It was stated that the claimant was employed by the second respondent, the Royal Borough of Greenwich, to work at the first respondent School. However, strictly speaking the employment of the claimant as a teacher is shared by the first and second respondents, this tripartite relationship being created by The Education (Modification of Enactments Relating to Employment) (England) Order 2003, The School Staffing (England) Regulations 2003 and The Education Act 2002. This was succinctly put by Judge Ansell in Butt v Bradford Metropolitan District Council 22nd July 2010 UKEAT/0210/10/ZT at paragraph 11:

"The relationship... created by the statutes and regulations is one of a duality of employer. The contractual employer and paymaster is the local authority, but the majority of employment powers are exercised by the governors who, for the purpose of tribunal proceedings, are treated as the employer, although under reg 6(3) of the Modification Order any award is treated as if made by the local authority."

9. I note that the claimant's most recent statement of terms and conditions of employment dated 16th July 2009 is at R1 83-91. I was referred to the School's Disciplinary Procedure at R1 331-358; the School's Relationship and Positive Behaviour Policy at R1 392-399t; the School's Code of Conduct at R1 400-403; the Department of Education - Teachers' Standards at R1 404; and the School's Positive Handling Policy at R1 405-407; and the School's Child Protection Policy at R1 408-425.
10. From the policies I particularly note the following:

- 10.1 At R1 337 of the Disciplinary procedure, under the heading "Rules of conduct" (R1 337) inter alia:

"Employees must:

- *carry out their duties in a conscientious and professional manner*
- *comply with reasonable instructions, and legitimate policies and procedures”;*

10.2 At R1 338 of the Disciplinary Policy, “Gross Misconduct” includes:

“failure to observe the School’s physical intervention policy and/or The Royal Borough’s Guidelines for the Use of Care and Control in Schools, e.g. seriously ill treating any person within the care of or dealt with, by the school / The Royal Borough” and “any other sort of violence or aggression on another person”.

10.3 At R1 393 of the The Relationships and Positive Behaviour Policy:

Providing “a happy, secure, inclusive, caring environment where all feel valued” “To treat children fairly...To build strong relationships with pupils... To ensure approaches to behaviour and relationships are meaningful and positive”

10.4 At R1 404 of the Department of Education – Teaching Standards:

“establishing a safe and stimulating environment for pupils, rooted in mutual respect”, and “demonstrate consistently the positive attitudes, values and behaviours which are expected of pupils”

“treating pupils with dignity, building relationships rooted in mutual respect and at all times observing proper boundaries appropriate to a teacher’s position”

“having regard for the need to safeguard pupils’ well-being...”, “showing tolerance of and respect for the rights of others”, and

10.5 At R1 406 of the the Positive Handling Policy R1 406) that:

“Positive Handling should be limited to emergency situations and used only as a last resort”.

11. From the start of her employment, the claimant worked with children of all ages, but predominantly taught Key Stage 1 pupils (age ranges from 4 to 7 years old). From September 2013 onwards, the claimant was a Teacher in the School’s nursery (“the Nursery”), responsible for teaching and looking after Foundation Stage 1 nursery pupils aged 3 to 4 years old.
12. At the time of the events in question the claimant was the only Teacher working in the Nursery and had a number of assistants called Early Years Practitioners and Teaching Assistants. She worked from 08:45 to 11:45 and 12:45 to 15:45 with a lunch break from 11:45 to 12:45.
13. The Nursery is large. It consists of an outdoor area and inside there is a studio play room, a story room, a toilet and another separate room. Approximately 30 children attended per session with up to 5 staff prior to January 2017 and 4 thereafter. There were no statutory staff/children ratios.

Guidelines suggested 1 staff member per 10-12 children. However, the staff would be situated in designated positions in each area to provide adequate supervision. If a staff member needed to leave the nursery they would have to advise a colleague so that their area remained supervised. The claimant and Ms Georgina Dawe, Foundation Stage 1 Teacher, had a specific arrangement so that the claimant could leave the nursery at designated times to deal with specific duties, such as School Council, administration and home visits.

14. At the time of the material events, the Executive Head of the School was (and still is) Ms Joanne Gordon and the Associate Head Teacher was Ms Janis Anns. Ms Gordon has been employed by the second respondent since September 2015 and is the substantive headteacher and oversees the strategic leader of Deansfield and Alderwood Primary Schools. Ms Anns has been employed by the second respondent since April 1994. She was Associate Head from November 2015 until September 2017 and has been in her current post since that date. She is responsible for the day to day running of the School, including staff well-being, teaching and learning, safeguarding of children and welfare. Ms Anns is also known as Janis Blyth and is referred to by this name in the documents within R1. I will refer to her as Ms Anns.
15. Both Ms Gordon and Ms Anns sit on the school's Senior Management Team and together are responsible for safeguarding, finance, leadership, and teaching and learning.
16. In September 2010, Mr John Camp, the then Head Teacher had concerns as to the claimant's communication with teachers and parents and warned her in respect to such behaviours (R1 93).
17. On 4th November 2010, Ms Gordon, then the Assistant Head Teacher, noted that the claimant was behaving in an angry way using a threatening tone. She asked her to consider the way she had spoken to another member of staff (R1 94).
18. In July 2013, the claimant was placed on a performance improvement plan ("PIP") which focused on three core areas, one of which was Teaching Standard 7: "Ability to manage behaviour effectively and maintain good relationships" (R1 95). The Teaching Standards are national requirements (R1 404)]. In cross examination, the claimant accepted that she was aware of these and that she had been assessed against them both with respect to the PIP but also in her periodic observations and appraisals. The PIP mandated weekly review sessions and was concluded in early November when it was recognised that the claimant had met the required standards (R1 101).
19. In July 2015, a mother of a pupil complained about the claimant's treatment of her son and herself. She stated that the claimant had shouted at the children "telling them off – more than once" and that she had left her son on the "naughty chair" distraught and crying with a red face for a long time (R1 115-116). Ultimately, the mother withdrew her son from the school as a result. In discussions between Ms Gordon and the claimant about this complaint,

the claimant accepted that she had “overlooked” the child crying on the “naughty chair” and she was counselled to review the Positive Handling Policy and how to deal with children she suspected had special needs. The claimant assured Ms Gordon that she would not overlook children on the “naughty chair” again (R1 117).

20. In early September 2016, the claimant suffered an injury to her arm but remained at work, with a recommendation of amended duties for a period of four weeks (medical certificate at R1 148).
21. On 7th September 2016, Ms Anns had to counsel the claimant in respect of her professional relationships and conducting herself professionally in the nursery (R1 150).
22. On 28th November 2016, Ms Dawe who worked with the claimant, raised concerns with Ms Anns as to the claimant’s behaviour in the Nursery. She stated that was very unhappy working with her and was considering leaving. She said that the claimant made her feel very uncomfortable, rejected her ideas, did not include her in actions, was volatile and it was never clear what mood she would be in (R1 151).
23. The following day, 29th November 2016, the claimant requested a meeting with Ms Anns in which she said that she was very unhappy with Ms Dawe’s behaviour, that she was difficult to work with, was not respecting her ideas and contributions and it was affecting her home life and making her depressed (R1 151).
24. Ms Anns decided to move Ms Dawe out of the Nursery to carry out cover responsibly, the week commencing 5th December 2016 (R1 151). From subsequent meetings with the claimant it is apparent that the claimant was unhappy with this decision, that she said that things had got better between her and Ms Dawe and that she was also unhappy with the way in which the decision to move Ms Dawe was conveyed to the other Early Years Practitioners (R1 151)
25. On 9th January 2017, Ms Anns was approached by Ms Julie Benstead, Early Years Practitioner (who is referred to in Ms Anns’ documents at “Staff No. 1”) who informed her of concerns that she had about the claimant and the alleged negative environment she was creating at work. Ms Anns asked Ms Benstead to put her concerns in writing so that she could then determine the correct action to take.
26. Separately, two other members of staff, Ms Jenny Ryan, Early Years Practitioner (referred to as “Staff No. 2” in the documents), and Ms Katarzyna Balonis, Teaching Assistant (referred to as “Staff No. 3” in the documents), raised concerns about the claimant’s conduct to Ms Janice Lewis, Associate Head Teacher – Inclusion Lead, during appraisal meetings held on 13th January 2017.
27. Ms Lewis told Ms Anns of these concerns that same day and Ms Anns in turn informed Ms Gordon that same day of the concerns of Ms Ryan, Ms Balonis as well as those of Ms Benstead so as to determine the correct approach to

take. These concerns collectively raised questions regarding the claimant's conduct towards pupils and staff and in terms of her compliance with the School's policy and procedures.

28. Given these new concerns raised about the claimant's conduct and the nature of the previous complaint, Ms Anns asked Ms Dawe to provide a written account of her observations about the claimant's conduct. Ms Anns also discussed Ms Dawe's concerns when discussing the concerns raised by the other member of staff when she spoke with Ms Gordon on 13th January 2017.
29. All of these staff members subsequently provided written accounts of their concerns. Ms Ryan on 20th January 2017 (at R1 152-153), Ms Balonis on 23rd January 2017 (at R1 155-156), Ms Dawe provided this on 22nd January 2017 (at R1 154) and Ms Benstead on 28th January 2017 (at R1 162).
30. Ms Ryan's written concerns about the claimant were as follows: as to her general timekeeping; that she left during Nursery sessions; that she used her mobile phone during the sessions; that she had lengthy conversations with staff during the sessions or did paperwork; that she was generally negative; as to her behaviour towards the children; that planning meetings were disorganised, irrelevant or ran over time; and that she did not work co-operatively with teachers (at R1 152-153).
31. Ms Balonis's written concerns about the claimant were as follows: her lack provision of an induction or introduction to the work of the Nursery; her negative attitude; speaking inappropriately to the children; and a lack of clear leadership. She also raised concerns about the bad or lack of communication from some of the other team members in the Nursery (at R1 155-156).
32. Ms Benstead's written concern was that the claimant was using her phone during teaching time (at R1 162). Her e-mail indicates that she is clearly very anxious about putting something in writing and the claimant finding out but having been asked to do so she understands that she will be "breaching her contract and could face a disciplinary herself". Ms Anns indicated in evidence that her concerns were also as to the negative atmosphere that the claimant was creating at work.
33. Ms Dawe set out in writing her concerns about the claimant at the time of her early complaint as, inter alia: her inconsistent mood swings; speaking to children and adults inappropriately; grabbing children roughly; and leaving the room at inappropriate times (at R1 154).
34. Following the receipt of the written allegations and after consultation with the second respondent, Ms Gordon asked Ms Anns to conduct an investigation in accordance with the School's Disciplinary Procedure (R1 378 to 384).
35. Ms Anns met with the claimant on 25th January 2017 to inform her of the allegations that she had received and that she would be conducting a formal investigation under the School's Disciplinary Procedure. This was confirmed to the claimant in a letter dated 26th January 2017 (R1 157). The letter set

out the allegations of misconduct which would be under investigation as follows:

- *Use of your mobile phone during session times in FS1*
 - *Leaving the Nursery during sessions, including opening times*
 - *Poor staff relationships, unpredictable moods, leading to a tense and unhappy atmosphere in FS1*
 - *Negative comments made about a prospective member of the EYP team*
 - *Frequency of interaction with children in FS1*
 - *Dealing inappropriately with children, including pulling and grabbing them roughly.”*
36. The letter indicated that Ms Anns would hold a further meeting with the claimant on 31st January 2017 at which she could be accompanied by a union representative or a colleague. Thereafter, Ms Anns would present a written report to Ms Gordon for her to make a final decision about whether a formal hearing was required.
37. Ms Anns carried out interviews with Ms Ryan on 26th January 2017, Ms Dawe on 27th January 2017 and Ms Benstead on 30th January 2017, the records of which are at R1 159, 160-161 and 163 respectively. In the notes of the interviews, the various allegations are set out in more detail.
38. Ms Anns' meeting with the claimant was rearranged for 1st February 2017. Prior to this meeting, the claimant's her trade union representative, Mr Christopher Holland, initially met with Ms Anns to obtain further information about the remit of Ms Ann's investigation. Mr Holland objected to Ms Balonis' written statement being relied upon as part of the investigation because he felt it raised matters of capability rather than conduct. As a result, Ms Anns agreed not to rely upon Ms Balonis' written statement within her investigation.
39. Ms Anns then met with the claimant and Mr Holland later that day. The notes of this meeting are at R1 165-167. At that meeting the claimant did not deny most of the allegations or say she would not have behaved in such a way, she merely stated she did not recall the matters.
40. On 6th February 2017, Ms Anns completed her disciplinary investigation report in which she recommended that a disciplinary hearing be convened to consider whether the claimant had committed acts of misconduct contrary to the School's Rules of Conduct at R1 401-403, Teachers' Standards at R1 404 and the School's Relationship and Positive Behaviour Policy at R1 392-399. A copy of her original report does not appear in R1.
41. Upon receiving the report and notes of interviews, Ms Gordon referred the matter to the second respondent's Local Authority Designated Officer ("LADO"), Mr Ken Palmer, in line with the School's Disciplinary Procedure at R1 355-35. The LADO Referral Form is at R1 173-175. The form sets out a number of previous allegations or complaints made against the claimant at R1 174.
42. On 3rd February 2017 Mr Palmer advised that given the weight of the allegations, the historic patterns of behaviour exhibited by the claimant and

previous support provided to her by the School's management team, a disciplinary hearing should be held. This evidence came from Ms Gordon, there being no document in R1 to support it. On balance of probability I accept this evidence.

43. Ms Gordon took the decision to suspend the claimant from work with full pay. She and Ms Anns met with the claimant on 6 February 2017 to inform her of her suspension and confirmed the decision in writing to her that same day (R1 172).
44. In evidence, Ms Gordon set out her reasons for suspension. She explained that by this stage it was clear that the allegations were very serious. She had regard for the claimant, her continued working in the environment, the nature of the allegations and concerns as to the safety of the children. She spoke to the LADO and HR and they felt suspension on full pay was the best thing to do for safety of children and the well-being of the Claimant. On balance of probability I accept her evidence.
45. Ms Gordon then took steps to convene a disciplinary hearing and wrote to the claimant in February 2017 (the date is not visible on the copy provided) setting out the allegations against her and notifying her of the date of the disciplinary hearing to be held on 28th February 2017 (R1 177-179).
46. The letter listed the allegations as follows:
 - *You have been witnessed shouting inappropriately pupils and grabbing them by their arms to sit down their head to line up;*
 - *Leaving the nursery to answer your mobile phone answering your mobile phone in class;*
 - *Regularly leaving the classroom without informing the team, often the nursery without a teacher;*
 - *Leaving pupils to sit on the 'thinking chair' for an unreasonable amount of time and stopping other members of staff going to a child when they are inconsolable"*
47. The letter also advised the claimant of her right of accompaniment.
48. In a further letter to the claimant dated 27th February 2017, Ms Gordon advised the claimant that the date of the disciplinary hearing had been moved to 10th March 2017 (R1 180-181). Apart from the change of hearing date, this letter was in identical terms to that sent previously.
49. However, on 8 March 2017, Ms Anns received a phone call from a parent of a child attending the School in which the parent complained that the claimant had hurt her child's hand. In the light of this and following HR advice from the second respondent, Ms Gordon asked Ms Anns to re-open the disciplinary investigation to look into and make findings with regard to this new allegation.
50. Ms Anns wrote to the claimant by letter dated 8th March 2017 advising her of "further allegations" which had resulted in the re-opening of the disciplinary investigation and postponement of the disciplinary hearing set for 10th March

2017 (R1 184). The letter advised the claimant that she would be invited to a further investigatory interview in due course.

51. At the same time Ms Gordon also received an e-mail from Mr Christopher Ford, the claimant's trade union representative (R1 213B-C) in which he expressed concern that Ms Anns had only interviewed those staff making complaints against the claimant and not the other staff who were present at the time of the events in question. His e-mail requested Ms Anns to interview Ms Tammy Duncan, Early Years Practitioner and Ms Sharon Murray, Early Years Practitioner, who had by then left the School. He also expressed concerns that potential safeguarding issues were belatedly raised by the complainants in breach of the School's Safeguarding/Child Protection Policy and requested that this matter be addressed by the disciplinary investigation.
52. Ms Gordon replied on 27th March 2017 (at R1 213D) indicating that his concerns had been passed to Ms Anns to make a decision as to whether to interview additional witnesses but not to engage ex-employees in the process. She also stated that the safeguarding concerns would be investigated and action taken as appropriate.
53. In evidence, Ms Gordon stated that she had individual meetings with the staff members concerned and Ms Anns stated that there was a group session with all staff (not just those who had complained about the claimant in which their obligations and the safeguarding policy was reiterated. On balance of probability I accept their evidence.
54. Ms Anns interviewed the child who was the subject of the further allegation on 10th March 2017 (R1 185-186). She also received a written statement from the child's parent dated 13th March 2017 (R1 187).
55. By a letter dated 13th March 2017, Ms Anns wrote to the claimant advising her of the nature of the further allegations from a parent and child that she *"physically hurt a child's hand whilst dealing with an incident that occurred between two children"* and requested that she attend a second investigatory interview scheduled for 20th March 2017 (R1 188).
56. Ms Anns interviewed the claimant again on 20 March 2017 with Mr Ford. The notes of this interview are at R1 189. She also met with Ms Benstead, regarding the incident involving the child and Ms Duncan on 23rd March 2017 and Ms Balonis on 27th March 2017 (R1 190-194 and 197-199) regarding the incident involving the child and the other allegations.
57. Mr Ford e-mailed Ms Murray a series of questions on 24th March 2017 and received her answers in reply in an e-mail dated 27th March 2017 (R1 195-196). In her e-mail the only adverse answer was that sometimes she did not like the way that the claimant "would shout at the children if she thought they were not doing the right thing". This does not appear to have formed part of the re-opened investigation.
58. On 31st March 2017, Ms Anns completed her investigation and produced her revised disciplinary investigation report (R1 200-210) in which she recommended that the original allegations plus a further allegation of hurting

a child be considered at a formal disciplinary hearing. This was based on the evidence from Ms Benstead, Ms Ryan and Ms Dawe from the original investigation report and from the child and her parent as to the additional allegations and from Ms Benstead, Ms Duncan and Ms Balonis, from the re-opened investigation.

59. Ms Gordon wrote to the claimant by letter dated 31st March 2017 advising her that the additional investigation was complete and that the claimant was required to attend a disciplinary hearing at which allegations would be considered which potentially amounted to gross misconduct (R1 211-213). That letter indicated which documents had been provided to the claimant.
60. The allegations were as follows:
- *You have been witnessed shouting inappropriately pupils and grabbing them by their arms to sit down their head to line up;*
 - *Leaving the nursery to answer your mobile phone answering your mobile phone in class;*
 - *Regularly leaving the classroom without informing the team, often the nursery without a teacher;*
 - *Leaving pupils to sit on the 'thinking chair' for an unreasonable amount of time and stopping other members of staff going to a child when they are inconsolable*
 - *Physically harming a child in your care".*
61. Ms Gordon again wrote to the claimant by letter dated 18th April 2017 advising of a revised date for the disciplinary hearing (R1 215-217).
62. The disciplinary hearing was held on 27th April 2017, conducted by Ms Gordon as the disciplinary hearing officer and Mr Mark Higgins, Senior HR Advisor from the second respondent in attendance. The claimant was accompanied by her trade union representative, Mr Ford. Ms Anns attended to present the management case and Mrs Pickard, Senior Administrative Officer, was present to take notes. The notes are at R1 221-228).
63. The hearing had before it copies of the various witness interviews, the disciplinary investigation report and the claimant's mobile phone bills (at R1 236-243).
64. The minutes of the disciplinary hearing are very full. During the tribunal hearing the claimant stated that the minutes were inaccurate but did not specifically challenge the contents at the time and has not produced a list of inaccuracies. On balance of probability I accept that the minutes are accurate.
65. The meeting went through the four allegations against the claimant one by one and Ms Anns' conclusions. Mr Ford questioned Ms Anns. He and Ms Anns then questioned the witnesses, Ms Benstead, Ms Ryan, Ms Dawe and Ms Duncan. Ms Balonis was not present at the hearing because she was on jury service and her evidence was presented by Ms Anns. Mr Ford presented the statement from Ms Murray. Mr Ford summarised the claimant's position

at the end of the meeting. I would note that the claimant did not give evidence and barely participated in the meeting.

66. The School prepared a Disciplinary Hearing Report which is at R1 229-235. This sets out the findings and conclusions of Ms Gordon and Mr Higgins. The report concluded that allegations 1 to 3 were substantiated on the balance of probabilities but allegation 4 relating to the physical harming of a child was not. The report appears to be formal version of the minutes of the disciplinary hearing with the conclusions reached. The report's outcome was to dismiss the claimant as of 27th April 2017.
67. In evidence, Ms Gordon stated that the decision to dismiss was made solely in reliance upon allegation 1 ("shouting inappropriately at pupils and grabbing them by their arms to sit down and by their heads to line up"). The other allegations were regarded as misconduct, but not gross misconduct, and were not relied upon. On balance of probability I accept her evidence.
68. I have referred to a number of incidents predating those matters giving rise to the disciplinary investigation and proceedings against the claimant in my above findings. In evidence Ms Gordon said that she did not rely on these past incidents when dismissing the claimant, but she did take them into account when considering mitigation, once Mr Ford had stated that the claimant had an unblemished employment record. The past matters did not form part of the documents before the disciplinary hearing (as set out at paragraph 16 of Ms Gordon's witness statement). On balance of probability I accept Ms Gordon's evidence.
69. Ms Gordon wrote to the claimant by a letter dated 5th May 2017 advising her that she was dismissed with effect from 3rd May 2017 (R1 245-253). The letter sets out the allegations against the claimant, the findings and conclusions reached. The letter further advised the claimant that should she wish to appeal she would need to provide detailed written grounds of appeal to the Governing Body of the School within 10 days of receipt of the letter. The claimant received the letter on 8th May 2017. The second respondent also wrote to the claimant on 9th May 2017 confirming her summary dismissal as of 3rd May 2017 and indicating that by statute the matter had to be referred to the Disclosure and Barring Service and the National College for Teaching & Leadership ("NCTL") (R1 257).
70. On 8th May 2017, Mr Ford e-mailed Ms Gordon confirming the claimant's intention to appeal with the words "*I confirm that an appeal shall be made in this case*" (R1 256). Following receipt of the e-mail, Ms Gordon e-mailed Mr Higgins seeking advice on the appeal process (R1 267). In her e-mail she asked if he could ring her the following day "*to go through the time frame for the next part of this process and how many Governors we need to the appeal panel*". Ms Gordon inadvertently included Mr Ford as a recipient of this e-mail.
71. Mr Ford e-mailed Ms Gordon on 9th May 2017 asking a series of questions about the appeal process (R1 262-263). Ms Gordon replied on 11th May 2017 answering his questions (R1 262-262).

72. Mr Ford e-mailed Ms Gordon on 14th June 2017 having not heard anything further regarding the appeal (R1 259). Ms Gordon referred his e-mail to Mr Higgins, confirming to Mr Higgins that the School had not heard from Mr Ford since 11th May 2017 and had not received any grounds of appeal (R1 260). Mr Higgins replied to Mr Ford by e-mail on 14th June 2017 advising him that the claimant had 10 days from receipt of her dismissal letter to submit the details of the grounds of appeal in writing, had not done so and so was now out of time to appeal (R1 259). A further exchange of e-mails took place between Mr Higgins and Mr Ford regarding the appeal process (R1 264-266).
73. Mr Ford submitted a formal complaint regarding this matter to the board of governors by letter dated 29th June 2017 (R1 269-271). He stated he had exercised the right of appeal, Ms Gordon had responded stating that a time frame was being arranged and a panel of Governors being organised, that he was reasonably expecting notice of an appeal hearing date and his intention was then to submit the grounds of appeal in advance and/or make submissions at the hearing. However, he received nothing further and on enquiring was told that the appeal was out of time. He stated that this decision was *"in error and unreasonable"*. He requested that given the claimant's length of service and the impact on her teaching career that she be afforded the opportunity to appeal. He did not receive any response.
74. I was referred to the letter from the NCTL at R1 312A-313. This indicates that the NCTL has considered the referral by the School of the circumstances of claimant's dismissal and formed the view that:
- "... this matter has been dealt with at a local level and any further action by the NCTL would be disproportionate. Taking all these factors into account the panel decided that there was not a realistic prospect of a prohibition order being imposed and closed the case with no further action."*
75. The claimant has alleged that the respondents wanted to dismiss her for financial reasons (at paragraph 17 of her witness statement). This was not a matter that she raised during the disciplinary process. In evidence she stated that she was on a very high salary, the School could employ more staff with this money and that whilst staff were told that the School was in surplus they were also told there was no money for training and other things. Ms Anns stated in evidence that this was never a factor in dismissing the claimant, that at the time the School had a surplus budget and that the claimant's role was filled by Ms Dawe, who was already employed at the School and on the same pay scale as the claimant. On balanced of probability I accept Ms Anns' evidence.
76. The claimant has also alleged that her dismissal was engineered as a result of personal animosity against her from Ms Dawe and the other complainants. She bases this on Ms Dawe unhappiness in working with her, possible collusion and the similarities in their statements. This was not a matter that she raised during the disciplinary process and she has no evidence in support of what is a bare assertion.
77. In evidence, the claimant accepted that the allegations against her would contravene the School's policies if such allegations were true. She also

accepted the following: that the Relationships and Positive Behaviour Policy (R1 392-399) was used regularly in training teachers at the annual INSET day, prior to the school year commencing; that the Teaching Standards (R1 103- 112) were used regularly for the purposes of appraisals and in observations (at R1 103); and that her 2013 Performance Improvement Plan was predicated on them (R1 95-96). The Positive Handling Policy had been specifically referred to in Summer 2015 when Ms Gordon reminded the claimant to review the policy and abide by it (R1 117).

Relevant Law

78. Section 98 (1), (2) and (4) of the Employment Rights Act 1996:

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

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

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

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

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

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

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

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

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

Submissions

79. The parties provided me with very detailed written submissions and replies after the end of the hearing. I was very grateful for the work put into these documents and I have considered them very carefully in reaching my conclusions.

Conclusions

80. I would first state that I found all of the witnesses to be credible and did not accept the submissions of the claimant's Counsel with regard to the evidence of Ms Gordon. I take into account that giving evidence at a tribunal is an artificial and one would hope rare experience and that simply best a witness does not answer yes or no in cross examination does not render them to be non-credible or unreliable. I have set out my findings above on the basis of the evidence I heard and accepted where there was any dispute. This of course was done on the basis of the standard of proof and where appropriate the burden of proof.
81. Turning then to the claim itself. I first considered whether the Respondent had shown a potentially fair reason for the Claimant's dismissal within section 98(1) and (2) ERA 1996.
82. I find that the respondents have shown conduct to be the potentially fair reason for the claimant's dismissal. The two other reasons put forward by the claimant are simply not made out in evidence and I note that the claimant's counsel does not even pursue them in his written submissions.
83. The respondents made four allegations against the claimant during the course of the disciplinary proceedings against her. In summary these were: allegation 1: Inappropriate shouting in the classroom and inappropriate handling of children; allegation 2: Leaving the nursery to answer her mobile phone and/or answering her mobile phone in class; allegation 3: Regularly leaving the classroom without informing the team; and allegation 4: Physically harming a child in her care.
84. Allegations 1, 2, and 3 were found to be proven and put forward as grounds for dismissing the claimant (albeit Ms Gordon on took allegation 1 to give rise to an act of gross misconduct) whereas Allegation 4 was not substantiated and therefore not relied upon by the respondent.
85. Whilst the claimant's Counsel submits that allegation 4 was not proven, I accept the respondents' Counsel's submission that a finding of unsubstantiated is not the same as disproven or false. The respondents' Counsel referred me to the School's Disciplinary Policy, which Ms Gordon was following, which states that where there is inadequate evidence to either prove or disprove an allegation, it should be held to be "unsubstantiated" as distinct from a finding of disproven or false (R1 361-362).
86. I find that the claimant was summarily dismissed for gross misconduct by the respondents with effect from 3rd May 2017.
87. I then turned to consider whether this was a sufficient reason for the Claimant's dismissal within the test of reasonableness within section 98(4) ERA 1996. This involves an examination of both the way in which the Respondent dismissed the Claimant (the process followed) and the reason for the dismissal (the substance).

88. Turning first to the procedure followed having regard to the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) as well as the School's Disciplinary Procedure, I have considered the following:
- 88.1 The claimant was given advance notice of the nature of the allegations before even the investigatory meeting;
 - 88.2 She was afforded the right of accompaniment at each stage of the process;
 - 88.3 She had every opportunity to advance her case at each stage;
 - 88.4 She was given full disclosure of all statements and evidence prior to the disciplinary hearing and therefore had a full understanding of what was alleged against her;
 - 88.5 The managers hearing each level of the matter were separate and more senior;
 - 88.6 She had every opportunity to challenge the witnesses' accounts at the disciplinary hearing and to question them and the investigating officer;
 - 88.7 All relevant witnesses were involved (by the disciplinary stage); and
 - 88.8 She was provided with a letter setting out the reasons for her dismissal in great detail.
89. With regard to the right of appeal, the claimant was informed of her right of appeal, the necessary requirements and the time limit involved. This was clearly set out within the letter of dismissal at R1 245-253 at 252 and within the Disciplinary Procedure at R1 351 which she had been provided with a copy of.
90. The claimant's Counsel contends that it would have been wholly reasonable for the respondents to allow an appeal in this case, particular given the claimant's length of service, the seriousness of the consequences of dismissal on the claimant's career, the seriousness of the allegations and the lack of prejudice to each side in hosting a late appeal.
91. However, I do not accept the construction of the events regarding the appeal. I find on balance of probability that Mr Ford, who is a trade union representative, simply did not comply with the requirements to provide grounds of appeal with the requisite time frame and that it was not reasonable of him to apparently rely on Ms Gordon's e-mail to Mr Higgins as a justification for what amounted to inaction. Given the seriousness of these matters one would have expected a greater degree of care. Time had marched on and there has to be some finality to such matters. The respondent is entitled to impose a procedure and time scale within which to appeal. There is nothing unreasonable or onerous about its requirements. Whilst perhaps some might find the respondents' decision to be harsh, in the circumstances I cannot find that the respondents' refusal to allow a late appeal is unreasonable or outside the band of reasonable responses.

92. I then turned to consider the dismissal itself and the test of reasonableness within section 98(4) ERA 1996 and I also had regard to the test contained within BHS v Burchell [1979] IRLR 379, EAT relating to conduct dismissals. This requires me to consider the following:
- 92.1 Whether the employer believed that the employee was guilty of misconduct;
- 92.2 Whether the employer had in mind reasonable grounds upon which to sustain that belief; and
- 92.3 At the stage at which the employer formed that belief on those grounds, whether s/he had carried out as much investigation into the matter as was reasonable in the circumstances.
93. When assessing whether the Burchell test has been met, the tribunal must ask itself whether what occurred fell within the 'band of reasonable responses' of a reasonable employer. This has been held to apply in a conduct case to both the decision to dismiss and to the procedure by which the decision was reached (Sainsbury's Supermarkets v Hitt [2003] IRLR 23, CA).
94. In addition, I remind myself that I must be careful not to substitute my own decision for that of the employer when applying the test of reasonableness.
95. These are very serious allegations leading to the dismissal of a teacher of many years standing. It is important to understand where the allegations lie and what evidence there is of each.
96. In submissions, the claimant's Counsel has suggested that if the allegations were so serious why did the members of staff not raise them sooner. I have considered my findings in this regard and the action taken by Ms Gordon and Ms Anns. I also take into account that part of the delay was due to the Christmas break and the reluctance of some staff in raising the issues (as can be seen from Ms Benstead's e-mail). However, any delay does not render the allegations as not sufficiently serious, as the claimant's Counsel suggests. Having received the allegations, it is reasonable of the respondents to act upon them and reasonable of them to take the action that they did to reinforce the need to raise allegations as soon as possible upon its staff.
97. I found the following table provided by the respondents' Counsel in her written submissions of great assistance in considering the various allegations against the background of the various policies and in the context of a Nursery, where teachers are entrusted with the care of young vulnerable children. I have reproduced this below (the references in square brackets are to page numbers in R1):

ALLEGATION	COLLEAGUE	SPECIFIC COMMENTS
Misuse of "thinking chair"	Ryan [153] Duncan [194] Balonis [198]	"he was sitting on the chair for approximately 10 minutes or more. He was not allowed out. He was very upset, crying. I was inside. I asked one of the

		<p>other adults to check. A message came back that this was how it was meant to be" [198]</p> <p>"misuse of time out – time not monitored. Child left" [153]</p>
Leaving inconsolable children to cry	<p>Dawe [161] Duncan [194] Balonis [198]</p>	<p>As above at [198]</p> <p>"She would ignore their distress" [194]</p> <p>"If a child is inconsolable after being spoken to by her, she stops another adult talking to the child" [161]</p>
Grabbing/ pulling / yanking children roughly	<p>Ryan [153], [159] Dawe [154], [160] Duncan [194] Balonis [198] and [199]</p>	<p>"Physically pulling a child by the arm" [153]</p> <p>"Children grabbed roughly" [154]</p> <p>"If children don't move / respond quickly, she speaks very loudly at them, sometimes grabs them by the lower arm and pulls them around. This can be quite frequent" [159]</p> <p>"yank children into line hard... at least a couple of times a week" [160]</p> <p>"She just came straight in, didn't give him a verbal warning, came and grabbed his wrist. It was a very firm grip, there was no eye contact, she pulled him away angrily and took him to the chairs... that's one of Jackie's things, to manhandle children. She would grab them by the wrist or arm, then move them to a different place in line" [198]</p>
Turning children by their heads	<p>Dawe [160] Duncan [194] and [226]</p>	<p>"yank children into line hard or turn their heads physically" [160]</p> <p>"turns children by the head and pulls them by the arm" [194]</p> <p>"pull the child by their head or arm in line" [226, lower third of page]</p>
RRM grabbed and pulled by the arm because slow to respond to command to sit down	<p>Dawe [161] Benstead [163]</p>	<p>"Jackie had asked the child to sit down. RRM was slow to respond, Jackie grabbed her by the arm and pulled her arm. RRM rubbed her arm, looking hurt... I asked if she was ok and intervened" [161]</p> <p>"she was very aggressive to RRM... She shouted at her to sit down then pulled her down" [163]</p>
H and M pulled roughly by the arm	<p>Ryan [159]</p>	<p>"M and H... were treated roughly, pulled by the arm when Jackie wanted them to sit in a specific position" [159]</p>
Inappropriate shouting	<p>Ryan [159] Dawe [160] Benstead [163] Duncan [194]</p>	<p>"if children don't move / respond quickly, she speaks very loudly at them" [159]</p> <p>"she will just bellow" [160]</p>

	<p>Murray [196] Balonis [198]</p> <p>"Jackie shouts at them" [163]</p> <p>"she would approach a child head on, close to their face, standing over them and speak very loudly. I have seen children look upset... at lining up time, you could hear Jackie getting louder and louder. One of us would help calm it down..." [194]</p> <p>"I sometimes would not like the way Jackie Eather would shout at the children if she thought they were not doing the right thing" [196]</p> <p>"She had a rising voice quite often... sometimes it was fair, but sometimes it was inappropriate" [198]</p> <p>"It's not appropriate to shout at children with a cross face or lean over them... she does it a lot but it became worse over three years" [224]</p>
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98. The respondents submit that in the context of vulnerable young children, and the pupil-teacher dynamic, these actions and behaviours are very serious egregious acts of gross misconduct. I accept this submission.

99. Whilst the claimant's Counsel has submitted that the allegations against the claimant were very broad and unspecific, making it very difficult for her to respond in her defence, I do not accept that. The allegations became more specific during the course of the investigation and sufficient for the Claimant to reply in her defence. I find that given the nature of the allegations and the evidence that the respondents had obtained it acted reasonably acting as it did and presenting this to the claimant.

100. I also note from the respondents' submissions that paragraph 9 of the ACAS Code states:

"If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

101. Further, the School's Disciplinary Procedure stipulates the contents of and attachments to the written instruction to attend a formal disciplinary hearing at R1 345. This is reflected in the letter sent to the claimant at the time at R1 211-213.

102. In addition, the respondents' Counsel referred me to Spink v Express Foods Group Ltd [1990] IRLR 320, in which the EAT stated:

"fairness surely requires in general terms that someone accused should know the case to be met; should hear or be told the important parts of the evidence

in support of that case; should have an opportunity to criticise or dispute that evidence, and to adduce his own evidence and argue his case.”

103. I also take into account that there is no indication that during the course of the investigatory process or disciplinary proceedings that the claimant or her trade union representatives raised requests for further information as to the allegations and at the hearing itself Mr Ford did not raise the issue of lack of clarity of the allegations or seek to obtain more specific information (R1 223-227). When Mr Ford asked for further witnesses to be interviewed and he presented further evidence, the respondents did so/allowed the evidence to be presented. When Mr Ford made closing submissions at the disciplinary hearing, he did not mention that the charges were incomprehensible or unclear (R1 228). Indeed, he stated “*explanations can be provided for the more serious indictments*”. Moreover, at paragraphs 30-34 of the claimant’s grounds of claim, she challenges various aspects of the procedures adopted by respondents but not the adequacy or clarity of the allegations (R1 19).
104. The claimant had the invitation to the investigatory meeting for 4-5 days prior to the interview itself but did not put forward any positive defence or even firmly deny many of the matters she was ultimately dismissed for but by and large simply stated she did not recall incidents.
105. From the minutes of the disciplinary hearing, from the report and from the dismissal letter, all of which set out what happened at the hearing, it is clear that the claimant hardly participated and, moreover, Mr Ford whilst cross examined each of the witnesses, he did not positively dispute their assertions in respect of most of the allegations. When the witnesses explained their evidence, further implicating the claimant, Mr Ford did not challenge their accounts (for example, Ms Benstead at R1 224).
106. I find that the respondent carried out as much of an investigation as was reasonable in the circumstances, that the claimant was provided with the information which the respondent had, interviewed further witnesses at the claimant’s behest and the claimant was afforded reasonable opportunities to defend herself and to challenge the evidence before the disciplinary hearing.
107. Given the claimant’s position in the disciplinary hearing, Ms Gordon was faced with what were serious allegations, corroborated by the various witnesses (save for allegation 4) and without a firm defence, explanation or denial from the claimant. I find that the conclusions reached were reasonable and that Ms Gordon formed a genuine belief that the claimant was guilty of gross misconduct in respect of allegation 1 and of misconduct in respect of allegations 2 and 3.
108. Ms Gordon considered the seriousness of allegation 1 and formed the view that dismissal was the appropriate sanction. She considered the claimant’s length of service but was drawn to consider the claimant’s previous employment record when Mr Ford stated that it was unblemished. Her previous record was not unblemished as Mr Ford stated.

109. Whilst some might view the dismissal of the claimant for gross misconduct as harsh it is not an unreasonable conclusion for the respondents to reach given the circumstances. It falls within the band of reasonable responses.
110. In all the circumstances I conclude that the claimant was not unfairly dismissed and her claim is dismissed.

Employment Judge Tsamados

Date: 4th June 2018