Case No: 1310247/2020

EMPLOYMENT TRIBUNALS

Claimant: Mrs C Moseley

Respondent: Sandwell Metropolitan Borough Council

Heard at: Midlands West (by Cloud Video Platform)

On: Tuesday 18 to Friday 21 January 2022
Friday 11 March 2022 (in chambers)
Friday 1 April 2022 (am in chambers and pm for judgment)

Before: Employment Judge Faulkner
Mrs R Forrest
Mr T Liburd

Representation: **Claimant** - Ms A Fadipe (Counsel)
Respondent - Mr N Carr (Counsel)

JUDGMENT

1. The Claimant's complaints that she was subjected to a detriment on the ground that she had made a protected disclosure are not well-founded and are dismissed.

2. The Respondent did not dismiss the Claimant because or principally because she made a protected disclosure. She was nevertheless unfairly dismissed. Her complaint of unfair dismissal is well-founded.

3. The Claimant was also dismissed in breach of contract. That complaint too is well-founded.

4. The matter of remedy for unfair dismissal and breach of contract will be considered on a date separately notified to the parties.

REASONS

Judgment in this case was sent to the parties on 12 April 2022. These Reasons are provided in response to the request received from the Claimant's representatives on 13 April 2022.

Issues

1. The Claimant having brought complaints of protected disclosure detriment, unfair dismissal and breach of contract, the following were the issues the Tribunal was required to decide, on the question of liability only.

Protected disclosures

2. The first issue was whether the Claimant made protected disclosures.

3. The Tribunal was first required to determine what disclosures of information she made. She relied on the following, final clarification of which only came during the oral evidence, two of the alleged disclosures originally relied upon being withdrawn as a basis of the Claimant's case part way through day 2:

3.1. A verbal discussion with Mr D Abbiss (Business Manager) in August 2019 in connection with the Claimant's appraisal, followed by a meeting with Mr Abbiss on 3 October 2019. The Claimant's case was that the information disclosed was that she was unsupported by colleagues and heard colleagues speaking about her in a derogatory manner regarding her dressing too young for her age.

3.2. Verbal comments made by her, also at the meeting on 3 October 2019, regarding changes to her job description.

4. The Respondent accepted when we were working through the list of issues that these disclosures of information were made, but we will return to the information disclosed below in our analysis.

5.The Tribunal was secondly required to determine whether the Claimant reasonably believed that the disclosures were in the public interest. As to the first disclosure, the Claimant's case was that she was being undermined by comments about her age. In respect of both disclosures, she said that she was highlighting a danger to children, as to the first disclosure by colleagues not supporting her sufficiently and as to the second by her having to carry out more administrative tasks so that she was not able to have the same contact with children.

6. If she did, the Tribunal was required to decide thirdly whether in relation to both disclosures the Claimant reasonably believed that the information disclosed tended to show that the health and safety of any individual had been, was being, or was likely to be endangered (section 43B(1)(d) of the Employment Rights Act 1996 ("ERA")). The Claimant's case was that she was highlighting that children's health and safety was at risk. In relation to the first disclosure only, she also said that the Respondent was failing to comply with a legal obligation to protect her from discrimination and thus relies also on s.43B(1)(b) ERA.

7. If any disclosure of information was a qualifying disclosure, because it meets the tests outlined above, it was accepted that it was also a protected disclosure because it was made to the Respondent.

Protected disclosure detriments – section 47B ERA

8.If the Claimant made one or more protected disclosures, the Tribunal was required to determine whether she was subjected to a detriment by any act or failure to act on the part of the Respondent. She relied on the following:

8.1. The Respondent commencing a disciplinary investigation on 30 January 2020.

8.2. The Respondent failing, prior to reaching its decision to dismiss her, to address her concerns about her colleagues.

8.3. The Respondent failing to consider CCTV footage and to probe reasons behind its not being disclosed to the Claimant, prior to reaching its decision to dismiss her.

9. If the Claimant could establish that she was subjected to any of the detriments on which she relies, and that there was a prima facie case that this was because of one or more of the protected disclosures, the Respondent was required to show the ground on which any act, or deliberate failure to act, was done – see section 48(2) ERA.

10. Mr Carr confirmed that the Respondent did not raise any time limit issues.

Unfair dismissal

11. In relation to unfair dismissal, the Tribunal was required to determine the following issues on the question of the reason for dismissal (**Kuzel v Roche Products Ltd [2008] ICR 799**, approving in this respect the earlier decision of the Employment Appeal Tribunal):

11.1. whether the Claimant had shown a real issue as to whether the reason put forward by the Respondent was not the true reason for dismissal;

11.2. if so, whether the Respondent had proven the reason for dismissal – it relied on the conduct described in detail below;

11.3. if not, whether it has disproved that a protected disclosure was the reason or principal reason for dismissal;

11.4. if it had, whether the reason for dismissal was a fair reason within section 98(2) ERA – the Respondent obviously relied on conduct.

12. If dismissal was for a fair reason, the remaining issue was whether dismissal for that reason was fair within the meaning of section 98(4) ERA. This would usually include consideration of at least the following:

12.1. whether the Respondent genuinely believed the Claimant had committed misconduct;

12.2. whether it had reasonable grounds for that belief;

12.3. whether at the time of forming that belief it had carried out such investigation as was reasonable in all the circumstances, to be assessed in accordance with the range of reasonable responses;

12.4. whether the Respondent followed a fair procedure in dismissing the Claimant, including an assessment of whether it complied with the ACAS Code of Practice on Disciplinary and Grievance Matters, and including of course the conduct of the appeal; and

12.5. whether the decision to dismiss the Claimant fell within the range of reasonable responses.

13. The main matters on which the Claimant relied for her assertion that the dismissal was ordinarily unfair were the Respondent's failure to disclose CCTV and investigate its non-disclosure, its failure to investigate (before reaching its decision to dismiss her) the background issue of the Claimant's relations with colleagues, and that the sanction was too harsh. She also says the Respondent treated her inconsistently with another employee, Ms J Shipton.

Breach of contract

14. The single issue was whether the Claimant's conduct was such that the Respondent was entitled to dismiss her summarily.

Facts

15. The parties agreed a bundle of around 350 pages, with the Claimant submitting additional documents running to around 90 pages. We made clear from the outset that we would consider only those documents we were expressly taken to, whether by references in witness statements or otherwise during oral evidence. Page references below are references to the bundle.

16. We read statements and heard oral evidence from the Claimant, Tina Bate (the investigating officer), Lee Maskell (the dismissing officer) and Gemma Beardmore (the appeal officer). It is plainly right not to name Child A in compiling these Reasons, nor is it necessary to do so for anyone reading them to understand the decisions we have reached. For the same reason, we will not name his mother, although she provided a statement and gave evidence. We will simply refer to her as Child A's Mother. References to statements use alpha-numeric form, for example CM5 would be paragraph 5 of the Claimant's statement and LM7 would be paragraph 7 of Mr Maskell's statement.

Background

17. The Respondent is of course a local authority. It employs staff at schools throughout the borough. The Claimant was employed from 13 October 2003, in a school setting, moving to Brandhall Primary School on 1 November 2004. From 16 March 2009 she was employed as Extended Services Leader, heading up before and after school care, and a holiday club. She was thus responsible for several staff.

18. The Claimant's main relationships were of course with the staff she managed, though she also had regular contact with school staff, three of whom were key players in the events leading to her dismissal:
18.1. Chantay Paige, a class teacher – she told the Respondent (see below) that she had little contact with the Claimant, but the Claimant says in her evidence that she spoke to her quite often in Foundation stage. She says that when Ms Paige was in Years 1 and 2, she turned her back when the Claimant asked questions of her. The Claimant also says that on one occasion Ms Paige told her she was a "horrible woman" and that no-one liked her. The Claimant says (CM13) that she raised with this with Mr Abbiss but he brushed it aside; Mr Abbiss cannot recall this being raised. On balance, we conclude that this was said, on the basis that Mr

Abbiss's evidence, very honestly, was that he could not recall it, rather than that it did not happen. We also conclude that these comments were made by Ms Paige to the Claimant, as this was not challenged by the Respondent.

18.2. Ms Jenny Shipton (Learning Support Practitioner) – the Claimant says Ms Shipton excluded her in group conversations and only answered questions from the Claimant very bluntly, telling her more than once that she did not have time to provide information the Claimant was seeking.

18.3. Ms Versheila Patel (Higher Level Teaching Assistant) – the Claimant says Ms Patel ignored her even when she said good morning.

19. We accepted the Claimant's evidence as to Ms Shipton and Ms Patel, as summarised above, given that it was not challenged.

Alleged protected disclosures

20. The Claimant says she had concerns about staff not interacting with and monitoring children properly. Specifically, at the summer club in August 2019, two colleagues left children unattended which resulted in an accident. There had been too many children on a bouncy castle and one ended up with a nose bleed. Staff had been sitting down drinking coffee and so could not see the children properly.

21. The Claimant says she raised this with Mr Abbiss, who was her line manager, and with Tom Moore (the School's Safeguarding Lead) at a teacher training day around 3 September 2019, that is after the summer holidays. She says she also raised with them that children were left to run around in the bathroom, and on one occasion had been allowed to get balls from the school car park without supervision. The Claimant's view is that a child could have met with a serious accident in the car park, or could have banged their head in the bathroom. It was the former that she says she specifically raised with Mr Abbiss. This is not mentioned in her statement or Claim Form, though at CM20 the Claimant refers to raising "various issues" of staff not paying attention to children. Mr Abbiss was "pretty sure" the Claimant did not speak to him at all on 3 September 2019. He was a witness who was careful to distinguish what he could not recall and what did not happen; on that basis and because the Claimant only specifically raised this in oral evidence, we conclude on balance that she did not raise these issues with Mr Abbiss on 3 September 2019, or at least she did not raise the issues of concern regarding the bathroom or car park.

22. The Claimant raised the summer scheme accident again at a meeting with Mr Abbiss on 3 October 2019 (see CM20), at which the Headteacher was also present. The note of that meeting is from page 323 and this incident is mentioned at page 329. Mr Abbiss says this was the only matter the Claimant raised regarding child safety on this occasion. This is borne out by the detailed notes.

23. Another feature of the 3 October meeting was complaints about the Claimant by other members of staff, both historically and more recently. Mr Abbiss informed the Claimant that the staff in question wanted to be anonymous. He acknowledged the complaints may be unfounded, but said the volume of them was concerning. They related mainly to how staff were spoken to. He brought this to the Claimant's attention so that she could review her management style.

24. According to DA10, prior to 30 January 2020 (see below) none of Ms Paige, Ms Shipton or Ms Patel made any complaint, formal or informal, to Mr Abbiss

regarding the Claimant. The Claimant did not suggest otherwise. She suggested in discussion with Mr Abbiss that one complainant was an apprentice who had been rude to her. Mr Abbiss said she could make a complaint about the apprentice but the whole idea of the meeting was to draw a line under the issues.

25. The Claimant says she also raised with Mr Abbiss that office and other school staff were saying she dressed too young for her age. She says it made her feel like she did not want to be there, and that they would never support her on anything. Mr Abbiss told us this was definitely not raised at the 3 October meeting. Again, his evidence is borne out by the detailed notes and so on balance we conclude that this was not raised with him as alleged.

26. The notes record on page 326 that Mr Abbiss made clear there was no justification for staff to be rude to the Claimant and that this could be investigated further if the Claimant requested it. He said that if the Claimant had any concerns about the way she was treated by other members of staff, she must raise this with him or the Headteacher. At page 329 it is stated that the Claimant was told any future complaints from staff about her would be dealt with in line with School policy, namely that no informal complaints would be permitted.

27. The Claimant had raised in an earlier supervision meeting with Mr Abbiss that she was doing more duties than were set out in her original job description. There was some difficulty in locating that original, as a result of which Mr Abbiss prepared a draft job description and then sent a further draft to the Claimant adding a line regarding administrative duties. The Claimant says she informed Mr Abbiss that when she was busy with such work, colleagues were not always attending to children appropriately.

28. The job description was also discussed at the meeting on 3 October, though Mr Abbiss says this part of the discussion did not refer to issues of child safety as such, just that the Claimant was annoyed colleagues had not responded to her request for help at the summer club in August. That too seems to be borne out by the detailed notes.

29. The notes record Mr Abbiss saying he was confused that the Claimant had raised proposed changes to her job description with her union (who had called HR about it), given that his and the Claimant's prior discussions had been about the absence of a job description and the need to produce one. In addition to the matter of the job description and staff complaints, there was discussion of various other matters, including confirmation that the senior leadership team was pleased with the Claimant's work and the provision she was leading. It was eventually agreed that the inclusion of an additional line in the job description would be put on hold.

Child A

30. One child who attended the Breakfast Club and After School Club ("ASC") was Child A. His mother was in a senior role in the school. Child A was known to be prone to outbursts in certain situations.

31. The Claimant had a conversation in January 2020 with Child A's Mother about how to calm Child A down should he become upset, on the basis of techniques recently identified to his mother (by professionals outside of school). These involved sitting with Child A, or having him on one's lap, not talking too much, but rubbing his back or being close enough to give him physical contact which he found

reassuring. There was nothing in this conversation about techniques to employ to move him to somewhere he did not want to go. In that regard, Child A's Mother told us staff in the school had moved him previously by carrying him or holding him by his forearms, something she had raised with the Headteacher.

32. Child A's Mother told us this conversation was consistent with what was recorded in writing by the school for the benefit of all staff who dealt with Child A, again in January 2020. We did not see any such document. The Claimant had been off work for personal reasons when those wider discussions took place.

33. On 21 January 2020 (page 399), the Claimant sent an email to the Headteacher to say Child A had been upset and that she had held him to calm him down. The Headteacher replied that this was one of the agreed strategies and said "I would just make a note of it somewhere".

30 January 2020

34. Staff in the ASC would usually collect pupils to take them to the school hall.

35. On 30 January 2020, Child A refused to go with a Mrs Paskin (an ASC worker). The Claimant was informed and went to the classroom where Child A was. There was no agreed procedure for taking Child A to the ASC, though the Claimant (as well as others) had done it before. The Claimant says that on her arrival at the classroom, Child A was sitting calmly on Ms Shipton's lap. She says he got up and took her hand, whereupon she led him into the corridor and began speaking with him, their being for part of the time sat down together, with Ms Shipton also present. She says she then led him back into the classroom, holding his left hand and his arm (it is not clear which arm), whilst Ms Shipton carried his belongings, passing out into the playground through a door on the other side of the classroom. The Claimant says Child A tried to break away from her in the playground and she continued to hold his hand to keep him safe. She says the way she held Child A was based on a technique known as the "Caring C's", which had formed part of some training she had attended. No-one intervened at any stage. She says in CM37 that halfway across the playground, Child A became agitated and started screaming. She felt even more strongly that she could not let him go, but was not dragging him.

36. At some time shortly thereafter, these events were reported to the Deputy Headteacher, Rebecca Summers, by Chantay Page and Jenny Shipton. In broad terms, they informed Ms Summers that the Claimant had handled Child A inappropriately. They, and Ms Patel, discussed the matter in the classroom before reporting it. According to the School Safeguarding Policy (paragraphs 11.3 and 11.4 on page 232), the first step should have been to report the matter to the Headteacher.

37. Tom Moore and Ms Summers set out to make some initial enquiries. They found Child A sat on the Claimant's lap in the ASC, being comforted. The Claimant says they told her it was alleged she had dragged a child across the playground. This is consistent with their later evidence to Tina Bate (see below) so it is very likely this is what they said. Some other staff were present during these exchanges. Child A was left with the Claimant. Neither Mr Moore nor Ms Summers examined him.

38. Child A's Mother spoke with the Claimant about the matter later that afternoon. The Claimant reported to her that she had been informed allegations had been made that she had dragged Child A across the playground, but she told Child A's Mother she had not.

39. On 31 January, the Claimant was told she was suspended. Page 70 is apparently a note of a meeting between the Claimant (with her representative) and the Headteacher on this date. It is essentially a summary of the Claimant's account as set out above. The Claimant agreed in her statement (CM45 and CM47) that she met the Headteacher on the day of her suspension, though in oral evidence she seemed to suggest no meeting as recorded at page 70 took place. We find that it did, based on the Claimant's statement. She was given or sent a suspension letter (pages 400-401); this was in the terms one would expect, and so we need say nothing further about it.

40. The matter was referred to the local authority designated officer ("LADO"), though it is not clear whether this was done before or after the Claimant was suspended. According to Mr Abbiss (DA4) on 6 February 2020, he attended a meeting with the Headteacher and LADO and brought CCTV footage and stills of that footage to the meeting. The Headteacher had asked Mr Abbiss to review the footage on 30 January, which he did with her present. He found it to be one to two seconds long, from the only camera that covered any part of Child A's journey from exiting the classroom to the ASC. There was no indoor CCTV. On the night before (DA5), the camera had been vandalised – that is caught by trespassers on the school roof – and its angle adjusted as a result, so that only a small part of the playground was covered. We were content with that explanation. We found Mr Abbiss to be a very straightforward witness.

41. Mr Abbiss says he encountered difficulties playing the footage at the meeting, and that the LADO preferred the stills. The LADO decided that the main area of concern related to events in the classroom, and felt the stills did not show anything of significance. Mr Abbiss says the only other person to view the CCTV was Ms Bate during her investigation (see below). There is no record of police having been to the school, either signing in as visitors or in the CCTV logbook, despite the document in the bundle, apparently from the police, suggesting otherwise. This is at page 420, being an email to the Claimant in September 2020 from the police, saying that the footage was viewed by officers at the school but never seized. As will become apparent, we did not think it necessary to reach a conclusion on whether the police viewed the CCTV or not.

42. No safeguarding report was made. Part of the School's Physical Restraint Policy at page 159 says "all incidents of physical intervention must be recorded if deemed appropriate by a member of SLT. All incidents should be immediately reported to the Inclusion Manager (or in their absence the Headteacher/Deputy Headteacher)".

Disciplinary investigation

43. The Claimant accepts an investigation was required given that three members of staff had made allegations against her.

44. On an unknown date, but we assume fairly immediately after the event, the Headteacher asked a number of witnesses to put their recollections in writing. She then appointed Ms Bate to investigate and passed on the resulting notes to her

(these were not in the bundle). Ms Bate was supported by central HR (Lee Page). She is a governor at the school and a retired headteacher. She was keen to emphasise to us that her role was not to give an opinion but to record the facts, objectively and in a balanced way. She says in her statement (TB9) that she aimed to ensure "that any evidence that was favourable to the employee was given equal weight to any evidence that supported the allegations against her". Ms Bate also said she had no knowledge at any stage of her investigation about any concerns the Claimant had raised about the health and safety of children (including the scope of her duties) or comments about the Claimant's age. We accepted that; there was no evidence to suggest she knew of these matters, or that they played any part in her investigatory work.

45. The matter was referred to the police on 5 March 2020, and so the investigation was placed on hold. On 1 April 2020, the school was advised there would be no further action and so the investigation process then recommenced.

46. Ms Bate interviewed 10 people. A summary of their evidence is as follows – the Tribunal was asked to read the summary of the witness evidence set out in Ms Bate's eventual investigation report; whilst it was taken to parts of the full witness statements themselves, it did not read those in full until its deliberations.

47. Jenny Shipton said in summary as follows:

47.1. The Claimant took Child A off her lap and he was holding on to a table to prevent himself leaving with her – he was distressed and verbally protesting.

47.2. In the corridor, the Claimant held him firmly by his waist, keeping him on her lap. Child A said, "stop holding me"; the Claimant talking to him appeared to calm him down; she was also rubbing his back.

47.3. On returning through the classroom, the Claimant pulled Child A against his will towards the door and out into the playground.

47.4. The Claimant held his left hand and pulled him by a grip to his wrist, Child A pulling back. The force was sufficient to pull him across the playground against his will.

47.5. Child A "dropped his bodyweight" but he did not drop to the floor – it is not clear from her statement where Ms Shipton said this happened.

47.6. She said she did not hold Child A's wrist herself.

48. Versheila Patel said in summary as follows:

48.1. The Claimant took Child A out of the classroom into the corridor; Ms Patel also said she did not notice the Claimant do this – it seems that Ms Patel was saying that the first she realised something was amiss was when Child A and the Claimant were in the corridor, though this is unclear.

48.2. Referring to their return to the classroom, the Claimant tried to lift Child A off the floor, then used a firm grip to pull him, enough to make him move against his will, Child A shouting and grabbing on to tables.

48.3. This was not normal procedure.

48.4. The Claimant continued to pull Child A by his wrists in the playground.

48.5. She found it distressing watching what happened – Ms Bate recorded that Ms Patel "appeared to regret not intervening".

We add that the Claimant says Ms Patel was not in the classroom, only passing them in the corridor.

49. Chantay Paige said in summary as follows:

49.1. Jenny Shipton had been calming Child A down before the Claimant's arrival.

49.2. Ms Shipton, the Claimant and Child A went into the corridor – she did not remember how Child A was moved to the corridor, but said he continued to be upset so Ms Paige tried to contact Ms Summers for support while Ms Patel dismissed the other children.

49.3. When the Claimant and Child A returned from the corridor, the Claimant tried to lift Child A, then grabbed onto his wrist or hand so tightly he could not get out of her grip – Ms Paige described this as inappropriate.

49.4. Child A was pulling on a table (she heard the table move rather than saw it) and pushing his weight to the floor – she said that this was witnessed by Ms Patel.

49.5. She described the Claimant as frustrated, saying she kept hold of Child A's wrist and took him outside against his will – almost like he was dragged.

50. Rebecca Summers said in summary as follows:

50.1. The allegation the staff made to her was that the Claimant had dragged Child A over to the ASC, which Ms Bate took as starting in the classroom.

50.2. There was no indication Child A was hurt. He was still upset when they saw him in the ASC so that she and Mr Moore did not want to distress him further by asking him questions.

50.3. They asked the Claimant to demonstrate how she got him to move. She placed her hand on his wrist, saying this was how she had been trained. Ms Summers said to Ms Bate that this was how to move a child hurting themselves, not a technique to move them against their will.

50.4. The Claimant told her Ms Shipton had pulled Child A by the other arm, which Ms Summers took as implying that both she and Ms Shipton had pulled him.

51. Tom Moore said in summary as follows:

51.1. He understood Child A had been dragged to the ASC, Ms Bate again understanding this to have started in the classroom.

51.2. He too did not think it appropriate to ask questions of Child A, thinking it best to leave him, having first told him his mom would be there soon.

52. Child A's mother said in summary as follows:

52.1. The Claimant was able to deal with Child A and had strategies to get him to the ASC safely.

52.2. There was a mutual agreement between her and the Claimant for the Claimant to be more hands on as Child A was supported by physicality of touch.

52.3. She had complained to the school about what she believed to be breaches of safeguarding requirements on the day in question, such as leaving Child A with someone alleged to have behaved inappropriately, the Deputy Safeguarding Lead not remaining on site, Child A not being checked, and no contact being made with her as his parent.

52.4. The Headteacher had told her the CCTV showed that Child A was not dragged and that the Claimant had been suspended because of something she said to Child A's Mother, which the Headteacher did not specify.

52.5. Child A was not upset and suffered no harm; in his eyes, he was held by the hand; there were no marks on him that evening.

52.6. There was no formal procedure for taking Child A to the ASC.

Child A's Mother later submitted an email (pages 98 and 99) on 14 April 2020 (after Ms Bate's investigation report was concluded), as her concerns about safeguarding issues had not been included in the statement sent to her by Ms Bate. Ms Bate was "pretty certain" this email was included in the disciplinary hearing document pack. We are content to agree that it was, as this was not challenged by the Claimant.

53. Two additional witnesses were interviewed at the Claimant's request as the Claimant said they saw her taking Child A across the playground.

54. The first, Beverley Paskin (ASC Worker), said in summary as follows:

54.1. She was on the other side of the playground in the ASC. She heard Child A before she saw him, the Claimant and Ms Shipton.

54.2. She did not feel the Claimant was dragging Child A but he was resisting – he was being held by the wrist and under his arm, which she regarded as the correct position to walk a child in this situation.

54.3. The Claimant was pulling him slightly. There was no dragging. This would have been raised by another member of staff at the time if this was happening.

54.4. She was "80% sure" Ms Shipton was also holding his hand and trying to comfort him, as was the Claimant.

55. The second, Joanne Shelley (another ASC worker), said in summary as follows:

55.1. She was also in the ASC at the time.

55.2. She could not say whether Child A was being dragged, but he was pulling away from the Claimant.

55.3. She thought Ms Shipton was holding Child A's hand.

56. The Claimant was interviewed after Child A's Mother, Ms Paige, Ms Patel, Ms Shipton, Mr Moore and Ms Summers, but before Ms Paskin and Ms Shelley. She was accompanied by her union representative. Ms Bate asked for her account but

was told by the union representative that the Claimant would prefer to answer specific questions. Those questions elicited in summary the following evidence:

56.1. She had previously taken Child A to the ASC when he did not want to go.

56.2. She insisted she did not pull Child A, saying he left the classroom happily.

56.3. They had sat in the corridor and the Claimant had comforted him.

56.4. With reference to whether Child A grabbed tables as they went back through the classroom, she said, "Not that I saw". In her statement (CM32) she said "I do not recall" that he grabbed a table. She said to us in oral evidence that he could not have done so because she was on the side of tables as they walked back through the classroom to exit to the playground.

56.5. Child A became unhappy walking across the playground and started to scream and say "no".

56.6. Halfway across the playground, she moved him using the "Caring Cs", putting her hand in a C-shape around his wrist and her other hand under his other arm, which she told us she had learned when attending MAPA (Management of Actual or Potential Aggression) training, though this was not a MAPA movement (see also CM10). She had not used this technique before.

56.7. Ms Shipton was holding Child A's other hand once they were halfway across the playground.

56.8. No force was used; she did not restrain or drag him.

56.9. When asked why she thought the investigation had been started she initially said she really could not say. She then stated, when asked if she had anything to add, "To provide a context, it is fair to say there have been difficulties in the team previously with staff relations". When Ms Bate asked her if she thought this may have influenced the allegation, she stated, "I am aware there are a number of people that don't like me". She was clearly saying that the answer was yes.

56.10. The union representative then referred to a meeting in school, which we assume was that on 3 October 2019, saying "the school had listened to gossip and … [the Claimant] didn't seem to be listened to; to enable [the Claimant] to safeguard children". The representative then added, "It was felt that this allegation was not an isolated incident". Ms Bate did not ask for further details.

57. Ms Bate says she received no evidence that indicated the Claimant had any issues or disagreements with anyone who was a relevant witness on the day of the incident. The Claimant says she told Ms Bate that office staff commented on her dress and that the three main witnesses had made clear they did not like her. None of that is in the notes of her interview. Ms Bate told us the Claimant definitely did not tell her Ms Patel had ignored her, Ms Shipton was uncooperative, or Ms Paige had said she was horrible. Ms Bate gave all witnesses opportunity to check and amend, in discussion with her, the notes she prepared of the interviews. Given that, and the absence of these references from the notes, which include a fair amount of detail, we can only conclude that Ms Bate is right that these specifics were not mentioned to her. Ms Bate had not asked Ms Paige, Ms Patel or Ms Shipton whether they had any adverse history, or any history at all, with the Claimant and did not go back to them to do so.

58. Ms Bate did not question Child A. She felt it would not be appropriate or necessary in light of the evidence she had otherwise obtained.

CCTV and investigation report

59. As already indicated, CCTV footage was recovered after 30 January 2020, but all that could be seen was around two seconds, showing the Claimant and Child A just outside the classroom in the playground. Ms Bate decided it was of no value as it did not show what took place in the classroom, only the aftermath. She says the stills at pages 68-9 are a full representation of what the CCTV showed. They show Child A standing alongside, or more probably just ahead of and between the Claimant and Ms Shipton, the Claimant possibly holding his wrist or hand and Ms Shipton apparently just carrying something.

60. At page 259 it can be seen that the Claimant's union representative requested the footage from Mr Page on 3 June 2020, by which time it had been erased in accordance with usual procedures, as Mr Abbiss confirmed by email on 8 June 2020. The Claimant says the footage was requested after her interview with Ms Bate on 6 April 2020, via the Respondent's HR team. This was not mentioned in the email of 3 June 2020. Mr Abbiss says he offered the Claimant's representative an opportunity to view the stills on 11 June 2020 (that email was not in the bundle) and she replied thanking him for the email and saying this was the first time she had heard about CCTV. That part of Mr Abbiss's evidence clearly cannot be right given that the representative raised the matter on 3 June 2020. In any event, on balance, we thought it unlikely in the light of the 3 June email that a previous request was made.

61. The Claimant told us that her disclosures referred to above influenced Ms Bate's decision to discard the CCTV footage, because it was a decision based on Ms Bate's feelings (that is, she said she felt it was not of assistance), and if the footage existed it should have been disclosed immediately.

62. Ms Bate's Investigation Report had a number of appendices, namely the detailed statements of each of the witnesses and a number of the Respondent's policies. The main body of the Report summarised all of the statements, and what Ms Bate regarded as the differences and similarities in the evidence she had collated, e.g., highlighting that the Claimant gave a different account to that given by Ms Patel, Ms Paige and Ms Shipton who, Ms Bate said, had "provided consistent accounts of what they state they witnessed". The witnesses' description of how the Claimant held Child A was also said to be consistent. It was said that Ms Shelley and Ms Paskin both believed Ms Shipton was also holding on to Child A's hand, but it was noted that "staff members view [differed] between [the Claimant] 'dragging' Child A, to 'pulling' him along". Ms Bate did not highlight that Ms Paskin essentially supported the Claimant's account, telling us that this was because Ms Paskin only witnessed what took place in the playground. Similarly, she did not highlight any differences between the statements of Ms Patel, Ms Paige and Ms Shipton. She did note that Child A was left to be supervised by the Claimant after the allegation was made.

63. Ms Bate's summary also included extracts from the Moving and Handling Policy (that children should be encouraged to move independently) and the Restraint Policy (that physical intervention is a last resort, i.e., in a crisis situation – pages 158-9) to draw the disciplinary hearing panel's attention to them rather

than them having to search for them. She made no comment on whether or how the Claimant's conduct related to the policies. Similarly, she did not record any concerns raised by Child A's Mother about safeguarding failures, as she did not view them as relevant to her investigation.

64. Ms Bate closed her report by saying, "I conclude that these issues need to be considered in accordance with the Disciplinary Policy for School Based Staff".

Disciplinary hearing

65. On 15 May 2020, the Respondent told the Claimant the investigation was concluded and that there was a case to answer. A formal letter to her of 27 May 2020 said everything to be relied on at a disciplinary hearing was enclosed, but whilst Ms Bate's report had been submitted to HR and thence to the Headteacher, the Claimant says she was not given it until after the appeal hearing, though she did get the witness statements. The Claimant's union representative expressly referred to the report in her email on 3 June 2020 (page 259) when enquiring about the CCTV footage, which in our view clearly shows the report itself was distributed appropriately, including to the Claimant – or at least to her representative.

66. The Hearing took place on 23 June 2020. The hearing panel was chaired by Mr Maskell, the school's Chair of Governors. Other panel members were a church minister and someone who worked in HR professionally.

67. Mr Maskell had undertaken several such hearings before. He and colleagues read Ms Bate's Report and its Appendices beforehand, doing so before the parties arrived on the day, though they had not met to discuss the case before then. Mr Maskell was also given by HR an outline agenda for disciplinary hearings and some standard text to open the hearing. He told us the panel believed there were broadly three possible outcomes – not to uphold the allegation, a warning or dismissal.

68. Notes of the hearing are at pages 184-192. It lasted over 2 hours. In attendance were the Claimant and her union representative, Ms Bate, two HR consultants (Lee Page supporting Ms Bate and Darron Evans advising the panel), and witnesses who attended and answered questions. At the outset, Mr Maskell said questions had to be put via each party's representative and then through him.

69. Ms Bate read out her report. Mr Maskell summarises this in his statement (LM6) by saying, "Three colleagues … alleged that the Claimant had used inappropriate force to move Child A from the classroom across the playground into the ASC". Ms Bate then told the panel that she had viewed the CCTV but felt it would not form a significant part of the investigation. She also referred to the agreement between the Claimant and Child A's Mother, but noted it had not been recorded. The essence of the disciplinary case was stated to be, "[Ms Shipton, Ms Paige and Ms Patel] alleged that the Claimant had used inappropriate force to move Child A from the classroom across the playground into the ASC, the force being enough to move Child A."

70. Witnesses were then called. In summary:

70.1. Ms Paige was asked how well she knew the Claimant and she said she did not know her very well. She agreed with the statement put to her that Child A had been moved against his will and that the Claimant had physically restrained him.

It was inappropriate, she said, because the Claimant had held his wrist and he could not ease away from her grip. She had seen Child A in the corridor and the Claimant rubbing his back. When he came back through the classroom the Claimant lifted him off the floor. This appears to be when she thought the Claimant's actions became inappropriate. She said she had a conversation with Ms Shipton and both felt the incident had been inappropriate and went and reported it to Ms Summers.

70.2. Ms Shipton said Child A was on her lap, the Claimant took him off her and he grabbed tables to prevent being moved. She felt the force used was extensive and not the correct way to move a child. It was when the Claimant removed Child A from Ms Shipton's lap that he tried to hold on to table legs and was really crying and screaming. Ms Shipton could not remember if Child A fell down by the classroom door but could remember him "dropping his bodyweight". She did not think it appropriate to say anything to the Claimant in front of a child. She said that "halfway across the playground Child A became overly emotional and she told him to calm down".

70.3. Ms Patel said she saw Child A holding on to a table leg – such that the table itself moved – as the Claimant was taking him across the classroom, agreeing with the statement put to her that this was inappropriate force. She said she felt very uncomfortable watching the situation unfold. She later said she "thought she recalled the Claimant and Child A coming through the classroom but couldn't remember". She said that she had discussed the matter with Ms Shipton and Ms Paige and all three went to report it.

71. Some questions were put to these witnesses, the notes suggesting principally by Ms Bate. Mr Maskell accepts no question was asked by the panel about what took place in the classroom, essentially because the panel was satisfied that the written and oral evidence was clear. Neither the Claimant nor her representative asked questions of the witnesses on this point either, though it does not appear from the minutes that they were given the opportunity to do so.

72. The Claimant's representative then put a number of points to Ms Bate:

72.1. She stated it was disappointing the CCTV was not available. Mr Maskell confirmed to us that the panel did not see it and on the basis of Ms Bate's report did not regard it as helpful.

72.2. She asked what happened when Child A did not want to go to the ASC before. Ms Bate's reply was that either a member of SLT or Child A's Mother had been contacted.

72.3. Ms Bate confirmed that her report did not contain a detailed timeline – she confirmed to us this meant that whilst she was clear on the sequence of events on 30 January, she had not established the exact time at which they took place. The representative outlined what she saw as the timeline.

72.4. One of the panel members asked Ms Bate "why the accusation wasn't pursued further". It is not clear what this referred to. In any event, Ms Bate replied that "all accounts alluded to the same series of events and provided confidence that this was not a feature of the matter being investigated".

73. The Claimant's representative then put the Claimant's case, emphasising her length of service and "professional tensions" with staff and that the Claimant felt

this was not an isolated incident, that the "original incident" (apparently a reference to the discussions in October 2019) "fed directly into the allegations" against her, and so the representative was disappointed Ms Bate had not investigated this. She highlighted what she described as "conflicting statements" about Child A going into the classroom from the corridor and the fact of Child A's Mother's evidence of no harm being done to Child A who thought he was just holding the Claimant's hand.

74. The Claimant's witnesses were then called to give evidence:

74.1. Child A's Mother said she had shared coping strategies with the Claimant, had a mutual agreement for her to be more "hands on" with Child A, had full confidence in her and that Child A would not have been left with her had there really been an issue. She thought maybe the Claimant had panicked during the incident, as any member of staff would. The Claimant's representative said that whilst Child A resisted going with the Claimant he was not dragged or held inappropriately (page 190).

74.2. Ms Paskin did not consider the Claimant's handling of Child A inappropriate. She said the Claimant and Ms Shipton were leading him in a way appropriate for a child who was screaming and shouting; she was 80% sure Ms Shipton was holding his other hand. She said there was nothing different on this occasion from any other – it was not unusual for Child A to be screaming and shouting if he did not want to attend the ASC. Mr Maskell says Ms Paskin did not come across as confident of her evidence, and in any event could not speak to what the panel regarded as the crucial issue of what happened in the classroom.

75. The Claimant's representative summarised the Claimant's evidence, highlighting that Child A had been left with her after the event, nobody felt the need to intervene, that statements had been embellished after the event, and that the allegation could ruin the Claimant's career. She concluded by again reiterating disappointment about the CCTV not being made available.

76. Ms Bate and the panel then asked questions of the Claimant. In reply, the Claimant insisted she had not dragged or restrained Child A – holding his wrist did not mean making him stop and she could not have restrained him anyway, because of a knee condition. She said that intervention meant stopping a child moving, whereas holding Child A's wrist did not make him stop.

77. Both parties then summarised their cases.

78. The Claimant and her representative were sat apart, because of social distancing arising out of the Covid-19 pandemic, which the Claimant says made it difficult to put questions and comments, though Mr Maskell says he saw the Claimant and her representative communicating. The Claimant says she was prevented by this arrangement from raising how witnesses' evidence had changed. In her evidence before us she referred specifically to:

78.1. Ms Shipton saying in evidence at the disciplinary hearing that Child A dropped to the floor – page 186, "can't remember if he fell down by door but he did drop his bodyweight" – which she did not say in her statement given to Ms Bate. Ms Shipton did in fact refer to Child A dropping his bodyweight in her statement.

78.2. Ms Paige saying that she was not aware of the Claimant collecting Child A to go to the ASC previously, when in fact she had. We noted that this was not a change in Ms Paige's evidence, just something the Claimant considers inaccurate.

78.3. Ms Patel saying at the hearing that she could not recall the Claimant, Ms Shipton and Child A returning through the classroom (page 187) and that Child A grabbed a table when they moved to the corridor, whereas in her statement she said she was not aware of anything until the Claimant and Child A were already in the corridor. On our reading, Ms Patel did not say at the hearing that Child A grabbed a table on the way to the corridor.

79. The Claimant also says she was prevented from raising the following points:

79.1. How Ms Paige could have been releasing children to leave the classroom, call Mrs Summers and see what was happening in the corridor. Ms Bate pointed out to us that Ms Paige told her that Ms Patel dismissed the class (page 102).

79.2. That Ms Patel was not a direct witness because she was not in the classroom – though the Claimant later told us that when she was questioned about this, she did raise it, even though this does not appear in the minutes of the hearing.

80. The Claimant raises for our consideration further instances where she says the statements of Ms Paige, Ms Shipton and Ms Patel given to Ms Bate do not agree:

80.1. At page 102, Ms Paige said she could see Child A on the Claimant's lap in the corridor and that he was getting more distressed, whereas at page 106 Ms Shipton said he was calming down.

80.2. At page 106, Ms Patel said she saw the Claimant collect Child A who was very upset and then said she first saw them in the corridor (page 110).

80.3. At page102 Ms Paige mentioned that Child A pushed his way to the floor and was pulling a table but Ms Shipton did not mention him pulling a table on the way back through the classroom. The same point is made at CM61 – Ms Shipton suggested Child A grabbed a table and was dragged when moved into the corridor, whilst Ms Paige and Ms Patel say this was what took place when the Claimant and Child A went back through the classroom.

81. Ms Bate's view in her evidence before the Tribunal was that one should expect some inconsistencies, because for example Ms Paige would have had other children to attend to, so whilst she may not have recalled how Child A was moved to the corridor, she was clear she saw Child A's distress.

Dismissal decision

82. Once the parties had summarised their cases, the panel withdrew for around 30 minutes. They came unanimously to the view that the critical incident was in the classroom and that Ms Paige, Ms Shipton and Ms Patel had provided "consistent and credible accounts of the Claimant using inappropriate force to move Child A from the classroom" (LM12). Mr Maskell adds (LM12), "Accordingly, it was the Disciplinary Committee's conclusion that the allegations were substantiated". The panel felt that the evidence about what happened in the classroom was more reliable than the evidence about what happened in the

playground (it did not view the CCTV or still images of it), and whatever the three key witnesses saw, the panel were clear that it led them to want to report it.

83. The panel considered the issues the Claimant had raised about difficulties with colleagues, but it was not aware of any difficulties with the three key witnesses, namely Ms Paige, Ms Patel and Ms Shipton. It was aware of her having raised a concern about colleagues not properly supervising children in August 2019, but was satisfied that these were not the colleagues involved in the events of 30 January, which was the panel's sole focus.

84. The panel did not want to obtain evidence from Child A directly; the witness evidence was deemed sufficient and neither the Claimant nor her representative suggested he should be part of the investigation. Mr Maskell could not recall when giving evidence to us what weight he and his colleagues attached to Child A's Mother's evidence to the effect that Child A had said the Claimant was just holding his hand and did not seem to report any distress or upset about the events in question. The panel recognised he was found sitting on the Claimant's lap in the ASC but reasoned that he would have had some minutes to calm down by then.

85. On the balance of probability the panel preferred the evidence of the three key witnesses over that of the Claimant. It did not identify anything significantly inconsistent in their evidence. Before us, Mr Maskell was taken to the following:

85.1. In relation to when the Claimant was first in the classroom with Child A, Ms Paige saying (page 101) that he became more distressed, Ms Patel (page 109) saying he started to get very upset and the Claimant took him outside, and Ms Shipton (page 106) saying he tried to grab a table as he left the classroom, Mr Maskell said he was unsure what the panel concluded happened at this point and recognised the conflict of evidence in the three statements, specifically as to whether Child A grabbed a table at this juncture.

85.2. As to events in the corridor, Ms Paige (page 102) said Child A was sat on the Claimant's lap and getting more distressed, Ms Patel (pages 109 to 110) said he was very distressed, and Ms Shipton (page 106) said he stated "stop holding me" as the Claimant was holding him firmly round the waist and he appeared to be calming down. Mr Maskell could not remember how the panel viewed Ms Shipton's evidence that the Claimant was rubbing Child A's back and holding him firmly around the waist at the same time, but he pointed out that all three witnesses say Child A was distressed.

85.3. As to the return through the classroom, which was the focus of the panel's deliberations, Ms Shipton (page 106) said the Claimant pulled Child A, Ms Paige (page 102) and Ms Patel (page 110) said he was grabbing tables. Ms Shipton very clearly said the grabbing of tables was earlier. Mr Maskell says that all three stated Child A was being pulled, felt it was excessive, and mentioned grabbing of tables, though Ms Shipton placed this earlier in the sequence of events.

86. The panel considered whether the Claimant had acted out of character. Mr Maskell himself had known the Claimant for years, and had entrusted his own son to her care, but focusing on the events of 30 January 2020 led the panel to the conclusion she should be dismissed. He says they recognised the seriousness of dismissal for the Claimant. When Ms Fadipe put to Mr Maskell a question along the lines of "you were looking to prove the Claimant had done the things she was accused of weren't you", his answer was, "yes of course".

87. Mr Maskell told us that the panel considered the Claimant's service and record and thought about other forms of sanction. We accepted that they did. Mr Maskell says however that the Claimant's actions "amounted to a significant breach of trust and confidence that would undermine the employer/employee relationship", which he says was the trust the Respondent needed in the Claimant to be sure she was looking after children safely. He reasoned that although she did not intend any harm to Child A, she was a longstanding employee who had been properly trained and yet had failed to follow safe working practices, regulations and procedures, the panel thus concluding she was a risk to children. The gross misconduct was (quoting from the disciplinary rules at page 149) "serious breaches of safe working practices, regulations or procedures endangering other people …". The policies and procedures the panel had in view were:

87.1. The Moving and Handling Policy (page 152ff) which says a child should never be lifted manually – Mr Maskell says lifting is only an example here and the point was a child should never be moved (against their will) except when in danger.

87.2. The Restraint Policy referred to by Ms Bate in her report, in which it is stated that physical intervention is a last resort, i.e., in a crisis situation – pages 158-9.

87.3. The Safeguarding Policy, though Mr Maskell could not identify a specific part of that policy that was said to be breached.

Mr Maskell's evidence was that in considering the sanction, the panel was advised by the HR Advisor that it should be dismissal; he insisted however that it was the panel's decision and noted that one of the panel was an HR specialist. The panel did not know of, or at least did not take account of, a warning the Claimant was given in 2011 – page 302 – in circumstances where some force had also been employed in relation to a child. We return to this in our conclusions.

88. The panel returned to the hearing and Mr Maskell confirmed the decision, stating as the basis of the decision (page 192) – "Witness evidence provided in statements and in verbal submissions have supported the allegation that you had used inappropriate force in moving the child. Therefore, this is in contravention to the school's policies in relation to the Moving and Handling Policy and Restraint Policy. You have breached the school's disciplinary rules in relation to disobedience to reasonable orders/instructions, including failure to observe operational regulations and standing orders, neglect of duty and serious breaches of safe working practices, regulations or procedures endangering other people". That was what the HR adviser suggested be said, and appears to be the Respondent's standard practice.

89. A confirmatory letter was sent to the Claimant on 24 June 2020, from Darron Evans (pages 193 to 196), summarising the decision. It summarised the evidence of Ms Paige, Ms Patel and Ms Shipton by saying that they stated the Claimant had "held the child by the wrist and had used inappropriate force in an attempt to move him away from the classroom, across the playground into the ASC", adding that "one witness, [Ms Paskin], confirmed that you had not used inappropriate force". It then highlighted the inconsistencies Ms Bate had listed in her report (we note again that these were the inconsistencies between the Claimant's evidence and that of Ms Paige, Ms Patel and Ms Shipton) and her references to policies. It summarised the Claimant's evidence that she had moved Child A appropriately, by holding him under the arm and by the wrist, mentioned her point about animosity

with colleagues and highlighted other aspects of her case, such as how she could have been left with Child A if she had acted inappropriately. It did not say how the panel resolved the differences in evidence or how it had addressed the Claimant's concerns about her relations with colleagues.

90. The letter stated that physical intervention is only ever used as a last resort, namely where a child is in danger of harming themselves or others, where all other attempts to defuse the situation have broken down and then with a minimum of reasonable force. It repeated the wording above in summarising the panel's conclusions, and offered the Claimant the right of appeal.

91. In support of her case that the dismissal decision was because of or principally because of a protected disclosure, the Claimant's case was that Mr Maskell as Chair of Governors would have known of the statement read to her at the meeting on 3 October 2019 (page 324).

92. After the hearing, the panel referred the agreement between the Claimant and Child A's Mother to the Headteacher, because they were concerned it did not fit with the school's safeguarding policies. Disciplinary action was taken against Child A's Mother as a result. She later resigned from her employment.

93. At pages 415 to 418 is a document emailed by Child A's mother to the Claimant in late August 2020, which appears to be a police report. It stated in relation to the CCTV footage, "CCTV from the school has shown that the Claimant did not drag the child through the playground as initially believed". It then summarised the evidence against the Claimant in relation to the incident overall and recorded the Claimant as saying that she did "take hold of his wrist at which point he has grabbed a table and thrown his body weight to the floor. She has attempted to get him up off the floor and on to his feet and has done so by firmly holding his wrists". It then says, "Whilst it could be argued that [the Claimant] could have left Child A on the floor … I do not believe there is sufficient evidence to say that [she] has assaulted him", going on to recommend that the school deal with it internally. We heard nothing about how the police obtained the information in this document or reached their conclusions and therefore could attach little weight to them. The report appears to have been sent to Child A's mother in June 2020 in response to an email from her to the police (see pages 261-266). She told the police (page 265) that she understood (after the Claimant's disciplinary hearing) that there were "more witnesses to the event than I had originally been made aware of, who, I am led to believe, were witness to my son enduring far worse an assault than I was told of by both the school and the police". She asked for an investigation to be re-opened, either on the basis that the evidence about the seriousness of the matter was originally withheld from the police or on the basis that what witnesses had said was exaggerated. The police evidently decided to take no further action.

Appeal

94. The Claimant wrote her appeal on 2 July 2020 (page 197), setting out the following grounds:

94.1. The CCTV had not been shown to her or her representative; Ms Bate had disregarded it as unhelpful, but that was not her decision to make.

94.2. The HR Consultant, Mr Evans, had overstepped his role at the disciplinary hearing by asking questions.

94.3. It was a harsh decision given her service and record.

95. The appeal hearing took place on 8 October 2020, via Microsoft Teams. A panel of three governors was chaired by Ms Beardmore, who was experienced in disciplinary issues because of her senior role in a bank. It was a remote hearing given the Covid-19 pandemic.

96. The notes of the hearing are at pages 198 to 206. Ms Beardmore told us that the panel understood the allegation to be that there had been maltreatment of a child that had breached safeguarding procedures (page 214, paragraph 1.4), specifically moving him against his will from the classroom to the ASC. She says, and we accept, that the panel considered everything discussed but ultimately its focus was on the three appeal points. This was not a re-investigation or re-hearing, as Ms Beardmore made clear to those present at the start.

97. The Claimant's representative presented the Claimant's case, stating in summary that:

97.1. The email to the Claimant from the police (shared with the panel) said that the CCTV showed Child A had not been dragged by the Claimant and noted that Child A was not upset or harmed.
97.2. The disciplinary allegation had changed as time went on. Initially Mr Moore and Ms Summers told the Claimant that it had been said she dragged Child A through the playground, but after the police said the CCTV did not corroborate this, the allegation focused on the classroom.

97.3. Ms Bate had failed to investigate whether witnesses had a grudge against the Claimant and "failed to collect evidence from both sides in relation to the issues".

97.4. The Claimant had no disciplinary record and the definition of gross misconduct (page 4 of the Disciplinary Policy at page 171) was not met.

97.5. One witness had stated there was nothing inappropriate about the Claimant's conduct, and Child A's mother clearly said no harm had come to him.

98. Mr Maskell then presented the management response, reading a statement which essentially repeated Ms Bate's report and the disciplinary panel's conclusions. On the grounds of appeal:

98.1. He said (apparently for the first time), that the CCTV had been vandalised. The disciplinary panel had accepted Ms Bate's explanation that the CCTV was not helpful, and they were able to read the statements of the three main witnesses. When asked by the Claimant's representative if the police were lying (in their email to her), Mr Maskell reiterated that he and his colleagues had relied on Ms Bate's explanation for not considering the CCTV and on the evidence of the three witnesses, more consideration was given to what witnesses said took place in the classroom and the three members of staff felt they had to report the incident.

98.2. He was asked if the panel considered collusion between witnesses. He replied that they did and that the panel established none had regular or significant contact with the Claimant. That is clearly incorrect, as the disciplinary hearing

minutes show that the only question remotely related to this point was a question to Ms Paige about how well she knew the Claimant.

98.3. Mr Evans was permitted to ask questions and did not usurp the panel's role.

98.4. As to the sanction, Mr Maskell stated that the seriousness of what took place outweighed considerations of length of service and the Claimant's clean record.

99. The Claimant says Mr Maskell did not answer questions put to him at the appeal hearing, though this is not recorded in the appeal minutes. These included, she says, questions about the CCTV footage being saved, exactly what was wrong with the CCTV, policies and procedures not being followed, and her point about Ms Patel not being a reliable witness because she was not in the classroom. The minutes do not show those questions being asked, other than that Mr Maskell was asked why the panel took Ms Bate's word regarding the CCTV in light of the police email. We do not think it necessary to resolve this particular conflict of evidence.

100. The parties then summed up, the Claimant's representative stating that her case that there had been collusion between witnesses as a consequence of a grudge against her had not been investigated. The panel then adjourned for around 50 minutes. Ms Beardmore explained to us the reasons for the decision not to uphold the appeal as follows:

100.1. The panel accepted Ms Bate's position regarding the CCTV. The key evidence in their view was from Ms Paige, Ms Shipton and Ms Patel, who had seen the Claimant use inappropriate force to move Child A. Ms Beardmore was comfortable that the CCTV had been discounted.

100.2. The panel's focus was on the classroom – the Claimant had a firm hold of Child A, he was holding a table, and that needed to be investigated. On the question of changing, or narrowing, of the issue, Ms Beardmore told us it was agreed by everyone Child A had been moved; the question was the seriousness of how that was done. Both the Claimant and Ms Shipton had held Child A's hand in the playground, but if Child A was in danger there, this met the criteria for intervention, whereas the situation in the classroom did not.

100.3. Mr Evans was permitted to ask questions, and did not play a part in the panel's decision.

100.4. No named people or events were put forward by the Claimant to suggest witnesses had a grudge against her.

100.5. Ms Beardmore and her colleagues did consider the Claimant's service and good record but this did not negate the seriousness of the allegation that resulted in dismissal. Ms Beardmore told us that no other sanction would have withstood scrutiny in terms of protection of other children or maintaining the confidence of parents given the Claimant's role. She highlighted in her evidence to us the risk of harm to others. There had been a breach of School policy, the panel concluded, even if Child A had not been harmed.

100.6. The panel appreciated the differences in the Respondent's evidence, but on balance felt the disciplinary panel's decision that there were reasonable grounds for dismissal stood up to scrutiny. Some variances in evidence were to be expected, given the context of a busy classroom.

100.7. It was not a concern to the panel that Child A had been left with the Claimant in the ASC, given that this was in a large hall with many other adults present.

101. The panel returned after the adjournment and communicated the decision as follows: "The appeals panel considered the documented evidence and the verbal submissions raised at the hearing and had based their decision on the points raised, as well as considering the points raised as part of the appeal, and do not uphold the appeal. Therefore, the hearing is concluded and there [is] no further right of internal appeal".

102. A letter dated 9 October 2020 was sent by Ms Beardmore to the Claimant confirming the decision – pages 207 to 209. It summarised the appeal grounds and Mr Maskell's response and then concluded, "Following an adjournment, I advised you that the panel [had] considered the documentary evidence and listened to submissions made at the hearing. The panel have decided that the explanations given by Lee Maskell to the above points in your appeal to be fair and reasonable, therefore we do not uphold your appeal".

J Shipton

103. Child A's Mother says in her statement that Child A reported to her that (on a separate occasion, around 6 February 2020) he was pulled from a class by Ms Shipton and dragged from the floor.

104. Pages 403 to 405 are a complaint by Child A's grandmother, on 6 February 2020, alleging that Ms Shipton moved Child A with inappropriate force, which had upset him. It is evident from what the grandmother stated in the email that the Headteacher and LADO advised going through a chronology of the day with Child A, which is set out in the email, which concludes with a request for an investigation. Mr Abbiss says the matter was referred to the LADO who advised him on 5 March 2020 that there was no need to suspend Ms Shipton as there were no independent witnesses (the school could not investigate the matter between 6 February and 5 March 2020 because of the police involvement initiated by Child A's Mother). The Headteacher decided there was no basis on which to proceed further.

105. In late June 2020 (see pages 265 to 266), Child A's Mother contacted the police, asking that they re-open the investigation into Ms Shipton's alleged behaviour which she told them was yet to be investigated by the school. The reply referred her to the school (pages 261 to 264) and made clear that the police were advised that the LADO threshold was not met (it is not clear whether this is a comment on the matter involving the Claimant as well or only that involving Ms Shipton). The police concluded by saying that there was no ground for reopening matters.

Findings of fact for breach of contract claim

106. Our findings of fact as to what we conclude took place on the crucial date of 30 January 2020 will be set out separately in our conclusions on the Claimant's breach of contract complaint.

Law

Protected disclosures

107. Section 43A of the ERA defines a "protected disclosure" as a qualifying disclosure made by a worker in accordance with one of sections 43C to 43H. Section 43B then defines what counts as a "qualifying disclosure". For the purposes of this case, this is any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; (d) that the health or safety of any individual has been, is being or is likely to be endangered.

108. As noted, a "qualifying disclosure" is a protected disclosure if made in accordance with one of sections 43C to 43H. As far as relevant to this case, section 43C applies if a qualifying disclosure is made (a) to the worker's employer.

109. It is of course for the Claimant to satisfy the Tribunal that she made protected disclosures. As the legislation and related case law make clear, there are a number of matters for the Tribunal to consider in this regard. We now set out a brief summary of these matters and the relevant case law.

110. A "qualifying disclosure" requires first of all a disclosure of information by the worker. It is accepted that there was a disclosure of information in this case, though see further our analysis below.

111. Once a tribunal is satisfied that information has been disclosed, the next question is whether the two remaining requirements of section 43B set out above are satisfied. The first such requirement is whether the Claimant reasonably believed that the disclosure of the information was in the public interest. The second requirement is whether the Claimant reasonably believed that the information she disclosed tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation, or reasonably believed that the information she disclosed tended to show that the health and safety of any individual had been, was being or was likely to be endangered.

112. On the first of these requirements, as made clear in **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] IRLR 837**, the test is whether the Claimant reasonably believed that her disclosure(s) were in the public interest, not whether they were in fact (in the Tribunal's view for example) in the public interest. The worker must actually believe that the disclosure is in the public interest and the worker's belief that the disclosure was made in the public interest must have been objectively reasonable. Why the worker makes the disclosure is not of the essence, and the public interest does not have to be the predominant motive in making it. Tribunals might consider the number of people whose interests a disclosure served, the nature of the interests affected, the extent to which they were affected by the wrongdoing disclosed, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer.

113. The second of these requirements is assessed very similarly. It is well-established that in order for the Claimant to demonstrate that she reasonably believed the information she disclosed tended to show (for example) that health and safety was endangered, it is not necessary that this actually be true, although of course the factual accuracy of what is disclosed may be relevant and useful in assessing whether she reasonably believed that what she said tended to show that, using the same example, health and safety was endangered. The cases of **Darnton v University of Surrey [2003] IRLR 133** in the EAT and **Babula v Waltham Forest College [2007] ICR 1026** in the Court of Appeal make clear that

a disclosure may be a "qualifying disclosure" even if a worker is mistaken in what they disclose, provided they are reasonably mistaken, in other words that they have the required reasonable belief. This is a question of fact for the Tribunal, looking at the Claimant's state of mind at the time she made the disclosures.

114. We note also the EAT's decision in **Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4** that the assessment of reasonableness in this context involves consideration of the personal circumstances of the Claimant at the time she made the disclosures. In other words, it is necessary to assess reasonableness taking into account the Claimant's particular experience in the relevant line of work.

115. Finally, we note that the Claimant must have the required reasonable beliefs in relation to each alleged disclosure.

Detriment

116. The test the Tribunal must apply in determining the detriment complaints is whether any protected disclosure had a material influence on any conduct which the Claimant is able to establish amounted to a detriment. The question is not whether the protected disclosure was the reason or principal reason for that conduct.

117. The correct approach seems to be:

117.1. The burden of proof lies on the Claimant to show that a protected disclosure was a ground for (a more than trivial influence upon) the detrimental treatment to which she was subjected. In other words, the Claimant must establish a prima facie case that she was subjected to a detriment and that a protected disclosure had a material influence on the Respondent's conduct which amounted to that detriment.

117.2. If she does, then by virtue of section 48(2) ERA, the Respondent must be prepared to show the ground on which the detrimental treatment was done. If it does not do so, inferences may be drawn against it – see **London Borough of Harrow v Knight 2003 IRLR 140, EAT**.

117.3. As with discrimination cases, inferences drawn by tribunals in protected disclosure cases must be justified by the facts it has found.

Dismissal

118. Section 98 ERA says:

"*(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) [which includes a reason related to the conduct of the employee] …

(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".

119. As Section 98(1) ERA puts it, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee". That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers.

120. The Court of Appeal in **Kuzel v Roche Products [2008] ICR 799** (approving in this respect the earlier decision of the Employment Appeal Tribunal) said that questions tribunals must answer are:

120.1. whether the Claimant has shown a real issue as to whether the reason put forward by the Respondent was not the true reason for dismissal;

120.2. if so, whether the Respondent has proven the reason for dismissal;

120.3. if not, whether it has disproved that the Claimant having made a protected disclosure was the reason or principal reason for dismissal.

121. If the Respondent shows the reason (or disproves that the protected disclosure was the reason) and establishes that the reason was one falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including its size and administrative resources, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This is something which is to be determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and certainly requires an assessment of the reasonableness of the decision to dismiss. In all respects, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer.

122. In assessing these requirements in connection with a conduct dismissal, the Tribunal will of course have regard to the guidelines in **British Home Stores v Burchell [1980] ICR 303** as to whether the Respondent believed the Claimant to be guilty of misconduct (on the basis of a reasonable suspicion),

had reasonable grounds to sustain that belief, and when forming that belief had carried out a reasonable investigation in the circumstances. The reasonableness of the Respondent's actions is to be assessed based on what it knew, or reasonably should have known, at the time it took its decision to dismiss. The question to be answered is not what the Tribunal would have done in the same circumstances; rather the focus is on the Respondent's actions – has it acted reasonably? The Court of Appeal in **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23** held that the range of reasonable responses test also applies to the investigation carried out by the Respondent.

123. In respect of both the investigation and the Respondent's decision to dismiss, that would require the Respondent to be willing to listen to and take into account evidence in support of the Claimant's protestations of innocence as well as evidence that supported the Respondent's suspicion of guilt. In ***A v B 2003 IRLR 405, EAT***, the EAT stated that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. In that case, the fact that the employee, if dismissed, would never again be able to work in his chosen field was by no means as irrelevant as the tribunal appeared to think. Serious criminal allegations must always be carefully investigated, and the investigator should put as much focus on evidence that may point towards innocence as on that which points towards guilt. Having said this, the EAT accepted that the standard of reasonableness will always be high where dismissal is a likely consequence, so the serious effect on future employment and the fact that criminal charges are involved may not in practice alter that standard. Such factors merely reinforce the need for a careful and conscientious inquiry. Elias LJ made the same general point about career-threatening dismissals in **Crawford and anor v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ. 138**.

124. The question of consistency can arise in relation to decisions to dismiss, namely whether an employer has treated another employee more leniently. **Post Office v Fennel 1981 IRLR 221** decided that this is part of ensuring tribunals decide cases in accordance with equity (and the substantial merits of the case). The Court of Appeal made clear in that case that it is for the Tribunal to determine if there is sufficient evidence before it to decide whether the cases are genuinely comparable. In **Hadjioannous v Coral Casinos [1981] IRLR 352** it was said that the question is whether the employer had a rational basis for the different treatment. That underlines the importance of the Tribunal not substituting its view for that of the employer.

125. In **Wincanton plc v Atkinson [2011] UKEAT/0040/11** it was held that a risk does not have to have materialised in order for a dismissal based on risks to others to be fair.

126. Generally, "gross misconduct" must have an element of wilfulness about it. Failure to list particular conduct as "gross misconduct" in an employer's policy may be relevant to fairness, but tribunals must also consider whether the employee should have known the conduct was viewed in this way in any event. Furthermore, as made clear in the cases of **West v Percy Community Centre [2016] UKEAT/0101/15** and **Hope v British Medical Association [2021] IRLR 206**, the focus should be on section 98 when looking at whether dismissal was within the range of reasonable responses, not on the label "gross misconduct", though whether the employee's conduct is gross misconduct as set out in an employer's

policy is a factor in this assessment and of course if something is described as gross misconduct which a tribunal thinks cannot sensibly be such, dismissal for that reason may well be outside the range of reasonable responses.

127. **West Midlands Co-Operative Society Ltd v Tipton [1986] ICR 192** is well-known authority for the principle that unfairness in connection with an appeal against dismissal can of itself render that dismissal unfair. In that case the appeal was provided for contractually, but there is no reason to doubt that the same principle applies where appeal arrangements do not have contractual force as such. Appeals can also correct unfairness at the dismissal stage – **Whitbread & Co plc v Mills [1988] ICR 776**. In **Taylor v OCS Group Ltd 2006 ICR 1602** it was held that an appeal does not have to be in the nature of a re-hearing to do so. That case also confirms that fairness must be assessed from the start of the disciplinary process to its finish, whether as to the employer's investigation, its conclusions, or its decision. A Tribunal must look at the substance of what happened throughout. If the first hearing had been defective the appeal would have to be comprehensive if the whole process and the dismissal was to be found to be fair. The Court of Appeal also added that where misconduct was serious and there are procedural imperfections, section 98(4) might still be satisfied; where it was less serious, a procedural deficiency might mean dismissal is not fair. **Polkey v AE Dayton Services Ltd [1988] ICR 142** is however clear authority to the effect that a tribunal cannot say a dismissal is fair because the unfairness would have made no difference to the outcome – except where taking a particular step would have been utterly futile.

128. In summary, what is important is to answer the question posed by section 98(4), as summarised above, and in doing so to make an overall assessment of the facts as we have found them to be. Also of course, in any case such as this, the Tribunal must have regard as far as relevant to the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Breach of contract

129. The essential question in relation to breach of contract is whether the Claimant repudiated the contract, that is whether she actually did so, not whether the Respondent believed she did so, such as to entitle the Respondent to summarily dismiss her. **Neary v Dean of Westminster [1999] IRLR 288** held that the conduct must so undermine trust and confidence that the employer should no longer be required to retain the employee. The conduct must be viewed objectively by the tribunal, regardless of the employee's intention. The nature and context of her employment may be relevant, as might contractual terms and policies.

Analysis

Protected disclosures

130. We start our analysis with the question of whether the Claimant made protected disclosures. As a preliminary point, we should say that it is unsatisfactory that her case shifted considerably in this respect during the course of the hearing, though the Claimant herself was hardly to blame for that; this is a complex area of law. We have of course analysed her case as it stood by the time the evidence was completed and submissions made.

Was information disclosed?

131. The Claimant relied on a verbal disclosure of information to Mr Abbiss in August 2019 and at a meeting on 3 October 2019, at which the Headteacher also appears to have been present. We concluded in our findings of fact that she did raise the summer club incident with Mr Abbiss in August 2019 as well as at the meeting on 3 October 2019. We have also concluded on the balance of the evidence that she did not report to him the comments she says were made about her clothing and her age. As to the Claimant's comments about her job description, there were comments made at the meeting on 3 October, but the notes show, as the Respondent submitted, that these were plainly not in connection with the safety of children. In fact, the context of that discussion shows that there was no mention of children at all, let alone their health and safety. The Claimant's sole focus in mentioning her job description, according to the meeting notes, was that the Respondent might be adding further responsibilities to her workload and that this was not in accordance with established procedures for changing her duties. In other words, the Claimant disclosed information expressing concerns about her job description, but not with the factual content she relies upon for the purposes of this case.

132. Accordingly, notwithstanding the Respondent's agreement at the start of the Hearing that all of the above information was disclosed, our findings of fact were that the information in fact disclosed as far as relevant to this Claim was solely the comment the Claimant made in August 2019 and again on 3 October 2019 about the summer club incident where a child was hurt, in the Claimant's view at least due to some of her colleagues not paying sufficient attention to their work and failing to provide the required assistance to her when requested. We now address the further questions the law requires of us in relation to that specific disclosure.

Did the Claimant reasonably believe that the disclosure of information was in the public interest?

133. In analysing this question, we had regard to the decision in **Nurmohamed**. What matters is not whether the disclosure of the information was in the public interest but whether the Claimant reasonably believed it was. That divides into two questions: subjectively did she believe it was, and was that belief objectively reasonable?

134. We noted the following in relation to the comments about the summer club:

134.1. The Claimant was raising concerns about insufficient support from her colleagues and effectively flagging a concern that what had happened with the child at the summer club might happen again – the matter of lack of support from colleagues was a general concern on her part.

134.2. The Respondent submitted that it concerned routine day to day issues. It was clearly a workplace matter, but we did not think it inevitably lacked the necessary character as a result.

134.3. It is clear that it could objectively be believed that the wider school community, parents of children who attended the summer club and similar provision, and very arguably the broader community would be interested in the safety of children in those contexts. Given the work the Claimant and her

colleagues were carrying out at the summer and other clubs, given also the nature of the concern she was raising, and given also that child safety is a highly visible issue and widely regarded as publicly important, we were satisfied that objectively measured she could reasonably have believed that raising what had happened in the summer – and her understanding of the cause of it – was in the public interest.

134.4. Neither party paid much attention during their evidence to the question of whether that was what she actually believed subjectively, though we noted one reference to this matter made by the Claimant's trade union representative during the investigation interview with Ms Bate where the representative referred to the October 2019 meeting and the notes include the comment, "to enable Carol to safeguard children". Even if the disclosure principally arose out of her concerns about not being supported in her work, it is clear the Claimant was concerned to operate a properly and professionally run service and that she was expressing a concern that she was being compromised to some extent in doing so by what she believed to be the inattention of some of her colleagues. We were satisfied that she did believe what she told Mr Abbiss was in the public interest as we have analysed it, and that this was an objectively reasonable belief.

135. For completeness, even if the relevant disclosure had been made, we do not see how colleagues' comments about the Claimant's dress and age could reasonably have been believed by the C to be in the public interest. They were clearly personal comments, as she understandably took them to be, however inappropriate and undermining, but it is difficult to see how a reasonably well-informed worker such as the Claimant, or indeed anyone, could reasonably believe that reporting them was in the public interest. The same would be the case in relation to any comments the Claimant reported about her job description given the specific content of the information she communicated in that regard. We would have concluded that neither such disclosure, had they been made, would have been qualifying disclosures on this basis.

Did the Claimant reasonably believe the disclosure tended to show health and safety was being endangered?

136. We concluded that she did, for essentially the same reasons. It is crystal clear the Claimant was concerned about child safety and wellbeing, even if her primary concern was not being supported by colleagues, and given what she disclosed about how staff had behaved at the summer club and the consequences for one of the children, it is clear that this belief was objectively reasonable.

137. This disclosure was therefore a qualifying disclosure. It was made to the Respondent and therefore protected. The Claimant therefore made one protected disclosure – to Mr Abbiss in August 2019 and at the meeting on 3 October 2019, concerning what had happened at the summer club and how this illustrated the approach of some of her colleagues to their work and the potential impact on the children in their care.

Detriments

138. Turning to the Claimant's detriment complaints, the test we have to apply is whether the protected disclosure had a material influence on any conduct which the Claimant is able to establish amounted to a detriment. The burden was on the Claimant to establish a prima facie case as to the fact of the detriment, that it was a detriment and that it was materially influenced by the fact that she made a

protected disclosure. If she could do so, it was then for the Respondent to prove the ground for the treatment complained of – section 48(2) ERA.

139. We begin with some general comments about what took place on 3 October 2019. During that meeting, Mr Abbiss said to the Claimant – albeit in the specific context of a discussion regarding colleagues' comments about her, rather than her protected disclosure – that if she had any concerns about staff, she should raise them with him. At page 325 he is also recorded as saying that if the Claimant were to see somebody contravening the Respondent's safeguarding policy or not following the staff code of conduct, she should hold them to account. The meeting covered a wide range of subjects and the notes concerning the summer club were added later by the Claimant's union representative, but Mr Abbiss's comments very much suggest he was supportive of the Claimant raising concerns about staff behaviour and child safety, as one would expect him to be. That is important context.

140. The Claimant complained of three detriments. We dealt with each in turn.

The Respondent commencing a disciplinary investigation from 30 January 2020

141. We accept of course that this can reasonably be said to have been detrimental to the Claimant, albeit that it might ultimately have cleared her of the wrongdoing that had been alleged. That said, whether looked at on the basis of whether the Claimant has met the burden on her to establish a prima facie case that the commencement of the investigation was materially influenced by the protected disclosure, or from the perspective of whether the Respondent has shown the ground for its decision to commence the investigation, the Claimant's case was not made out.

142. We recognise that direct evidence of a decision being influenced by a protected disclosure is rare. But Mr Abbiss's general attitude and approach just referred to, the fact that he – the recipient of the protected disclosure – was not involved in commissioning the investigation and the fact that although we did not hear from the Headteacher as to the ground on which she decided to instigate it, the Claimant herself accepts that there needed to be one, all made clear that the commencement of the investigation was in no sense influenced by the protected disclosure.

143. The Respondent's case was that it began the investigation because of allegations regarding the Claimant's conduct on 30 January 2020. All the documentary and witness evidence supported that contention. There was no evidence to suggest the protected disclosure played any part in that decision. This complaint was evidently not well-founded and was dismissed.

The Respondent not addressing the Claimant's concerns about her colleagues prior to her dismissal

144. Even at the conclusion of the evidence and submissions, it was still not entirely clear what precisely the Claimant was referring to in this complaint. We took it to be that the Respondent did not investigate the concerns she raised about historic staffing disagreements.

145. The first question was whether the Claimant had established that she was subjected to a detriment in this regard. We noted that she stated at her interview

with Ms Bate that she had encountered issues with a number of staff (the union representative mentioned safeguarding), and we also noted that her representative stated both at the disciplinary hearing and at the appeal hearing (the latter strictly speaking being outside of the scope of this particular complaint) that the disciplinary allegation was connected to previous staffing issues. As already indicated and as we will return to, Ms Bate's evidence was that in the absence of having been given clear information regarding any relevant history that she could enquire about, she saw no need to investigate the matter further. This was nevertheless an important part of the Claimant's case in her defence, as on each of the occasions just mentioned she was very obviously saying that there may have been reasons why the allegations were made that would cast doubt on their reliability. A reasonable employee could reasonably conclude that this not being investigated further was detrimental to her. We will return to the matter in analysing the complaint of unfair dismissal, but it is clear that the Claimant was subjected to a detriment in this particular regard.

146. We were not satisfied however that she has established any connection between the Respondent's omission in this respect and her protected disclosure. We refer again to Mr Abbiss's positive response to the matters discussed at the meeting on 3 October 2019, which it must be remembered concluded with him (and the Headteacher) making clear that the Claimant was doing a good job, which as we have said is important context suggesting that the Claimant's protected disclosure had not been seen in any negative light whatsoever. Furthermore, there was no evidence which got near to satisfying the burden on the Claimant to prove that Ms Bate's decision not to explore historic relationship issues was in any sense influenced by anything she said to Mr Abbiss in their discussions some months before, and in any event, we found that Ms Bate was unaware of those discussions generally and of the protected disclosure specifically.

147. As for the Respondent's reason for not addressing these concerns as the Claimant says it should have, it is abundantly clear that Ms Bate's view was that she had not been told of anything that suggested historic difficulties with the three employees who were the source of the misconduct allegation against the Claimant. We will return in the unfair dismissal context to whether it was reasonable of Ms Bate not to investigate these matters in any event, but the reason she acted as she did was that whilst she did hear something about past relationship difficulties the Claimant had encountered at work, she decided there was nothing to suggest any substantial issue between the Claimant and the crucial witnesses. That is why she did not probe the matter further. We were satisfied that was the reason, such that the protected disclosure had no influence on the Respondent's decision at all. This complaint too was not well-founded and was dismissed.

The Respondent not considering CCTV and not probing the reasons for its non-disclosure

148. This too could legitimately be said to be a detriment, and again we return to it below in considering the complaint of unfair dismissal, but this complaint was not well-founded either. We noted again our factual conclusion that Ms Bate was not aware of the protected disclosure. Furthermore, the Claimant said herself during her evidence that the ground of the Respondent's decision in this regard was Ms Bate's feelings about the relevance of the CCTV. That plainly did not advance a case which suggested the required connection between Ms Bate's decision and the protected disclosure. In other words, the Claimant herself did not assert a

causal link between the two. She thus failed to establish a prima facie case in this regard.

149. The Respondent's case was that there was no connection between Ms Bate's decision and the protected disclosure. We agreed. In the words of section 48(2), the Respondent has proven the ground for this decision. Rightly or wrongly, it was Ms Bate's belief in the irrelevance of the CCTV to the disciplinary process and the disciplinary panel's acceptance of that belief.

150. None of the complaints of detriment because the Claimant made a protected disclosure were well-founded. They were therefore dismissed.

Unfair dismissal

Reason for dismissal

Was the protected disclosure the reason for dismissal?

151. According to **Kuzel**, **t**he first question was whether the Claimant had shown a real issue as to whether the reason put forward by the Respondent was not the true reason for dismissal. We concluded that she had not.

152. Again, the contextual evidence was highly relevant. The Respondent took no adverse action against the Claimant after she made the protected disclosure, whether in August 2019 or at the meeting on 3 October 2019. Furthermore, as we have stated already, Mr Abbiss communicated very clearly at that meeting that the Claimant should raise any concerns she had regarding staff behaviour and that she should manage it. In other words, she had the Respondent's full support regarding the issue she had raised by way of her protected disclosure.

153. Ms Bate as the investigating officer had no knowledge of the concerns the Claimant had raised which constituted her protected disclosure. She was a governor, and governors can be expected to be kept generally well-informed of a range of matters concerned with the life of a school, but there was no evidence before us that the protected disclosure influenced Ms Bate's thinking, consciously or otherwise, in the investigation she carried out or in the conclusions she reached – which we will return to.

154. Of course, what was more pertinent to ask was whether the disciplinary panel chaired by Mr Maskell decided to dismiss the Claimant because or principally because she made a protected disclosure. When asked about her case in this respect, the Claimant said Mr Maskell would have known, as Chair of Governors, about the statement read to her by Mr Abbiss at the meeting on 3 October 2019. That misses the point however, in that the statement read to the Claimant by Mr Abbiss was not the Claimant's protected disclosure. Rather, it was a note of concerns about the Claimant raised by other staff.

155. We have already noted that Mr Maskell had a high regard for the Claimant. Even if he did know about the protected disclosure, there was no evidence that he or his colleagues were in any way influenced by it in reaching their decision. All of the documentation and oral evidence clearly demonstrated that the reason for the Claimant's dismissal was the panel's conclusions about her conduct on 30 January 2020. There was nothing flimsy or suspicious about the Respondent's case that

this was the ground on which it proceeded with its decision. Accordingly, whether analysed as the Claimant's failure to show a real issue as to the reason put forward by the Respondent, or as the Respondent showing the reason that was in the mind of the decision-makers – including, we should say, Ms Beardmore – the Respondent has shown that the reason for dismissal was its conclusions as to the Claimant's conduct on 30 January 2020. That was clearly a reason related to her conduct, which is a fair reason within the meaning of section 98(2) ERA.

156. It is of course an entirely separate question whether dismissal for that reason was fair, the crucial question in this case to which we now turn.

Reasonableness/fairness

157. The questions set out in **British Home Stores v Burchell** remain a helpful guide to analysing the reasonableness of a conduct dismissal, though at all times what remains important is the wording of section 98(4).

Did the Respondent have a reasonable belief that the Claimant had committed misconduct?

158. This can be answered very briefly. The Claimant accepted that what the three main witnesses said meant that an investigation was required. We agreed, and were clear that the Respondent had the necessary reasonable belief. The three main witnesses told Ms Summers what they said they had seen. The Respondent had reasonable grounds to suspect there may have been misconduct having received that information.

Did the Respondent carry out a reasonable investigation?

159. As is often the case, this required a more detailed analysis.

160. We reminded ourselves that the test is whether the investigation was within the range of reasonable responses. That is so, even noting **A v B** and similar cases. It is and should have been abundantly clear that dismissal on the grounds levelled at the Claimant had the potential to have a significant impact on her future career, not least because her representative raised it, most explicitly at the disciplinary hearing, so that within that range of reasonable responses, we needed to consider whether the investigation was careful and conscientious. A further contextual factor was that although the Claimant was employed in a school setting where there was a relatively small number of employees, the Respondent by whom she was employed is a large local authority, which was able to offer significant HR support not only for the investigation but for the whole disciplinary process. In that sense, it can be held to a higher standard than many employers, noting that section 98(4) expressly refers to the size and administrative resources of the employer as one factor in the overall assessment of fairness. With those general matters in mind, our analysis of the investigation now follows.

161. Ms Bate was clearly an appropriate choice for investigating officer – she was a governor and had previously worked as a headteacher. We were in no doubt that she took her responsibilities very seriously. The Claimant has nevertheless raised a number of criticisms of the investigation. Our task was to deal with the most material.

162. One criticism was that Ms Bate did not interview Child A. Ms Bate determined that it was not appropriate to involve a child in a disciplinary investigation, nor in this particular context did she think it necessary to do so because she had obtained Child A's Mother's account of what he had told her and regarded that as sufficient. We agreed with Mr Carr that as a matter of general principle we should be very cautious about saying that it is a requirement of reasonableness to involve a child in a disciplinary investigation. There may be circumstances where that is required, so that tribunals should not apply hard and fast rules about this issue, but given that the Respondent had a detailed account of what Child A said about the events of 30 January 2020 in the statement of his mother, in this case it cannot be said to have been unreasonable not to interview him directly. The Respondent could reasonably conclude not only that it would not have been appropriate but also that it was unnecessary.

163. More broadly, the Claimant did not suggest that anyone else should have been interviewed by Ms Bate who was as good as her word and interviewed people suggested to her by the Claimant, namely Ms Paskin and Ms Shelley. She thus interviewed all of the relevant witnesses.

164. The Claimant said that Ms Bate did not put the Claimant's case to the other witnesses, but in our judgment that was not Ms Bate's role as such, save in one important respect we will come to. In any event, the general putting of the Claimant's case was something that on the face of it could have been done at the disciplinary hearing. As we have said, it is not clear whether this opportunity was afforded to the Claimant and her representative, though they could have requested it. We did not think that this criticism, in broad terms, rendered the investigation unreasonable.

165. The Claimant next said that Ms Bate's report did not highlight the evidence given by Ms Paskin. We will come back to how Ms Bate constructed her overall summary of the evidence she had uncovered in her investigation but, on this specific point, she did include Ms Paskin's statement as an appendix to her report, together with a fair summary of it in the section summarising each witness's evidence. There was no substance in this criticism.

166. The Claimant also said that Child A's Mother's concerns about the operation of safeguarding procedures around the incident of 30 January, raised by the mother in her email following her investigatory interview, were disregarded by Ms Bate as irrelevant. The evidence of what Mr Moore and Ms Summers did was included as part of Ms Bate's report, both in their statements attached as appendices and in Ms Bate's summary of their evidence. Moreover, an assessment of safeguarding compliance was not part of Ms Bate's remit. Again, we did not think that not expressly addressing that matter could properly be said to render the investigation unfair.

167. We did however have a number of concerns about the investigation process and the report to which it led.

168. The first was Ms Bate's decision to exclude the CCTV from her considerations and thus from the material put before the disciplinary and appeal panels. We make clear that she cannot be criticised for not attaching any weight to what the police had to say about the footage, given that she was not aware of the document prepared by the police at the time she carried out her investigation and compiled

her report. We add as a brief aside that we did not think the police report contributed anything material to the overall picture with which we were presented in any event. We did not think that what was stated by the police necessarily led to the conclusion that if they did review the footage the police officers in question saw more than was described to us by Ms Bate and Mr Abbiss. In any event, we were unable to go further than that as we were unable to discern what it was the police saw.

169. Returning to the investigation, Ms Bate did view the footage and so she did not ignore the fact that it was there. In that sense, she investigated it. But her decision that it was of no relevance meant that the Claimant did not see it and in turn that it formed no part of the deliberations of the disciplinary and appeal panels. Ms Bate's reasoning was that the footage did not show the classroom, which was the focus of her attention, and that in any event it did not show anything of value. There are however two points of concern in relation to that conclusion.

170. The first is that Ms Bate's investigation did in fact cover a broader scope of events than just what took place in the classroom. The Claimant, Ms Shipton, Ms Shelley and Ms Paskin all commented on the walk across the playground, all of which evidence was recorded by Ms Bate in her report, and indeed Mr Maskell summarised his understanding of the report (LM6) by saying that it was alleged the Claimant had used inappropriate force to move Child A from the classroom across the playground. Secondly, as short as the CCTV footage seems to have been, based on the explanation from Mr Abbiss of the limited reach of the camera it very evidently showed what was happening, albeit momentarily, immediately after Child A, Ms Shipton and the Claimant left the classroom. As we have already indicated in our fact-finding, the still photos in the bundle, taken from the CCTV, showed Child A positioned ahead of – or perhaps alongside – the Claimant, which would suggest that at that moment at least he was not being pulled by the Claimant or led by her at all, let alone inappropriately. In the context of any case that might lead to dismissal, including one that might have serious implications for an employee's future working life, that was potentially very relevant evidence both for the Claimant to see and comment upon and for the disciplinary and appeal panels to review and consider, however brief it was, being potentially instructive as to what had taken place seconds before. We add that the LADO's focus on what took place outside of the range of the footage did not change our conclusion in this regard. It was for the Respondent to act reasonably and, in any event, we noted that Ms Bate did not rely on the LADO's view as an explanation for her decision.

171. The next concern is that Ms Bate did not investigate the Claimant's relationships with the main witnesses against her, namely Ms Paige, Ms Patel and Ms Shipton. She did not ask them about their relations with the Claimant when she interviewed them, which was before she interviewed the Claimant. The Claimant referred in her interview to difficulties in the team. When asked if she thought this had influenced the allegation, she said she was aware that there were a number of people who did not like her. Her union representative also made a similar reference. Ms Bate told us that she did not investigate this issue because the Claimant did not provide her with anything specific suggesting any historic relationship difficulties with any of Ms Paige, Ms Patel or Ms Shipton. Two things can be said about that. First, Ms Bate did not pursue that line of enquiry with the Claimant, seeking to ascertain from her whether there was in fact any specific information she could provide. Secondly, she made no enquiry at all of the three main witnesses concerning their relationships with the Claimant, either in the interviews with them or by going back to them subsequently. It would have been

ideal of course if the Claimant or her representative had voluntarily provided further details. Nevertheless, in the context of the obvious need for a careful and conscientious enquiry, where the Claimant had made such clear representations that there were background issues which may have influenced what the key witnesses had said, a reasonable investigation required that such enquiries be made. These should reasonably have included what the three witnesses had discussed together before they reported the matter to Ms Summers.

172. Our final concern relates not to the investigation as such but to the conclusions reached by Ms Bate in her investigatory report. Her role was, by her own account, to set out what she found, rather than to reach conclusions. The report annexed each witness statement and, in the main body of the report, Ms Bate summarised each witness's evidence. We regard those summaries as broadly fair.

173. In addition to those individual summaries, Ms Bate set out at section 6 of her report an overall summary of what she found, specifically what she believed to be "similar" evidence and what she believed to be "inconsistencies" in the evidence. She did therefore analyse the evidence rather than just report it. We do not say that was improper, but it was important that the analysis be careful and balanced, and we did not think that it was.

173.1. First, as the Claimant pointed out, there were clear differences between the statements of Ms Paige, Ms Patel and Ms Shipton. This is abundantly clear from the actual statements, in particular that Ms Shipton referred to Child A holding on to tables when exiting to the corridor, whereas Ms Paige and Ms Patel did not indicate anything particularly untoward at that point and said that the holding on to tables occurred on the return back through the classroom. Ms Bate did not draw that out in her summary at all. She did say that staff members' views differed (page 81) between the Claimant dragging Child A to pulling him, but that was not a reference to any differences between the three key witnesses. Ms Bate said in terms that they provided consistent accounts. They did not.

173.2. Secondly, Ms Shipton said that the Claimant pulled Child A across the playground; Ms Shelley and Ms Paskin said otherwise, as the Claimant has also pointed out. Whilst those differences can be seen from the individual statements, this was not mentioned by Ms Bate in her summary of the evidence, even though it was evidently of potential relevance to Ms Shipton's credibility as a witness.

173.3. Thirdly, the summary did not draw attention to the fact that the three key witnesses said Child A had been dragged by his wrist, whereas his mother said there were no marks on him and reported that he had said the Claimant had just held his hand, something else the Claimant highlighted.

173.4. Fourthly, Ms Bate's summary of the similarities in the evidence said that Ms Shelley and Ms Paskin had reported that Ms Shipton was also holding Child A's hand but did not say that the Claimant had also said this. That was mentioned in the summary of the inconsistencies Ms Bate had observed in the evidence, but she did not point out that Ms Shipton's denial that she had held Child A's hand was inconsistent with three witnesses saying that she had, which was something else of potential relevance to Ms Shipton's credibility.

173.5. Ms Bate also said that Child A's Mother had said Child A should not be touched by staff members as this can escalate his behaviours, but that is clearly

not what his mother had said. As the Claimant pointed out, she had expressly said that he should be touched, as it helps to calm him down, something the Claimant had been open with the Headteacher about before; it was moving him against his wishes that his mother had said should not take place.

174. Stepping back and looking at it overall, the investigation was detailed and undertaken with serious intent, but it was unfair to take a decision which led to the CCTV not being shown to the Claimant or the hearing panels, to not investigate at all the relationships between the key witnesses and the Claimant and to provide an unbalanced summary of the evidence. We were sure this was not intentional on Ms Bate's part, but particularly when one takes these three important matters together, the result was an investigation process – and report – which did not seek or summarise evidence that might have been regarded as exculpatory of the Claimant but, rather, focused on obtaining and highlighting evidence that was suggestive of her guilt. The investigation itself and the summary it provided for the disciplinary hearing panel therefore fell outside of the range of reasonable responses to the material with which Ms Bate was presented.

The dismissal procedure

175. We will return to how those matters affected the disciplinary hearing below, but putting them aside for a moment, more broadly, we were satisfied on balance that the overall disciplinary process followed by the Respondent was fair and reasonable. We noted the following:

175.1. It may well have been that the initial steps taken by the Respondent on hearing of the allegations of misconduct did not comply with its safeguarding requirements, but it was not our task to assess that and, in any event, we did not think that of itself it created unfairness in the disciplinary process.

175.2. There was some delay in completing the investigation, but this was essentially because of the referral to the police; the Respondent cannot be criticised for awaiting the outcome of police deliberations and overall, there was no unreasonable delay.

175.3. Notwithstanding the inconsistences in the evidence relied upon, the Claimant knew the essence of the allegations against her, both during the investigation process and by the time of the disciplinary hearing. She was clearly able to put her case in response to the allegations against her. This is because she was sent the investigation report and all of the evidence on which the Respondent relied, four weeks before the disciplinary hearing. That was a fair timescale.

175.4. We noted the Claimant's concerns about being distanced from her union representative at the disciplinary hearing, but broadly speaking both appear to have participated in the hearing satisfactorily.

175.5. It was clearly a full disciplinary hearing. Mr Maskell was an appropriate chair for the panel. There was no suggestion that he should not have taken that role; in fact, he had a high opinion of the Claimant.

175.6. The Claimant was provided with an outcome letter. It summarised the evidence and announced the Respondent's conclusion. It did not say, at least not with any clarity, why some evidence had been preferred over others. We think it

should have and, in our view, the Respondent should reconsider its standard practice in this respect, but we accepted Mr Carr's submission that a dismissal letter does not need to be a model of legal drafting in order to satisfy the requirements of reasonableness as to what the employer has found and why. As we have said, the Claimant knew the case against her, it was explored in detail at the hearing and we did not think that the opacity of the Respondent's conclusions on the evidence hampered the Claimant's appeal. She was represented by her union and was able to put forward her appeal case.

The conclusions of the disciplinary hearing panel

176. We turn now to consider the conclusions of the disciplinary hearing panel chaired by Mr Maskell.

177. Notwithstanding its considerable resources, and the importance of conscientiousness and care in a case such as this, we were conscious of course in reaching our decision that the Respondent cannot be held to the standard of a court or tribunal. It had to carry out its work reasonably, that is carefully and conscientiously, recognising the potential impact on the Claimant of being dismissed on the basis of the allegation against her, something the Claimant's representative highlighted to the panel in summarising her evidence.

178. The overall conclusion and the basis for dismissal can be seen in the dismissal letter at page 193, namely that the Claimant had used inappropriate force on a child in an attempt to encourage the child to attend the ASC. The basis on which the Respondent reached that conclusion, according to Mr Maskell's evidence, was that there were consistent and credible accounts of the Claimant using such force to move the child from the classroom – LM12.

179. It was clear to us however that the concerns we identified in relation to the investigation carried through to and impacted upon the work of the disciplinary hearing panel.

180. First of all, whilst it was acknowledged by Mr Maskell before us that there were inconsistencies in the evidence of the three main witnesses, his witness statement clearly shows that the panel proceeded on the basis that their accounts were consistent. This was in all likelihood because of the summary of the evidence set out in Ms Bate's report, which as we have said was not as balanced or careful as it should have been. Mr Maskell was not able to say how he and his colleagues viewed the key inconsistencies; indeed, it seemed to us that they were entirely overlooked. They have been referred to above, but we highlight in particular the following matters which were drawn to our attention in the course of this Hearing:

180.1. There was inconsistency in the evidence about what happened before the Claimant left the classroom with Child A for the first time. Ms Shipton said he held on to tables, whereas her colleagues did not appear to have noticed anything untoward.

180.2. There was apparent inconsistency about what then happened in the corridor, including how the Claimant could both have been firmly holding Child A and rubbing his back to calm him down. Ms Shipton said Child A was calmer, Ms Paige said to Ms Bate that he continued to be upset and at the disciplinary hearing said that the Claimant was rubbing his back.

180.3. As to the return through the classroom, Ms Shipton said nothing about Child A holding on to a table at this point, though she did tell Ms Bate he was pulled against his will out into the playground. Her two colleagues said that the child held on to a table.

180.4. Ms Paige said twice at the disciplinary hearing that the Claimant had lifted Child A off the floor, whereas her statement to Ms Bate seems to have suggested that the Claimant had tried to do so.

180.5. Ms Patel also said the Claimant tried to lift Child A and that the table moved, and then told the hearing panel that she thought she recalled them coming through the class but could not remember.

180.6. Ms Patel said at the disciplinary hearing that she was part of the discussion with the other two main witnesses in the classroom after the event, whereas Ms Paige told the panel she had a discussion with Ms Shipton and did not mention a discussion with Ms Patel.

180.7. It appears that whoever reported the matter to Ms Summers and Mr Moore referred to the Claimant pulling Child A across the playground, though whilst mentioned by Ms Patel and Ms Shipton subsequently, this did not feature in the evidence given by Ms Paige, who spoke only about Child A being pulled in the classroom.

181. None of these inconsistencies in the evidence, or their significance for the case against the Claimant overall, were addressed by the panel, as was evident from the way in which their conclusions were put to the Claimant at the time and in Mr Maskell's honest evidence before us that he was unable to say how the inconsistencies were resolved by him and his colleagues.

182. Secondly, and again accepting the position adopted by Ms Bate, it is clear that Mr Maskell and his colleagues entirely disregarded the CCTV, apparently not even enquiring of Ms Bate what it showed. As will already be evident, that was in our judgment a serious omission, given that it would have been plain that even as brief as the footage was, it would have shown the position immediately on the Claimant, Child A and Ms Shipton leaving the classroom, which at the very least the panel reasonably needed to consider as entirely objective evidence that might have shed some light on what had taken place seconds earlier.

183. Thirdly, the panel evidently did not see the need to consider further, or arrange further investigation into, the question of the Claimant's relationships with the three main witnesses in support of the management case, notwithstanding that her representative had specifically said in presenting the Claimant's case to the panel that the disciplinary investigation was connected to "professional tensions" with staff and was disappointed Ms Bate had not investigated that. The panel was satisfied, based on what Ms Bate had told it – without having made any enquiries about the matter (apart from one question to Ms Paige) – that there was no evidence of issues between the Claimant and Ms Paige, Ms Patel and Ms Shipton.

184. In addition to those matters, Mr Maskell was unable to tell us what weight the panel attached to Child A's evidence, specifically that he was reported as not being upset by what had happened and described the Claimant as having held his hand. The only conclusion it was possible to draw from Mr Maskell's evidence in this

regard was that Child A's evidence was not taken into account, or at least not afforded any weight.

185. Taken together, the panel's neglect of these important matters was plainly unfair to the Claimant. As with Ms Bate, we are sure Mr Maskell and his colleagues took their responsibilities seriously, but it is clear from our analysis that they were almost entirely focused on inculpatory not exculpatory evidence, that is evidence which suggested the Claimant's guilt of the disciplinary charge against her as opposed to any evidence which might support her protestations of innocence. Essentially, the main planks of the Claimant's response to the allegations were not thoroughly considered, if at all. Mr Maskell's evidence that the panel was "of course" looking for evidence to prove the Claimant's guilt was telling in that regard. One could add to the matters we have just identified the fact that the panel did not see Ms Paskin's or Ms Shelley's evidence as relevant, when in fact the Claimant was dealing with a screaming, resisting Child A in the playground, as she had apparently had to do in the classroom, but neither Ms Paskin nor Ms Shelley thought that she was doing so inappropriately.

186. We do not say whether the Respondent could have reasonably concluded that the Claimant used inappropriate force in an attempt to encourage Child A to attend the ASC had it properly considered all of the evidence. What we cannot say is that the panel's failure to consider, or properly consider, the matters we have highlighted, made no difference to the fairness of its decision. The unfairness we have highlighted in relation to the investigation and its conclusions, far from being corrected at the disciplinary hearing stage, significantly affected it.

Appeal

187. We turn next to the appeal process. As we indicated in our summary of the law, an appeal is a crucial part of a dismissal process, and fairness is to be judged up to and including its conclusion. Furthermore, appeals can cure any unfairness at the initial disciplinary hearing stage.

188. Ms Beardmore was clearly a suitable candidate to chair the appeal hearing. Whilst Mr Maskell was Chair of Governors, and thus might be said to be more senior to Ms Beardmore, that is not really how governing bodies work. Individual governors can be expected to be sufficiently independent of their colleagues, and we are satisfied that Ms Beardmore was committed to reaching her own decision on the grounds of appeal put forward. The Claimant did not suggest otherwise.

189. There was some delay in the appeal being heard, which was not explained to us, but again the Claimant did not put any emphasis on this as a matter for us to consider. Ms Beardmore made clear in her evidence that the appeal was not a re-hearing, but it is clear that it did not have to be such in order to be fair or indeed to correct any defects at the earlier stage.

190. The Claimant and her representative provided the appeal panel with the police report, which had not been available to the disciplinary panel. It is not clear what, if anything, Ms Beardmore and her colleagues made of it, but as we have already indicated, in our judgment, it added little to what the disciplinary panel was told by Ms Bate or to what the appeal panel was told by Mr Maskell.

191. The reasons for turning down the Claimant's appeal set out in Ms Beardmore's decision letter were, like the dismissal letter, opaque. There is one

respect in which that was significant, which we will come to, but in general terms, whilst this is not ideal, and again we would strongly recommend that the Respondent review its standard practice in this regard, we were satisfied that Ms Beardmore was able to give a clear account of the panel's decision in her evidence before us and that the letter did not therefore reflect the absence of proper consideration of the grounds of appeal.

192. Overall, we were satisfied that the appeal process addressed the Claimant's grounds of appeal and that the way in which it was conducted as a hearing was well within the bounds of reasonableness.
193. The key question was whether it corrected any of the shortcomings we have identified earlier in the process.

194. First, it did not in relation to the CCTV – which was of course a main plank of the Claimant's appeal. There was no opportunity for the appeal panel and the Claimant to view the CCTV (it was too late by the time of either hearing). The appeal panel did not ask to view the still images. It simply accepted Mr Maskell's acceptance of Ms Bate's explanation for it being discounted as valuable evidence.

195. Secondly, a point raised by the Claimant's representative at the appeal hearing, the significance of historic relationships within the school was not addressed by the appeal panel in any detail. It reached the same conclusion as Ms Bate and the earlier panel that no specifics had been provided by the Claimant to suggest the witnesses held a grudge against her, but this was without Ms Bate, the disciplinary hearing panel or the appeal panel itself having explored the matter with the Claimant, or with the relevant witnesses.

196. Thirdly, it does not appear that Child A's evidence was given any weight by the panel, though again this was expressly mentioned by the Claimant's representative in putting the Claimant's case.

197. It does appear that Ms Beardmore and her colleagues considered the inconsistencies in the evidence against the Claimant, albeit this was not expressly explored in the decision letter. Ms Beardmore said to us that the panel's view of the inconsistencies was that it was agreed by everyone Child A had been moved; the question was the seriousness of how that was done. She and her colleagues concluded that both the Claimant and Ms Shipton had held Child A's hand in the playground, but if Child A was in danger there, this met the criteria for intervention, whereas the situation in the classroom did not. She told us the panel appreciated the differences in the Respondent's evidence, but on balance felt the disciplinary panel's decision that there were reasonable grounds for dismissal stood up to scrutiny. In her view, some variances in evidence were to be expected, given that the relevant events took place in the context of a busy classroom.

198. We note the effect of the case law we have referred to, namely that an appeal would have to be comprehensive in order to overcome unfairness at the earlier stage, though it would not have to be in the nature of a re-hearing to do so. Plainly, the appeal panel did not engage with the witnesses in order to address the inconsistencies in the evidence. Even putting that aside however, whilst Ms Beardmore and her colleagues legitimately concluded that some inconsistency was to be expected and that all three witnesses against the Claimant had said that she pulled Child A on her return through the classroom and thought it inappropriate, the panel does not appear to have considered the inconsistencies of the witnesses within their own evidence, such as Ms Paige's evidence as to the

Claimant lifting Child A off the floor and Ms Patel's evidence that she could not remember the Claimant and Child A coming back through the classroom. Further, there is no clear explanation of how the issues with the evidence – those and the others we have identified above – affected the panel's assessment of the credibility of the case against the Claimant. The opacity of the panel's reasoning for the decision given at the time reinforces our conclusions in this regard. The unfairness occasioned by the disciplinary panel proceeding on the untested assumption that the evidence against the Claimant was consistent and credible was not therefore cured on appeal.

Sanction

199. It will be plain by this point that we concluded that the Claimant's dismissal was unfair. In considering the question of remedy for unfair dismissal, there will inevitably be the question for us to consider of whether the Respondent would and could fairly have dismissed the Claimant if the unfairness we have identified was eradicated, and what the chance of that was. That requires further submissions and possibly further evidence and we did not want to determine those issues at this stage. It was however relevant and hopefully helpful for us to go on to briefly consider in our judgment at this stage whether a dismissal where the Respondent had acted fairly and thus fairly concluded that the Claimant had used inappropriate force in moving a child would be within the range of reasonable responses.

200. The Respondent relied on a number of policies as the basis for a sanction of dismissal in such cases:

200.1. The Disciplinary Policy, which includes at page 149, in the list of examples of gross misconduct, "serious breach of safe working practices … endangering other people".

200.2. The Moving and Handling Policy (page 155) which says that children should not be "lifted manually" except in life threatening situations.

200.3. The Physical Restraint Policy (pages 158 to 159) which says that physical intervention is a last resort in a crisis situation when a child is in danger of harming themselves or others, when all other attempts to defuse the situation have broken down and then with the minimum of reasonable force, adding that "restrictive physical intervention" is also a last resort.

200.4. There is also the Safeguarding Policy, though Mr Maskell could not point to anything within it that related to this matter.

201. In our judgment, the Physical Restraint Policy is clear about when physical intervention with children should be used. We think the Disciplinary Policy's example of gross misconduct just quoted is also broad enough to cover a situation where there is inappropriate force employed in moving a child, in that a child could be endangered if such force were used, though the Respondent may wish to consider making the Disciplinary Policy's link to the Restraint Policy clearer. In any event, we think it is, or ought to be, abundantly clear to employees working in a school context that inappropriate force in moving a child might lead to dismissal. It seemed clear to us that the Claimant understood that.

202. We should also say that in accordance with the principle set out in **Wincanton**, we did not think it can be said that a school employee could only be fairly dismissed if the danger or risk of harm to a child actually materialised.

203. The Claimant said in her statement that the 2011 incident led to a written warning so that dismissal for the reasons relied on by the Respondent in 2020 cannot have been an appropriate sanction, but on her own case what happened in 2011 was a markedly different situation to the one which the Respondent concluded had taken place in January 2020, in that it appears that in 2011 she was seeking to avoid a situation where a child might have been endangered.

204. Ms Fadipe said it is unreal to suggest the policies we have referred to cannot be departed from in practice, but we do not see on what basis that can be said to be the case when they set out exceptions to the rule that force and restraint are generally inappropriate. Ms Fadipe also submitted there was some confusion for the Claimant regarding what she could and could not do with Child A, but that was not put to the Respondent at the time of the dismissal nor pursued before us in the course of the evidence.

205. In summary therefore, an employer such as the Respondent which conducted a fair investigation, otherwise acted fairly and then reasonably concluded that an employee had used inappropriate force in moving a child could fairly dismiss that employee, in our judgment even one with long service, essentially for reasons along the lines of those set out by Ms Beardmore in her evidence to us setting out why she and her colleagues believed dismissal to be the appropriate sanction. We do not think that the absence of a police investigation or even further safeguarding action changes that conclusion given the different considerations involved in those specific contexts.

Jenny Shipton

206. Finally in relation to unfair dismissal, it was necessary for us to deal with the matter of Jenny Shipton's alleged conduct on 6 February 2020.

207. We agreed with the Respondent that although on the face of it, there was some similarity between what the Respondent concluded happened on 30 January and what was alleged on 6 February, we as the Tribunal did not have anywhere near sufficient information about 6 February to reach a safe conclusion as to whether they were truly parallel allegations. We were given much evidence in relation to 30 January; we effectively had only Child A's Mother's evidence of what is said to have taken place on 6 February.

208. We would also add that in respect of 30 January, three staff members expressed concern about the Claimant's conduct, whilst the child did not. In respect of 6 February, the child expressed concern but there were no concerns from staff at all. It was not possible for that reason also to say that they were truly parallel circumstances.

209. In summary, the Claimant was unfairly dismissed for the reasons we have given. These are in summary, that both the investigation and the disciplinary hearing were focused on evidence in support of the case against the Claimant and did not fairly or reasonably consider evidence that may have supported her protestations of innocence, namely the CCTV footage, her case that there were historic relationship issues that had influenced the allegation against her, the

inconsistencies in the evidence of the three main witnesses and the evidence of Child A – in other words, the central planks of her defence. Taken together this was outside the range of reasonable responses and represented serious unfairness to the Claimant, which was not cured on appeal. The Claimant's complaint of unfair dismissal is well-founded. The question of remedy will, regrettably, have to be dealt with at a separate hearing.

Breach of contract

210. We were required to take a different approach in dealing with this complaint, in that we had to determine what we (not the Respondent) concluded happened on 30 January 2020, on the balance of probabilities, based on all of the evidence before us. No one piece of evidence was conclusive of itself; we had to weigh up all that had been presented to us and decide whether we thought the Claimant used inappropriate force with Child A. We focused on what took place on the return through the classroom as that is where the alleged gross misconduct was said to have taken place, but we nevertheless considered it highly relevant to also have regard to what took place initially in the classroom and in the corridor and afterwards in and across the playground, as crucial contextual evidence.

211. We noted first that there was clearly a relationship of trust between Child A and the Claimant and that she had taken him over to the ASC previously when he did not want to go.

212. Secondly, we noted that the balance even of the Respondent's evidence was that there was nothing untoward in how the Claimant accompanied Child A out into the corridor, nor in the corridor itself, even though for at least part of this time he was unhappy and upset. It also seems to be agreed that he calmed down whilst with the Claimant in the corridor.

213. We then considered the evidence we had of the situation in the playground. As limited as it was, the CCTV stills suggested very much that Child A was not being pulled by the Claimant immediately on exiting the classroom; he was standing alongside or ahead of her. Further, it was agreed by the Claimant and Ms Shipton that Child A became distressed halfway across the playground, Ms Shipton telling the disciplinary panel that she told him to calm down. All of this evidence suggests that he was calm, or relatively calm, in the playground until this point.

214. Ms Paskin, Ms Shelley (perhaps less clearly) and of course the Claimant herself said that Child A was being moved across the playground appropriately at this point. Ms Shipton said otherwise, but there is reason to be somewhat sceptical of her evidence given that she denied holding Child A's hand whereas the Claimant and Ms Paskin were pretty clear that she did. There was thus evidence which suggested the Claimant was dealing with Child A appropriately at a time when he was in a heightened emotional state, moments after the exit from the classroom where he appears to have been in a similar state.

215. We also thought it significant that Child A was not perturbed by the events in question, and regarded the Claimant as having held his hand.

216. We considered carefully that each of Ms Paige, Ms Patel and Ms Shipton said the Claimant pulled Child A on the return through the classroom and that it was inappropriate. There were however material differences in their accounts which

we have repeatedly referred to, we had some caution about Ms Shipton's evidence as we have said, and we also noted the unexplained comment of Ms Patel at the disciplinary hearing casting doubt on whether she saw the Claimant and Child A coming through the classroom at all.

217. Finally, it was also material in our judgment that no-one intervened during the course of events on 30 January and that the Respondent did not make any report under its Restraint Policy.

218. We concluded that Child A did hold on to one or more tables – it seems unlikely that piece of evidence came from nowhere – but weighing up all of the evidence, on balance, and it is on balance, we concluded that all of the contextual evidence – the Claimant's relationship with Child A, everything that took place before the return through the classroom, the clear indications from the evidence of what took place on exiting the classroom, and Child A's own evidence – makes it more likely than not that the Claimant did not use inappropriate force in accompanying him to the ASC. Only the Claimant and the other witnesses of the events truly know what happened, but that was our conclusion on the balance of probabilities based on all of the evidence.

219. We did not accept Mr Carr's submission that the warning in 2011 was indicative of the use of inappropriate force in 2020. The only detailed account we had of 2011 was in the Claimant's statement, and it is clear from that account that there were extenuating circumstances on that occasion, namely that a child was potentially at risk.

220. We make clear that we are not saying that no reasonable employer could have concluded that the Claimant had used inappropriate force in moving Child A. That is a matter for further submissions, and possibly further evidence, on the question of remedy for unfair dismissal. What we are saying is that we concluded that there was no gross misconduct on the Claimant's part on 30 January 2020. Her complaint of breach of contract therefore also succeeds.

Note: This was a remote hearing. There was no objection to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

Employment Judge Faulkner
19 May 2022