RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms S Malabver-Goulbourne**

Respondent: **Arbor Academy Trust**

Heard at: **East London Hearing Centre**

On: **3,4,5, and 6 October 2023**

Before: **Employment Judge Jones**

Representation
Claimant: Ms A Palmer, Counsel
Respondent: Mr M Palmer, Counsel

JUDGMENT having been sent to the parties on 22 November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was the Claimant's complaint of unfair and wrongful dismissal. At the start of the hearing, the Claimant withdrew her complaint of wrongful dismissal, but asked the Tribunal not to dismiss it. The Respondent did not object to this but reserved its position on costs. At the end of the evidence, the Claimant conceded that her dismissal had been on the grounds of misconduct.

2. The Respondent defended these proceedings on the basis that it had reasonable grounds on which to conclude that the Claimant had committed gross misconduct and that dismissal was within the band of reasonable responses open to it.

Evidence

3. The Tribunal heard from the Claimant and from Fern Rosemary Wotton, who taught at the school in 2021/22, on her behalf. For the Respondent the Tribunal heard from Ms Liezel Le Roux, LADO for the London Borough of Hackney; Nick Pratt, a qualified child protection social worker who conducted the investigation into the incident on 17 January 2021, Rohan Wilson, chair of the local governing body, who chaired the disciplinary

hearing and Michal Russell and Candice Dwight, both former Headteachers of many years, who sat on the disciplinary panel with Mr Wilson. The Tribunal also heard from Mr Moss who sat on the disciplinary appeal panel.

4. The Tribunal had an agreed bundle of documents and signed witness statements from all those who gave live evidence.

Findings of Fact

5. From the evidence, the Tribunal made the following findings of fact. The Tribunal has not made findings on every piece of evidence but on those matters in dispute and relevant to the issues in the case:

6. The Claimant was the headteacher at one of the schools in the Arbor Academy Trust having been appointed to that role in 2017. The Claimant has been a qualified teacher for many years and has been employed by the Respondent since 2005. I was not told about any concerns ever expressed during the Claimant's employment about her teaching practice or her work.

7. The school is one of three that form the Trust. There are local governing boards for each of those schools, with delegated responsibilities and local governors.

8. On 17 January 2022 the Claimant was working late in her office. It was around 6.20pm and the Claimant was packing up her things to go home after having a meeting with Ms Bhagwandas, the designated lead for safeguarding. The Claimant as headteacher was also deputy safeguarding lead person for the school. The Claimant's two children who attended the school were in her offices with her, waiting for her to take them home. The Claimant's youngest child, her son J, who was 3 years old at the time, was in the room, as was her 11-year-old daughter. J took up a bottle of hand sanitiser which was on a table. The Claimant's daughter told her that he had squirted some to the floor. The Claimant took the sanitiser out of his hand. I find it likely that she then bent down to his level to speak to him about why he should not be playing with hand sanitiser. When she did so he turned his face away from her and she tapped him with two fingers on the back of his hand to get his attention, so that he would look at her to hear what she was saying.

9. I find that about 2 weeks earlier, there had been an earlier incident at the Claimant's home with hand sanitiser when J had squirted some on the carpet and rubbed it into his hair and face, in an effort to imitate a hairstyle that he had seen his older sisters do, with hair gel. In that incident, the Claimant had to wash the hand sanitiser off him, and it is likely that some went in his eyes and caused irritation.

10. It was with the knowledge of that earlier experience that the Claimant wanted to speak to him again to ensure that he understood that hand sanitiser was not a toy that he should be playing with.

11. It is agreed that Ms Bhagwandas then told the Claimant that she should not have hurt her son and that she should have spoken to him instead. Ms

Bhagwandas knew the Claimant's children as they had been colleagues at this school for some time. The Claimant replied that she had not hurt her son as all she had done was tap him with two fingers to get his attention.

12. Ms Bhagwandas was unhappy with the Claimant's response and two days later, she reported it to the Respondent by speaking to the CEO of the Trust. On 19 January, she made a written complaint. She completed a '*cause for concern'* form to report a *'safeguarding incident'*. In it she reported that she had witnessed the Claimant smack J on the hand. She also stated that before doing so, the Claimant had told J that she was going to smack him and expressed disregard for the Ms Bhagwandas' presence in the office. Ms Bhagwandas reported that the child had been crying and that she had pacified him.

13. On 19 January, Ms Bhagwandas spoke to the LADO (Local Authority Designated Officer) Ms Le Roux, on the telephone and then completed a referral form to refer the matter to her. The LADO received the form on 20 January.

14. The Respondent has a variety of policies that cover issues of safeguarding and copies of those were in the hearing bundle. The Claimant has had extensive training in safeguarding, and I was told that refresher training was undertaken every year, at the beginning of the school year. The Claimant signed to confirm that she had received the relevant training.

15. The Trust has a Staff Code of Conduct for Child Protection (pg385) which begins by stating that the welfare of the child is paramount and that safeguarding is everyone's business. Those are principles that everyone involved in this case agreed with. Under the sub-heading – *contact with pupils* it stated as follows: -

'As a general principle, staff are advised not to make unnecessary physical contact with their pupils.

It is unrealistic and unnecessary, however, to suggest staff should touch pupils only in emergencies, in particular, a distressed child, especially a younger child, may need reassurance involving physical comforting, as a caring parent would provide. Staff should not feel inhibited from providing this.

Staff should never touch a child who has clearly indicated that he/she is, or would be, uncomfortable with such contact, unless it is necessary to protect the child, others or property from harm.

Physical punishment is illegal, as is any form of physical response to misbehaviour, unless it is by way of necessary restraint.

Staff who have to administer first-aid to a pupil should ensure wherever possible that this is done in the presence of other children or another adult. However, no member of staff should hesitate to provide first aid in an emergency simply because another person is not present.

Any physical contact which would be likely to be misinterpreted by the pupil, parent or other casual observer should be avoided.

Following any incident where a member of staff feels that his/her actions have been, or may be, misconstrued, a written report of the incident should be submitted immediately to his/her line manager.

Staff should be particularly careful when supervising pupils in approved out of school activities, and on residential tours and trips.'

16. Also referred to in the hearing was the *'Keeping Children safe in Education 2021 Statutory Guidance for schools and Colleges'* document (pg219). This document confirmed that: -

> '*School and College staff are particularly important, as they are in a position to identify concerns early, provide help for children, promote children's welfare and prevent concerns from escalating.*
>
> *All staff have a responsibility to provide a safe environment in which children can learn.*
>
> *The Teachers' Standards 2012 state that teachers (which includes headteachers) should safeguard children's wellbeing and maintain public trust in the teaching profession as part of their professional duties.'*

17. When she received the form from Ms Bhagwandas, Ms Le Roux considered that this was an allegation that met the criteria for LADO procedures to be initiated. It was an allegation about behaviour that may have harmed a child, it concerned an individual in a senior position in the school and it was alleged to have happened in front of the DSL. For those reasons, Ms Le Roux initiated the LADO process. The first step in that process was to convene an ASV meeting.

18. An ASV meeting was arranged for 20 January, which was between the LADO - Ms Le Roux; the Trust's CEO Ms Okoye, and an HR representative from Waltham Forest. In the minutes it was recorded that by the time of that meeting, the CEO had already referred the matter to the local authority MASH (Multi-Agency Safeguarding Hub), which was local to the child's home. They discussed the delay in Ms Bhagwandas reporting this matter. The meeting concluded that it was likely that as the Claimant was senior to her, she was likely to have been in a difficult position. The HR representative advised the Respondent that it would be appropriate to suspend the Claimant while investigations were conducted and that this would be a neutral act. In the meeting it was agreed that the following actions would be taken: the Claimant was suspended, the LADO made a referral to the child abuse investigation team (Police), and the Trust would appoint someone to conduct an investigation into the incident. There was also to be another 1st review ASV meeting. Based on Ms Bhagwandas' allegation, the LADO supported the Respondent's decision to suspend the Claimant.

19. The Claimant was suspended on 20 January 2022. The Claimant was not given any details of the allegation that had caused her suspension. The letter confirming the suspension simply stated that she has been suspended so that allegations made against her could be investigated.

20. On the same day that the matter was referred to them MASH responded to say that they did not consider that this matter met the threshold for further action or investigation.

21. The 1st Review ASV meeting was held a few days later on 24 January, which the police attended. Also present were HR representatives from the local authority. It was noted that the Claimant had already been suspended by the Respondent's CEO.

22. The police indicated that they did not feel that this incident, as reported by Ms Bhagwandas would even meet the threshold for a criminal investigation but the Claimant was in a position of trust. The police officer commented in the meeting that this was a unique situation as it was a mother who was also in a position of trust at the school. She stated that because of those factors, this could be considered reasonable chastisement from a mother on one hand and action from someone in a position of trust in the school, on the other hand. She considered this to be a minor incident. It was decided that the next step would be for the police to speak to the child.

23. A few days later, all of the Claimant's children were interviewed by the police – including J. On 2 February, the Claimant was also interviewed by the police, in the presence of a solicitor. Transcripts of the interviews were in the bundle. In her interview, DC Darco asked the Claimant what her intention was in tapping her son on the hand and whether she had the consent to do so. At no point in the interview did she tell the police that she considered that what she had done was reasonable chastisement. She explained on more than one occasion during the interview that what she did was tap him on the hand with two fingers to try to get his attention so she could explain to him that he should not play with the sanitiser. She told the police about his habit of looking away whenever she tries to talk to him and that her purpose in tapping him on the hand was to get him to look towards her so that she could make eye contact when explaining to him why it was not okay for him to play with the bottle of hand sanitiser.

24. After speaking to all the Claimant's children, Ms Bhagwandas and the Claimant, the police decided that what happened was reasonable chastisement and that there was no need for further action on their part. DC Darco reported to the next 1st review ASV meeting on 4 February, that the Claimant said in her interview with him that had happened was reasonable chastisement. The Claimant denied that she had said this. It is likely that the police concluded from all the interviews, that what had happened was reasonable chastisement and not an assault and that is where the term came from. He reported it to the ASV meeting as though it was the Claimant's words, but it is more likely that this was the police conclusion after considering all the evidence. It is likely that the police did not accept Ms Bhagwandas' version of what occurred in the incident. Nowhere in the transcript is it recorded that the Claimant said that what happened was

reasonable chastisement. The transcript was not available until much later in the process, in June 2022 and therefore by the time of the appeal.

25. DC Darco confirmed to the meeting that the police would not be taking any further action in the matter as it did not meet the threshold for progression nor even for community resolution. He considered that physical chastisement could be appropriate because the child was in possession of a chemical, which could have caused irritation to his eyes, and he accepted the Claimant's explanation that her response was to get him out of harm's way.

26. At the end of that meeting, the LADO considered that the Claimant's use of tapping of the child's hand as physical chastisement and behavioural management was cause for concern. She felt that what had been shared at the meeting meant that the allegation that the Claimant had behaved in a way that has harmed a child or may have harmed a child had been substantiated as there was sufficient evidence to prove the allegation that a child had been harmed or there was a risk of harm.

27. She recommended that there should be an investigation to decide on disciplinary action and handed the matter over to the Respondent to conduct that investigation.

28. Also on 4 February, in a letter continuing the Claimant's suspension, the Trust's CEO gave her details of the allegation against her. The allegation was that she had behaved in a way that has harmed a child or may have harmed a child and that the allegation had been substantiated. This was the term used by the LADO at the end of the second ASV meeting. In saying this, it is likely that the LADO was relying on the evidence of Ms Bhagwandas that the child had been smacked, had cried after he had been hit on the hand by the Claimant and that after he had been hit, she needed to comfort him for at least 5 minutes.

29. Ms Bhagwandas had also said that the Claimant told the child that she was going to smack him and that she was going to do so even though Ms Bhagwandas, the designated safeguarding lead, was in the room.

30. Mr Pratt was recommended to the CEO as someone experienced in such matters and someone who could conduct the investigation. On 7 February, he was instructed to do so by the Respondent's CEO.

31. Mr Pratt's brief was to investigate the following allegation: *That on 17th January 2022, Ms. Malabver-Goulbourne assaulted a pupil/child whilst in a position of trust and on school premises.*

32. In the investigation, Mr Pratt spoke to Ms Bhagwandas and the Claimant. He consulted the relevant policies including: - Keeping Children Safe in Education 2021 (DfE statutory guidance), Working Together to Safeguarding Children (DfE statutory guidance), Arbor Academy Trust Disciplinary Policy and Procedure, Arbor Academy Trust Code of Conduct Policy, Guidance for safer working practice for those working with children and young people in education settings (Feb 2022), the Teachers'

Standards, DfE, July 2011 (latest update December 2021); and the Arbor Academy Trust Staff Code of Conduct for Child Protection.

33. The Working Together to Safeguard Children DfE statutory guidance document states that: -

'it seeks to emphasis that effective safeguarding is achieved by putting children at the centre of the system and by every agency and every individual and agency playing their part……..

This child centred approach is fundamental to safeguarding and promoting the welfare of every child. A child centred approach means keeping the child in focus when making decisions about their lives and working in partnership with them and their families.

All practitioners should follow the principles of the Children Acts 1989 and 2004 – that state that the welfare of children is paramount and that they are best looked after within their families, with their parents playing a full part in their lives, unless compulsory intervention in family life is necessary.

34. Mr Pratt also considered the Claimant's contract of employment, Ms Bhagwandas' completed Cause for Concern Form and her statement to the Respondent, the Respondent's letters of suspension to the Claimant and the minutes of the Review ASV Meeting chaired by the Hackney LADO dated 4th February 2022.

35. When she was interviewed, Ms Bhagwandas reportedly stated that the Claimant's actions were not reasonable or justifiable and that there was no way that her actions were compliant with behaviour policy or safeguarding policy. She told Mr Pratt that the Claimant had inflicted pain on a child which could not be justified and was not in line with the promoting the child's best outcomes. She felt that the Claimant's actions were a breach of the Head Teachers Standards and not in the best interests of school's pupils. She also felt that the Claimant should be modelling good behaviour and that she was shocked at what happened and considered it a form of corporal punishment.

36. When the Claimant was interviewed, she stated that her actions were designed to get her son's attention and not to hurt him. She stated that from her perspective as the children's parent, she does have sanctions available to her, such as putting them on time-out and taking away their devices. She advised that she thought that you needed to speak to children about their actions and to get down to their level when doing so. She told Mr Pratt that when explaining inappropriate behaviours to her child she will say *'this is wrong we don't do that'* and explain why or show him the appropriate way to behave. She explained that this is what she did when her son J took up the hand sanitiser the first time at home. She showed him the difference in the bottles (sanitiser and hair gel) and explained the difference in the use of each and the danger of the hand sanitiser. When it happened again in school, she reminded him about the first encounter with the sanitiser and that it had got into his eyes. She told Mr Pratt that she used 'tapping' on J's wrist to get his attention. She described this action as meaning, "*look at me*

when I am talking to you, focus on me and what I am saying" as he looked away when she was talking to him. The Claimant's live evidence was that she later realised that J may need some type of medical intervention as he tended to look away whenever he was being spoken to and she was not sure if this was a medical issue or otherwise. She had resolved to get assistance and when she later consulted her doctor, she was told that because of his young age, it would be beneficial to wait a few years before he is tested for any neurological or other issues.

37. The Claimant told Mr Pratt that her son had not cried from her tapping the top of his hand, he started whining because she took the bottle away from him. She had not done it in anger or as a punishment. She tapped him on the top of his hand to get his attention to explain to him the danger of playing with hand sanitiser as she was worried about what could happen to him. (page 643). She was clear that she had not smacked him.

38. When the Claimant was asked what her understanding was of the impact of physical chastisement on children, the Claimant's response was as follows:

> *"when you undertake physical chastisement, you are belittling, you are trying to make a child feel less of themselves. You are telling them off and they might feel unworthy of something or disappointed, thinking they have done something wrong.*
>
> *It can also cause harm to a child. This can be emotional harm. Can lead to aggression."*

39. She pointed out that her action in tapping her son's hand was not chastisement as it was to remind the child of the dangers of playing with the sanitiser and to get his attention as he would not look at her while she was talking to him.

40. When asked whether her behaviour in this incident impacted on her safeguarding role (as deputy DSL), the Claimant told Mr Pratt that she had done it as a parent in "*trying to safeguard him based on his previous actions."* She went on to say *"In my responsibility as a parent, I thought I was acting within the parameters of a parent. When in school, it is different in terms of other children. When he is in school, if anyone had concerns for J, they would have to follow the right procedure".*

41. Ms. Malabver-Goulbourne pointed out that she had not caused him any harm.

42. Mr Pratt produced a report on or around 10 March. In it, he recommended that there was a disciplinary case for the Claimant to answer. He concluded that it was unlikely that the Claimant had been emotional and raised her voice during the incident, as had been suggested by Ms Bhagwandas. Nevertheless, he found Ms Bhagwandas credible in her account of the Claimant informing the child that he was going to be smacked. He did not find Ms Bhagwandas credible in terms of whether the child was smacked in the way she described it - in her cause for concern form, her statement to the Respondent's CEO and in her interview with him. He also recorded that

the Claimant had consistently stated whenever she had been asked to say what happened, that she had tapped the child with two fingers. He found Ms Bhagwandas more credible in terms of the verbal exchange between her and the Claimant.

43. He also found that there had been no mark on the child.

44. Mr Pratt noted that this incident took place with the Claimant's own child and that there was no evidence to suggest that the Claimant had or would ever apply this approach to any of the children at the school. However, he criticised the Claimant for not self-reporting and for having a lack of insight into her parental approach to behaviour management.

45. Mr Pratt set out the policies that he considered that the Claimant had breached. In particular, he referred to the Trust's Staff Code of Conduct for Child Protection policy, which was as quoted above.

46. On 29 March 2022, the Respondent's HR manager wrote to the Claimant to invite her to a disciplinary hearing to be conducted by members of the governing body. The Claimant was advised that Mr Pratt would attend to present his investigation report and that a member of Human Resources from the London Borough of Waltham Forest would attend to support and advise the panel. The Claimant was advised that she had the right to be accompanied to the hearing by a trade union official or a colleague. The Claimant was advised that the panel could decide to take one of four courses of action at the end of the hearing: take no further action, take formal action such as providing more training or support, impose a formal disciplinary sanction such as warnings or terminate her employment.

47. The disciplinary hearing was held on 27 April 2022 and conducted by a panel comprised of Rohan Wilson, the chair of the local governing body, and Candice Dwight and Mike Russell, two experienced former Headteachers who were also governors. A Senior HR Adviser from the local authority was also present to provide support. The Claimant attended with her trade union representative. The invitation to the disciplinary hearing outlined one single allegation against the Claimant: '*that she assaulted a pupil/child whilst in a position of trust and on school premises'.*

48. The disciplinary panel heard live evidence from Mr Pratt, the Claimant and Ms Bhagwandas. It also considered the investigation report and all the relevant reports and guidance/policies. From the evidence I heard, I find that Ms Dwight's main concern was that the Claimant had not self-reported the incident. Self-reporting was a recent addition to the Trust's safeguarding policy and the Claimant had received training on it. It was not something however, that she was charged with in the disciplinary proceedings. Mr Wilson's main concern was that the Claimant had breached safeguarding regulations and that it would be difficult for the Claimant to continue to work with Ms Bhagwandas, if she remained in school. All members of the panel were concerned that the Claimant did not view this incident – even her version - as a breach of their policies and she did not express sufficient regret.

49. In his presentation to the panel – Mr Pratt pointed out that this had occurred after school hours, that this was the Claimant's child and that she had not been acting as a professional and a teacher towards a pupil. He also concluded that she had acted outside of the various policies that he outlined.

50. I find it likely that the Claimant apologised during the hearing. When it was clarified by Mr Pratt that a parent tapping their child with two fingers on their hand was considered chastisement – she immediately apologised in her position as headteacher for her actions. She was not simply expressing regret that she was being disciplined. She apologised for the incident and apologised that she had done this in her position as Headteacher. She also expressed regret that she had not reported it and taken the opportunity to explain what had happened, in such a report. She was clear that it was the taking the bottle from him that caused her son to whine and that she had tapped him on the hand because she was worried to make sure that he looked at her when she told him that he would harm himself with the hand sanitiser. She was also clear that this was not physical chastisement. She was also clear the J had not needed comforting, and that Ms Bhagwandas had not comforted him.

51. She confirmed that as she had been suspended there had not been an opportunity to apologise to anyone at the Trust before then but as confirmed above, she did apologise in the police interview.

52. The Claimant explained to the meeting that she had concerns for her son's safety and that her action in tapping him with two fingers on the hand was to bring his attention to her so that she could explain the dangers involved in playing with hand sanitiser, which he would not have known about. Ms Bhagwandas had not been at the Claimant's home to witness the earlier incident.

53. When she was asked what she would do if she observed such a situation with another parent, she said that she would talk to the parent and the child, depending on the age of the child. If there were previous incidents linked to the child, she would have to refer to make a referral.

54. The panel's decision was to dismiss the Claimant. This decision was based, as Mr Wilson said in his witness statement, on the panel's belief that *'as headteacher, she may not deal with a similar situation in the appropriate way, consequently, we felt that we had lost trust and confidence in her and that this meant that we had no option but to dismiss'.* The panel found it particularly worrying that the Claimant would consider the context, if she witnessed a parent doing the same thing.

55. Ms Dwight considered that the Claimant had assaulted her son and that it did not matter what the context was or whether it was a smack or a tap. This was most likely based on Ms Bhagwandas' evidence that the child cried on being hit and that he needed comforting. It also did not matter to her that this was the Claimant's son, and this was her action in trying to keep him safe from getting hand sanitiser in his eyes.

56. The panel's outcome letter dated 5 May 2022, outlined the reason for the decision to terminate the Claimant's employment as follows: - The panel found that '*the Trust expressly forbids any physical chastisement or contact of any kind. Therefore, whether a tap or otherwise, this was unnecessary physical contact with a pupil, which constitutes an assault, and therefore a breach of policies and statutory guidance*'. I was not drawn to any policy that forbade contact of any kind.

57. The letter outlined that, '*as stated in the Guidance for Safer Working Practices, no physical intervention should take place unless:*

- *There is evidence of a criminal offence*
- *Injury to themselves or others*
- *Causing damage to property*
- *Engaging in behaviour prejudicial to good order and to maintain good order and discipline.'*

58. The panel did not consider that any of the above applied in the Claimant's situation.

59. The panel found Ms Bhagwandas' account compelling. It is unlikely that they accepted the Claimant's explanation of what led up to the tap on the child's hand. They also pointed out in the letter that the Claimant could have self-referred as per the Keeping Children Safe in Education statutory guidance. The panel felt that they had no confidence that the Claimant would deal with a similar situation regarding an adult making physical contact with a child appropriately and in line with Trust policies and statutory guidance. They therefore felt that they no longer had confidence and trust in the Claimant's abilities to carry out her duties.

60. They concluded that what the Claimant had done was gross misconduct, which reflected on the whole school/Trust and therefore also presented reputational damage. It was the panel's decision that the Claimant had failed to demonstrate her ability to follow safeguarding guidance as a role model within the Trust. As a result, it was their conclusion that the Claimant should be dismissed, with immediate effect.

61. The Claimant submitted an appeal against dismissal on 18 May 2022. She appealed on the basis that the disciplinary sanction applied was grossly disproportionate, that parts of the evidence had not been considered at all or properly, that there were underlying personal reasons for her dismissal and that in the circumstances, the decision to dismiss her was outside the band of reasonable responses and therefore unfair.

62. The appeal hearing occurred on 27 June 2022. The appeal was heard by a panel of three who were, Mr G Moss, Chair; Ms M Douet, Trustee and Ms H Wagner, Trustee. Mr Wilson attended to present the disciplinary panel's decision to dismiss the Claimant and the Claimant attended with her Trade Union representatives. Two HR advisers from the local authority also attended.

63. The appeal panel's letter to the Claimant outlined that the disciplinary panel had considered a range of potential outcomes such as moving the Claimant to another school, a final written warning, demotion from the post of headteacher, dismissal with notice before deciding on summary dismissal.

64. Mr Moss, who gave evidence to the Tribunal on behalf of the appeal panel considered that the Claimant had done two interventions, taking the hand sanitiser from J and then tapping him on the hand with two fingers. He decided that the act of taking the hand sanitiser away from him should have been sufficient to deal with the situation and that she therefore did not need to do the second act which was to tap him on the hand. In the decision letter dated 7 July 2022, Mr Moss confirmed the Claimant's summary dismissal.

65. The panel concluded that whether this was the Claimant's normal parenting approach to her son, the key relationship here was that she was the headteacher at the school and this happened to a pupil at the school, while she was working. The appeal panel decided that this should not have happened in a school setting as the child was at no risk of danger once the sanitiser was taken away. The appeal panel concurred with the disciplinary panel that this was gross misconduct. In answer to the question of whether dismissal was an appropriate sanction, the appeal panel considered that it was a serious offence and that it did not matter that the Claimant was the parent of the child concerned. They held that this had occurred within the school where the Claimant was the headteacher. They agreed with the disciplinary panel that it was right to regard this incident as an action between the headteacher of the school and a pupil at the school for who she had a duty of care for his wellbeing. They agreed with the disciplinary panel that this was gross misconduct and that what had occurred was sufficient to cause the Respondent to lose confidence and trust in her as the headteacher. The fact that she chose to use her own parental approach to handling the incident with her son, knowing that it was in breach of safeguarding policies made it appropriate to dismiss her. The Claimant's dismissal was confirmed.

66. The Claimant began the early conciliation process on 31 July 2022 and obtained the ACAS certificate on 11 September 2022. The ET1 employment tribunal claim was issued on 11 October 2022.

Law

67. The issues to be determined in this matter were set out at pages 71 – 72 of the hearing bundle. These will be set out below in the section applying law to facts.

Unfair Dismissal

68. In this case, the Claimant complained of unfair dismissal.

69. In determining this claim, the Tribunal is concerned with the question of determining the reason for the Claimant's dismissal and whether it is one of the reasons set out in section 98(2) of the Employment Rights Act 1996

(ERA). The burden is on the Respondent to show the reason for the dismissal and that it is a potentially fair reason i.e., that it relates to the Claimant's conduct or capability.

70. A dismissal that falls within that category can be fair. In order to decide whether it is fair or unfair, the Tribunal needs to look at the processes employed by the respondent leading up to and including the decision to dismiss. In cases concerning the employee's conduct, a three-stage test must be applied by the tribunal in assessing the respondent's decision to dismiss an employee for alleged act/s of misconduct. This was most clearly stated in the case of *British Homes Stores Ltd v Burchell [1980] ICR 303*, as follows. The employer must show that:-

    (a) he believed the employee was guilty of misconduct;
    (b) he had in his mind reasonable grounds which could sustain that belief, and
    (c) at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

71. The means that the employer does not need to have conclusive direct proof of the employee's misconduct but only a genuine and reasonable belief of it, which has been reasonably tested through an investigation.

72. Where an employee has admitted the misconduct, the employer will be acting reasonably in believing that the misconduct has been committed without needing to carry out any further investigation (*Royal Society for the Protection of Birds v Croucher* [1984] ICR 604 EAT).

73. If the Tribunal concludes from all the evidence that this is the case; then the next step for the Tribunal is to decide whether, taking into account all the relevant circumstances, including the size of the employer's undertaking and the substantial merits of the case, the employer has acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the Tribunal has to be mindful not to substitute its own views for that of the employer. Whereas the onus is on the employer to establish that there is a fair reason, the burden in this second stage is a neutral one. The *Burchell* test applies here again, and the Tribunal must ask itself whether the employer's decision fell within "the range of reasonable responses" of a reasonable employer. The law was set out in the case of *Iceland Frozen Foods v Jones [1982] IRLR 439* where Mr Justice Browne-Wilkinson summarised the law concisely as follows:

> "We consider that the authorities establish that in law the correct approach for the … tribunal to adopt in answering the question posed by [section 98(4)] is as follows:
>
> (1) the starting point should always be the words of section 98(4) themselves;
>
> (2) in apply the section (a) the tribunal must consider the reasonableness of the employer's conduct, not simply whether

they (members of the tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct (a) tribunal must not substitute its decision as to what was the right course to adopt for that of employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the …. Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable response which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

74. The tribunal is therefore not allowed to substitute its view for that of the employer.

75. The Respondent submitted that if the dismissal was found to be unfair, the Tribunal should consider the Claimant's contributory conduct within the meaning of section 123(6) Employment Rights Act 1996.

76. That section states that "*where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".*

77. In the case of *Renewi UK Services Ltd v Pamment* EA-2021-000584 (26 October 2021, unreported). HHJ Ford said that section 123(6) of the Employment Rights Act 1996, *'focuses on the actual conduct of the claimant and whether the conduct, if blameworthy, caused or contributed to the actual dismissal. It does not direct tribunals to answer the counterfactual question of whether the respondent would have dismissed the claimant for that conduct if it had acted properly, reasonably or fairly. Such an approach confuses factual causation under section 123 with considerations relevant to s 98 of ERA.'*

78. *Harvey* also referred to the case of *Maris v Rotherham Corporation* [1974] IRLR 147 and the following dictum of Sir Hugh Griffiths in that case, which, although made in the context of a predecessor to the present provision, applies equally to ERA 1996 s 123(6):

79. *"[The section] brings into consideration all the circumstances surrounding the dismissal, requiring the tribunal to take a broad common sense view of the situation and to decide what, if any, part the [claimant's] own conduct played in contributing to his dismissal and then in the light of that finding*

decide what, if any, reduction should be made in the assessment of this loss'.'

80. And lastly, in the case of *Gibson v British Transport Docks Board* [1982] IRLR 228 Browne-Wilkinson J put it clearly and succinctly as follows:

''What has to be shown is that the conduct of the [claimant] contributed to the dismissal. If the applicant has been guilty of improper conduct which gave rise to a situation in which he was dismissed and that conduct was blameworthy, then it is open to the tribunal to find that the conduct contributed to the dismissal. That is how the section has been uniformly applied'.'

Applying Law to Facts

81. As the Claimant withdrew her complaint of wrongful dismissal, the list of issues that this Tribunal had to consider begins at page 71 of the Tribunal bundle.

Unfair Dismissal

Paragraph 3. Was the Clamant dismissed for the reason of her conduct in connection with the incident which amounts to a potential fair reason within the meaning of section 98(2) of the Employment Rights Act 1996 (the ERA 1996)?

Paragraph 4. If the Claimant was not dismissed for the reason of her conduct in connection with the incident, what was the reason for her dismissal? Paragraphs 4.1 and 4.2 then referred to the CEO's alleged animus towards the Claimant or her high salary as possible reasons for her dismissal.

82. At the end of the hearing, the Claimant accepted that she had been dismissed because of misconduct. It is also accepted that the Claimant had responsibilities for safeguarding her child as she did with all pupils at the school.

83. Although it is likely that the Claimant and the Respondent's CEO did not have a good working relationship, there was no evidence that the Claimant's dismissal was related to that or her high salary. The Respondent's CEO was not on the disciplinary panel and there was no evidence that she was involved in the decision to terminate the Claimant's employment.

84. It is this Tribunal's judgment that the Claimant was dismissed for misconduct.

85. The Tribunal then went on to consider the other issues in the list.

Paragraph 5. If the Claimant was dismissed for the reason of her conduct in connection with the incident, was her dismissal fair or unfair within the meaning of section 98(4) of the ERA 1996 and, in particular:

5.1 Did the Respondent have a belief that the Claimant had committed gross misconduct by reason of her actions in connection with the incident?

5.2 Was the Respondent's belief that the Claimant's actions in connection with the incident constituted gross misconduct based upon reasonable grounds?

5.3 Had the Respondent conducted an investigation and disciplinary process (including the hearing of an appeal by the Claimant against the decision to dismiss her) which was consistent with its requirements under the relevant policies prevailing and more generally was fair and reasonable in all the circumstances?

5.4 Did the Respondent's decision to dismiss the Claimant fall within the band of reasonable responses open to a reasonable employer?

86. The allegation against the Claimant was that she had committed misconduct by assaulting a child, while in a position of trust. This was clearly set out in the letter of invitation to the disciplinary hearing. That was the allegation considered in the disciplinary process. The Claimant was not charged with failing to self-report the incident or breaching trust and confidence between her and the Respondent.

87. The Respondent did not clarify what it considered to be an '*assault'* in the correspondence with the Claimant or in the disciplinary hearing. Because of the reliance on the Code of Conduct and the Guidance for Safer Working practices in the disciplinary hearing and in the dismissal letter, it is likely that the Respondent considered that any physical contact which was in breach of those documents could be considered an assault.

88. Did the Respondent have a belief that the Claimant had committed gross misconduct by reason of her actions in connections with the incident on 17 January? Was that belief gleaned from a reasonable investigation?

89. From the evidence in the investigation report and in the statements made in the disciplinary hearing, it was reasonable for the Respondent to believe that on 17 January, the Claimant had tapped her child's hand after she took a bottle of hand sanitiser away from him, which he had been playing with. It was the Respondent's case in the hearing that the Code of Conduct prohibited any physical contact with pupils. It is this Tribunal's judgment that the Code of Conduct did not prohibit any physical contact with pupils. The Guidance for Safer working practices also does not prohibit all physical contact between pupils and teachers. It provides examples where physical intervention could take place. It was not clear to the Tribunal why, given the Claimant's explanation of why she tapped her son on the hand, the Respondent did not give any consideration as to whether any of those exceptions applied.

90. Ms Bhagwandas did not dispute that the Claimant's physical contact with her son was to get him to pay attention to her while she explained that playing with hand sanitiser was dangerous.

91. The Respondent's Code of Conduct does not prohibit any physical contact whatsoever. It stated that staff should never touch a child who has indicated

that he would be uncomfortable with such contact, unless it is necessary to protect the child, others or property from harm. The Guidance for safer working practices also does not provide a total prohibition of any physical contact as it allows for exceptions. Included in those exceptions were – to prevent injury to the child, to prevent damage to property, to address a child engaging in behaviour prejudicial to good order and to maintain good order and discipline. It is this Tribunal's judgment that the Respondent had sufficient evidence at the disciplinary hearing in the form of the Claimant's evidence to it and to the investigator that she was trying to prevent injury to her child and addressing his behaviour. The decision letter and the evidence to the Tribunal in this hearing did not address why the panel did not consider that her actions came within those exceptions to the Guidance or why it was not considered to be necessary physical contact – which would also be an exception to the Code of Conduct.

92. It would be difficult for the Claimant to abide by a prohibition against any touch of pupils in relation to her own children, whom she would have to touch on a regular basis in order to provide care for them. The Code of Conduct also stated that it was unrealistic and unnecessary to suggest staff should touch pupils only in emergencies. This implied that there were circumstances, including where a child needed comforting, where touch would be appropriate.

93. There was no consideration as to whether the Claimant's touch of her son by tapping him on the back of his hand, when he turned away from the Claimant when she was trying to talk to him about the dangers of hand sanitiser, could be considered to come within the exceptions to the Code of Conduct or the Guidance or safer working practices. The panel refused to look into this in coming to its conclusion that the Claimant had assaulted her son J.

94. It is therefore this Tribunal's judgment that the Respondent did not have a reasonable belief that the Claimant had committed gross misconduct on 17 January.

95. Was the Respondent's belief based on reasonable grounds?

96. Ms Dwight believed that the context of the Claimant's physical contact with her child did not matter. However, the exceptions to the rule against physical intervention set out in the Guidance for safer working practices clearly does envisage a consideration of the explanation for the physical contact. The Respondent panel drew no conclusion on the Claimant's explanation of why the contact happened and why as a parent, who was also a Headteacher, she considered it appropriate, in that moment, to make that physical contact.

97. It is likely that Ms Bhagwandas' opinion was that it did not matter the reason for the Claimant's physical tap on her son's hand and that there were other ways of approaching any concerns that the Claimant had about the child's safety with the hand sanitiser. However, the question for the disciplinary panel was not whether there were other ways of addressing what she had done but whether in addressing it as she did, she assaulted him. Like Ms

Bhagwandas, the panel considered that it did not matter the reason for the Claimant's physical contact with her son. But this Tribunal's reading of the exceptions outlined in the Guidance document and set out in the dismissal letter is that after the panel concluded that there had been physical intervention by the Claimant, it had to go on to consider whether the circumstances of that physical intervention came within the stated exceptions. To say as the panel did, that *'we did not consider that any of the above applied'* without discussing how they did not apply, demonstrated to this Tribunal that they had not given any or sufficient consideration to the Claimant's explanation of why she tapped her son on his hand. In giving consideration of her explanation – the question for the panel would not have been whether tapping him on the hand was the best possible thing that she could have done – but as the Guidance is phrased – the question for the panel's consideration was, whether the Claimant did the physical intervention to stop J injuring himself or causing damage to property or to maintain good order and discipline or to prevent behaviour prejudicial to good order, as she proposed; or whether it was physical chastisement or an assault as the Respondent alleged.

98. The Claimant was also consistent in her explanation of why she tapped her son on the hand and the previous incident of the hand sanitiser, about which Ms Bhagwandas had not been aware. The panel had no evidence to contradict that explanation.

99. The Respondent had conflicting evidence about whether the child cried or whined. The Respondent accepted Ms Bhagandwas' evidence that the child cried and that he cried because of the physical contact from the Claimant. The panel also had the Claimant's evidence that he cried/whined because he was unhappy about the hand sanitiser being taken from him, which was a credible explanation for why a three year old would be upset.

100. The Tribunal is mindful that it is not to substitute its opinion for that of the Trust and that it has to consider the decision made by the Respondent, from the evidence before it at the time. At the disciplinary hearing, the Respondent had the Claimant's explanation for making physical contact with her son's hand on 17 January. It had conflicting evidence between the Claimant and Ms Bhagwandas as to the whether the child was crying or whining and the extent to which he needed to be comforted, if at all. The LADO clearly accepted Ms Bhagwandas' account and on that basis, found the allegation substantiated. However, at the disciplinary hearing, after further examination and hearing from Mr Pratt as well as the Claimant and Ms Bhagwandas, the Respondent continued to accept Ms Bhagwandas' version even though it also decided that it was likely that she was wrong about the child being smacked and the possible effect on her memory of having waited two days before making her report. The Respondent agreed that, based on the children's evidence to the police, it was likely that it was a tap rather than a smack. That is not insignificant as Ms Bhagwandas not only reported a smack. She reported that it was a smack so hard that it made a noise, that the Claimant told the child that she was going to smack him and that she told him that despite Ms Bhagwandas being in the room, she was still going to smack him. Having heard Ms Bhagwandas at the

disciplinary hearing, it does not appear that the Respondent accepted her evidence in relation to those other details.

101. It is this Tribunal's judgment that the Respondent had complied with its policies and procedures in the disciplinary process but that although the panel were influenced by the issue of self-referral, the Claimant was only charged with assault of a pupil – which the Respondent says breached the procedures.

102. It is this Tribunal's judgment that there was insufficient evidence from which the Respondent could conclude that the Claimant committed gross misconduct as outlined in the dismissal letter. There was no evidence that she had committed physical chastisement or an assault. The evidence that the Respondent had at the disciplinary hearing was that in tapping her child's hand – she did not punish him for taking the hand sanitiser but did it to get his attention so she could explain to him why playing with the hand sanitiser was dangerous. This was because he turned away from her when she bent down to speak to him.

103. If by '*assault'* the Respondent meant physical chastisement, punishment or unwarranted physical contact, it is this Tribunal's judgment that at the disciplinary hearing the Respondent did not have reasonable grounds for concluding that the Claimant had assaulted her child. The evidence at the disciplinary hearing was that the Claimant had tapped her son on the back of his hand with two fingers to get his attention as he was looking away from her, even though she had gone down to his level to speak to him. The Claimant wanted to explain to J why playing with hand sanitiser was not something that he should do as it could get in his eyes and cause irritation, as happened previously, when he was playing with hand sanitiser at home.

104. It is therefore this Tribunal's judgment that the decision that the Claimant had committed gross misconduct was not based on reasonable grounds and cannot stand.

105. It follows that the decision to summarily dismiss the Claimant did not fall within the band of reasonable responses.

106. Even if the Respondent came to a decision that this was gross misconduct – was an assault - it would have to conduct a separate exercise in coming to a decision on the appropriate sanction to be applied.

107. It is this Tribunal's judgment that the Respondent did undertake a separate exercise in deciding what would be the appropriate sanction. However, this focussed mostly on the fact that the Claimant was the headteacher with responsibilities for safeguarding and that she insisted that she was dealing with her child as a parent and not as headteacher. Less emphasis was placed on the fact that the Claimant had worked at the school for many years and in that time, had referred other teachers to the LADO over safeguarding matters and therefore demonstrated that she was aware of her obligations in that regard. Also, in his presentation to the panel, Mr Pratt did not believe that there was ever and would ever be an occasion in the school where she would tap a child on the hand for any reason. The police

and MASH considered that this was reasonable chastisement and therefore not an assault and that there was no reason to take any further action.

108. In the circumstances, it is this Tribunal's judgment that the Claimant's dismissal was outside of the band of reasonable responses to her actions on 17 January. The Respondent placed a lot of reliance on the evidence of Ms Bhagwandas which they also discounted in certain instances. It was not reasonable for the Respondent to do so where the Claimant was also consistent and had given the same explanation for her conduct at every stage of the process. The Respondent concluded that she had assaulted her son in circumstances where they had not defined what they meant by assault, and where the polices they referred to for support did not prohibit all physical contact and gave exceptions which would include the situation which the Claimant found herself in.

109. The Claimant's dismissal was unfair.

110. The Claimant is entitled to a remedy for her successful complaint of unfair dismissal.

111. The Tribunal did not decide on the remedy due to the Claimant as there was insufficient time to do so but it did consider whether it was appropriate to apply a *Polkey* reduction in any remedy or whether the Claimant caused or contributed to her dismissal.

112. The section of the list of issues that applied here was paragraph 8, which stated as follows: -

8. If, which is denied, the dismissal is found to be procedurally unfair and contrary to section 98(4) of ERA 1996 to what extent, if at all, should any financial compensation payable to C whether under the basic award or the compensatory award be discounted either in accordance:

8.1 with the Polkey principle to take account of the fact that C's conduct was the reason for the dismissal and the Incident was sufficiently serious to warrant the termination of the C's employment and that in the circumstances that any procedural deficiency was remedied then C would have been dismissed in any event? and/or

8.2 with section 123(6) of ERA 1996, if the Employment Tribunal finds that the Incident did not constitute conduct warranting C's dismissal then the extent to which C's actual conduct caused and/or contributed to the dismissal.

113. It is this Tribunal' judgment that a *Polkey* reduction is not applicable in this case as the dismissal is not procedurally unfair. This was a substantively unfair dismissal.

114. As far as contribution is concerned, the law referred to above (Section 123(6)) asks whether the dismissal was to any extent caused or contributed to by any action of the Claimant. As submitted by the Respondent, the

question of contribution rests on the Claimant's culpable or blameworthy conduct. What did the Claimant do or fail to do, which contributed to her dismissal? It is this Tribunal's judgment that the Claimant's physical contact with her son came within the exception to the Code of Conduct and could not be said that it was unnecessary physical contact. The contact also came within the exceptions to the prohibition on physical intervention outlined in the Guidance for safer working practices, given that the Claimant was a parent dealing with her son, after school hours when he was engaging in an activity that could have caused him harm. It is appropriate to take into account here the fact that there had been a similar incident two weeks earlier when J had picked up a bottle of hand sanitiser and put it all over his head and face which it is likely also had caused irritation to his eyes. Clearly, simply taking the hand sanitiser from him as suggested by Ms Bhagwandas in her statement and Mr Moss in this hearing, had been insufficient to let him know that this was not something that he should be doing, since that had been done on the first occasion. The evidence, which Ms Bhagwandas' evidence did not refute, was that the tap in the hand was to get his attention as he was looking away from the Claimant, when she was trying to explain the danger to him.

115. In those circumstances, this Tribunal makes no deduction for contribution to dismissal in the Claimant's role as a parent. However, the Tribunal does make a 20% deduction to her remedy in terms of her role as headteacher. The Claimant herself acknowledged in the disciplinary hearing that now that she knows that a tap on the hand could be considered as common assault by the LADO she will make enquiries how she could deal with the situation differently and she apologised for her actions. In so doing, she acknowledged that as the headteacher, she had not handled the situation in the best way and would endeavour to do differently if it ever arose again. This was not an acknowledgement of assault but an acknowledgment that she could address the situation differently if it ever happened again, without tapping her son on the hand. This was also an acknowledgment that she dealt with this as a parent and not as a headteacher.

116. The Tribunal is clear that the Claimant did not assault her son but her action in tapping him on the top of his hand with two fingers was the conduct which contributed to her dismissal. The Claimant tapped her child's hand to get his attention so that she could look into his eyes and explain why playing with hand sanitiser was dangerous and could cause him harm.

117. It is this Tribunal's judgment that this was one way that she could have got his attention. It is likely that it was not the only way to do so. The Claimant appeared to accept that, when she told the disciplinary hearing that she will make enquiries to find out how else she could have addressed the situation. She told us in the Tribunal hearing that she had spoken to the GP and that there may well be some assessments of her son in the future, when he is old enough that might address his tendency to not listen or to look away when he is being spoken to.

118. It is therefore this Tribunal's judgment that the Claimant's actions in tapping her child on the back of his hand to get his attention on 17 January was an

action that contributed to her, as a headteacher with safeguarding responsibilities, being disciplined and then dismissed.

119. It is this Tribunal's judgment that the Claimant is entitled to a remedy for her unfair dismissal and that remedy is to be reduced by 20% to reflect her contribution to the situation that led to her dismissal.

120. The Claimant was unfairly dismissed and the remedy due to her will be decided by the Tribunal at a hearing on 16 January 2024.

Employment Judge Jones
Dated: 20 February 2024