



EMPLOYMENT TRIBUNALS

Claimant: Mrs Jennifer Parker

Respondent: The Delta Education Trust

Heard at: Southampton by Video
On: 6,7,8 November 2025

Before: EJ Rayner

Representation

Claimant: Mr Jack Brown, GMB Representative

Respondent: Mr Oliver Foy, Counsel

Reserved JUDGMENT

1. The Claimant's claim that she was unfairly dismissed is well founded and succeeds.

REASONS

Introduction and background

1. The claimant was employed by the Delta Education Trust from 26 March 2018 until the 12 July 2024 when she was dismissed for gross misconduct.
2. Prior to her dismissal the claimant worked as a pupil support worker at the Harbour school.
3. By a claim dated the 3 October 2024 the claimant claims unfair dismissal.

4. The Claimant contacted ACAS regarding her claim on 22 August 2024, and was granted an early conciliation certificate dated the 3 October 2024.
5. The claimant's claim was brought within the primary three-month time limit.

The hearing

6. The claim was heard over 3 days by video hearing before the Southampton employment tribunal. The claimant was represented by Mr. Brown her trade union representative and the respondent was represented by Mr Oliver Foy of Counsel.
7. I had an agreed hearing bundle of 201 pages before me and witness statements from the claimant on her own behalf, and from Mrs Sian Lacey; Mr Andre Frullo and Mr Fritz Penn- Barwell on behalf of the respondent.
8. I was also provided with a copy of the CCTV evidence of the incident which led to the Claimant's dismissal.
9. The head teacher who had made the decision to dismiss the claimant did not give evidence and did not provide a witness statement.

Background

10. The Claimant was employed as a pupil support worker, from 26 March 2018 until her dismissal on 12 July 2024 . At the point of her dismissal, she was a pupil support worker for child C. At the point of her dismissal the claimant had a clean disciplinary record.
11. On Tuesday 30 April 2024 two teaching assistants reported an interaction between the Claimant and Child C as a low level concern, using the Respondent's newly introduced pink form system.
12. The interaction between the Claimant and Child C was captured on CCTV.

13. The CCTV has no sound but shows the claimant speak to a child, then walk a few steps with her finger on his upper chest, speaking to him. He takes a few steps back, where there is a wall, then says something, pushes away the claimant's hand and walks away.
14. The claimant said that the child was smiling.
15. The form which recorded the issue of concern raised by the two colleagues was not shared with the claimant and has not been provided to the tribunal, but it was passed to Mr Morely, who was the head teacher at the time.

Findings of fact

16. There is no dispute that on 30 April 2024, the claimant touched the child C with her finger, and using her finger pushed the child back against a wall, that she spoke to him that he pushed her hand away and walked off.
17. This is recorded on CCTV and the claimant has always accepted that the event took place. The claimant admitted the event from the outset, maintaining that she did not shout at the child; that she was not being aggressive and that they were just mucking about.
18. The incident was witnessed by two relatively new members of staff who considered that they needed to report the matter. They filled in a pink form which was the respondent's systems reporting concerns together. I have not seen a copy of the form but I accept the evidence of Mrs Lacy that it was filled in jointly by the two members of staff. The respondent's evidence, which I accept is that it was reported as a low level concern.
19. The head teacher, who did not give evidence or provide a witness statement took a decision to refer the matter to the police. The respondent says the referral to the police was made on 1 May 2024.
20. On the 3 May 2024 the headteacher made contact with the local authority designated officer for safeguarding, in respect of the allegation, and sent a referral form on the 7 May 2024.

21. The referral form records an incident on the 30 April that the head teacher became aware of on 3 May. The form refers to the child and to the claimant and then provides additional information stating *the above member of staff was referred into LADO in October 2023 following an incident that was reported in school. further details can be provided on request*. This is a reference to allegations made against the claimant previously, in respect of which no further action was taken against the claimant. I note that he does not say that this was an incident in respect of which no further action was taken against the claimant.
22. On 7 May 2024 Mr Morley also contacted the external human resources advisor, Mr. A Frullo about the incident. I have heard evidence and received a witness statement from Mr Frullo.
23. Mr Morley attached the LADO referral to his email to Mr Frullo and says *you will see that this is related to the member of staff that we formally investigated in the autumn term following an allegation made*.
24. Again he does not remind Mr Frullo that the allegation was not proven and the matter was taken no further.
25. Mr Frullo said he knew about the previous allegation, which was that there had been a failure to keep a child safe and report an incident, but that he was also aware that no further action was taken. Mr Frullo was clear that his view was that the previous matter was irrelevant and stated that he thought that Mr Morley understood the allegation was irrelevant. He did not suggest that this was due to anything said at that time, and having heard no evidence from Mr Morley, I cannot make a finding to that effect on the basis of the evidence.
26. I find that the fact of a previous unproven allegation was at the forefront of Mr Morley's mind when he spoke to human resources advisor and that he wished to remind the HR professional of this matter in his first correspondence.

27. Mr Frullo and Mr Morley spoke on the phone the same day and Mr Frullo advised that the claimant should be suspended. He drafted a suspension letter, to be sent to the claimant.
28. The claimant says and I accept that Mr Morley telephoned the claimant to tell her that she was being suspended before sending out the letter on the same day.
29. The claimant says that she understood from Mr Morley that she was being suspended for an assault on a pupil. I accept her evidence that this was her recollection of the conversation that she had with Mr Morley and that her belief that she had been accused of assault was a genuine one. On the basis of the evidence before me, I find on the balance of probability that she formed this belief because that is what Mr Morley said to her. I find that Mr Morley had formed an early view that the claimant may have committed an assault on a pupil. From the evidence I have seen of what was said and what was shown in the CCTV, there was no fair basis for forming a view at that point or at all that this was an assault.
30. The suspension letter at p50, states that the reason for the suspension and the allegation against the claimant, is that on the 30 April 2024 she grabbed a student's collar, pushed him against the wall and shouted in his face. Having seen the CCTV, I find that the choice of language is not objective, and describes a short apparently minor incident in language that is potentially prejudicial. I find that this is indicative of what Mr Morely believed or wished to believe.
31. The letter to the claimant said an investigating officer would be appointed but, that she the claimant, must have not have any contact with work colleagues. The claimant was given the name of a contact for the period of her suspension.
32. On the 21 May 2024 Kirsty Watts of Hampshire police contacted Mr Morley to inform him that the claimant had come in for an interview. She informed Mr Morley that the claimant had denied the allegations and had provided a

prepared statement. The claimant has told her that it was only today that she had heard about the full allegation and she was shocked by it.

33. Ms Watts said that the claimant had stated that she had a good relationship with the child, who she had worked with for three years, and did not wish him any harm. She said she did not tell him off, or assault him in any unlawful way and their relationship was very much one of jest, in nature. She said any interaction was not the way it had been reported and that her and the child messed around together.

34. The CCTV was sent over to the police and the police officer reported that she and her supervisor had watched it.

35. She contacted Mr Morley and said they were both of the opinion that there wasn't an assault. She did say that she considered the claimants behaviour was wholly inappropriate, in that the claimant was over familiar with the child.

36. Ms Watts also said that the child had not disclosed anything and stated that they had a good relationship. Ms Watts also notes that in the footage *you can see he is smiling*, but she says that the claimant is was too comfortable with him and that this isn't appropriate. She says she would ask her inspector to review the matter but that she would be recommending no further action for it and that it could be dealt with in house with school and LADO.

37. At this point the police had contacted the child and had interviewed him.

38. Mrs Lacey who was then the deputy head teacher but is now the head teacher was subsequently appointed to carry out an investigation. She was aware that the child had been interviewed by the police. She did not interview the child. She did speak to someone from safeguarding, who told her that they had spoken to the child three days after the incident. Mrs Lacey spoke to that person, who was identified as Andrea Nesbitt, a couple of days after she had interviewed the two members of staff who had raised the initial concern about the claimant.

39. Andrea Nesbitt told Mrs Lacey that she had a telephone call with child Cs mother, who was adamant that the child did not want to talk about the incident, but that he was OK, and he doesn't want to get anyone into trouble.
40. Mrs Lacey said that a note was made on the CPOM system, which she had seen but could not recall what was stated on the note.
41. No reference whatsoever was made to this conversation or to the comments made by the child at any point within the investigation or the disciplinary procedure.
42. Mr. Brown reminded Mrs Lacey that he had asked whether anyone had spoken to the child and was told that they had not.
43. I find that a conversation had taken place between Miss Nesbitt and the child's mother and that it was Miss Nesbitt who advised Mrs Lacy not to interview the child because the mother did not wish it.
44. However the police had interviewed the child, and the child had made a statement. In this statement the child had apparently stated that they were just mucking around, which is what the claimant subsequently said. Mrs Lacy said she was not aware of that statement at the time she did her investigation, but she did become aware of it as the investigation proceeded and that was aware of it before she wrote the report, but that she had not seen it.
45. I find that at this point, on any objective view, there was no evidence that the child had been harmed or had been put at risk of harm by the interaction. The only suggestion from those with expertise in the matter was that the Claimant was over familiar with the child and had acted inappropriately. I accept that that was sufficient to justify an investigation.
46. I find it was Mr. Brown the claimant's representative that reminded Mrs Lacey that the police had interviewed child C and had decided not to take it any further, during the investigation meeting.

47. Once appointed as investigating officer Mrs Lacey interviewed the two women who had filed the initial report.
48. She told the tribunal that she had allowed them to be together when she interviewed them, because they were very distressed. She said she had been aware of the possibility of them influencing one another, but considered that she had a duty of care towards them because they were both relatively young women and one of them in particular was so distressed that she was in tears.
49. She considered that by giving them separate statements to read & she had dealt with any potential question of them influencing one another's evidence.
50. The claimant representative raised some concerns about this during the subsequent meeting with the claimant.
51. I accept that Mrs Lacey was concerned not to cause either young woman too much distress, but since one of the women was unsure about what she had seen or heard it would clearly have been preferable to have interviewed them separately.
52. The claimant raised concerns throughout the process that both witnesses had exaggerated or embellished their statements. She and her representative pointed to the CCTV, which they assert does not support the version of events given by the two women.
53. Firstly, the claimant says that there is no indication that she was shouting at the child and the claimant maintains and has always maintained that she did not shout at him.
54. Further she says she did not grab his collar and did not push him or speak to him aggressively. She accepts that she pushed him with her finger but says it was in the context of him saying something cheeky to her and her asking if he was being cheeky and was just them mucking about.

55. Mrs Lacy interviewed the claimant. She was represented by Mr. Brown, and I find that the claimant and her representative had every opportunity to make the representations they wanted to make about the event, the claimant's recollection of the event and the context within which it had taken place.
56. Following the meeting with the claimant, Mrs Lacey asked JA, the woman who had made the initial complaint, some further questions.
57. Mrs Lacey wrote her report, in which she recommended disciplinary action, which was sent to Mr Morley the head teacher.
58. In her report Mrs Lacey describes the event as recorded on CCTV and the evidence of the witnesses.
59. She describes the CCTV footage showing Mrs Parker pushing the child against a wall, grabbing his collar and waving a finger in his face. She says, *it's possible to see clearly that JP was acting in a rough and aggressive manner towards child C and had pushed him up against the wall whilst grabbing onto the shirt collar of his shirt.*
60. I find that whilst this may have been the honest assessment of Mrs Lacey. I do not consider that it was a fair assessment of the CCTV, as there is no obvious evidence of aggression, and it is not at all obvious that the claimant grabbed the child's collar. Mention the view of the police officer that the child appeared to be smiling, nor does she mention that the child had said they were mucking around.
61. Whilst I find that the process of the investigation had flaw I find that overall, a broadly fair investigation, it was a broadly fair investigation. I accept that she formed an honest view after a fair broadly fair investigation, that there should be disciplinary action taken. I consider that her conclusions were broadly within the range of reasonable responses, although at the harsh end of what was reasonable.

62. Her honest opinion was that the claimant should be subject to disciplinary proceedings. This was the recommendation she made to the head teacher Mr Morley.
63. Mr Morley was advised by Mr Frullo who gave evidence to the tribunal. Mr Morely decided that disciplinary action should be taken. I have no evidence as to why he made that decision , or why he considered that this might be capable of being gross misconduct.
64. Mr Frullo explained that he drafted the invite letter, including the disciplinary policy investigation report notes of the investigation meeting and the three witness statements . In the letter he stated that they would not be calling either Miss Lacey who conducted the investigation or Jess or Katrina, who had raised the concern, to answer questions on their witness statement. The claimant was asked to tell the respondent if she wished them to be present in good time.
65. The claimant did ask for the two witnesses to attend.
66. The Allegation was that the claimant had behaved in an intimidatory way towards a student; grabbed his collar; pushed him against the wall and shouted in his face.
67. Mr Frullo also attended at the disciplinary hearing on the 10th of July 2024 to provide human resources support and take notes.
68. The claimant attended at the disciplinary hearing with her GMB representative Mr Jack Brown who was also represented her before me.
69. I have been referred to the notes of the hearing.
70. Mr. Brown raised a concern both that the two women who had reported the claimant had been interviewed together and that they had not been available to be questioned at the disciplinary hearing, despite assurances that they

could be if the claimant wanted, and despite the claimant asking them to attend.

71. Mr Brown stated that they had asked them to attend but they had refused, and expressed a concern that there was something going on, as two of them were involved and said *I find it very hard that they haven't come in I find it harder that there has been lying from the witnesses*. Mr Frullo, Then said *I think that answers my question but I just wanted to make sure that in the absence of them coming then you have the opportunity to say your view*.

72. The claimant had specifically asked for the two witnesses who had complained about her to be present. She had been assured that they could be asked to attend, but no steps had been taken either by Mr Frullo or Mr Morley to ensure that they did attend. This was unfair to the claimant. She was not able to challenge what they said. All she was able to do was raise the concerns of potential collusion.

73. Whilst Miss Lacey explained in her witness statement and to the tribunal why she decided to interview the two young women together, and whilst the claimant had the witness statements available to her at the hearing, I find that this was an unfairness to the claimant. Miss Lacey focused on a duty of care she had towards two complainants, rather than any duty of care she had to a long standing employee about whom a complaint was being raised. She failed to be entirely impartial. Mr Frullo And Mr Morley failed to ensure that the claimant had an opportunity to ask the witnesses questions, despite giving assurances that they could do so.

74. In both instances when Mr Brown raised concerns it was Mr Frullo who asked questions and decided how the matter would be dealt with.

75. The claimant was asked for her recollection of the incident and she said as follows

“according to this he was running along the corridor but if you actually watched the video he is walking along the corridor in fact he is *sultarying down to get his?*

(sic) . . . We then bumped into him and he said something to me and I asked him where he was going. He got cheeky with me and I said *are you getting cheeky are you getting cheeky* I have been with C for three years. I have a very good relationship with C and we mess around all the time. This is not unusual for an interaction with the both of us, so to me it was just a normal interaction. When you phoned me and said it about it I hadn't even remembered it had happened and I thought it was the fact that he jumped on my back outside when he was waiting for this taxi and nearly took me to the ground. I didn't think anything of this interaction at all."

76. Mr Morley asked the claimant about the PACE training the claimant had had, and whether this was a method on managing a situation. He did not specifically tell the claimant that in his view this was not an appropriate way to manage or that it was not in line with the Training. The claimant reiterated that it wasn't aggressive they were just having a laugh and messing around.

77. Mr Morley continued to ask the claimant whether her behaviour was part of any training, but did say directly that he did not consider it to be in line with training. The claimant said it wasn't but it wasn't done aggressively.

78. The claimant also said she was messing around and that they were allowed to mess around with the children.

79. Mr Morley suggested that pushing a child against the wall was not messing around. The claimant said OK.

80. Mr Morley did then express the view that this was not acceptable or appropriate behaviour, but he did not refer to the disciplinary policy, nor did he refer to any particular part of the Schools policy, or referred to PACE. Instead, he again asked the claimant if she thought her behaviour was in line with training. She did not, I find give a clear answer.

81. Mr. Brown expressed the view that looking at the CCTV, the child was not pushed but walked back to the wall and that he was not appearing to be in fear, and suggested that the school should be looking at how somebody acts

with a child and how they get on with child, and whether they could have a laugh with the child.

82. Mr Brown also asked Mr Morely if the school had a no touching policy , and Mr Morely said, *No I have not said that.*

83. It was not suggested to the claimant that she ought to have known that her behaviour was likely to be considered gross misconduct, or event misconduct, at any stage of the hearing, although it was clear I find, that Mr Morely thought the claimant should have known her behaviour was inappropriate.

84. Going back to the hearing, Mr Morley suggested that he had two witness statements that said the claimant was shouting and only her statement to say she was not and no sound on the CCTV.

85. There was further discussion about what the claimant had , how she had said it and about the evidence. The claimant raised her concerns about the two women who had observed the incident, noting that they stood there and held the door open.

86. Mr Frullo asked Mr Brown what he would have asked the witness if they had attended and what he thought they would have said. Mr Brown said that they might have said they had got it wrong. He said that she might have said *I saw one bit of what was happening, did not know the child and put 2 and 2 together and got to 100*, because she did not know the child.

87. Mr Morely responded, stating that this was an irrelevant question.

88. I find that this is the question that Mr Brown could have asked, and that it is not an irrelevant question , because it is about whether or not the claimant was shouting aggressively. That is part of the allegation.

89. The claimant also reminded the respondent that in the past she had been running C's class in the absence of a teacher and had asked the senior leadership team at the time whether it was acceptable for C to be wrapped

around her, as this had been the situation when an SLT Kate Percival had come into the room. The claimant said she had been told that if that was his sensory need then she should *go with it*. She said that was the way she had dealt with that situation and dealt with C like that since.

90. I find that at this point in the hearing the claimant had referred to two specific examples of the child C engaging in very particular physical contact with the claimant. The claimant specifically stated that she had asked for advice about the appropriateness of this.

91. Further I find that the claimant considered that her conduct with child C was part and parcel of their normal relationship. The claimant's behaviour took place in an open corridor with witnesses and as she said in full view of CCTV.

92. I find that the claimant was clearly expressing confusion about when physical contact was and was not acceptable. I find that at the point of the disciplinary hearing she did not understand why her behaviour was being treated as misconduct. This is relevant to the question of whether or not the claimant could reasonably have been expected to understand that her conduct might be treated as gross misconduct for which she could be summarily dismissed.

93. I also find that there was an expectation that the claimant should identify why her behaviour may have been inappropriate, but I found this was not made clear to the claimant.

94. The claimant also said that she was on *his paperwork* as being the person he goes to when he is not coping, because *I make him laugh all the time because we have a good relationship it's a very positive relationship he makes me laugh as well it's never been negative or aggressive or anything like that it's always been a happy relationship*.

95. Neither Mr Frullo nor Mr Morley challenged this.

96. During the hearing the CCTV was viewed again and Mr. Brown stated clearly his view that there was No Fear on the child's face and that he appeared to

be laughing as he walked away. Mr Morley was unsure whether C was laughing, but JB asserted that he did not look scared or in fear. Mr Morley said that would be a subjective thing to decide and Mr Frullo said that he was trying to be impartial but he did not think it was possible to say whether he was smiling or not. No one referred to the view of the police officer, that the , *you could see that the child was smiling.*

97. Mr. Brown pointed out some inconsistencies from the two witnesses who had suggested the child had been running when the CCTV showed him walking.

98. Following further discussion Mr Frullo stated that the meeting would be adjourned and suggested the decision would not be made that day. The claimant was asked if there was anything else she wanted to say and the claimant said that she had done the job for 20 years and had never had an allegation against her with any child. She said, *if anything it's been the opposite I have always supported kids I've had kids that are unable to manage in class I've walked into class and settled them I have always been a trusted adult.*

99. Mr Morley took Mr Frullo's advice and adjourned and said he would be making the decision the following day.

100. Following the meeting Mr Morley contacted Mr Frullo, and told him that he had made a decision to dismiss the claimant for gross misconduct.

101. Mr Frullo told us that he had typed up the matters that Mr Morley had raised with him but he did not produce a copy of that note. The only explanation for the decision is from Mr Frullo's recollection of what Mr Morely told him.

102. He said that Mr Morley had stated that he could not understand why the claimant had told him that she'd never had an allegation raised against her, when he was aware there had been an allegation against her before albeit that it did not proceed to a formal disciplinary.

103. Mr Frullo said that he recollected that Mr Morley had said it did not make any difference to the physical interaction with the child in this case or his decision to making a finding of gross misconduct but that he was concerned that she had told him something that was untrue and he wanted reference to this included in the outcome letter he was concerned that an employee had lied to him.
104. Mr Morley has given no evidence to the tribunal and the claimant has therefore not had the opportunity of challenging him as to the reasons for including a reference to this matter in his decision letter. Mr Frullo was challenged as to whether or not his recollection was correct.
105. On 12 July 2024 the Claimant was informed that Mr Morley had decided to summarily dismiss her for gross misconduct and that her last day of employment will be the 12 July 2024. She was told that a full decision letter would follow.
106. The decision letter dated 15 July 2024 from Mr Morley states in its material parts as follows

Jack alleged that the witness statements of J&KH were the subject of collusion and lying. I don't agree with this and there was no evidence provided by Jack to support his allegation. However for the purposes of my decision I do not consider either statements, my decision is based solely on the CCTV footage and your personal testimony during the investigation and disciplinary hearing.

After Jack put forward that the student C was not being pushed but was in fact walking backward towards the wall I asked you to confirm what you had said in your investigation meeting yeah I pushed him against the wall with my finger.... you confirmed to me, " yes I did that we were only messing around."

I asked you to explain to me how the behaviour was in line with pace training or other policies and procedures regarding behaviours . You told me it isn't.

You told me that you had formed a relationship with C over several years and that it was normal to mess about with him in this way and that in fact this met his sensory needs. However it is clear that C raises his hand and pushes you back and my finding is that this demonstrates his resistance to your behaviour and thus did not meet his sensory needs.

You told me that you were told by member of SLT three or four years ago that pace allowed for students to wrap themselves around you this met their sensory needs. Whilst there is no evidence of this, your testimony described a situation initiated by a student of wrapping around a member of staff to meet their sensory needs. I do not find that this reconciles with a member of staff taking the initiative to push the student against a wall.

Jack asserted that C was laughing and smiling as he walked away that there was no fear on his face. I find it objectively true to say that the CCTV does not allow for any interpretation of the expression on C's face as he is walking away.

Finally you told me that you had worked for the school for eight years and had not had any allegations against you in that time and that you were a trusted adult for the students I know this to be untrue because there was an allegation raised against you in October 2023 for which you were subsequently suspended while an investigation was carried out.

My decision is that your behaviour is substantiated as a safeguarding concern as in and is deemed to be gross misconduct. You are therefore summarily dismissed without notice as advised by e-mail on 12 July 2024.

107. There are several difficulties with this letter for the respondent, which in the absence of Mr Morely, have not been explained.

108. First Mr Morely has said that there is not objective basis to conclude what the expression on the face of the child was, despite clear evidence from the Police officer, that she considered the child was smiling as he walked away.

109. Second, even though Mr Morely says he will discount the evidence of the two complainants, he dismissed the claimants view that they could have been mistaken.
110. Since Mr Morely has discounted the witness evidence of the two complaints, it is not clear how he determined whether or not the claimant had shouted in the child's face. He had before him her evidence, that she was shouting , and the CCTV evidence which had no sound. On that basis , on any reasonable basis, he must have determined on balance, that she did not shout. He does not explain at all how, in the absence of any evidence to the contrary , he came to his conclusion.
111. Nor does he explain what his determination is in respect of the other parts of the allegation , that the claims behaved in an intimidatory way towards the child. All he says is that he finds that *it is clear that C raises his hand and pushes you back and my finding is that this demonstrates his resistance to your behaviour and thus did not meet his sensory needs.*
112. He does not make any finding or explain whether he finds that the claimant grabbed the child's collar. The claimant says she did not, and I find that the CCTV does not clearly show this. Mr Morely does not say what he thinks the CCTV shows in this respect.
113. In the absence of any positive finding that the claimant did behave aggressively and an explanation of how he reached such a finding , it is not possible to understand whether Mr Morely considered that the allegation was proven or not. Mr Morely simply states at the end of the letter that he considers the allegation is substantiated.
114. One of the matters that does appear to have been taken into account by Mr Morely in making his decisions , was the claimant's comment about not being the subject of a complaint before. Mr Morely decided she was lying about that and appears to have taken that supposed dishonesty into account in his decision making. I find that Mr Morely did not raise this with the claimant at the time, and she had no chance to comment or challenge h

115. I find his letter also suggests that he had the earlier complaint that had been made, but not substantiated, in his mind when making his decision to dismiss. In part, this is because it is evince that he had that failed complaint about the claimant in mind from the outset.
116. There is no evidence that Mr Morely considered whether the claimant was acting maliciously, or deliberately, or whether she knew or should have known that her behaviour might be considered to be gross misconduct.
117. I find that he did have evidence before him of mitigation , and did have evidence that the claimant was confused about the level of physical contact, and messing around that was acceptable. Mr Morely did have the claimants own account of her raising the matter , and no reason to disbelieve her. He is wrong to say he has no evidence . What I find he means on balance, is that he does not believe her evidence , or consider it to be less persuasive than that of others
118. Mr M Frullosaid that Mr Morley had stated that he could not understand why the claimant had told him that she'd never had an allegation raised against her when he was aware there had been an allegation against her before albeit that it did not proceed to a formal disciplinary.
119. Mr Frullo said that he recollected that Mr Morley had said it did not make any difference to the physical interaction with the child in this case or his decision to making a finding of gross misconduct but that he was concerned that she had told him something that was untrue and he wanted reference to this included in the outcome letter he was concerned that an employee had lied to him.
120. Mr Morley has given no evidence to the tribunal, and the claimant has therefore not had the opportunity of challenging him as to the reasons for including a reference to this matter in his decision letter at this hearing .

121. The letter that Mr Frullo drafted for Mr Morely, is detailed and specifically states that Mr Morley has not taken into account the evidence in the witness statements of the two women who raised the initial complaint.
122. If Mr Morley had made a similar comment about his belief in the claimants dishonesty I would have expected Mr Frullo to have included a similar statement in the letter he has not done so.
123. On the evidence before me, and in particular with the letter of dismissal, I find that Mr Morley did take into account of both the fact of an earlier unproven allegation and the comment made by the claimant in the meeting, when deciding to dismiss the claimant for gross misconduct.
124. I find that the fact of a previous allegation was not raised with the claimant at all during the course of the disciplinary hearing and therefore neither the claimant or her representative had any opportunity to comment on it.
125. I find that Mr Morley had the opportunity to query the claimant's final comment and to clarify whether she had remembered a previous allegation or not or whether she meant she had never been subject to disciplinary proceedings or not but did not do so. Instead I find he drew a damaging conclusion, that the claimant had lied to him. I find he then took that into account when making his decision to dismiss the claimant.
126. There is nothing in the letter to suggest or explain why, having decided that the claimant's actions were capable of substantiating a safeguarding concern, he decided that they amounted to gross misconduct.
127. The letter does not explain whether he considered that this might be an act of misconduct rather than gross misconduct for example and nor is there any reference to the disciplinary policy to explain why he considered it was gross misconduct.

128. The disciplinary policy includes a statement of potential gross misconduct, and includes amongst other things the following

128.1. Physical violence intimidation aggressive behaviour or bullying

128.2. Serious breach or failure to provide safe working environment for children and young people.

128.3. These allegations sit alongside allegations have been capability at work brought on by alcohol or illegal drugs serious breach of health and safety rules offering alcohol drugs or any other illegal substances to pupils, failing to follow a reasonable management instruction, unlawful discrimination or harassment.

129. I find that he did not properly consider whether or not the conduct he had found had occurred was gross misconduct at all. This is a significant failing.

130. A claimant is entitled to know why a finding of gross misconduct has been made and a respondent has a duty to explain it to them in order to be fair. That is of particular importance when the finding may lead to summary dismissal, and where as in this case, it can be career ending.

131. Nor does Mr Morely explain why he considered that summary dismissal was an appropriate or fair sanction in this case. It appears to follow on simply from his determination that the claimant had committed gross misconduct.

132. He does not explain for example, whether or not he took into account the claimants long service, or considered that she had a clean disciplinary record. This was a first offence.

133. He does not consider whether a lesser sanction might be appropriate. He did not take into account or consider whether or not the matter might be one which could be dealt with by further training and a final written warning for example.

134. Mr Morley has given no evidence to the employment tribunal, and he has not therefore been able to explain the process by which he reached his

decision. Mr Frullo who spoke to him about his decision gives no evidence in chief that Mr Morley had considered these matters and they are not, as noted already, referred to in the letter in the letter

135. In the absence of evidence before me about any of these matters, I find on balance of probabilities that he did not take any of these matters into account. I find that he did not consider any lesser sanction.

136. The Claimant appealed and Mr Penn Barlow was asked to conduct the appeal. He took into account the CTV evidence the claimant's statement and the evidence presented at the hearing.

137. The claimant set out her concerns in a detailed appeal letter. She criticised the trust for allowing the two complainants to be interviewed at the same time , and complained of collusion and the fact that the child see had not been interviewed.

138. She pointed to inaccuracies in the written statements when they were provided; She complained that her long relationship with the child had not been taken into account.

139. At point 6 she complains that the disciplinary manager had considered an incident from October 2023 from which the claimant said she was exonerated with no case to answer and now seems to be used against her to come to a decision without being given a right of reply. She explained in her appeal letter that she had been talking about physical violence or assault against a pupil when she made the comment in the meeting. She also said, *I fail to understand that if you are exonerated in a previous false allegation case how that becomes a guilty consideration to be considered in another allegation case*

140. She says that her eight-year clean disciplinary record should have been taken into account, and took issue with the finding that there was a safeguarding issue.

141. She said that a safeguarding issue or concern is *anything that might impact on children and young people's safety and welfare caused them harm or put them at risk of harm sometimes a child or young person might tell somebody about abuse or neglect*. She said this was not the case here and that there was no risk to the child, as the child had stated to the police. He had said, *me and Big Mamma were mucking around*.
142. Mr Penn Barlow dismissed the claimant's appeal. He noted that Mr Morley had discounted the evidence of the two complainants when making his decision, and concluded that it would not be inappropriate to have interviewed the child.
143. Mr Penn Barlow formed the view having seen the CCTV footage that the claimant's conduct was very wrong and potentially damaging. He considered that the claimant appeared to be physically controlling the child when there was no need to do so.
144. He stated and it is accepted that the role of the school was to keep children safe and to educate them about how to keep themselves safe. He said that with the role of the adults at the school was to model excellent behaviour, which demonstrates steps they should take to keep themselves safe.
145. He referred in his evidence to both PACE and PRICE, which are complementary approaches one of which is about building trust and safe relationships with people who have experienced trauma, one of which is about managing challenging behaviour. He expressed the view that the claimant did not appear to have followed either approach.
146. He concluded that the claimant's behaviour could not be considered as either messing around or a joke and was concerned that it would send the message that bigger people can control others by physical means.

147. He said that the claimant had showed no accountability and gave no indication that she understood that her conduct is not in line with policies and training could cause harm to a vulnerable young person.
148. He also said that the claimant had given no indication that she would reflect on her behaviour or that she would not behave that way in the future.
149. These were clearly reasonable matters to consider and were matters of importance to Mr Penn Barlow.
150. In response to a question asked by the judge Mr Penn Barlow stated that looking at the evidence he was presented with, he was looking to the claimant and he was presented with no evidence that her behaviour was understood and he was given no reassurance that if she had not been dismissed, that it would not happen again. He was asked when he had raised this with the claimant in the appeal, but was not able to identify any point in the appeal hearing when he had specifically raised this with the claimant.
151. He accepted that he had not specifically asked the claimant the question.
152. Mr Penn Barlow agreed that he could have considered further training or supervision for the claimant as an alternative to dismissal, but said that he thought the first step was for her to recognise that her behaviour was inappropriate and that was he had been told by Mr. Brown that the behaviour was just mucking around.
153. He also said that if she had said in the meeting that it was a difficult day and she regretted her actions and recognised it was inappropriate that he would have been sympathetic and that the decision may have been different but that that was not presented to him at any point.
154. However, I find that during the course of the appeal hearing Mr Penn Barlow did not explain to the claimant that he was looking for an indication that she would reflect on her behaviour or that he was expecting her to indicate or tell him that she would not behave that way in the future.

155. At no point in the appeal hearing did Mr Penn N Barlow ask the claimant how she would behave in future, or discuss the sort of behaviour that would be acceptable, or suggest to her that she needed to change her behaviour in order to keep her job.

156. He did not at any point make clear to her or her representative that he might be prepared to impose a different sanction, if he was satisfied that the claimant could learn and change.

157. On the point the claimant raises about Mr Morely taking into account a previous allegation, Mr Pen Barlow said in the meeting that he'd read the letter differently and he'd read it that Mr Morely had said that there had previously been an allegation, not that it had been substantiated and he says *I think it was just a point of fact that he was making*. Mr Penn Barlow confirmed when under oath that he had not in fact spoken to Mr Morley to ask him about this comment.

158. Mr Penn Barlow has referred to his belief there was no need for a member of staff to touch a child and that physical contact should only be initiated by a child, but he accepted that this was not written down anywhere.

159. He also accepted that there may have been a shortfall in some 1 to 1 supervision of the claimant.

The relevant Legal Provisions

160. I reminded myself of the legal principles relevant in an unfair dismissal claim.

161. The starting point is the statutory wording of section 98 of the Employment Rights Act 1996. The burden is on the employer to establish a potentially fair reason for dismissal. In this case the respondent relies upon misconduct, which is a potentially fair reason for dismissal. It is for the employer to show a

potentially fair reason for dismissal. Here the respondent relies upon gross misconduct, which is a potentially fair reason.

162. If the employer is able to establish a potentially fair reason for the dismissal the question for the tribunal is whether or not the decision to dismiss was fair or unfair within the meaning of section 98(4).

163. I remind myself that I must not substitute my own view for that of a reasonable employer and that when considering whether or not this employer acted reasonably or unreasonably in deciding to dismiss the claimant for the misconduct they rely upon, I must consider whether or not the reason for dismissal and the decision to dismiss falls within the band of reasonable responses open to an employer in the circumstances before me.

164. I remind myself of the leading case of *British Home Stores v Burchell* 1980 ICR 303 which sets out the requirements of a fair dismissal.

165. First the employer must show that the dismissal of the employee was for the reason of misconduct and that the employer had formed an honest belief on reasonable grounds that the misconduct has taken place. Put another way the belief in misconduct must be genuine.

166. The decision to dismiss must be based on reasonable grounds and this means there must have been a reasonable investigation before the decision to dismiss is made.

167. Whether an investigation is reasonable or not will depend on the particular circumstances and I remind myself to take into account the nature and gravity of the case; the state of the evidence and the potential consequences of an adverse finding to the employee. The amount of inquiry and investigation including questioning of an employee will vary depending on the allegations and circumstances .

168. The standard of investigation required will be high where dismissal is a likely consequence. Here the consequences were potentially career ending for the claimant.

169. I also remind myself that the claimant can expect all factors to be weighed equally. Matters which could support her should be given equal weight to those against her

170. Once an employer has shown a potentially fair reason for dismissal, the tribunal must go on to decide whether the dismissal for that reason was fair or unfair. This involves deciding whether the employer acted reasonably or unreasonably in dismissing for the reason given in accordance with S.98(4) of the Employment Rights Act 1996 (ERA)

171. That provision states that *'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'.

172. It is the employer who must show that misconduct was the reason for dismissal. According to the EAT in *British Home Stores Ltd v Burchell 1980 ICR 303*, EAT, a three-fold test applies. The employer must show that:

- i. it believed the employee guilty of misconduct;
- ii. it had in mind reasonable grounds upon which to sustain that belief,
and
- iii. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

173. When considering whether or not the employer has undertaken a reasonable investigation I must consider whether the investigation was in the

range of reasonable investigations that an employer could take. (see for example *Sainsbury's v Hitt*. [2002] EWCA Civ 1588 [2003] I.C.R. 111)) That case reminds me that it is necessary to apply objective standards of the reasonable employer to all aspects of whether employee fairly dismissed. The purpose of investigation is not to establish guilt, but whether reasonable grounds existed to support dismissal for gross misconduct.

174. This means that the employer need not have conclusive direct proof of the employee's misconduct, and a genuine and reasonable belief, reasonably tested, will be enough.

175. I also remind myself that an internal appeal process can cure defects of procedure in the original disciplinary process. As observed by the Court of Appeal in *Taylor v OCS Group Ltd*, [2006] ICR 1602 CA, At para 47

Employment tribunals should realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceedings with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness or not of the decision maker the overall process was fair notwithstanding any deficiencies at the early stage.

176. I remind myself that it is not enough that the employer has a reason that is capable of justifying dismissal, as S.98(4) makes clear. The tribunal must be satisfied that, in all the circumstances, the employer was actually justified in dismissing for that reason. For this part of the test, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide. (see for example *Boys and Girls Welfare Society v Macdonald* 1997 ICR 693, EAT.)

177. I must be careful to assess the question of reasonableness under S.98(4) in the context of the particular reason for dismissal it found established by the employer.

178. The question of whether an employer has acted reasonably is not a question of law. S.98(4) has the effect of giving tribunals a wide discretion to base our decisions on the facts of the case before us, and in the light of good industrial relations practice. As Lord Justice Donaldson put it in *Union of Construction, Allied Trades and Technicians v Brain* 1981 ICR 542, CA:

‘Whether someone acted reasonably is always a pure question of fact. Where Parliament has directed a tribunal to have regard to equity...and to the substantial merits of the case, the tribunal’s duty is really very plain. It has to look at the question in the round and without regard to a lawyer’s technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane.’

179. The appellate courts have, nevertheless, developed certain general principles, some of which have crystallised into principles of law. Thus, the broad, non-technical approach has led to the development of the ‘band (or range) of reasonable responses’ test as a tool for assessing the reasonableness of an employer’s actions.

180. The test of whether or not the employer acted reasonably is usually expressed as an objective one meaning that we, the tribunal, must use our collective wisdom as industrial juries to determine ‘the way in which a reasonable employer in those circumstances, in that line of business, would have behaved’ (see for example *NC Watling and Co Ltd v Richardson* 1978 ICR 1049, EAT.) Nonetheless, there is also a subjective element involved, in that we must also take account of the genuinely held beliefs of the employer at the time of the dismissal. However, we reminded ourselves that what a tribunal must not do, is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal. Whilst a tribunal can substitute *their decision* for that of the employer, that decision must not be reached by a process of substituting *themselves* for the employer and forming an opinion of what they would have done had they been the

employer (Per Court of Appeal explained in *Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden* 2000 ICR 1283, CA).

181. I remind myself of *London Ambulance V Small* [2009] EWCA Civ 220 [2009] IRLR 563, in this respect, that the question of whether or not a dismissal is within the range of reasonable responses open to the employer means that even if summary dismissal is one end of the range, with a written warning at the other end the dismissal is not unfair just because the tribunal would have chosen a lesser sanction.

182. The fact that the standard of the hypothetical reasonable employer is so central to the S.98(4) assessment of reasonableness means that tribunals are able to take account of good industrial relations practice in making their decisions.

183. Once the tribunal has determined that misconduct has taken place the question of whether it amounts to gross misconduct and whether or not a dismissal is reasonable, will depend upon the nature of the misconduct in question. Where misconduct amounts to breaches of rules or instructions I must consider whether or not the claimant was aware of the rules and instructions (See for example *Donachie v Allied Suppliers LTD* EAT 46/80), and whether or not the breach was a minor breach or one which in the view of the respondent was a serious breach.

184. I must also consider whether or not the respondent sets out within their disciplinary code that the type of misconduct to which a claimant either admits or is found to have committed is capable of amounting to gross misconduct.

185. I remind myself of the ACAS code relevant to this case, which I must have a regard to, and I remind myself that a failure to follow the code can result in an adjustment to compensation. The ACAS code sets out 6 steps that an employer must normally follow. first there must be an investigation to establish the facts of each case; second the employee must be informed of the problem; thirdly there should be a meeting with the employee to discuss the problem; fourthly the employee should be allowed to be accompanied to

the meeting; fifthly the respondent must decide on appropriate action and lastly the employee must be given an opportunity to appeal.

186. In *Westminster City Council v Cabaj* 1996 ICR 960, CA, the Court of Appeal stated that although employers should follow the agreed procedures, a failure to do so would not necessarily mean that a dismissal is unfair. The question a tribunal must decide in cases of unfair dismissal is not whether in all the circumstances the employer acted reasonably, but the narrower question under S.98(4) of whether the employer acted reasonably in treating the reason shown as a sufficient reason for dismissing the employee.
187. Exactly what type of behavior amounts to gross misconduct is difficult to pinpoint and will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract) — *Wilson v Racher* 1974 ICR 428, CA. Moreover, the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence — *Laws v London Chronicle (Indicator Newspapers) Ltd* 1959 1 WLR 698, CA, and *Sandwell and West Birmingham Hospitals NHS Trust v Westwood* EAT 0032/09.
188. Nevertheless, an employment tribunal hearing an unfair dismissal claim does not necessarily have to consider whether the employee's conduct amounts to gross misconduct in the contractual sense.
189. I have taken into account the dicta from the Court of Appeal in the case of *Ofsted v Hewston* CA Civ 250.
190. In that case the claimant, who was an inspector employed by the respondent brushed water off the head and touched the shoulder of a boy aged 12 or 13. The child had been caught in a rainstorm during the course of an inspection. This was observed by a teacher who felt the incident was inappropriate and the student completed an incident form saying he did not feel comfortable when it happened. It was reported as a case of

inappropriate touching. it was not suggested any improper motivation on the part of C.

191. At the disciplinary hearing the claimant said “ to say I would not do it again would suggest I'm guilty of acting inappropriately. I feel that the gesture of care for a child and engagement I still feel that it was not a crime and need to come to this point it does not fall within the definition of gross misconduct .having gone through all this and the stress I can say that I would not do it again. this is not suggesting I'm guilty. does that make sense.”

192. The claimant was dismissed for gross misconduct and the respondents said that they had asked the claimant during the hearing whether or not he would do it again and he said that he would not do so because of how stressful matters were, but referred to the claimant's firm view that he'd felt that his actions were appropriate.

193. The respondent stated therefore that they had no confidence that he recognised his error or that he was able to maintain professional boundaries between himself and the student. The respondent went on to say that he had displayed a grave error of judgement and his lack of contrition or recognition of any wrongdoing led the dismissing officer to find that his actions and response to the challenge destroyed the relationship of trust and confidence to allow him continue as an inspector, and that there was no option but to dismiss him with immediate effect.

194. The claims of unfair and wrongful dismissal were dismissed by the employment tribunal.

195. The EAT overturned both decisions substituting a finding of unfair dismissal and remitting the wrongful dismissal claim. The EAT held the dismissal was substantively unfair because the claimant had not been told and could not otherwise reasonably have understood, that any touching of a pupil without consent might lead to dismissal. It also considered that his attitude to his conduct was of limited relevance to the question of fairness.

196. Showing insight, remorse and a willingness to learn, may lead a manager to issue a lesser sanction, but would not render a dismissal fair within the band of reasonable responses, in the absence of a strict no touch policy for example.

197. The Court of Appeal dismissed the appeal upholding the finding of an unfair dismissal and said as follows at para 66:

It is important in addressing submission to bear in mind that the issue arises only where, as the EAT found to be the case here, the misconduct in itself is not of a kind which would justify dismissal. As a general proposition I find it hard to see how in such a case it could be reasonable for the employer to bump up the seriousness of the conduct only because the employee fails, during the disciplinary process to show proper contrition or insight.

I take this to be the point being made by the EAT at paragraph 82 of its judgement. It is reinforced by the fact that how employees react to an allegation of misconduct is likely to vary greatly according to individual temperament and the dynamics of the particular situation. The stressful circumstances of a disciplinary hearing or interview are unlikely to be conducive to calm self reflection and it is inevitable that some employees will be overly defensive. In some cases where the issue is whether what was done constituted misconduct an employee who genuinely believes that it did not, faces the dilemma that if they say that they would not do the same thing again they may be taken to be accepting guilt.

I have said as a general proposition because I recognise that this is an area in which it is prudent not to be too prescriptive. There may be particular cases where a neat distinction between the seriousness of the substantive conduct and the employees subsequent attitude is difficult to draw. There is obvious force in Mr Allen's point that there may be cases of less serious misconduct where a persistent failure on the part of the employee to recognise that they have done anything wrong means that there is a real risk that they will commit more serious misconduct in the future and that that risk should in principle depending on the particular circumstances be capable of justifying dismissal.

Conclusions

198. In this case the conduct at the centre of the case was not denied. The conduct was witnessed by two members of staff who raised a complaint, and the respondent appropriately considered that there was cause for concern and took steps to deal with the issue.

199. I accept the respondent's submissions that it is necessary to consider the context within which the conduct took place. I have heard evidence from Mr Penn Barlow and Miss Lacey about the needs of the pupils in this particular school and about the ethos and expectations of the school regarding the treatment of pupils and the behaviour of staff when interacting with pupils.

200. I accept that the claimant's conduct gave rise to serious concerns not only to the senior managers and teachers in the school but also to the police. I accept that it was reasonable for the head teacher to carry out an investigation and for Miss Lacey to recommend that a disciplinary hearing should take place. The investigation was carried out fairly and Miss Lacey came to her conclusion for genuine reasons based on a reasonable investigation.

201. However, I also conclude that objectively, this was a minor issue, and that there was evidence of a context, which was that of a long term member of staff, who had a good relationship with the child, and who had received mixed messages about how to behave with him, and who was engaging in some horse play, or messing about with him. It may well have been inappropriate, and may not have been inline with PACE training, but at no time was the claimant ever told why or how. She was expected to understand why her behaviour was wrong and blame worthy.

202. From all the evidence I conclude that although there were flaws in the disciplinary investigation and that although there were some flaws within the disciplinary hearing itself, the process was broadly fair. It was not fair to fail to

allow the claimant to question the two witnesses, having said it would be allowed, but I accept that the unfairness in the process would have been remedied had their evidence been ignored by the decision maker.

203. I conclude that Mr Morely did not have reasonable grounds for finding that the claimant had committed the act of gross misconduct she was accused of.

204. I conclude that Mr Morely took into account irrelevant factors , such as the former allegation, and that he did take into account the his view of the likely truth of the two witnesses account , and dismissed that claimants account. He failed to explain at all why a relatively minor incident was capable of being the gross misconduct alleged.

205. I conclude however that Mr Morley did not act fairly in concluding either that this was an act of gross misconduct or in concluding that therefore the claimant should be summarily dismissed for that act.

206. From the facts I have found I conclude that Mr Morley took into account irrelevant factors when reaching his decision to dismiss. I find he took into account both the fact of a previous allegation which had been dismissed against the claimant and the claimants unchallenged statement that she had not been subject to complaints previously. I find that he considered both matters were negative marks against the claimant and that that was part of his decision making and his reason for considering both the claimants actions were capable of being gross misconduct and that the sanction should be summary dismissal.

207. why this was found to be gross misconduct.

208. I remind myself that it is generally accepted that gross misconduct, is behaviour which fundamentally undermines an employment contract . Further the conduct must usually be a deliberate and wilful contradiction of the contractual terms see for example laws and London chronicle above.

209. Whilst it is not necessary to consider whether or not the conduct is gross misconduct in a contractual sense, in this case there is no suggestion that the claimant was wilfully or deliberately going against her contract.
210. I conclude that all the evidence indicated that the claimant genuinely considered that her behaviour was acceptable, within the training she had been given and the guidance she believed she had received from other senior members of staff and the relationship she had with the child. The respondent's witnesses were not able to point to any specific policy preventing behaviour of that type, but relied instead on their expectation that staff would recognise inappropriate behaviour. Mr Morely does not explain how he weighed the claimant's evidence, other than to say he had no evidence of the discussion she had had with senior manager. He had her evidence but appears to have given it no weight. There is no evidence that he considered whether she understood that this type of conduct might amount to gross misconduct, or why he thought that this particular conduct amounted to gross misconduct, other than that it had taken place.
211. As set out in the findings he failed to weigh up the evidence before him of what the CCTV showed in an objective manner, ignoring what the police officer had said, and ignoring what the child himself had said.
212. He does not explain how he concluded that this was an aggressive act.
213. Whilst the respondent may have been entitled to conclude that the claimant was wrong, and conclude that this was misconduct, an explanation of why the misconduct was considered to be gross misconduct was required.
214. There is no evidence before me that Mr Morely considered at any time whether the conduct which the claimant admitted was in reality an act of misconduct rather than an act of gross misconduct, or if he did, why he reached the conclusion that he did.
215. This is of particular importance in this case because on the face of it when viewed objectively the CCTV shows a relatively short relatively minor instance

which can be explained as a child and an adult who have a good natured long term relationship, as mucking around.

216. I conclude that in this case on all the evidence he did not consider whether or not the misconduct found could reasonably be considered to be gross misconduct, and that he had no reasonable grounds for reaching the conclusion he reached.

217. I conclude that he classified it as gross misconduct simply because he had found it proven.

218. Further I conclude that any reasonable head teacher would have considered that the conduct was misconduct, not gross misconduct because of the lack of any deliberate or malicious intent and because of the claimants explanations about her relationship with the child, and the nature of the behaviour its self.

219. The Head teacher has failed to explain why he then considered that summary dismissal was an appropriate sanction.

220. Whilst it is possible that a first offence of misconduct might justify summary dismissal, the dismissing officer would be expected to take into account the persons disciplinary record , their service, and mitigation and whether a lessor sanction might be appropriate. I conclude that any reasonable employer would have taken into account the claimant's service, her clean record and the possibility of a lessor sanction , and training and supervision for example

221. From my findings of fact I conclude that Mr Morely did not take any of these factors into account.

222. He decided to dismiss the claimant because he had found the conduct proven,. The decision was unfair and was not within the range of reasonable responses.

223. I conclude that he did not consider therefore that the claimant had a clean disciplinary record, but was influenced by the fact that an allegation had been made against her in the past. I conclude that this is sufficient to make the decision to dismiss for gross misconduct unfair.
224. The appeal in this case does not cure those defects. Mr Penn Barlow did not investigate why Mr Morley had made the comment about the previous allegation and was not therefore able to explain whether or not this had in fact formed any part of his thinking. He did not address the claimants specific concern about her having a clean record and 8 years employment.
225. Mr Pen Barlow considered that there was a possibility that a lesser sanction would have been appropriate. However, he did not make clear to the claimant either that this was a possibility, or what he expected from her, before he would consider it.
226. I conclude from my findings that he consider whether or not the conduct would justify a lessor sanction, of its self. What he did on stead, was to fist required the claimant to show some remorse, or admit some culpability, before he was prepared to consider whether a lessor sanction would be appropriate.
227. He failed to consider whether the conclusion of Mr Morely , that this was gross misconduct was a fair one. He then placed an additional requirement on the claimant that she must show remorse or admit culpability, before he would consider a lessor sanction , but failed to make clear to her in any way, that he would only consider a lessor sanction in those circumstances. She therefore had no opportunity to challenge his approach , or to provide him with the reassurances he wanted.
228. He suggested he had a concern that she would say what he wanted to hear to keep her job, but did not give her any chance to do so, and therefore did not in fact consider the matter.

229. I have reminded myself of the determination of the court in the case of Ofsted and Houston and I have also reminded myself of the submissions made by Mr Foy in respect of that case. I accept that this case is factually different..

230. None the less the principle that case that a lack of remorse from a claimant, should not be used to increase the sanction , if the conduct cannot support the sanction is relevant. In this case, I find that the appeal did not remedy the flaws in the disciplinary decision making, and was itself flawed and unfair because Mr Penn Barlow failed to first consider whether the conduct justified the sanction , and made the sanction dependant on the claimant admitting or accepting culpability, without that being explained to her.

231. I conclude that the appeal did not remedy the defects of the original decision-making, and was itself unfair and unreasonable in all the circumstances of this case.

232. For all these reasons I conclude that the decision to summarily dismiss the claimant for gross misconduct was unfair.

Employment Judge Rayner
Date 28 January 2026

JUDGMENT & REASONS SENT TO THE PARTIES ON
20 October 2026

FOR THE TRIBUNAL OFFICE