



Reserved judgment

THE EMPLOYMENT TRIBUNALS

Between

Mrs F Nimmons

Claimant

and

**The Governing Body of Bellenden Primary School (1)
London Borough of Southwark (2)**

Respondents

**Hearing at London South on 16-20 & 23 & 24 January 2017 before
Employment Judge Baron**

Appearances

For Claimant: *Melvyn Harris*

For Respondent: *Peter Linstead*

ORDER AND JUDGMENT

The Tribunal **orders** that the name of the First Respondent be corrected to 'The Governing Body of Bellenden Primary School'.

It is the **judgment** of the Tribunal that the dismissal of the Claimant was fair.

REASONS

Introduction

- 1 These proceedings unfortunately have a long history. I regret that that history has been further elongated by the delay in issuing this judgment and the reasons for it. This has been caused by a shortage of judicial resources and my concern to ensure that I had sufficient time to consider the arguments on both sides carefully. This is an important case, particularly from the point of view of the Claimant.
- 2 The Claimant was employed at Bellenden Primary School ('the School') in January 2006 and was summarily dismissed with effect from 5 February 2014. On 2 May 2014 she presented this claim to the Tribunal. The sole head of claim is unfair dismissal within Part X of the Employment Rights Act 1996.
- 3 The matter was heard by Employment Judge Sage on various dates from February to August 2015. By her judgment dated 2 September 2015 the Tribunal found that the Claimant had been unfairly dismissed. The

Respondent appealed to the Employment Appeal Tribunal. The Order of the Employment Appeal Tribunal made by HHJ Eady QC dated 30 September 2016 was to the effect that the appeal was allowed by consent and that the judgment be set aside on the ground that the decision contained errors of law. The matter was remitted to a differently constituted Tribunal, and was allocated to me to rehear.

- 4 As this was to be a total rehearing of the claim in accordance with the order of the EAT I intended not to read the judgment of Judge Sage, nor the Notice of Appeal, nor the EAT judgment. Mr Harris did refer some witnesses and me during cross-examination to passages in the judgment of Judge Sage where the relevant witness is recorded as having given certain evidence. When the matter was raised at the outset of the hearing I made it clear that I considered it wholly inappropriate for me to raise any points with Judge Sage where the evidence of the witness before me appeared to differ from the evidence as recorded by Judge Sage. I said I would take what was recorded in her judgment into account along with any comments made by Mr Linstead on the relevant point, and also the oral evidence given to this hearing, when making findings of fact and that I have done.
- 5 Further during his closing submissions Mr Harris referred me to a paragraph in the EAT judgment. Mr Linstead asked that therefore I read the whole of the EAT judgment. That I have done, albeit with some reluctance. I have not, however, read the judgment at first instance of Judge Sage, save for those specific passages to which I was referred.
- 6 The Claimant gave evidence herself and did not call any additional witnesses. I heard evidence from the following on behalf of the Respondents:¹
 - Stevan Borthwick – Head Teacher
 - Craig Orr – HR Manager with the Second Respondent
 - Chris Cooper – School Governor and employee of the Second Respondent
 - Pamela Fennell – School Governor
 - Tessa Brooks – School Governor.
- 7 I was provided with about 1,000 pages of documents. As unfortunately is so often the case I have to question whether it was necessary or proportionate for there to have been such a large volume.

The facts

- 8 The School is a State school in Peckham with some 270 pupils. The Claimant is an experienced teacher. She joined the School in 2005 and at the relevant time was a Class teacher responsible for Year 5. Virginia Moore was the Head Teacher when the Claimant was first employed. The tenor of Claimant's evidence was that during the tenure of Mrs Moore all was well in her relationship with the School, and that her 'problems started' when Mr Borthwick took over from Mrs Moore in September 2010.

¹ The status of each witness is given as at the relevant time.

- 9 I do not accept that evidence. There were in the bundle some papers from the Claimant's personal file. There were notes of a meeting between the Claimant and Mrs Moore of 27 May 2010 which record Mrs Moore as having said that she considered the Claimant's behaviour atrocious, and that at times she found her to be arrogant and abominable. There was an exchange of correspondence of 16 June 2010 in which the Claimant complained about being required to attend another meeting, and that she was beginning to consider this as harassment. The details of these incidents are not relevant. What is of more importance is that they demonstrate that there was a history of some difficulties in the employment relationship.
- 10 There were further difficulties arising after Mr Borthwick became Head Teacher in September 2010. It is not necessary to record all the evidence put forward. There was a problem in late 2012 which resulted in a grievance by the Claimant and disciplinary proceedings. There were three allegations relating safeguarding of children. All three allegations were upheld and found to have constituted misconduct, with one of them constituting gross misconduct. The panel dealing with the matter was chaired by Mrs Brooks, and Sarah Hyder, another Governor, also sat on the panel. The panel found that there had been a breakdown in communication between the Claimant and Mr Borthwick, and because of that mitigating circumstance the Claimant was given a nine months' written warning. That was upheld on appeal. Mr Cooper chaired the appeal panel. The letter of 23 April 2013 dismissing the appeal referred to tensions in the personal relationship between the Claimant and Mr Borthwick.
- 11 There was a letter in the bundle of 15 April 2013 in which Mr Borthwick gave the Claimant 'a warning for misconduct' for telling a child to 'shut up'. In her witness statement the Claimant said that she did 'not accept that [she] was formally given this warning'. This letter was the cause of some evidence and submissions. Mr Harris submitted that I should find as a fact that Mr Borthwick had changed his evidence from that given to Judge Sage, and also that the letter was not in fact sent. He gave reasons why I should make that latter finding. The point about the alleged change of evidence was that Judge Sage recorded Mr Borthwick as having accepted that what had occurred was not fair, whereas before me he had denied saying that. In my view this is a detail of no importance, and any warning which may have been given to the Claimant in April 2013 is also of no importance to the issue which I have to decide.
- 12 Before dealing with the matters which led to the dismissal of the Claimant I summarise various policies or procedures. The first is the Disciplinary Procedure. The procedure is in very much of a standard form, the likes of which are produced at Tribunal hearings day-in and day-out. In his written submissions, Mr Harris said that the School had acted in breach of the procedure 'numerous times'. I record those aspects of the procedure upon which Mr Harris relied in that respect.
- 13 Section 2 of the Procedure is headed 'Investigation', and it provides as follows:

The investigator will write to the employee and give the following information:

- a) Details of the allegations
- b) Copies of the available information
- c) A copy of the disciplinary procedure
- d) Time and date of the investigation meeting
- e) Right to representation at any meeting

14 Paragraph 2.2 is headed 'Suspension'. It provides as follows:

Suspension should only be considered in extreme circumstances where the employee's continued presence on site

- Makes a fair investigation impossible
- Represents a serious risk to the safety of others or themselves
- Seriously undermines the reputation of the school

15 There is reference to an oral suspension being confirmed by letter. The procedure states:

The letter should state that the investigatory and disciplinary process should be completed within 30 working days.

In the same section it is stated that as an alternative to suspension the Head Teacher or Chair of Governors may consider

an initial 'cooling-off' period which should be mutually agreed for a period not exceeding three days.

16 After setting out the disciplinary procedure to be followed there is a section listing the actions which may result from a disciplinary hearing ranging in severity from no further action to dismissal. The document does not set out a list, as is often the case, of examples of misconduct which would justify dismissal. The document simply states that summary dismissal is

appropriate in cases of gross misconduct where the breach is considered to be sufficiently serious to warrant dismissal for a first offence.²

17 There was quite properly provision for an appeal against any disciplinary sanction. The purpose was stated in paragraph 6.1(a) to be as follows:

The purpose of the Governors Appeal is to review the decision made by the initial hearing, questioning the management presenter and/or considering any new evidence or mitigating circumstances.

18 Further, in paragraph 6.1(e) there was reference to a timetable for any appeal as follows:

Wherever possible the Appeal should be heard within 20 working days of the lodging of the appeal and the employee should have at least 10 working days notice of the Appeal Hearing.

19 There were two documents in the trial bundle, each being a Behaviour Policy. One is dated September 2010 and the other September 2013. Each provides for a coloured card system. On leaving the classroom a child should take a green card for going to the toilet, a blue card for being on a message, and a red card for going to the Head or Deputy.

20 The passages of particular relevance in the 2010 document and the 2013 document are respectively as follows:

2010

² That does not appear to be a particularly helpful definition.

If a child's behaviour gives cause for serious concern or is a danger to others or themselves or school property in the class, they will be asked to leave the classroom with an adult. If they refuse they will be safely handled out off (sic) the situation.

Parents will be informed each time safe handling is used and a record is kept by the school.

2013

If a child is endangering other children, do not try to restrain the child. Instead, remove the class from the situation and send the red "immediate response" card to the head/deputy/office.

If two children are fighting, send the red "immediate response" card the head/deputy/office. Only intervene if there is serious danger to one or other of the children.

- 21 There was a difference of evidence as to which policy applied. I find that the 2010 policy was the one technically in force at the time, but that at the staff Inset day at the beginning of the autumn term there was a proposal discussed to introduce the 2013 policy on a trial basis before putting it to the Governors for formal adoption.³ I reject the suggestion made on behalf of the Claimant that the 2013 policy was first created in December 2013 specifically in an effort to justify any action then to be taken against the Claimant, and was thus a 'false' document. I do not accept that the document provided said to be the 'metadata' in relation to the 2013 policy is in any way conclusive. It was simply a reproduction of what Word describes as the properties of a document.
- 22 The other material document is a document entitled 'Use of Reasonable Force – Advice for headteachers, staff and governing bodies' issued by the Department for Education and dated July 2013. The title is self-explanatory. It contains non-statutory advice. In summary it states that staff have the power to use reasonable force and gives guidance as to what is reasonable and when force can be used. It specifically provides as follows:

Schools should not have a no contact policy. There is a real risk that such a policy might place a member of staff in breach of their duty of care towards the pupil, or prevent them taking action needed to prevent a pupil causing harm.

- 23 I now turn to the substance of the claim. An incident occurred on 8 October 2013 which resulted in the dismissal of the Claimant. I emphasise at this juncture that it is not my function in coming to a conclusion on the merits of this claim of unfair dismissal to make any finding as to what actually occurred on that occasion. My task is to consider the matter in accordance with section 98 of the Employment Rights Act 1996.
- 24 Shortly after 3 pm Nigel Roffey, the Premises Manager, reported to Mr Borthwick in his office that when passing her classroom he had seen the Claimant shaking Child B violently backwards and forwards and shouting into his face. Mr Roffey had been a police officer. Mr Borthwick made a handwritten note of what he had been told by Mr Roffey as follows:

Walking down corridor door open. Saw Fidelia holding [child B] by his shoulders shaking him appeared she was speaking shouting to him all the time. Not sure exactly what was being said

³ I have noted the emails at B397 of 3 February 2014

but appears to have been 'Don't say that to me'. Didn't appear to be trying to remove him. He wasn't saying anything back. I came straight down to you (SB). She was close to the door. There were other children in the room. [Mr Roffey] was not sure of who they were. There were children at the table where this was happening.

25 Mr Roffey also made a written statement which reads as follows:

On Tuesday 08 October 2013 at about 1518 I was walking down the junior corridor from the playcentre, as I passed Year 4 classroom I noticed that the door was open and I saw Mrs Nimmons with both of her hands on each shoulder of a small black male child wearing glasses.

She was shouting directly into his face and shaking him violently backwards and forwards. He was not retaliating at this point.

I went straight to Mr Borthwick's office and told him what I had just witnessed.

26 Having been informed of the incident by Mr Roffey, Mr Borthwick immediately went to the classroom, and found the Claimant standing talking to the children. Child B was not in the room. Mr Borthwick asked the Claimant to come to his office. He made arrangements for the Claimant's class to be covered by a Learning Mentor.

27 There were then discussions between Mr Borthwick and the Claimant, interrupted by Mr Borthwick taking advice from Joan Forrest, an HR Officer with the Second Respondent. Mr Borthwick was concerned, as he described it, about 'the overarching need to safeguard children in the school, and to be seen to be doing so.' The decision reached after the discussions with Ms Forrest was that in the circumstances there should be what Mr Borthwick described as a cooling off period. A letter was prepared dated 8 October 2013, the first paragraph of which was as follows:

Following the incident in class this afternoon where it was alleged that you shook a child, I am writing to instruct you to stay at home for a 3 day cooling off period. Please note, this is not a sanction or implication of guilt and you will continue to be paid on full-pay for this period.

28 The Claimant told Mr Borthwick that Child B had head-butted her, and her jaw hurt. The Claimant was not feeling well. Mr Borthwick went to check on the welfare of the child, leaving the Claimant in the care of the Senior School Administration Officer. Arrangements were made for the Claimant to be taken to a health centre by taxi. The Claimant was then referred to St Thomas' Hospital, and then to King's College Hospital with a suspected broken jaw.

29 Mr Borthwick also made manuscript notes of what he was told by the Claimant, and those are as follows:⁴

[Patricia Sawyers] had left class at 3 pm. Normally maths is planned to 2.30 – 3:30 pm. While I was looking for [Ms Sawyers] Tracy [Black] told me that [Ms Sawyers'] timetable had changed therefore she was in Yr 6. I asked class if they should stop the maths or carry on. They said carry on. I asked the children to please bear with me while I showed the other independent group what to do.

Whilst I was doing this [child A] was crawling under the table and [other children] got up and went to book corner with Child B and started taking books.

⁴ I have amended it so that it is always in the first person.

I asked them to return to their seats and [child A] was crawling under the table so I took him to year 3.

I got [another child] back to his seat and went to get [child B]. I pulled out his seat and asked him to sit down. He sat down then stood up again. Because I was behind the chair holding it for him his head butted me.

I went to go and get him back to his seat and he went to sit down and then he head butted me upwards.

I felt dizzy. I asked him to get up and go to year 5. He would not move so I took him to year 5. I carried him off his seat and took him to year 5.

[##]

The left side of my face is swollen. Shock.

- 30 Some explanation is necessary. The entry [##] indicates that there is obviously some text which was missed during the photocopying process. The two paragraphs in italics were added by Mr Borthwick later during the conversations with the Claimant on 8 October and 'inserted' into the main text by means of arrows.
- 31 At the request of Mr Borthwick, Megan Anderson made a statement. Ms Anderson was the Teaching Assistant assigned to the Claimant's class at the time. There was a manuscript statement at page 113 of the bundle headed 'Wednesday 8th Oct 2013' which reads as follows:⁵
- Approx 3:10 pm [the Claimant] was sitting at table with a group of children they were doing Maths the table was quite noisy. I heard [the Claimant] telling [child B] to be quiet and go back to his table. I didn't see what happened next as I had my head down working with a group of children. I looked up when [the Claimant] said loudly did you see what he's done? In response I asked what [child B] had done. [The claimant] replied that Child B had head butted her. She grabbed him forcefully by the shoulders and shook him then grabbed his arm, twisted it sideways and pushed him towards the door leading to the wet area. There was a moment of quiet as I adjust to what I had just seen. I headed into the wet area. [The claimant] was coming out, I continued in and found [child B] sitting on the floor in Yr5. I asked him to follow me out into the play centre where I asked Striby to listen while I spoke to [child B]. I asked him what had happened and he explained that he was getting up and accidentally hit [the Claimant] on the chin with the back of his head.
- 32 This is a trivial point but I find that that statement was probably written by Ms Anderson on the evening of 8 October 2013.
- 33 The 'wet area' is a small room, or similar, which is between the classrooms used by Year 4 and Year 5.
- 34 There was a typed statement purporting to have been made by Ms Anderson. It was headed 'Tuesday 8th October 2013'. Mr Harris said in his submissions that there was serious doubt as to whether the statement was actually written by Ms Anderson or whether it had been written for her at a later date. There was no evidence before me to cause any such doubt. The statement was undated and unsigned but I have no reason to believe that it was not prepared by her, and I accept that it was made by her. I find that it was prepared following the LADO Strategy Meeting of 14 October 2013 referred to below. It contained details about what had

⁵ There is an addition at the top of the page which was lost in copying, but no point was made about it during the hearing. The date is obviously wrong as 8 October 2013 was a Tuesday.

happened during the morning and early afternoon of 8 October 2013, none of which are relevant. Reference was then made by Ms Anderson to the incident in question, and she repeated the contents of her manuscript statement.

- 35 At some stage on 8 October 2013 also there was a brief conversation between Mary Kelly, the Deputy Head, and Child B. It was not an interview in any formal sense. Ms Kelly made manuscript notes and then converted them into a 'question and answer' format. Child B is recorded as having said as follows:

I was naughty. I did not listen to [the Claimant]. She got cross. She sat me down hard on a chair. I stood up and hit my head into her. She dragged me to Yr5 and my arm hurts.

- 36 The existence of the notes, both manuscript and typed, made by Ms Kelly was not disclosed to the Claimant during the subsequent disciplinary process. Mr Borthwick and Mr Orr (who assisted with the subsequent investigation) were both aware of the existence of the documents. Mr Cooper, who carried out the investigation, was not made aware of them at the time. The reason they were not included in the investigation report was that it was simply not the normal practice of the local authority to interview children.
- 37 Ms Fennell and her colleagues on the appeal panel became aware of the existence of the documents but decided not to ask for them. I accept the evidence of Ms Fennell that there were two reasons for that decision. The first was that the consent of the parents of Child B had not been obtained, and secondly that he had not been properly and fully interviewed by a trained person, and so may have thought that he was in trouble.
- 38 Mr Borthwick contacted the Local Area Designated Officer ('LADO') and he was advised that a Safeguarding Panel would have to be convened to decide whether a police investigation was warranted. For reasons of which I am not aware, such meeting could not be convened until 14 October 2013. Mr Borthwick therefore wrote to the Claimant again on 11 October 2013 instructing her to remain at home on a cooling off basis for a further two days pending a 'Strategy Meeting'.
- 39 On 13 October 2013 the Claimant presented a grievance against Mr Borthwick. I do not propose to set it out in full. In summary she complained about Mr Borthwick's lack of care towards a member of staff who had been assaulted. She said that Mr Borthwick saw the incident as an opportunity to dismiss her.
- 40 The LADO Strategy Meeting took place on 14 October 2013. Present were Joy Jarrett, the Child Protection Coordinator, Mr Borthwick, Joan Forrest, a Social Worker and a police officer. It was agreed that the parents of Child B should be asked if they wished to pursue a criminal investigation, and that pending any such investigation, and any decision by the Respondents as to whether to pursue disciplinary action, the Claimant should be suspended.
- 41 There is one further minor point arising from this meeting which I mention in the light of a submission made by Mr Harris as to the authenticity of the statement made by Ms Anderson. The notes of the meeting record that one of the actions to be taken by Mr Borthwick was:

Provide a copy of [Ms Anderson's] statement and have it typed.

- 42 Mr Borthwick sent a letter to the Claimant on 15 October 2013 confirming the suspension, and requiring her to attend an investigation meeting on 16 October 2013. The matter to be investigated was stated to be as follows:

Alleged that you shook a child and inappropriately handled the child to remove him from the room.

- 43 The letter stated that the investigation would be carried out as quickly as possible. It did not specifically refer to a 30 day period for the whole disciplinary process as set out in the Disciplinary Procedure which has been mentioned above.

- 44 The Claimant contacted Mr Borthwick to say that she was unable to attend the investigation meeting because of her injury, and it was postponed as a consequence. Mr Borthwick wrote to the Claimant on 16 October 2013 confirming the continued suspension, and saying that there could be a delay pending the conclusion of any police investigation. The reason given for the suspension was that it was

necessary in order to allow a proper and fair investigation to be carried out.

- 45 The Claimant completed an accident report form ('HS1') on 15 October 2013. The relevant passage is as follows:

As I was demonstrating on the whiteboard [child B] continued to interfere with other children; not allowing them to listen or concentrate. Eventually I had to stop this demonstration in order to get [child B] back to his seat. I went round to his table and pulled out his seat and asked him to come and sit on it, I counted down to 5 for him, as he sat down on the chair, he exploded into a sudden tantrum and head butted me upwards on my chin. I was dazed and as he continued to kick his legs upwards I was concerned that he would hurt the child next to him, last week he drew blood from another child and this lunchtime, he gave another child a swollen face, I asked him to stop and he would not and for everyone's safety, I got hold of him by his arms to restrain him and pulled him to take him to the next class. [Child B] continued to struggle all the way to the other class, Year 5. By the time I came back from taking the other class, I was feeling quite faint and had the headteacher not come into the classroom then, I would have passed out.

- 46 What had occurred had been reported by Mr Borthwick to Mrs Brooks, the then Chair of Governors. She sent an email to Mr Cooper on 20 October 2013. She said that the Claimant had once again been suspended, and that Southwark Council was dealing with the disciplinary aspects. Mrs Brooks also referred to the grievance, and said that Ms Forrest had advised that the two matters be dealt with together. She asked Mr Cooper if he would take the lead on the matter.

- 47 The Claimant then presented another grievance on 29 October 2013. The complaint was that her photograph, and photographs of other staff members had been put on the school's website without permission, together with their full names. In essence she was asking that Mr Borthwick should be the subject of disciplinary action as a result.

- 48 The Claimant then made a complaint direct to the local authority's Director of Education on 31 October 2013. Her complaints were that she was being victimised and harassed by Mr Borthwick, and Ms Forrest was providing unbalanced advice. Ms Forrest therefore felt unable to advise further. Craig Orr took over.

- 49 The police decided not to pursue any criminal action. There was a further LADO Strategy Meeting on 5 November 2015 at which it was noted that the matter would be investigated in accordance with the school's management investigation process. I was shown an email of 12 November 2013 from Mr Orr to the Claimant in which he informed the Claimant that there would be an investigation into the incident of 8 October 2013. Although I was not referred to them I have noted in preparing this document that in earlier emails in the chain Mr Orr was seeking to obtain further information from the Claimant about her complaints and the desired outcome.
- 50 Mr Orr wrote formally to the Claimant on 13 November 2013 saying that Mr Cooper and he were to investigate the following allegation:
- Allegation: incident in class on 8 October 2013 where it has been alleged that you shook a child.
- The Claimant was required to attend an investigation meeting on 25 November 2013.
- 51 On 20 November 2013 Mr Cooper interviewed Mr Roffey, with Mr Orr present. As with other such interviews there were notes in the bundle. Mr Roffey said that the Claimant had her hands on child B's shoulders shaking him violently. She was also shouting at him. Child B was not retaliating. Mr Roffey signed the notes of the meeting as correct. After the interview Mr Roffey took Mr Cooper to the place in the corridor where he (Mr Roffey) was at the time of the incident.
- 52 Mr Cooper then interviewed Mr Borthwick. Mr Borthwick recounted his involvement with the events of 8 October 2013, and what he had been told by the Claimant shortly after the incident. Mr Cooper asked what Mr Borthwick considered to be acceptable restraint. Mr Borthwick referred to a behaviour policy which had been discussed at the Inset day at the start of that term. There was a red card system. He gave an example of a child having a tantrum, whereupon the other children would be removed from the classroom, and a red card would be brought to him by another member of staff or responsible pupil. Mr Borthwick said that only members of the senior management team would be expected to perform any restraint. Staff should avoid physical contact if possible. The notes were also signed by Mr Borthwick.
- 53 There was uncertainty in the evidence as to whether Mr Borthwick showed to Mr Cooper the notes he had made of the conversations with the Claimant and Mr Roffey shortly after the incident on 8 October 2013. I find that Mr Borthwick had the notes with him when being interviewed by Mr Cooper and that fact may have been mentioned. However, if they were mentioned, Mr Cooper did not pay attention to them and did not read them nor copy them. The notes were not provided to the disciplinary panel nor the appeal panel.
- 54 Mr Cooper then interviewed Ms Anderson. Ms Anderson repeated the contents of her two statements mentioned above. The notes of the interview wrongly record Mr Cooper referring to Ms Anderson as saying that the Claimant 'went into a rage'. Mr Cooper accepted that that was not said by Ms Anderson and he had chosen the wrong words at the interview. When Ms Anderson had said was that the Claimant 'was

overcome with anger and had distorted facial expressions.’ She was asked what she considered appropriate behaviour and replied:

For me the expectation of the adult is to make sure and look after children in a professional way. Learn to control your emotions, think before you leap. Shaking a child like [the Claimant] did is not acceptable. We are told never to physically engage with pupils, find an appropriate senior manager - Mary Kelly, Stevan Borthwick. You should never lash out, there is the child protection policy.

- 55 When asked what she would have done, Ms Anderson replied that she would have shouted for help. She added at the end of the interview that she was so angry with what had happened to Child B that she had slapped the door. Ms Anderson said that she went straight home and did not talk to anyone. She said that she wrote her statement either the following day or the day after that. Ms Anderson signed her interview notes, having made some amendments.
- 56 Mr Cooper then met the Claimant on 25 November 2013. There was an initial difficulty in that she wished to be accompanied by a Mr Charway of the Ghana Union. He did not fall within the categories of persons allowed to accompany an employee in such circumstances, and it was agreed that he would wait outside of the room, and the Claimant could consult him if necessary. The interview lasted almost three hours with a short break in the middle. The notes are over 20 pages long, and consist of 319 numbered ‘paragraphs’. They were much amended by the Claimant. At the meeting there was a discussion about the Claimant’s grievances as well as the incident on 8 October 2013.
- 57 In paragraphs 81-83 of the notes the Claimant said that Child B had head-butted her. She said that she pulled out his chair and asked him to sit down. She was counting to ten. Then he just erupted and caught the Claimant on the chin. The Claimant said that Child B was kicking out his legs and was sitting next to another child. Later on in paragraphs 209 and 211 the Claimant referred to the incident again. The Claimant said that Ms Anderson was not present at the time because she had to attend a disciplinary meeting with Mr Borthwick. Although not stated in the notes it is agreed that any such attendance would have been because of Ms Anderson’s role as a union representative. There was no question of any disciplinary action being taken against her. When asked to confirm that she was saying that Ms Anderson was not in the classroom the Claimant said that she did not see her. When describing the incident the Claimant said that Child B had head-butted her, and that she had taken him by the arms to the Year 5 classroom.
- 58 At the investigation meeting the Claimant provided Mr Cooper with a copy of the document ‘Use of Reasonable Force – Advice for headteachers, staff and governing bodies’ issued by the Department for Education and dated July 2013 already mentioned. Mr Cooper had already obtained access to it via the internet by at least 21 November 2013.
- 59 At this juncture in the chronology I record that on 5 December 2013 Mrs Brooks sent an email to Mr Orr as follows:

I am just writing to ask (before the Christmas rush sets in) where we are in respect of the disciplinary / grievance processes concerning [the Claimant]. I am aware that you will need to

assemble a panel at some point in the new year and it would be helpful to have some idea about the how and when of this as soon as possible.

- 60 Mr Orr replied on 13 December 2013 saying that the Claimant's complaints were not upheld but that disciplinary action was being recommended, and he asked for the approval of Mrs Brooks. That was then given.
- 61 Mr Cooper wrote to the Claimant on 4 December 2013 with a copy of the notes of the interview with Ms Anderson. Because of the conflict of evidence the Claimant was asked to comment on the issue as to whether or not Ms Anderson was in the classroom at the time of the incident. The Claimant replied on 11 December 2013 with a ten page document commenting on Ms Anderson's interview notes. The Claimant said that Ms Anderson had told her that she would not be in class after lunch because of attending a disciplinary hearing with Mr Borthwick. Therefore, said the Claimant, she planned activities which required the minimum adult support until 2.30 when she was to be joined by another Teaching Assistant, Patricia Sawyers. Ms Sawyers was said by the Claimant to have been present from 2.30 until 3.00 pm. The Claimant disagreed with various other elements of the notes of Ms Anderson's interview.
- 62 Mr Orr wrote to Mr Borthwick on 11 December 2013 asking whether he was carrying out any HR related interviews involving Ms Anderson as a GMB representative on 8 October 2013. It appears that Mr Borthwick then asked for assistance from the Council's HR department, although what the question was is not known. The result was that there was sent to Mr Borthwick a copy of an email of 26 September 2013 which referred to there being a sickness guidance meeting with Mr Borthwick and another Teaching Assistant on 4 October 2103 at 2 pm. Mr Borthwick therefore informed Mr Orr that the meeting which Ms Anderson had attended was on 4 October 2013. No documents which otherwise confirmed the date of the meeting were provided.
- 63 Mr Cooper wrote to the Claimant on 13 December 2013 informing her that her grievances had not been upheld, and properly advising her of her right to appeal. On the same day he also wrote saying that he had found that there was a case for disciplinary action to be taken, and that further details would be provided. A letter was to be sent outlining the charges. In response to that letter the Claimant wrote on 15 December 2013 objecting to there having been reference to 'outlining the charges'. She also said that the allegation against her was 'that [she] shook a child and inappropriately handled the child to remove him from the room.' She said that she was not prepared to respond to any other charges.
- 64 Mr Cooper also made enquiries of Patricia Sawyers through Ms Kelly. He sent an email to Ms Kelly requesting that Ms Sawyers be asked whether Ms Anderson was in the classroom when she left at 3 pm, and at any other time on 8 October 2013. Ms Sawyers wrote a brief statement on 20 December 2013 confirming that Ms Anderson had been present when she left the Claimant's classroom at about 2.45 pm.
- 65 Mr Cooper, in conjunction with Mr Orr, prepared a report. It was signed by Mr Cooper and dated 13 December 2013. A considerable amount of time was spent on evidence as to whether Mr Cooper was in work that

day to sign the document, and reference was made to an email of 10 January 2014 to him from Mr Orr. That email referred to 'a rough draft incorporating your initial draft' as being attached. I do not consider the date on the final report to be relevant. I find that the report is an accurate record of Mr Cooper's understanding of the evidence he had obtained. Further, it is that document which was supplied to the Claimant.

66 It was submitted by Mr Harris that it was clear from the evidence that it was Mr Orr who put the report in writing and that he was using his own words. I do not accept that submission. There is a lack of a clear 'audit trail' as both Mr Cooper and Mr Orr worked in the same office and so did not need to send emails to each other. My note of the evidence of Mr Orr in cross-examination is that the first draft was prepared by Mr Cooper. I accept that evidence.

67 In the report it was stated as follows:

The allegation is that [the Claimant] shook a child and inappropriately handled the child to remove him from the room.

The facts as found by Mr Cooper were set out, together with his recommendation as follows:

I would recommend that this matter be referred to a disciplinary panel. It is my view that the charge constitutes gross misconduct under the Council's Disciplinary Procedure and are breaches of the Council's Code of Conduct.

Mr Orr accepted in cross-examination that the references to the Council's documents was an error.

68 On 20 January 2014 Mr Cleary, the Clerk to the Governors of the School, wrote a formal letter to the Claimant requiring that she attend a disciplinary hearing on 4 February 2014. The disciplinary charge was stated to be:

On the 8th October 2013 you inappropriately handled Child B in clear breach of school Behaviour Policy.

69 That wording was decided upon by Mr Cooper. The Claimant was properly notified in the letter that the charge could constitute gross misconduct, and that dismissal could be the result. The Claimant was informed of her right to be accompanied. She was asked to provide any documents she wished to be considered by 30 January 2014. The Claimant was told that each of Mr Borthwick, Ms Anderson and Mr Roffey would give evidence. There was no mention of the possibility of the Claimant bringing witnesses. With that letter was sent a bundle of documents. The list of documents is set out at page 398 of the bundle for this hearing.

70 The Claimant set out her comments on the report and documents supplied to her, and prepared her own bundle of documents.⁶ They were provided to Mr Orr, probably on 29 January 2014. The Claimant pointed out that the wording of the allegation in the report was different from that in the letter of 15 October 2013 suspending her. The Claimant questioned which Behaviour Policy was in force saying that she had not seen the

⁶ A list of the Claimant's documents is at page 398A of the bundle.

2013 version before. She set out points from the Department for Education 2013 Advice document mentioned above. After referring to there being disruption in class the Claimant then said the following:

The child then head butted me in the chin with such force that caused me severe injury. I reacted by grabbing him by the arms to which he resisted and pulled him out of the class. When I responded to what had happened to me; my response was instantaneous. There was no malice or desire to do the child any harm. I simply responded in such a way as to remove him from the class. In that moment, I knew I had been hurt; I could not know what was going on in his mind what he would do next. So, I removed him from the class in a way consistent with the Behaviour Policy, DFE advice and the Law. To send a red card or to take the rest of the class out in such circumstances is not practicable, as recognised by the DFE advice (F19). The DFE advice also gives examples of unreasonable force (. . .) and I did not do any of these; I grabbed the child by the arms. I did not cause him any harm; it was me who was injured.

- 71 The disciplinary hearing took place on 4 February 2014. The panel consisted of Pamela Fennell who chaired the hearing, John Freckleton and Mark Howarth. Ms Fennell and Mr Freckleton were Governors of the School, and Mr Howarth was a Governor of another School. The disciplinary panel was advised by Steven Parker, an HR Manager with the London Borough of Southwark. The Claimant was present and was not accompanied at her own choice. The management case was presented by Mr Cooper. Evidence was given by Mr Roffey, Ms Anderson, and Mr Borthwick in that order. The notes of the meeting are substantial but are not a precise transcript. I summarise the process and those matters to which my attention was drawn.
- 72 Mr Cooper is recorded as saying at the outset that the key facts were that the Claimant had used physical force, and had contravened the school policy of which she was aware. Mr Roffey was then called, and he confirmed that his statement was accurate. When asked what he meant by restraint he replied that Child B was not struggling or trying to get away. The Claimant asked him how she could have been behind Child B and also shouting directly into his face to which Mr Roffey replied that there was a chair between them and the Claimant was shouting into the side of child B's face. He said he did not know what was being shouted. In the seconds during which he was looking into the classroom he did not see Ms Anderson.
- 73 Ms Anderson was then called. She confirmed the accuracy of her statement and specifically stated that she had been in the classroom at the time. Ms Anderson said in reply to a question from Mr Cooper that shaking a child with two hands on his shoulders and putting one hand up his back was not acceptable restraint. There were lengthy exchanges as to exactly what Ms Anderson had been doing with various children at the time. Ms Anderson said that she wrote her statement when she went home that evening. It will be recalled that there was an obvious error in either the day or date of the manuscript statement.
- 74 Mr Borthwick then gave evidence. He referred to the red card system as primarily to safeguard children and that it is used most frequently for first aid purposes. He said that he believed that the Claimant's behaviour was in breach of the 2013 Behaviour Policy. He confirmed that that policy had not yet been approved by the Governors. Later on Ms Fennell asked Mr Borthwick about the difference between the 2010 and 2013 policies. He

said that the reason for the change was for the safety of 'ordinary' staff so that it was clear that a senior member of staff would be needed in such circumstances. He stated that the change had been discussed at the Inset day and that the Claimant had been present.

75 Mr Borthwick confirmed that the meeting which Ms Anderson had attended with him in her capacity as a GMB representative had been on 4 October 2013. When asked by the Claimant whether he could confirm that Ms Anderson was not in her class at the relevant time he said that he could not do so.

76 Mr Cooper then made a further presentation of the management case. He said that Child B was not endangering others, although he may have been disruptive. The Claimant was in breach of the Behaviour Policy, whichever one was applicable. She should have used the red card system. Mr Cooper said that his conclusion was that the Claimant had inappropriately handled Child B. The Claimant then asked questions of Mr Cooper. The principal point raised was about the presence of Ms Anderson at the time of the incident.

77 The Claimant then gave evidence. She said at the outset about the incident:

I wasn't making a decision, it was an offscale reflex action to an incident.

78 The Claimant said that the 2010 Behaviour Policy was the one in force at the time, and that she had not seen the 2013 version until included as part of the pack for the hearing. She said that the 2013 Policy contradicted the DfE Advice. I was specifically referred to three passages in the notes of the hearing where the Claimant referred to the incident:

I was not refusing to follow the behaviour policy or red card – for these children, the red card does not work. I told him to come back to his seat by the count of 10. I held a chair out for him and started counting – by the time I reached 5, he had sat down, but was kicking out. I was standing over the chair holding it and he just erupted. The child headbutted me in the chin - there was no time. I grabbed him by the arms. He resisted and I pulled him out of the class. I had nothing – I just grabbed him. Everything happened so quickly. When I responded to what had happened to me; my response was instant. There was no malice or desire to do the child any harm. I simply responded in such a way as to remove him from class. I did not hit or strike the child or harm him in any way; it was me who was injured. I merely removed him with enough force – the law takes account of cases such as this.

79 There was an exchange between Mr Cooper and the Claimant:

Cooper – You said your reaction was an 'offscale reflex action'

Claimant – I am not saying my reaction was off the scale, but using [Ms Anderson's] term. The line graphs are my interpretation – reflex action is that which wasn't planned – because we are all individual, our reactions are all different.

80 There was a further exchange:

Fennell – . . . Was it a freak accident, reaction not thought through? Might it have been a natural reaction but not appropriate?

Claimant – Removing from the class was appropriate

Fennell – Did you ask the child to stop? Seems odd to react so quickly to remove. Had you thought through your other options?

Claimant – I didn't want him hurting others

Fennell – Could you have asked

Howarth – If it happened tomorrow, would you do the same thing?

Claimant – I wouldn't hold his chair- if kicking legs, I would stand in position to ensure another child is not hit. If I had stood, it would have prevented him.

81 In cross-examination in this hearing the Claimant maintained that at the disciplinary hearing she was intimidated into accepting that she had grabbed the child instantly because she felt she was in a nightmare and she was begging for her job. The Claimant denied that her account of what happened on 8 October 2013 as set out above was in fact correct, and she said that the contemporaneous notes prepared by Mr Borthwick shortly after the incident were accurate.

82 Mr Cooper and the Claimant then summed up their respective cases. Her case was, in essence, that she had used reasonable force to control a pupil. There was then an adjournment for about 40 minutes for the panel to reach a decision. On the resumption Ms Fennell announced that the panel was satisfied that the investigation had been reasonable and appropriate, and that they had found that the Claimant had inappropriately handled a child in breach of school policy. After a further adjournment the Claimant made some points in mitigation. In particular she said the following:

The school policy I followed allows me to remove a child from the classroom. I pulled him out of class. I did not restrain him I just removed him from the class. Nigel [Roffey] confirms I was not restraining the child. I was pulling him out of the class but he was resisting me. It could appear I was shaking him because he was resisting. I was not deliberately shaking him. He was kicking his legs so I had a genuine belief he could hurt another child. On reflection I should have stood between him and he would have stopped. So I have learned from that. In 19 years nothing like this has happened it was complicated by me using the word restrain. The likelihood of it happening again is low. I would ask the panel to take this as a freak event. I did not mean it to happen. This should not end my career. If you do dismiss me I wouldn't be able to work with children again. That would be an injustice.

83 The panel decided that the Claimant was to be dismissed without notice. Two letters were sent to the Claimant in relation to her dismissal. The first letter dated 12 February 2014 is the more formal one, and was from the Director of Education. In the letter the dismissal was confirmed. The Claimant was informed of her right to appeal with the following guidance:

Your submission should identify the grounds of appeal you wish to pursue. Your appeal may be made on one or more of the following grounds:

- That there was a failure to follow the relevant procedure prior to or at a disciplinary hearing which materially affected the results of the disciplinary/dismissal hearing to the detriment of the employees.
- That the finding that a charge was proven was unreasonable.
- That the action of dismissal was too harsh in the light of all the circumstances including any mitigation.
- That there is relevant new evidence not available at the time of the dismissal and which would materially change the outcome of the disciplinary/dismissal hearing.

84 The second letter is much longer. It is dated 17 February 2014 and is from Mr Parker. The letter must of course be referred to for the detail.

The following are what I consider to be material extracts, taking into account the passages to which I was referred:

As outlined in the charge the disciplinary panel were asked to consider two aspects in terms of breaches of conduct: the first being on 8th October 2013 you inappropriately handled a student in removing the student from your class: and secondly your actions in handling the student in this manner were a breach of the Schools behaviour policy. In so far as the disciplinary panel found evidence from the case as presented that both of the above elements of the charge as proven, the disciplinary panel were clear both met the test of gross misconduct.

On the basis of the evidence presented to the hearing, the panel was satisfied that you then handled the child in a way to forcibly remove him from the class to an adjoining area. The panel were satisfied that handling the child in this manner was not appropriate. This remained the panels' view even taking into consideration (as stated and evidenced in your documentation) the injury that you had sustained through a blow from the back of the child's head. Furthermore, your actions to hold and forcibly remove the child from the class was not appropriate in the view of the panel because the child posed no risk to other children by his actions. The panel came to this conclusion on the basis of evidence provided by two witnesses, one who was walking past the classroom (NR) the other a teaching assistant (MA) who was in the class.

. . . the panel were clear that your actions in handling the child did not adhere to the schools behaviour policy. In this regard while the panel heard evidence from both parties concerning which behaviour policy (2010 or 2013) was in operation on the 8th October 2013: the panel was equally clear that you were aware of the existence of the procedure (either version). You had attended an INSET day (in September 2013) when the revised procedure was discussed by the senior management team with school staff and adopted for use at that meeting, albeit evidence given by the head teacher at the hearing stated that it had been confirmed at the INSET day that the policy would be reviewed while in operation during the autumn term. The issue of the adoption or approval of the behaviour policy by the school Governors was not relevant in the view of the panel in so far as the panel were clear the senior management team did have a policy in place and were clear it should be used operationally (following the INSET day) within the school and this was known by the school staff including you as a professional teacher.

The panel were also of the view having heard evidence that neither version of the procedure provided reasonable justification or cause to legitimise your actions. The panel were further clear the guidance you cited from the Department for Education (July 2013) was not, as you asserted, the law and the school was in effect complying with the spirit and intent of the guidance in so far as the school had a clear procedure for dealing with behaviour issues within the school.

In reaching its decision, the panel considered your perspective of your actions as being reasonable due to being dazed (due to an injury) and being reflex actions or off scale at the time of the incident as you describe them. The panel however also noted in your mitigation statement you conceded that you should have handled the situation differently. The panel was not convinced your points of explanation of your actions at the time in any way justify these actions, and indeed only reinforced concern that you may react in a similarly inappropriate manner on a future occasion and contradict the schools behaviour policy.

- 85 The Claimant did appeal by a letter of 21 February 2014. As a preliminary the Claimant objected to the terms of the letter of 12 February 2014 in that, she said, it did not include 'the precise nature of the misconduct proven' nor the 'basis of the panel's decision' as required by the Disciplinary Procedure. She accepted, however, that those matters had been rectified by the letter of 17 February 2014.

- 86 The Claimant then set out her detailed grounds of appeal under the four headings set out by Mr Parker in his letter of 17 February 2014. The new evidence which the Claimant wished to introduce and have considered by the appeal panel consisted of various letters from parents of pupils at the school, and what were said to be notes of a conversation by Lorraine Mills with the mother of Child B. In particular there was a letter with an unidentifiable signature and no name on it apparently from a parent of a child in the Claimant's class in which it was said that there was no other teacher or helper in the classroom at the time of the incident. Ms Fennell prepared a management case in response to the grounds of appeal.
- 87 The appeal was heard by another panel on 28 March 2014 chaired by Mrs Brooks, the Chair of Governors. She was accompanied by Sarah Hyder and Charlotte Moore. Ms Fennell and Mr Parker were present representing the management, and the Claimant was present and on this occasion she was accompanied by a Mrs Mills, described in the notes of the hearing as a 'McKenzie Friend'.
- 88 Ms Fennell prepared a document setting out the disciplinary panel's position on the appeal. I consider the following paragraphs to be particularly material:
- 5.3.1 With regard to witness evidence, the panel was satisfied on the balance of probability Megan Anderson, the teaching assistant was in the classroom at time of the incident, as outlined in her written statement and also Patricia Sawyer's statement.
- 5.3.2 The panel also found the witness evidence given by Nigel Roffey reliable in terms of the handling of the child.
- 5.3.3 The panel also noted in [the Claimant's] mitigation statement she conceded she could have handled the situation differently.
- 5.3.4. The panel heard evidence concerning which version of behaviour policy (2010 or 2013) was in operation on 8 October 2013. The panel was clear that [the Claimant] was aware of the existence of the permission card system in a procedure in operation at school.
- 5.3.5 The panel was clear that [the Claimant's] actions in handling the child did not adhere to school's behaviour policy. The panel was clear from evidence presented that neither version of the school's behaviour procedure provided reasonable justification or cause to legitimise [the Claimant's] actions.
- 5.3.6 The panel when finding the charge proven was clear, it was doing so on the basis of the "balance of probabilities" test not on the test of "beyond reasonable doubt". The former test the panel was advised was the appropriate tests to be used in employment related matters.
- 5.4.1 The panel was satisfied that Child B having sat down stood up suddenly and struck [the Claimant] accidentally with the back of his head of [the Claimant's] chin and/or side of her head. This was uncontested by both parties.
- 5.4.2 The panel was fully appreciative that [the Claimant] had sustained injury but again this could not be seen in any way as justification for [the Claimant's] actions.
- 5.4.3 The panel did consider the injury [the Claimant] sustained but did not feel [the Claimant's] actions to then hold and forcibly remove Child B from the class were appropriate.
- 5.4.5 The panel was not convinced that [the Claimant's] points of mitigation explaining her actions in any way justify them as being appropriate and only reinforced concern that [the Claimant] might react in a similarly inappropriate manner on a future occasion and contrary to the school's behaviour policy.
- 89 In opening the hearing, Mrs Brooks said that the purpose was to review the decision of the original hearing and answer the questions as to whether the decision to dismiss was reasonable, whether the case was proven on a balance of probabilities, had there been sufficient investigation, and whether there had been consideration of mitigation.

She also said that there was not to be a return to the original hearing unless it impacted on the four grounds being considered in relation to the appeal.

90 I was not referred to many parts of the notes of the appeal during this hearing. The principal issue to which reference was made was whether Ms Anderson had been present and the new documents from parents or grandparents of pupils in the class.

91 The Claimant presented her appeal, followed by a presentation in reply by Ms Fennell. In her presentation Ms Fennell said the following:

We agreed that around 3 pm [the Claimant] had been accidentally struck and responded by forcibly removing Child B from the class. [The Claimant], by her own admission said she had handled him. Had she pursued alternative options? The answer was no. Her first reaction was to physically remove Child B from the classroom. The sense given was of an instantaneous reaction. We were clear that considerable force was used – [Mr Roffey] was clear that it was assault. [The Claimant] accepts that considerable force was used – “it would have looked like the child was being shook back and forth.” The decision was very simple, regardless of whether Ms Anderson was in the class or not. Considerable force was used, the action was not carefully considered and was clearly in breach of both the 2010 and 2013 policies and DFE guidance on reasonable force. We were not convinced that any force was required. There might be a number of subtleties around the policies, but the position remains that a young child was inappropriately removed and we therefore upheld the charge.

92 The notes record that numerous questions were asked during the hearing. Following those questions each of the Claimant and Ms Fennell made final statements. The Claimant commenced her statement as follows:

I would apologise for my reactions – as a professional teacher, I should have been able to deal with pain. I almost went blind. It's unfair and unjust to expect teachers to be punchbags. To dismiss a teacher requires a serious proven offence, rather than on the balance of probabilities and assumptions. The child was disrupting the class and I had used a number of strategies. Child B erupted in a temper tantrum witnessed by others. To just stand there and continue to receive the kicking is not a fair request of teachers.

93 The substance of the reply by Ms Fennell is as follows:

The decision letter from the panel set out our views. We heard all the evidence and on the basis of this found that the charge was proven to be reasonable. There was more than one source of evidence allowing this conclusion. Whilst there are questions over some aspects, the decision was clear. . . . We considered the extent of investigation, but were confident that all eyewitnesses had been interviewed except children and that sufficient evidence had been gathered. The panel considered the injury, but did not believe it to constitute exceptional mitigation. No mitigation was offered which would permit an alternative sanction other than summary dismissal.

94 The outcome of the appeal was notified to the Claimant in a letter of 15 April 2014.⁷ The appeal was dismissed. Mrs Brooks said that the appeal panel discounted the ‘new evidence’ which the Claimant had sought to rely on because, broadly, of delay, the documents were not signed and there was no information about what questions had been asked of the children.

⁷ Wrongly dated 2015

- 95 The appeal panel was unanimous in agreeing with the decision of the disciplinary panel that the events were as described by Ms Anderson and Mr Roffey, and recorded in Mr Cooper's investigation report. However, Ms Moore was concerned that the sanction of summary dismissal was too harsh, and she would have substituted a final written warning. The reason for the dissent was that she did not consider it likely that such an event would reoccur. The majority noted that the Claimant had conceded that she should have done things differently, but she did not demonstrate that she felt that she had done anything wrong.

The law

- 96 This is a case of unfair dismissal where it is not in dispute that the reason for the dismissal related to the conduct of the Claimant, and thus it was a potentially fair dismissal. Further, although the wording of section 98(4) of the Employment Rights Act 1996 must of course be paramount, the guidelines in *Burchell* will usually be relevant.
- 97 I was addressed on the significance of the authorities starting with *A v. B* [2003] IRLR 405 EAT, followed by *Salford Royal NHS Foundation Trust v. Roldan* [2010] IRLR 721 CA and *Monji v. Boots Management Services Ltd* UKEAT/0292/13. Mr Linstead accepted that that as the allegations against the Claimant were such as having 'the potential to seriously damage her career', it was particularly important that the Respondents took their responsibilities seriously, focusing as much on evidence that may exculpate as that which may inculpate the Claimant.⁸
- 98 I quote from the headnote of *Roldan*:
- According to *British Home Stores v Burchell*, in cases of dismissal on the ground of misconduct, the tribunal has to decide whether the employer entertained a reasonable belief in the guilt of the employee. The employer must establish the fact of the belief; that there were reasonable grounds in his mind to sustain that belief; and that he had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. According to *A v B*, it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite.
- 99 I was referred in this context to the judgment of HHJ Eady in this case. In paragraph 12 of her judgment she said that it was
- acknowledged by the EAT in *Monji* that the higher test could be satisfied even though certain lines of enquiry were not pursued where there was no evidential basis to suggest that another line of enquiry could have led to an unravelling of the case against the Claimant.
- 100 I was asked by Mr Linstead to read the whole of paragraph 13 of the judgment which is as follows:
- I am not entirely comfortable with what might seem to be an attempt to elevate a fact-specific upholding of an ET decision in *Monji* into laying down some kind of broader point of principle. That said, even accepting the more stringent requirements that will arise when an employer is investigating a potentially career ending disciplinary charge, it is right to say that an ET must still be careful not to substitute its view as the importance of a particular investigatory step open to the reasonable employer or to ignore the possibility that a reasonable employer might reasonably conclude that certain steps were simply immaterial given the circumstances of the

⁸ Mr Linstead's submissions paragraph 5.

case. The touchstone remains section 98(4) of the Employment Rights Act 1996 and the band of reasonable responses test.

- 101 There are two other basic points to be made. The first is that there is no burden of proof on either party as to the fairness or otherwise of the dismissal. The Claimant does not have to prove that the dismissal was unfair, nor the Respondent that the dismissal was fair. It is a matter for the Tribunal in accordance with section 98(4) of the 1996 Act. The second point is that the Tribunal must always apply the test of the band of reasonable responses in respect of all aspects of the dismissal, including the procedure and the ultimate decision to dismiss the Claimant. It is not the function of the Tribunal simply to substitute its own view in respect of any relevant element for that of the employer.

Submissions and conclusions

- 102 Each of Mr Harris and Mr Linstead provided very substantial and detailed written submissions of nearly 70 pages in all. They were supplemented by oral submissions during which each counsel commented on the submissions of the other. Mr Linstead addressed the issue of credibility of witnesses, and Mr Harris referred to the antipathy between Mr Borthwick and the Claimant, and discrepancies in the Respondent's evidence. I have noted those and other general matters. I comment that I would have been very surprised if there had not been discrepancies in the evidence, particularly after a period of over four years since the incident in question occurred.
- 103 Because of the structure of the submissions made by Mr Harris a convenient way of considering the competing submissions is to divide them up into different points or topics and set out the submissions on each, or at least the principal elements of the submissions. I set out my conclusions on certain aspects after summarising the submissions, but set out at the end of this document my overall conclusions. In largely following the structure of the submissions of Mr Harris I am not suggesting for one moment that there is any burden of proof on the Claimant to demonstrate unfairness.

Procedures

- 104 Mr Harris first of all invited the Tribunal to 'take account of the numerous times that the School acted in breach of its own disciplinary procedure in its dealing with disciplinary matters with' the Claimant. Mr Harris referred to various aspects of the procedure adopted by the School in respect of the incident in 2012 mentioned briefly above when introducing the relevant facts. I consider that any procedural errors which may have occurred in that respect (as to which I make no findings) are simply not relevant the issue as to whether there was a fair dismissal following the incident on 8 October 2013.
- 105 Mr Harris said that Mr Borthwick had imposed a cooling-off period on 8 October 2013, and extended it on 11 October 2013 whereas the disciplinary procedure provided that such cooling-off period should be mutually agreed with the employee. It had not been mutually agreed and therefore there was a breach of the procedure. Further, he said, the imposition of the cooling-off period was clearly a suspension based upon

the wording of the letter of 8 October. The later suspension was also in breach of the procedure, said Mr Harris, because the stated ground of it being to allow a proper and fair investigation to be carried out was not in the procedure. As pointed out by Mr Linstead I note that the wording in the procedure refers to circumstances where the presence of the employee on site 'makes a fair investigation impossible'.

- 106 Mr Harris also submitted that the suspension was unnecessary and gave the message that guilt had been established and the Claimant was not going to return to the school. He relied on *Gogay v Hertfordshire County Council* [2000] IRLR 703 and *Crawford v. Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402 for the proposition that knee-jerk suspensions were to be deprecated. That comment about 'knee-jerk reactions' comes from the last sentence of paragraph 59 in the judgment of Hale LJ as she then was. The comment was made in the light of the facts of that case as is apparent from the actual wording of the sentence.
- 107 Mr Linstead accepted that the Claimant had not agreed to a cooling-off period but said that it made no difference to the fairness of it. Further, he said that as the Claimant was away ill because of her injury then the difference in terminology was not relevant. Mr Linstead submitted that suspension was appropriate so as to ensure that any investigation was not compromised. The Claimant should not be in a position to talk to either Child B or his mother. Child B was in the Claimant's class. This was particularly important because at the time there was the possibility of a police investigation. He submitted that the cooling-off period and subsequent suspension was not a knee-jerk reaction as characterised by Mr Harris.
- 108 I prefer the submissions of Mr Linstead on these points. It is not the law that any breach of a written procedure makes a subsequent dismissal unfair. The situation facing Mr Borthwick was of a serious allegation having been made against a member of staff. In my view it must be right for steps to have been taken to ensure that a proper investigation could be carried out, and also that the Claimant could not have any further contact with Child B who was in her class. This was especially the case where there was the possibility of a police investigation being undertaken. Further, this point is really academic because it transpired that, unbeknown to Mr Borthwick at the time, the Claimant was to be away because of her injury. To my mind the difference between the wording of the ground for suspension in the written procedure and that set out in the letter of 16 October 2013 is very slight indeed and is of no importance to the fairness of the dismissal. I also note that the phrase in the procedure is 'should be mutually agreed' and not 'must be mutually agreed'.
- 109 Mr Harris mentioned the antipathy between Mr Borthwick and the Claimant. I have already mentioned something of the history of the Claimant's relationships with the previous Head Teacher and other members of staff. I do not consider any antipathy which there may have been to be material. I fail to see what else Mr Bothwick could have done in the circumstances commensurate with his responsibilities as the Head of the School. In any event, the evidence of Mr Borthwick was relatively incidental to the outcome of the disciplinary proceedings.

- 110 Mr Harris also raised matters relating to the Claimant allegedly not having been told what a strategy meeting was, that the recommendation made that the Governors undergo diversity training following a grievance raised by the Claimant in 2012 had not been followed, and that the Claimant had not been informed of the outcome of a grievance raised on 13 October 2013. These matters appear to me not to be directly relevant to the issue to be decided.
- 111 All those points were expressed by Mr Harris to be by way of preliminaries. He then set out in his written submissions the principal points he wished to make as to unfairness.

Concealment of documentary evidence

- 112 The first point made by Mr Harris related to alleged concealment from the Claimant of documentary evidence until the appeal or later. The first documents were the notes made by Mary Kelly of the notes of her brief conversation with Child B just after the incident. As the reason for not including them was that there had not been an interview by a specialist, then a specialist ought to have been arranged to interview the child. The point made by Mr Harris is that the notes did not refer to the child having said that he had been shaken by the Claimant.
- 113 Mr Harris referred me to *Old v. Palace Fields Primary Academy* UKEAT/0085/14. That case also involved a teacher whose career was at risk. Two witness statements which had been taken from 10 or 11 year old children were not provided to the disciplinary or appeal panels. The Employment Tribunal found the dismissal to have been fair. HHJ Peter Clark noted there is an obligation on an employer to disclose material which could be of assistance to the employee and he remitted the matter back to the same Employment Judge to consider again whether the dismissal was unfair in accordance with section 98(4) of the 1996 Act.⁹
- 114 Mr Linstead submitted that it was reasonable of the Respondents not to have disclosed the notes. There had not been a proper interview of child B, which would have been a matter for the police. The evidence was inevitably unreliable. Further, the disciplinary panel had the evidence of two adult witnesses who had not been involved in the incident. He reminded me of the evidence of Ms Fennell as to why the appeal panel had not sought the notes. It was reasonable in all the circumstances for the documents not to have been provided.
- 115 The next documents in question are the manuscript notes made by Mr Borthwick of what he was told by Mr Roffey and then by the Claimant immediately after the incident. Mr Harris submitted that the notes of the conversation with Mr Roffey were concealed from Mr Cooper, and that meant that the investigation was neither fair nor reasonable. The written statement by Mr Roffey was a considerable embellishment of what he had told Mr Borthwick because the words 'violently backwards and forwards' had been added, and 'speaking' had been changed to 'shouting'. Further, said Mr Harris, at the disciplinary hearing Mr Roffey is recorded as having said that he did not know what the Claimant was

⁹ There were other grounds of appeal also.

shouting. Thus, said Mr Harris, the evidence of Mr Roffey was unreliable, and that would have been apparent to the disciplinary panel if the notes made by Mr Borthwick had been disclosed. Mr Linstead submitted that any differences between the notes made by Mr Borthwick, which the disciplinary panel did not have, and the typed statement and interview notes of Mr Roffey, which the panel did have, were inconsequential.

- 116 The notes of what the Claimant had said to Mr Borthwick were also important, said Mr Harris, because the Claimant had stated in her witness statement that she had denied to Mr Borthwick that she had shaken child B, but that point was not recorded in the notes. Mr Linstead submitted that the fact the disciplinary panel did not have the notes in question was inconsequential, and that the Respondent did in fact carry out a fair procedure. He said that the information provided by the Claimant in the form HS1 was essentially the same as in the notes made by Mr Borthwick, and the disciplinary panel had that form in the pack of papers for the hearing. On that form she had said that she had asked Child B to stop. In the alternative, there would have been no difference to the outcome. He said that Mr Cooper was concentrating on obtaining written statements from the witnesses in question.
- 117 In my judgment the importance of these matter has been exaggerated by, or on behalf of, the Claimant. The notes made by Ms Kelly were very brief. The typed version which was converted into a 'question and answer' format was one question and one answer. They cannot possibly be considered as a considered and reliable statement made by child B. I entirely accept that for there to be a reliable interview with a young child then it should be carried out with an appropriate procedure. This exchange was nothing more than the Deputy Head asking a child what had happened. The fact that there was no reference to 'shaking' does not appear to me to assist the Claimant materially. What Child B said was that the Claimant dragged him into another room.
- 118 I have considered *Old*. In that case the statements from 10-11 year old children were apparently formal statements. HHJ Peter Clark said that a point made on behalf of the employer
- does not address the obligation on the Respondent to disclose material which may support her case to the Claimant once it has been generated in the course of the investigation.
- 119 I fail to see how the brief notes in question could properly be said to support the Claimant's case in the circumstances in which they arose.
- 120 I do not accept that, as submitted by Mr Harris, Mr Borthwick agreed in cross-examination that Mr Roffey had considerably embellished his statement when producing the typed version. My notes record Mr Borthwick as saying that he acknowledged that the wording was different, but Mr Borthwick then added that the essence was the same, and that Mr Roffey was probably trying to be clear. Be that as it may, the comparison is between the manuscript notes made by Mr Borthwick of his conversation with Mr Roffey immediately after the incident and in the heat of the moment, with the short typed statement made by Mr Roffey later. I would not expect the wording of Mr Borthwick's manuscript notes to be identical to the written statement later made by Mr Roffey. What is important in my view is that Mr Roffey was formally interviewed on 20

November 2013 by Mr Cooper, and he also gave evidence at the disciplinary hearing. I do not accept the submission by Mr Harris that if the documents had been provided to the disciplinary panel then Mr Roffey's credibility would have been undermined and that the panel could not have fairly found that Mr Roffey's evidence was reliable.

- 121 The third document in question is the manuscript note made by Mr Borthwick of the conversations he had with the Claimant immediately after the incident. The point made is that the document does not refer to the Claimant having said that she shook Child B. In my view this is even more difficult for the Claimant to pursue as a ground of unfairness. Not only is there the difficulty that the notes were only brief manuscript ones made immediately after the incident, rather than a more formal statement, but the Claimant was later interviewed during the investigation, and also of course was present at the disciplinary hearing to put forward her own version of events. Any notes made by Mr Borthwick cannot in all reality have been of any significance by comparison with information formally supplied by the Claimant during the investigation and disciplinary process. Further, the fact there is no mention of the Claimant having shaken Child B cannot properly support the proposition that she in fact told Mr Borthwick that she had not shaken Child B. I also accept Mr Linstead's point that the almost contemporaneous form HS1 specifically included the statement that the Claimant asked Child B to stop, and that that was available to the disciplinary panel.

Backdating of documents

- 122 Mr Harris submitted that Mr Cooper's investigation report, and both the manuscript and the typed statements of Ms Anderson had each been knowingly backdated, although he accepted that that did not make the dismissal unfair. Mr Harris said that it demonstrated a disregard for the truth. In my view these are matters of supreme unimportance. I do not accept that either document was 'knowingly backdated' in the sense that there was any attempt to deceive anyone. In particular, Mr Harris submitted that Mr Orr and Mr Cooper conspired together duplicitously to backdate the investigation report. I reject that submission. Mr Harris did not go on to suggest what possible motive there could have been for such conduct.
- 123 It is clear from the notes of the LADO meeting on 14 October 2013 that Mr Borthwick was tasked with having Ms Anderson's statement typed, and I have concluded that that is how the document in question came about. It is headed 'Tuesday 8th October 2013'. That is not backdating but merely stating the date of the incident about which Ms Anderson was writing. Mr Harris further submitted that the 2013 Behaviour Policy had been backdated from 10 December 2013 to September 2013. I have already rejected that proposition as a matter of fact.

Choice of investigator

- 124 Mr Harris submitted that Mr Cooper should not have been the investigator because he had been the chair of the appeal panel which heard the Claimant's appeal against the written warning issued in 2012. Mr

Linstead submitted that as an accredited trade union representative it was appropriate for him to carry out the investigation.

- 125 I do not consider the choice of Mr Cooper to have been unfair. The Claimant did not object to him at the time. Further, he was only carrying out an investigation, and although making a recommendation and presenting the management case, he was not involved in the making of the decision to dismiss the Claimant.

Conduct of investigation

- 126 It is axiomatic that there must be an investigation which is fair and reasonable in the circumstances. Mr Harris made the following points:

126.1 Mr Cooper did not ask Mr Borthwick on 20 November 2013 whether he had made any notes of a meeting he had had with the mother of child B.

126.2 Mr Cooper asked Mr Borthwick about the Claimant's performance, and what Mr Borthwick considered to be acceptable restraint, both of which were issues irrelevant to the investigation. Thus, said Mr Harris, Mr Cooper did not understand what he was required to do.

126.3 Mr Borthwick was not asked by Mr Cooper how it was that he had understood that Ms Anderson was distressed immediately after the incident, as was stated by Mr Borthwick at his interview.

126.4 Mr Borthwick was not asked if he had made any notes of the conversations with the Claimant and Mr Roffey on 8 October 2013.

126.5 The investigation interview of Mr Roffey was perfunctory, with only six questions being asked. He was not asked for how long he was outside the classroom door nor for how long he saw the Claimant shaking child B. He was not asked if he saw Child B struggling. He was not asked if he had seen Ms Anderson in the room. Mr Roffey was, on the other hand, asked about restraint, which was not relevant.

126.6 A particular contradiction was not pursued by Mr Cooper. The statement made by Mr Roffey said that the Claimant was shouting directly into child B's face, whereas at his interview with Mr Cooper he had said that the Claimant was behind child B. Therefore, said Mr Harris, Mr Cooper ought to have been alerted to the unreliability of Mr Roffey's evidence.

126.7 Mr Roffey was asked if he had written a statement, which he confirmed he had, but he did not say that he had typed a statement. He was not asked if he had typed the statement.

126.8 There were discrepancies also in the evidence of Ms Anderson which were not pursued. She had said in her manuscript statement that the Claimant shook Child B and grabbed his arm twisted it sideways and pushed him towards the wet area, whereas in the investigation meeting with Mr Cooper she said

that the Claimant had started shaking Child B and put one hand up his back and took him to the wet area.

- 126.9 There was no valid basis for Mr Cooper to have said to Ms Anderson during her interview that the Claimant had gone into a rage, and Mr Cooper had accepted in cross-examination that that was his opinion.
- 126.10 No enquiries were made of the Year 5 teacher to ascertain if Ms Anderson had gone into her class, nor were enquiries made of others to check the information given by Ms Anderson.
- 126.11 No enquiries were made of the Learning Mentor as to what Child B or other members of the class had told her.
- 126.12 When the letter of 13 November 2013 was sent to the Claimant requiring her to attend the investigatory interview she was not supplied with copies of the documents then available to Mr Cooper, contrary to the School's disciplinary procedure. That, said Mr Harris, alone made the investigation unreasonable and unfair.
- 126.13 While the Claimant was asked to comment on the evidence of Ms Anderson, she was not supplied with copies of Ms Anderson's original manuscript and typed statements.
- 126.14 The Claimant was not asked to comment on the evidence of Mr Roffey given to Mr Cooper.
- 126.15 There was an insufficient investigation as to whether Ms Anderson had been at a disciplinary meeting with Mr Borthwick on the afternoon in question.
- 127 Mr Linstead did not seek to deal with each of the above detailed points. He submitted that the investigation was a reasonable one in all the circumstances. Mr Borthwick acted promptly to have Mr Roffey and Ms Anderson make manuscript notes of what they had seen. Mr Cooper interviewed the relevant witnesses. He then took proper steps to check the conflict of evidence between the Claimant and Ms Anderson as to whether Ms Anderson had been in the room at the time, as the Claimant was asked to comment on the investigatory interview of Ms Anderson, and information was later obtained from Ms Sawyers after the Claimant had mentioned her.
- 128 Mr Linstead submitted that it was not necessary for further witnesses to have been interviewed in order for the investigation to have been a reasonable one. It is not necessary for an investigator to investigate every point raised by an employee unless it can be shown that that would have led to the case against the employee unravelling. There were no other witnesses to the incident. The Claimant did not suggest that further witnesses should have been interviewed until she put in her appeal. Further, the Claimant could herself have brought witnesses to the disciplinary hearing.
- 129 The fairness of an investigation is an issue which requires careful consideration because it is one of the fundamental aspects to consider in the context of a dismissal for a reason relating to the conduct of an

employee. Again I remind myself that I have to consider whether what was done was within the range of reasonable procedures. Each of the points made by Mr Harris set out above are factually correct. Whether they are of significance is another matter.

- 130 Mr Harris submitted, as set out above, that there was a breach of procedure in that the Claimant was not supplied with copies of information then available when Mr Orr wrote to the Claimant on 13 November 2013. Mr Orr accepted that that was the case, although he pointed out that (apart from the documents mentioned above as allegedly having been concealed) the Claimant was supplied with all material documents when she was notified of the date of the disciplinary hearing on 20 January 2014. I do not accept that a breach of a policy or procedure *simpliciter* necessarily creates unfairness. Mr Harris submitted that the Claimant ought to have been told at that stage what others were saying. At the time the letter was written there were no notes of the interviews with the other witnesses as they had not taken place, although they had taken place by the time that the Claimant was interviewed on 25 November 2013. However what to my mind is important is that the Claimant was provided with all the material documents containing the information before the disciplinary hearing, and that was done. I do not accept as a proposition that in a disciplinary process it is necessary for the employee to be provided before the initial investigatory interview with all the relevant documentation then in existence. What is important of course is that the employee should know what the investigation is about. It may be necessary at that stage to discuss particular documentary evidence, but that is a different matter.
- 131 I agree with Mr Linstead that there was no necessity to interview other witnesses. The material witnesses were those who had seen the incident, and Mr Borthwick because of his involvement in the matter immediately afterwards. I agree that the interview with Mr Roffey was brief, but I do not see the necessity for it to have been extended. He was asked the relevant questions, being what he had seen, and what he then did. Further, Mr Cooper and Mr Roffey then went to the corridor off which the classroom is situated, and the notes of the interview record that Mr Roffey showed Mr Cooper exactly where he was at the time of the incident. Mr Roffey was present at the disciplinary hearing and any variations as to shouting in Child B's face and where the Claimant was standing could have been raised then. The Claimant did not raise the issue. I consider the point about whether Mr Roffey wrote or typed a statement frankly to be absurd.
- 132 I also consider the point about the differences in the descriptions by Ms Anderson of what had occurred in relation to Child B's arm to be of no consequence. In my view there is no material difference between the two statements. I also do not see any unfairness in the Claimant not being supplied with a copy of Ms Anderson's manuscript and typed statements by Mr Cooper when asking her to comment on the issue as to whether Ms Anderson was present. Mr Harris did not suggest what prejudice there was to the Claimant. The issue was whether or not Ms Anderson was present at all at the relevant time.

- 133 Mr Harris criticised Mr Cooper for asking some questions and not asking others. While it may be said, perhaps with some justification, that some questions asked were not directly relevant in my view Mr Cooper knew exactly what he had to do, which was to seek to ascertain the truth as to what occurred between the Claimant and Child B at about 3.15 pm on 8 October 2013.
- 134 I do not accept that any of the above points made by Mr Harris created any unfairness.

Investigation report

- 135 Mr Harris also criticised the investigation report prepared by Mr Cooper.
- 135.1 There was an admitted inaccuracy in that Mr Cooper said that both Ms Anderson and Mr Roffey confirmed that the Claimant had shaken Child B and dragged him by his arms to Year 5 class.¹⁰ That has been accepted by the Respondents as an error.
- 135.2 The report did not say that the red card system was not mandatory.
- 135.3 It was nonsense to say that there was vagueness about Ms Anderson's presence in the classroom as the Claimant was clear she was not present.
- 135.4 There was an incorrect reference to the Council's policies and procedure.
- 135.5 The report was put in writing by Mr Orr using his own words. I was referred to *Ramphal v. Department of Transport* UKEAT/0352/14 and *Chhabra v. West London Mental Health NHS Trust* [2013] UKSC 80.
- 135.6 There was no mention that the Claimant had told Mr Cooper that Child B was kicking out and having a tantrum and that was why he was removed by the Claimant.
- 136 Mr Linstead responded to some of those detailed submissions. There was no merit in the submission that there was no vagueness about the presence of Ms Anderson, as there was a clear conflict of evidence. While it was correct that there was erroneous reference to the Council's policies, that did not affect the fairness of the procedure.
- 137 Mr Linstead submitted that there was no evidence that Mr Orr wrote the report, and *Ramphal* was distinguishable. I have already rejected on the facts the submission by Mr Harris that it was Mr Orr who put the report in writing using his own words. I have also found that it is not possible to ascertain exactly what text was originally prepared by Mr Cooper and what additions or amendments (if any) were made by Mr Orr. It is at least very substantially the work of Mr Cooper. I have considered the facts of *Ramphal* and agree that is it a very different case. In paragraph 50 HHJ Serota QC refers to the investigating officer having 'dramatic changes of view after representations from Human Resources, which clearly went

¹⁰ It is the words underlined which were in issue as far as Mr Roffey was concerned.

beyond giving advice on procedure and clarification and appear to have led to the reshaping of [the investigating officer's] views'.

138 I comment further on the report when setting out my overall conclusions below.

The disciplinary hearing

139 Mr Harris referred to the disciplinary hearing.

139.1 Mr Cooper accepted in cross-examination that he had not investigated exactly what breach of which policy was in issue.

139.2 Ms Fennell interrupted the Claimant on nine separate occasions and did not allow her to ask questions she wished to ask. Further, she herself gave evidence.

139.3 Ms Fennell did not take the contradiction in the information supplied by Mr Roffey seriously, saying there was no contradiction.

139.4 Ms Fennell accepted that paragraph 14.3 of her witness statement was wrong when she said that both Mr Roffey and Ms Anderson agreed that the Claimant had used force, and that it was wrong of Ms Fennell to say that the panel found that force was used based upon the evidence of the Claimant and Mr Roffey.

139.5 Ms Anderson was not asked about why there were two statements and about any difference between her statements and the information supplied at the investigation meeting. Further the error in the date of the manuscript statement was not pursued.

139.6 The evidence of Ms Fennell that the panel relied upon the 2010 Behaviour Policy was contradicted by her questioning of Mr Borthwick at the disciplinary hearing.

139.7 The decision was taken hastily in 40 minutes and the Claimant was not told what part of the Behaviour Policy had been breached.

139.8 The panel did not properly consider mitigation when deciding upon the penalty of dismissal.

139.9 The penalty of dismissal was unreasonable, particularly where the Claimant's future career was at stake.

140 Mr Linstead did not respond to each of those detailed points, but submitted that by the standard of the band of reasonableness the procedure followed in the run-up to the hearing, and in the hearing itself was fair. The Claimant was sent the hearing pack well in advance. Contrary to what was suggested during this hearing, Ms Fennell had not intervened excessively. The Claimant had had a proper opportunity to question the witnesses for the Respondents, and Ms Anderson in particular.

141 I consider the disciplinary hearing below when coming to conclusions.

The disciplinary charge and the reason for the dismissal

- 142 Mr Harris referred to the terms of reference of the investigation and of the disciplinary charge. I have referred above to the terms of the letter of 13 November 2013, the statement in the investigation report as to the allegation being made, and the terms of the letter of 20 January 2014. Mr Harris submitted that it was fundamentally unfair to charge a person with something that had not been investigated. Further, there was a lack of detail in the allegation. The allegation did not refer to what part of the behaviour policy had been breached, nor were details of the inappropriate handling provided.
- 143 Mr Harris referred to the dismissal letter of 17 February 2014 and submitted that there was reference to two elements, whereas there was only one charge. He said that it was clear that the primary reason for the dismissal was because the Claimant had forcibly handled Child B to remove him from the room, and that there was nothing to support that finding.
- 144 Mr Harris submitted that there had been a change in the allegation from that of shaking a child to that of shaking and inappropriately handling Child B to remove him from the room. It was then changed again to inappropriate handling in breach of the behaviour policy.
- 145 Mr Linstead submitted that on the evidence the reason for the dismissal was the manner in which Child B was handled and removed from the classroom involving the use of excessive force, and not merely for breach of a behaviour policy. He drew attention to the phrases in the dismissal letter of 17 February 2014:
- . . . inappropriately handled a student in removing the student from your class
- . . . you then handled the child in a way forcibly to remove him from the class to an adjoining area. The panel were satisfied that handling the child in this manner was not appropriate.
- 146 Further, the panel had stated that it accepted the evidence of Mr Roffey and Ms Anderson as to shaking the child, and holding him forcibly. It was clear that that was the substantive reason.
- 147 The dismissal, said Mr Linstead, was not for a breach of the 2013 Behaviour Policy. The Claimant had been given the benefit of the doubt on the point as to whether that policy was in force. The use of excessive force to handle the child out of the situation was in clear breach of the 2010 policy.
- 148 The disciplinary panel, said Mr Linstead, had a genuine belief in the guilt of the Claimant in relation to the reason for the dismissal. There was no evidence to support any suggestion of Mr Borthwick seeking to exaggerate the seriousness of the incident, nor of those later involved in conspiring together. Mr Linstead reminded me of the comments made by the previous Head Teacher about the Claimant, and complaints made by other members of staff about her. Also, the Claimant had raised a grievance against Mr Borthwick, but that was rejected at the initial stage, and on appeal, with the Claimant not troubling to attend the appeal.
- 149 In answer to the submission that the charge had been changed, Mr Linstead submitted that the real question was whether the Claimant understood the case she had to meet, it was clear what was the

allegation being made, and that the variations in the wording between the suspension letter of 15 October 2013, the letter of 13 November 2013 requiring her to attend the investigation interview, and the letter of 20 January 2014 notifying her of the disciplinary hearing were of form and not substance. Further, in the investigation interview Mr Cooper had specifically said to the Claimant that the allegation was of shaking a child. The reference to the behaviour policy put the disciplinary allegation into procedural context.

- 150 I find that the reason for the dismissal was that the panel believed that the Claimant had inappropriately held or handled Child B and forcibly removed him from the class.
- 151 It is incontrovertible that there were variations in the wording of the allegation being made against the Claimant. In particular there ought to be a correlation between at least the letter notifying the employee of the disciplinary hearing and containing details of the allegation with the letter notifying the employee of the outcome. A difference between the terms of the initial investigation and the ultimate charge is more likely. Having heard all the evidence, and read all the documents material to the factual allegation I accept the submission of Mr Linstead that the variation in the wording was of form rather than substance, and that the Claimant knew the factual allegation being made. Further, the panel knew the allegation it had to consider.

The disciplinary decision

- 152 Mr Harris submitted that the decision was not fair in certain respects, as below.
- 152.1 Too much weight was given to the limited and late evidence of Ms Sawyers when deciding that Ms Anderson was in the classroom at the time, and there was no reference to the Claimant's comments dated 11 December 2013 on the notes of the investigation interview of Ms Anderson.
- 152.2 The panel relied on the 2013 Behaviour Policy, although it was not in force, and there was no evidence to support Mr Borthwick's assertion that it had been discussed at the Inset day in September 2013. Ms Fennell stated at the appeal that the panel were clear that there should be no intervention, having mentioned the 2013 policy.
- 152.3 The panel had concluded that Child B posed no risk to others by his actions, such finding being based on the evidence of Ms Anderson and Mr Roffey. However, neither had been asked about the matter. Mr Harris submitted that Ms Fennell had agreed that that saying the child posed no risk was wrong. My note of Ms Fennell's evidence on the matter was that she thought it would have been better to say that any risk could have been mitigated.
- 152.4 A comment was made in the letter that the Claimant had said in mitigation that she should have handled the situation differently. Mr Harris submitted that the Claimant had been dismissed before she made that statement. That is incorrect. The statement was

made after the panel had upheld the allegations, and before deciding upon a penalty.

152.5 Ms Fennell had agreed in cross-examination, as indeed she had, that the Claimant's actions were a judgment call to be made in the circumstances.

153 There were reasonable grounds for the disciplinary panel to have held the belief in the guilt of the Claimant, said Mr Linstead. The panel had the independent evidence of Mr Roffey and Ms Anderson, and the evidence of each was consistent with that of the other. Their evidence was inconsistent with the Claimant's assertion that Child B was struggling and that that could have been interpreted as shaking him out of anger. Mr Linstead pointed out that the Claimant had said that she did not consider any strategies after she was hit but simply grabbed the child, and had referred to an 'off-scale reflex reaction'. That implied a momentary loss of self-control. Those comments were inconsistent with the Claimant's other assertion that Child B was a danger to others. The evidence was, said Mr Linstead, that the Claimant acted out of pure retaliation.

Reasonableness of the dismissal

154 Mr Harris submitted that in all the circumstances the dismissal was unfair and that there should not be any reduction in accordance with the *Polkey* principle.

155 Dismissal was within the band of reasonable responses, said Mr Linstead. Violent shaking of a child is extremely serious and unnecessary. The Claimant had acted impulsively, and it was reasonable for the panel to have taken the view that there was a risk of the Claimant repeating the behaviour.

The appeal

156 Finally, on the merits of the matter, Mr Harris turned to the appeal and made the following points.

156.1 It was unfair for the letter of 12 February 2014 to restrict the grounds of appeal to four headings.

156.2 Mrs Brooks should not have chaired the appeal panel because she had been involved from the outset, and also she had chaired the disciplinary hearing in 2012 referred to above. Further Ms Hyder should not have been on the panel because she had also sat with Mrs Brooks in 2012.

156.3 The panel should not have refused to rely on the additional documents which the Claimant wished to introduce as new evidence. Mr Harris submitted that the decision was made 'as they were unsigned'. That is not in fact what the notes of the appeal hearing record Mrs Brooks as saying. The notes are as follows:

We will add them to the bundle, but as they are not signed statements, they don't hold weight.

- 156.4 The statement by Ms Fennell to the appeal panel that the Claimant had accepted that considerable force was used by her was wrong.
- 156.5 Mr Harris submitted that Ms Fennell also told the appeal panel that the 2013 policy was clear and known within the school. That is not quite what the notes record, which is as follows:
Our decision was made on the basis of evidence submitted to the panel. We considered that actions were in breach of both policies – 2010 and 2013 – regardless of the interpretation as to who was responsible for safe handling, the senior leadership or otherwise. The 2013 policy was to make that clear and was generally known within the school.
- 156.6 Ms Fennell said that the panel had considered it difficult to interpret the 2010 policy as allowing the removal of a child from a class. Mr Harris pointed out it does in certain circumstances. I have set out the relevant extract above.
- 156.7 Mr Harris drew attention to the statement made by Ms Fennell that the disciplinary panel had not relied on the evidence of Ms Anderson but on that of the Claimant herself, and he compared that with the statement in the dismissal letter of 17 February 2014 that the panel had relied on the evidence of Mr Roffey and Ms Anderson. Ms Fennell stated in cross-examination that her evidence to the appeal panel was not correct.
- 157 Mr Linstead addressed the argument as to the limitation of the grounds of appeal to the four specified in the letter of 12 February 2014. He said that the Claimant had not identified at this hearing any points which she was unable to put forward as a consequence of the restriction. There had been a full, fair and lengthy hearing and the Claimant had been able to present her appeal as she wished.
- 158 It was apparent, said Mr Linstead, that the panel had considered the harshness of the penalty as Ms Moore had dissented on that point, and that the grounds of not following procedure and the charge not having been proven were within a review of the decision as set out in the School's disciplinary policy. He submitted that it was within the permissible band of reasonableness for the appeal panel to discount the new letters. It was not known how the information had been obtained, none of the parents were witnesses to the event, and there had been a material time delay. Mr Linstead pointed out that the appeal panel had gone beyond the policy in allowing the Claimant to have Mrs Mills with her at the appeal.

Polkey

- 159 Each of Mr Harris and Mr Linstead addressed the issue as to whether there should be a *Polkey* reduction. That is of course a difficult thing to do without knowing exactly what the Tribunal will find as to the reason(s) for the dismissal to have been unfair, particularly where challenges are being made to so many aspects of the procedure.
- 160 Mr Harris submitted that there should not be any *Polkey* reduction, saying:

If it is found that [the Claimant] was unfairly dismissed, it was not errors in procedure that led to that. It was the concealing of relevant evidence, the wholly inadequate investigation, the changing of the charge so that what [the Claimant] was dismissed for was not what had been investigated, and the appallingly unfair disciplinary that was not in any way remedied by the appeal which itself was a farce. Those are matters of substance, not matters of procedure.

- 161 Mr Linstead, unsurprisingly, submitted to the contrary and that there should be a 100% reduction in any award. The issue as to the date of the investigation report was immaterial. The provisions of the notes made by Mr Borthwick on the day would not have made any difference to the outcome. The provision to Ms Fennell of the notes of the conversation with Child B would not have made any difference. Finally, if there had been some other matter which made the decision unfair then there was a high percentage chance that the Claimant would have been dismissed at the same time or shortly thereafter.

Overview

- 162 In this case there has been a considerable volume of documentary and oral evidence, and the submissions of counsel have been very detailed. Mr Harris in particular made many specific criticisms of the process, most at least of which have been mentioned above. He also frequently used words such as 'astonishingly' and 'remarkably' in his submissions. That was his language, and it is for the Tribunal to decide if it is justified.
- 163 Having been through the evidence and submissions and dealt with certain detailed points it is appropriate to pause and stand back. The issue before me is whether or not the dismissal was fair in accordance with section 98(4) of the 1996 Act. There would be a subsidiary issue as to any *Polkey* reduction were I to find that the dismissal was unfair for any reason or reasons.
- 164 I have reminded myself again of the limited function of the Tribunal in these circumstances. The focus has to be on the actions (or omissions) of the employer, and the question is whether they fell within the band of reasonableness at that time. The Tribunal must not substitute its own view, and not every failing by an employer will of necessity render a dismissal unfair. I have set out some conclusions above but in coming to an overall conclusion have looked at the totality of the issues before the Tribunal, and not simply each individual point made by Mr Harris.
- 165 The documents which are particularly material are of course the notes of the investigatory interviews, the investigation report, the notes of the disciplinary hearing, the dismissal letters, the Claimant's grounds of appeal, the notes of the appeal, and the letter informing the Claimant of the outcome.
- 166 The admitted reason for the dismissal related to the conduct of the Claimant within section 98(2)(b) of the 1996 Act. The *Burchell* principles are directly applicable to this case. Chronologically the first question relates to the reasonableness of the investigation, and that includes the extent of the investigation and the report produced as a result.
- 167 I do not accept that any of the criticisms made by Mr Harris relating to the conduct of the investigation, whether singly or cumulatively, were such as to make the investigation process itself unreasonable and so unfair. I

have set out above my conclusions on certain specific points made by Mr Harris. What Mr Cooper did with the assistance of Mr Orr was to interview Mr Roffey and Ms Anderson who were the only potential witnesses to the incident. He also interviewed Mr Borthwick, although his evidence was of course of less significance. Having interviewed the Claimant Mr Cooper then asked her to comment on the evidence of Ms Anderson which contradicted her own evidence. That, to my mind, was perfectly proper. This was not a quick perfunctory investigation. It was undertaken seriously by Mr Cooper.

- 168 The result of that investigation was the report. I have made findings elsewhere on the allegation that there was a conspiracy between Mr Cooper and Mr Orr, and that it was Mr Orr who was the true author of the report. There are in my view two potentially valid criticisms of the report. The first is that the reference to Mr Roffey having said that Child B was dragged by his arms into the Year 5 class was admittedly wrong. The second is that it did not mention that the Claimant had said that Child B was having a tantrum and was kicking out. What appears to be being suggested is that the Claimant's own version of events was being ignored. On a very strict view this second criticism is also correct. However, the report states as follows:

[The Claimant] acknowledged she did physically restrain Child B (who was struggling) and removed him from the classroom by grabbing him by the arms from the front and pulling him out of the classroom.

- 169 A little further on the Claimant is reported on two occasions as having said that Child B had struggled or was struggling. Taking into account the fact that the disciplinary panel had the notes of the interview with the Claimant in which there was reference to a tantrum and kicking out, I consider the abbreviation to 'struggling' and 'struggled' was perfectly appropriate. The report was only just over two pages, and obviously could not set out verbatim every element of the evidence given by each of the witnesses.
- 170 My conclusion is that the investigation process, including the contents of the report, was a fair and reasonable process overall.
- 171 The allegation set out in the letter of 20 January 2014 was that the Claimant had inappropriately handled Child B in clear breach of the Behaviour Policy. The next matter to be considered is whether there was sufficient evidence in front of the disciplinary panel from which it could reasonably have concluded that that allegation should be upheld. It is here that the witness statements and the oral evidence given at the disciplinary hearing are all important.
- 172 Mr Roffey referred in his initial statement to the Claimant having shaken Child B violently. He confirmed in his interview with Mr Cooper that that was correct. He also confirmed at the disciplinary hearing that his 'statement' was correct.¹¹

¹¹ It is not clear if that refers to the original testament, or the notes of the interview with Mr Cooper, but it does not make any difference in the end.

- 173 Ms Anderson had said in her typed statement that the Claimant had grabbed Child B forcefully, shaken him, and twisted his arm. In her interview with Mr Cooper she repeated that the Claimant had shaken the child. At the disciplinary hearing she confirmed that the contents of the interview notes were accurate.
- 174 In the notes of her own interview the Claimant is recorded as having stated that she took Child B by the arms to Year 5. In her comments on Mr Cooper's investigation report the Claimant said that she grabbed Child B by the arms, and that that response was instantaneous. I have set out extracts from the notes of the disciplinary hearing above recording that on several occasions the Claimant made similar comments at the hearing. At this hearing the Claimant sought to explain those comments away by saying that she felt intimidated and was begging for her job. The Claimant may have felt intimidated (although there was no evidence of deliberate intimidation) but that is not the point. The disciplinary panel was entitled to accept what the Claimant said as being her version of events and the reason for her conduct.
- 175 I conclude therefore that the disciplinary panel had sufficient evidence before it from which it could reasonably conclude that the Claimant had inappropriately handled Child B. The next question is whether dismissal was a sanction which was within the band of reasonable responses. This is not a case where there was a policy listing specific matters as examples of misconduct which would ordinarily justify dismissal. The Disciplinary Procedure effectively defines summary dismissal as being a sanction which is available where the summary dismissal is justified.
- 176 The question is not whether a lesser sanction would have been a reasonable one to impose, but whether it was reasonable to impose the sanction which was imposed. This is precisely where a Tribunal must take care not to substitute its own decision for that of the employer. A Tribunal may consider a decision of dismissal to be harsh (and I make no comment as to this case) but it can still be reasonable for that decision to have been made. In this case, Ms Moore decided at the appeal that she would have given a final written warning rather than dismissed the Claimant.
- 177 I hold that the dismissal decision was one to which the Respondents could reasonably have come in all the circumstances. It was not one which went beyond the permissible limits on the facts as found by the disciplinary panel and as reviewed by the appeal panel. I have particularly borne in mind the overriding importance of the safeguarding of children.
- 178 The final matter to be considered is whether anything in the appeal process made the dismissal unfair. The points made by Mr Harris are set out above. It was at the very least unfortunate that the letter of 12 February 2014 referred to four heads of appeal being available, whereas there was no such restriction in the School's procedure. In my judgement the point is more of form than substance. There was no evidence that the Claimant was in fact in any way restricted from making any points she wished to make. The School's procedure refers to a review of the

decision of the disciplinary panel, and it seems to me from reading the notes of the appeal hearing that that is exactly what was done.

- 179 I also do not accept that the composition of the panel made the process unfair. As the Chair of the Governors it was almost inevitable that Mrs Brooks would have had some involvement from the outset, but she was not involved in the substance of the investigation, nor the original disciplinary hearing. I also do not see that having been involved in a previous disciplinary matter prevented Mrs Brooks and Ms Hyder from reaching a proper decision in the appeal process so as to make it unfair.
- 180 Much was made of the documents provided by the Claimant said to have come from families of the children in the Claimant's class. It seems to me that two points arise. The first is whether they should have been accepted at face value, and it is clear that that would have been inappropriate. They documents were not proper signed statements, and the circumstances of their creation was not known. The second point is whether further evidence should have been sought from the children in the class at that late stage. I accept that it was not appropriate to do so. Mention has been made above of the concerns about evidence from young children.
- 181 Criticisms were made of Ms Fennell and her evidence to the appeal panel. The first point was that the Claimant had not accepted at the disciplinary hearing that she had used considerable force. However, if one looks at the oral submission by Ms Fennell to the appeal panel as recorded in the notes of the hearing it can be seen that she was relying on the quoted statement from the Claimant that "it would have looked like the child was being shook back and forth". I do not accept that the appeal panel was materially misled by Ms Fennell. The second criticism is that Ms Fennell told the appeal panel that the disciplinary panel had not relied on the evidence of Ms Anderson, which Ms Fennell had accepted was not correct. That in my view is not material. The appeal panel had before it all the evidence presented at the disciplinary panel. It is apparent from the written submission to the appeal panel and also the dismissal letter that Ms Fennell's oral statement to the appeal panel was wrong.
- 182 For those various reasons I find that the dismissal of the Claimant was fair within the meaning of section 98(4) of the Employment Rights Act 1996. I emphasise again that I have not made any findings of fact as to exactly what did happen on 8 October 2013.

Employment Judge Baron

20 April 2017