Case Number: 1600546/2016

EMPLOYMENT TRIBUNALS

Claimant: **Miss Helen Evans**

Respondent **Llanishen Fach Primary School**

Heard at: **Cardiff** **On: 14/15/16/17 February 2017**

Before: **Employment Judge P Cadney**
Members:
Representation:
Claimant: N Porter (Counsel)
Respondent: A Price (Counsel)

JUDGMENT

The judgment of the Tribunal is:

i) The claimant's claim of unfair dismissal is dismissed.

ii) The claimant's claim of wrongful dismissal is well founded.

REASONS

1. By this claim the Claimant brings claims of unfair dismissal and wrongful dismissal. On behalf of the Claimant I heard evidence from the Claimant herself and Mrs Meryl Boast. On behalf of the Respondents I heard evidence from Miss Baton, Miss Shephard, Mr Smith and Miss Coombes, whose roles are set out below.

2. The Claimant is a primary school teacher who had, until her dismissal, taught at Llanishen Fach Primary School for over 22 years. Indeed it is the

only school at which she has ever taught. There is a dispute between the parties as to the extent to which the Claimant did or did not have an unblemished record prior to the matters which directly led to her dismissal. The Claimant asserts that she has; the Respondent that she did not. For my purposes little turns on this and in reality the events with which I am concerned begin in the summer of 2014.

3. On 16 June 2014 the Claimant attended a disciplinary hearing before a panel of governors in relation to a number of allegations of unsatisfactory conduct. The three allegations included allegations of bullying and intimidating behaviour by four members of staff. One of the conclusions was that mediation would be beneficial, although it was a voluntary process, and a warning was placed on the Claimant's personal file for a period of six months which would be disregarded for disciplinary purposes provided her conduct improved. The specific date of the expiry of the warning was the 11 February 2015.

4. On 16 February 2015 the head teacher Miss Coombes took the decision to instigate a second disciplinary procedure. A report from Miss Coombes was sent to the Chair of Governors, Mr David Thompson who having considered the file asked Ms Sarah Sheppard, who was one of the governors, to formally investigate the allegations. As set out in Ms Sheppard's subsequent report, the specific allegations she was investigating were:

    - "Behaviour which is incompatible with the conduct ethos and precepts of the school as identified in the school's Staff Routines Roles and Responsibilities document, Educational Workforce Council Code of Conduct at Terms and Conditions of Employment Teachers Pay and Conditions document 2014.
    - Unacceptable behaviour towards colleagues involved in disciplinary proceedings,
    - Failure to follow reasonable managerial instructions,
    - Conduct resulting in complaints of distress and anxiety from colleagues raising health and safety concerns,
    - Failure to modify behaviour previously identified as causing concern at a disciplinary hearing.

5. Those arose from specific allegations of:

    (1) 19 December - the Claimant allegedly did not permit her class to attend a whole school Christmas sing-a-long/carol assembly;

    (2) 13 January 2015 - the Claimant's alleged failure to abide by known school policy procedure and protocol by allowing a snake to be brought into the school;

(3) 2 February 2015 - the Claimant allegedly openly mocking two members of the senior leadership team referring to them as “dumb and dumber”; and

(4) 3 February a public exchange between HE and SH allegedly caused SH significant upset and offence and alleged further interactions and behaviours of HE towards SH around the timelines mentioned within the preliminary assessment report which had caused distress and hurt to SH over a sustained period of time.

6. In the course of her initial investigation Ms Sheppard had interviewed seven witnesses including the Claimant by Friday 13 March 2015. At some point relatively shortly thereafter she was advised to pause the investigation and did not in fact resume it until 1 June 2015. The reason for that was an incident which had occurred on the afternoon of 24 March 2015. On that day there had been a school visit to Cardiff Castle. One of the children attending, child A, suffers from brittle bone disease which results in a far greater propensity to suffer broken bones than would ordinarily be the case. In outline the undisputed facts are that towards the end of the visit child A was holding hands with the Claimant when she caught her foot on the cobbled surface. She was in immediate pain and expressed the concern that her leg may have broken. Child A was put on a wall so that she was not weight bearing and she was attended by Ms Haines, a teacher, Helen Grant a teaching assistant and also Mrs Perkins who was a parent on the trip. Mrs Perkins is a Consultant Radiologist. She too examined child A, and in consequence a decision was taken to carry child A back to the school bus, which was outside the Castle, and to allow her to travel back to the school. Either shortly before the bus left or whilst the bus was travelling back another teaching assistant, Rhiannon Williams, at Kate Davies’ suggestion, rang the school who she asked to contact child A’s parents. On arrival at the school they took her to hospital where it was subsequently confirmed she had indeed broken her leg as she had feared.

7. A decision was taken that this incident should be investigated by SERVOCA on behalf of the Welsh Government Independent Investigation Service. As is set out in the report the specific allegations that were being investigated were:

(1) It is alleged that Helen Evans, a teacher at Llanishen Fach Primary School Cardiff insisted that (Child A) a 6 year old pupil who suffers with medical condition mild brittle bones should stand and walk on her feet whilst in pain after catching her foot on a cobbled surface. It transpired that (Child A) had suffered a broken leg as a result of the incident.

(2) It is also alleged that Helen Evans did not communicate certain information she was aware of to Sue Haynes the school designated first aider on duty in that (Child A) had told her her leg had clicked. This may have caused Sue Haynes to take a different course of action which may have prevented further pain and distress to (Child A).

8. The SERVOCA report is dated 20 June 2015, which is later than the date on which Ms Sheppard says she was asked to continue her earlier disciplinary investigation. Why there is a disparity in dates is difficult to establish and certainly there is no evidence before me which would allow me to draw any conclusions, but in fact in my judgment nothing turns on this slightly curious event.

9. The further issues which had arisen in the interim were a complaint from Kim Thomas, a complaint from the family of Sue Haynes, and the issues which had arisen from the trip to Cardiff Castle set out above. As a consequence Ms Sheppard carried out further interviews with Ms Thomas, Ms Haynes, an anonymised witness, Ms Kate Davies, Ms Helen Grant and the Claimant. Following the interview with the Claimant and at her suggestion, she interviewed Mr Chris Jones and Ms Sian John. She did not interview a further witness Ceri Phillips whom the Claimant suggested that she should. It is not necessary at this stage to set out in detail the evidence that is contained in the report, but in respect of the allegation of behaviour which is incompatible with the conduct ethos and precepts of the school, Ms Sheppard in her report sets out the elements of the conduct ethos and precepts expected of a teacher, and then has set out extracts from the interviews with the witnesses that "appear to substantiate the allegations that HE's conduct and behaviour are not in keeping with the precepts and ethos of the school". She concluded in respect of that allegation that "*Based on the depth and breadth of the evidence collated, based on the balance of probability it is my view that HE's behaviour was incompatible with the conduct ethos and precepts of the school as identified in the policies previously stated*."

10. In respect of allegation (2) unacceptable behaviour towards colleagues involved in disciplinary proceedings, she again sets out the evidence in support of this allegation from the interviews and concluded "*In considering all of the evidence presented in my view there is evidence to support this second allegation being upheld. A number of colleagues (more than two) have found HE's conduct and behaviour towards them to be unacceptable. In addition a number of colleagues have witnessed HE's behaviour towards other staff and given this same view point.*"

11. In respect of allegation (3) the failure to follow reasonable managerial instructions there are three specific elements; non attendance or boycotting of the whole school's Christmas sing-a-long/concert, failure to

carry out procedures in line with policy when a pupil requested to bring a pet snake into the school and failure to act in accordance with school policy and procedure whilst on a school trip. Once again Ms Sheppard sets out the evidence from the interviews. She concluded, "*In considering all of the evidence presented there is evidence to support this allegation. When looking at the evidence presented solely in relation to the assembly sing-a-long incident it cannot necessarily be confirmed that HE deliberately boycotted the assembly as there is only one witness who can substantiate that this was the exact phrase used by HE. However there is confirmation and evidence presented by a number of staff (more than two) who confirm that instruction was given that this assembly sing-a-long was for all to attend and this instruction was clearly confirmed within the morning briefing. For whatever reason HE and one of her support staff members do not recall this instruction being given and therefore did not believe the occasion to be one of a compulsory nature. However, consideration should be given to the fact that on the same day SC had specifically had a conversation with year 1 staff to remind them of the need to be consistent with the rest of the school. With this conversation live in the minds of those individuals it is difficult to ascertain why perhaps an alarm bell or trigger would not have rung within HE's mind to ask the question of someone "is my class needed?" or to question whether or not attendance was required by all classes. HE states that she asked the children to make the decision when she wished to attend or not due to the fact that it was the end of term and they were having fun with their games etc. This would not be normal procedure practice in school and question whether defence of asking 5-6 year olds to decide is one that can be a fully justifiable one. In addition to this incident consideration should also be given to the school pet snake visit. HE's defence is one that she did not think about the need to follow due process procedure as the children themselves would not be handling the snake. However, when other staff were asked to confirm what they would do in such circumstances all responded with an awareness in relation to policy and or the need to follow school procedure with regards to the visit. Even the TA's who were performing their roles at some lesser qualified level confirmed that they too would know that this was a requirement expected of them so it is therefore somewhat puzzling as to why HE herself would not have thought about the need to follow some sort of process or at least flag the visit at the earliest opportunity to a member of the SLT or Management Team. In conclusion the evidence has been presented via the investigation interviews held does suggest that HE failed to follow reasonable managerial instructions. Whether HE's actions were intentional or not remains unknown, however witness statements have suggested HE doesn't like rules, is a maverick and likes to do things her own way*.".

12. Allegation four is of conduct resulting in complaints of stress and anxiety from colleagues raising health and safety concerns. Once again Ms Sheppard sets out the evidence from interviews and other evidence and Ms Sheppard concluded, "B*ased on the strength of evidence put forward for this allegation and the number of individuals have expressed concerns about their health and wellbeing due to HE it is difficult to ascertain how this can solely be down to perception. There is consistency here given the number of individuals making the same claims. HE's actions, whether intentional or not, appear to have resulted in a significant level of stress and anxiety for some staff. This has most certainly raised health and safety concerns for schools management which are likely based on the balance of probability to continue and may be exacerbated in the future. With this in mind the school need to consider the duty of care it has to all members of staff including HE now and in the future*.

13. In relation to allegation five, failure to modify behaviour previously identified as causing concern at a disciplinary hearing, Ms Sheppard again followed the same procedure and states, "I*n conclusion to the specific allegation it is evident the findings already presented are allegation one, two and four that HE has failed to modify her behaviour that she was made explicitly aware of at the 2014 disciplinary hearing. Although the sanction given on 2014 disciplinary hearing is now spent it was live when these incidents occurred. Consideration needs to be given to the fact that HE was given an insight into the effects that her behaviour and interactions have had on her colleagues via that process. HE does not appear to have modified her style, manner, way despite having support put in place to allow her the opportunity to make this change to be given the tools and strategies to manage herself appropriately. This therefore begs the question as to whether or not HE has the ability to change and if the answer to this question is one of uncertainty then does this raise a fundamental issue regarding the working relationships."*

14. Her overall conclusion was that the five allegations against HE therefore appear to be supported by the evidence gathered during this investigation. She then sets out those matters and concludes, "I*n view of the extent and volume of evidence presented by more than a few individuals, in my view this matter should proceed to a disciplinary hearing in accordance with the schools disciplinary policy and procedure. That decision is however the Chair of Governors to make*."

15. Due to a number of delays, the reasons for which it is not necessary to set out here, the report was not finalised until 21 September 2015. Again there were a further delays before a disciplinary hearing could eventually be heard on 13 and 14 January 2016. I have heard no evidence from anyone who was involved in making the decision at the original hearing (which is the subject of submissions). However, for reasons which will be

discussed later the Claimant did not participate in that hearing and by letter dated 15 January 2015 the panel confirmed their view that the Claimant was guilty of all of the allegations which were:- Allegation 1 – behaving in a way that has harmed or may have harmed a child; Allegation 2 – fundamental dereliction of duty by failing to effectively communicate with colleagues to safeguard the welfare of a child; Allegation 3 – behaviour which is incompatible with the conduct ethos and presets of the school; Allegation 4 – unacceptable behaviour towards colleagues involved in disciplinary proceedings; Allegation 5 – failure to follow reasonable managerial instructions; Allegation 6 – conduct resulting in complaints of distress and anxiety from colleagues raising health and safety concerns; Allegation 7 – failure to modify behaviour previously identified as causing concern at the disciplinary hearing. Having upheld all seven allegations the panel concluded that they amounted to gross misconduct and the Claimant was dismissed without notice. On 19 January the Claimant appealed against the dismissal and on the same day lodged a grievance which is in almost, if not absolutely identical terms to that of the appeal.

16. The appeal hearing took place on 19, 20 and 21 April and the members of the committee were Phillip Smith, Nesta Evans, Sarah O'Brien and Christine Webb. I have heard evidence from Phillip Smith who was the Chairman of the panel. The Claimant made a further Witness Statement in addition to her Notice of Appeal and submitted a number of other Witness Statements in support. The Claimant was represented by a solicitor Mr McTaggert and at the conclusion submissions were made by Mr McTaggert and the presenting officer who was the head teacher Ms Coombes.

17. The outcome as set out in a letter of 10 May, was that allegations 1 and 2 of behaving in a way that has harmed or may have harmed a child, and fundamental dereliction of duty by failing to effectively communicate with colleagues to safeguard the welfare of a child were proven and amounted to gross misconduct. In respect of the non child protection allegations the committee concluded that "Y*our behaviour towards colleagues was not acceptable and we were satisfied that the pattern of behaviour was over a long period of tim. Iin particular we note Mr Jones was working at Llanishen Fach Primary School at the time your previous proceedings concluded. He witnessed your behaviour after you became subject to a warning and were aware of the need to modify your behaviour. We were satisfied that your unacceptable behaviour amounted to gross misconduct and that dismissal was in the range of reasonable responses.*" In considering allegation 7 failing to modify the behaviour, they did not consider that it added anything to allegation 3, nor that there was sufficient evidence in respect of allegation 4 unacceptable behaviour towards colleagues involved in disciplinary proceedings which they upheld in part

and for which there was a finding of lesser misconduct which would attract the penalty of a final written warning. In respect of allegation 5 failure to follow reasonable managerial instructions this was also proven. In respect of allegation 6 conduct resulting in complaints of distress and anxiety from colleagues this was in part upheld but there was a finding of lesser misconduct.

18. They state in conclusion that "*The decision of the committee on the allegations as stated above was unanimous due to the findings of gross misconduct in relation to allegations 1, 2 and 3 the committee determined that you should be dismissed without notice under the provisions of employers discipline policy and procedure. For the avoidance of doubt we consider whether this penalty was in the range of reasonable responses on each of the three individual allegations*." Accordingly the Claimant was dismissed as from 29 April 2016.

Conclusions

Unfair Dismissal

19. As this is a conduct dismissal there are four questions I have to answer. The first is whether the respondent has discharged the burden on it of showing that a belief in the misconduct was the genuine reason for dismissal. If so there follow the three Burchell questions. Did the respondent conduct a reasonable investigation, did it draw reasonable conclusions from that investigation, and was dismissal a reasonable sanction. The range of reasonable responses test applies to each of those questions.

20. There are a number of challenges to the fairness both to the procedure and substance of the decision to dismiss. The first point made by the Claimant is that for a teacher to be dismissed for gross misconduct is in and of itself likely to be career ending, and in particular when a teacher is dismissed for gross misconduct in relation to child protection that risk is even greater; and it follows that the standards are particularly high and are to be subject to the heightened level of scrutiny as set out in a number of cases *Salford Royal NHS Foundation Trust –v Roldan* [2010] ICR 1457, *A –v- B* [2003] IRLR 405, *Crawford –v- Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402, *Turner –v- East Midlands Trains Ltd* [2013] ICR 525. The Claimant essentially contends that judged against any standard the dismissal is unfair, but judged in particular against the standard expected of a career ending dismissal that it falls well outside any decision reasonably open to the try to the Respondent.

Reason for Dismissal / Pre –Judgement/Bias

21. The respondent contends that the true reason for dismissing the claimant was a belief in the misconduct found against her and that it has satisfied the first question set out above. The claimant does not accept this contending that the issues were pre-judged and the investigation biased from the start. If this proposition is correct she submits that the respondent's defence falls at the first hurdle.

22. The first specific allegation made is that the whole process was tainted by bias and predetermination. The primary allegation is that the head teacher Ms Coombes was biased against the Claimant and that as she both communicated the original complaints and presented the Respondents case at both the disciplinary hearing and the appeal that both processes are therefore tainted by her own bias against the Claimant.

23. In terms of the initial decision to refer the matters to the Chair of the Governors for consideration by him in my judgment Ms Coombes in practice had little choice, and it is certainly impossible to identify any bias in the way that she dealt with them. Indeed when one reads the subsequent interviews with a number of members of staff that were obtained during the course of the investigation it is apparent that the concerns expressed in relation to the specific incidents by Ms Coombes reflect much broader concerns as to the Claimant's attitude and behaviour. Accordingly this is not a case in which in my judgment it is possible to discern any bias in the original decision to refer the matter to the Chair of Governors nor in the way it was referred.

24. The second point that the Claimant makes about bias on the part of Ms Coombes relates to the contents of her presenting officers report dated 13 and 14 January which is in fact the same document that was presented subsequently at the appeal. Without dealing with every point made by the Claimant the Claimant submits that, as was accepted in cross examination by Ms Coombes, it should be a fair and measured exposition of the allegations and evidence. The Claimant submits that the decision to refer to formal complaints of a similar nature in 2006 bear no relation to the matters in hand and are evidence of bias; that her description of the evidence in respect of the child protection allegation highlighted the evidence which is condemnatory of the Claimant but failed to draw to the panels attention evidence which was exculpatory; and that she referred to an allegation of sexual assault which is of necessity an extremely serious allegation which was historic but which had been resurrected due to the fact that in the summer of 2014 the member of staff involved had reported the matter to the police. This had resulted in bail conditions which involved altering the terms of her suspension.

25. In evidence Ms Coombes did not accept that her report could be reasonably categorised as unmeasured or unfair. She contends it provides an overview of the background and of the events which in presenting the case to the governors, the governors were entitled to know of previous matters albeit ones that were not directly before them and that looked at overall she contended that the report was a fair presentation of the case against the Claimant which resulted from the investigation of Ms Sheppard. In my judgment looked at overall the report is a reasonably fair and balanced assessment of the case against the Claimant. It must be born in mind in my view that certainly by the stage of the final appeal hearing that the Claimant was represented by a solicitor and that if either the Claimant or her solicitor were of the view that any part of the report was unfair or misrepresented the evidence it was open to them to draw that to the panels attention.

26. Bias is also alleged against Ms Sheppard on the basis that in the course of her investigatory interviews she asked leading questions of some of the witnesses. In my judgment there is nothing in this submission. The interviews were extremely thorough and as far as I can judge conducted with transparent fairness and all of the questions which are alleged to be leading questions arise out of answers given by the witness him or herself. In any event there is nothing inherently wrong in leading questions being asked. An investigation is not subject to the requirements of an examination in chief in a courtroom.

27. The Claimant in addition asserts that it was, even if not unfair to refer to the allegation of sexual assault at all, unfair not to highlight the fact that no charges had been brought and that it was incorrect to say that the Claimant had admitted the sexual assault. I confess this appears to me to be dancing on the head of a pin in as much as the Claimant had clearly admitted the act which constituted the allegation of sexual assault and so it is not unreasonable to say that she had admitted it in the context of the report to the governors. In my judgment of more substance is the assertion that where in the report Ms Coombes states "*In addition Miss Evans had made allegations against me as head teacher criticising actions which I contend were taken as a result of my duty of care to staff against the deputy providing information about her response to a police request and against the Chair of Governors for allegedly stalking Miss Evans. Grievances against all three of us, the senior managers of the school and the Chair have been threatened for some months and Miss Evans and her legal representative albeit they have yet to be received. In my view this alone demonstrates that the relationship between Miss Evans and the school has been damaged to such an extent that the relationship between us has irretrievably broken down.*" As Ms Coombes accepted in evidence and is self evidently true, the act of the Claimant making

allegations is not in and of itself evidence that the relationship had broken down nor would her lodging a grievance in respect of those allegations, nor is her legal representative suggesting that a grievance will be lodged. The passage certainly appears to suggest that Ms Coombes regards criticism of her or any part of the senior management of the school as in and of itself evidence of a breakdown in the relationship which is self evidently an incorrect proposition. However in my Judgment in the overall context of the report that does not in and of itself undermine what in my judgment is an essentially reasonable document. Once again it should be borne in mind that the claimant was represented by a solicitor at the appeal and it was open to him to make all the points set out above to the appeal panel.

28. In my judgment, looked at overall I can see no evidence which supports the allegation that the outcome of any disciplinary hearing was either as a result of bias or of predetermination and having heard the evidence of Mr Smith I am entirely satisfied that the decision to dismiss was genuinely based upon a belief that the Claimant had committed the acts of misconduct found by the Respondent.

29. It follows that the Respondents have established a potentially fair reason for dismissal.

Reasonable Investigation / Procedural Unfairness

30. In terms of the Section 98(4) test of fairness there are a number of submissions. The first is that the process was procedurally unfair. There are a number of elements of the submission of procedural unfairness. In summary the primary submissions are as follows. The first is that the respondent failed to follow its own disciplinary procedure, in that the process to decide whether or not to pursue any disciplinary proceedings was not taken in accordance with the policy, nor does the decision to investigate internally by means of an existing governor comply with the requirement for external investigation other than in exceptional circumstances. Secondly there was significant and unreasonable delay; and thirdly the decision not to permit the claimant and her solicitor to participate in the initial disciplinary hearing was procedurally (and indeed substantively) unfair. In relation to the disciplinary hearing there is a connected point which is not strictly procedural but which it is convenient to deal with at this stage. The panel made findings that the claimant was guilty of the misconduct alleged but made no findings of fact and it is therefore on the face of the decision itself, impossible to know the factual basis for the panels conclusions. As no evidence has been called in this hearing its conclusions are not open to either challenge or explanation.

31. In broad terms the respondent accepts that the disciplinary process was not followed in its entirety, contends that there were reasons for the delay, and essentially contends that as the appeal was a complete rehearing any procedural defects in the initial hearing (if any) were cured in any event.

32. The starting point of procedural unfairness is the schools disciplinary policy which provides that in respect of the investigation (paragraph 17) as soon as the alleged breach of discipline has been brought to the attention of the head teacher or the Chair of Governors. In the case of the head teacher a full investigation must be carried out where possible the head teacher or Chair of Governors will arrange for any investigation to be carried out externally e.g. by the LA Diocesan authority where appropriate or a person who is unbiased. The cost of any investigation will be met from the schools budget. It goes on (paragraph 18) to say that no undertaking of confidentiality would be given to witnesses. The Claimant submits that there were breaches of both paragraphs insofar as Ms Sheppard was a parent governor and was therefore not external, and she did give an undertaking to one witness anonymising that witnesses Witness Statement. The evidence of the Respondents is quite simply it is a matter of practice given current budgetary restraints that where there is someone who is believed to be unbiased who can carry it out without incurring expense that that is the current requirement and that there is no reason to supposed that Ms Sheppard did not conduct her investigation perfectly properly.

33. In addition paragraph 52 provides that once a report has been completed it will be given to either the head teacher and Chair of Governors or two Governors and who will decide either that there is no evidence to support the allegation and the matter is closed, or that the conduct does not amount to gross misconduct but to lesser misconduct which can be dealt with by an appropriate person, or that the conduct does amount to gross misconduct and is required to be referred to a staff disciplinary and dismissal meeting. Paragraph 53 provides that this discussion should be minuted and the decision minuted by a clerk. Similar although not identical provisions are set out at paragraph 65 in respect of a referral for an independent investigation. In both cases it appears that the decision was made by the Chair of Governors that the allegations were sufficiently serious to amount to gross misconduct and to refer the matter to the staff, disciplinary and dismissal hearing. There is no evidence that he took that decision together with any other person. The specific evidence of Ms Coombes is that she did not participate in that decision precisely in order to avoid allegations that she interfered with the decision making process. There was no minute taken of why the Chair of Governors came to that conclusion in either case.

34. The Claimant therefore submits that the starting point of the disciplinary stage of the process following the two investigatory reports, the internal and external, is that there has been a complete failure to adhere to those provisions with the result that it is not known why the Chair of Governors took that decision. Moreover as the Chair of Governors has not given evidence it remains a mystery before the Tribunal. Since the only purpose of those provisions can be to ensure fairness for the teacher in question the failure to comply with them in the absence of any evidence as to why, is in and of itself a significant procedural failing. Pausing there, the failure to appoint an external investigator and the other matters set out above are clearly not in accordance with the respondent's own disciplinary policy. However that does not in and of itself render any subsequent decision unfair. Despite these procedural errors the investigation was thorough and diligent and the conclusion that there was a disciplinary case to answer one that was reasonably open to the respondent based on the investigation report.

35. In addition, the whole process was subject to, the Claimant asserts, unreasonable delay in as much as the earliest allegations dated from December 2014 but the investigatory report into the non child protection allegations was not completed until October 2015. The disciplinary hearing did not take place until January 2016 and the Appeal not until April 2016. The Respondents dispute that there was any excessive delay in this case. The initial referral to the Chair of Governors was promptly made by Ms Coombes. Ms Sheppard was promptly instructed to investigate. She did investigate but not unreasonably had to pause her investigation between March and June to allow for the outcome of the SERVOCA investigation into the child protection issues. By that stage further allegations had arisen which needed further investigation and the period of the summer holidays were ones in which the Claimant was entitled not to have any dealings with the disciplinary process. There was then a delay in getting the Claimant to send back signed copies of her own interviews which resulted in a delay, the final report being promulgated on 5 October. In my judgment whilst this may have resulted in the process being lengthy all of the delay is adequately explained and does not in and of itself in my judgment fundamentally affects the fairness of the process.

36. The Claimant contends that it was a fundamental procedural failing not to allow her to participate in the initial disciplinary hearing. The Claimant points out that there has been no one called from the initial disciplinary hearing in order to explain that decision (nor to explain its conclusion that the Claimant was guilty of gross misconduct). The Respondents answer to that is that the first disciplinary hearing was overtaken by events in that the second disciplinary hearing or Appeal was a complete re-hearing. Therefore, irrespective of the outcome of the first disciplinary hearing its

conclusions were not being reviewed, there was no sense in which its conclusions were taken into account in the Appeal which was a complete re-hearing of the evidence and it follows that what needs to be examined is the process by which the Claimant ultimately came to be dismissed given that her employment continued between the first disciplinary hearing and the appeal. Effectively, the respondent submits, whether the decisions made by the initial panel were right or wrong are simply not relevant to any question I have to answer**.**

37. On the face of the notes of the disciplinary hearing the Claimant made an application for an adjournment due to the absence of her solicitor. The panel refused an adjournment. The Claimant then left and subsequently attended with her solicitor. The panel then took legal advice in which they were given two options, to allow the hearing to continue with the Claimant and her legal adviser present or effectively to decide that as the proceedings had started that they would continue to hear them in the absence of the Claimant and her legal representative. They chose the latter and accordingly the hearing proceeded in their absence. The subsequent dismissal letter whilst recording the conclusions that the Claimant was guilty of gross misconduct and that dismissal was the appropriate sanction, did not make any specific findings of what the factual basis for the allegations that they had upheld was and therefore it is impossible to know from the letter itself why they reached the conclusion that the Claimant was guilty of gross misconduct.

38. The Claimant submits that an important point of principle arises from this. Firstly the Claimant contends that given that the Respondent has not sought to defend the actions of the first disciplinary panel or its conclusions by calling any live evidence the Tribunal is bound to conclude that it was either procedurally or substantively unfair or both. They submit that the Respondent appears to have taken the position that as the appeal was a complete re-hearing that this was necessarily curative of any defects in the first hearing. The Claimant refers to the well known case of *Taylor –v- OCS Group Ltd* and submits that if the first proceeding was effectively a nullity or void, as it submits that the first proceeding was because it at the very least was held in the absence of the Claimant or her legal representative, then when looking at the overall fairness of the procedure the Claimant has in fact had only one disciplinary hearing, in this case the appeal, and not two and that therefore looked at overall this in and of itself must make the dismissal unfair.

39. I am not persuaded that this analysis is correct. It appears to me that *OCS –v- Taylor* is authority for the proposition that in determining the fairness of a dismissal what must be looked at is the process overall. If there are defects in the first hearing then it follows automatically that there must be much greater scrutiny as to whether those defects were or were

not remedied by the hearing of an appeal. It necessarily follows that there will be cases where, looked at overall, the process is fair despite defects in one or other of the disciplinary or appeal hearings and other cases where the dismissal is not fair. If this were not the case any failing that could be identified in the process or reasoning at either stage would automatically result in a finding that a dismissal was unfair. What the Tribunal has to assess is the extent of any deficiencies, the extent to which they were or were not cured and then stand back and look at the overall process in determining whether it was or wasn't fair and I am unable to read *Taylor – v- OCS* as supporting the proposition that where there are very significant failings in respect of the first hearing that that in and of itself renders a disciplinary process necessarily unfair irrespective of the conduct of the appeal.

40. As a general proposition in my judgment it is fair to say that an appeal which is a complete re-hearing is more likely to cure any procedural or substantive defects that are found to have occurred in the first hearing than simply a review. However whether the second hearing is a review or a re-hearing does not alter the fundamental task that the Tribunal has to consider which was taken overall which was whether the procedure was fair. In my judgment the appeal hearing itself was transparently fair in that it was a complete re-hearing and there was no limit placed on the matters that the Claimant could place before that Appeal panel. I am not therefore of the view that the process looked at overall can be said to be unfair.

41. Looking beyond the specific allegations of procedural failings, in my view the investigation was reasonable. Ms Sheppard conducted it with great thoroughness and diligence and in my judgment it fulfilled its basic task, in that it provide a wealth of information to allow the subsequent disciplinary and appeal panels to draw their conclusions.

Reasonable Conclusions / Substantive Unfairness

42. The Claimant's next challenge is that the decision of the appeal panel was substantively unfair. In order to understand the submission it is most easily understood by effectively reverse engineering the matter and starting with the conclusions of the disciplinary panel. The Claimant's submission is that she was never provided with sufficient clarity of the disciplinary allegations she had to meet. Dealing firstly with the child protection allegations, the specific allegations were: allegation 1 behaving in a way that has harmed or may have harmed a child: allegation 2 fundamental dereliction of duty by failing to effectively communicate with colleagues to safeguard the welfare of a child. The conclusions of the committee as set out in the letter supporting their conclusion that both allegation 1 and allegation 2 were proven are as follows:

"*The committee consider that there was no direct evidence a child had been harmed. However we believe that what had happened did expose a child to the risk of avoidable harm. The committee noted your acceptance that you were the adult with responsibility for the child. From the evidence presented and what we heard from you in response we were satisfied that the general response to the incident at the Castle can best be said to have evolved rather than to have been directed as the teacher with responsibility for the children in your class we considered that you had failed to direct a response to the incident and in particular to communicate with and direct the actions of the other adults present. We noted that the evidence in relation to the child's leg clicking is equivocal. The evidence of Sue Haynes was untested and therefore we did not attach any significance to her written statement that she would have acted differently. It was clear to us that the terms of the care plan did not absolutely require an ambulance to be called as there was neither an obvious deformity nor an open fracture. However we consider the care plan did require a parent to be contacted and in our firm opinion this should have happened at the time of the accident. You failed to comply with the school policy requirement to have a fully charged mobile phone with you during any trip off school premises. You also failed to take any steps to determine if another person had a mobile and so failed to make contact with the parents before embarking on an irretrievable course of action. The phone call was only made when already on route back to the school when Rhiannon Williams phoned the school which in turn led to the parents being contacted. It was clear to us that this resulted in a delay in the pupil being taken to hospital and exposed her to several journeys and incidents of manual handling without the benefit of pain relief. In your own evidence you stated that the pupils leg was hanging and that from your experience the pupil was a good judge of her own condition. When describing the pupil's response to stubbing her foot and her screams you stated that she does not react in that fashion unless the incident was significant. The accident report form which you stated you completed before receiving any report back from accident and emergency on the pupil's condition leads us to conclude that you considered the pupil's leg was broken and that you should have attempted to contact the parents before she was moved from the Castle. We noted that while Dr Perkins statement confirmed that she did not find any obvious deformity and that she formed the view that the adult acted appropriately she also did not know until afterwards that the pupil has brittle bone disease. We also noted Dr Perkins statement that you did nothing to assist the pupil. It went on to say that these were breaches of the EWC Code of Conduct and the STPCD at various paragraphs and the requirement to have a fully charged mobile phone.* "

43. The Claimant submits that the conclusions as to gross misconduct as found by the panel, do not relate to any allegations that were specifically

made against her. The details of allegations as set out in the SERVOCA report are (1) female teacher insisted that 6 year old female pupil with mild brittle bone disease should stand on her feet and walk when the child was in pain after catching her foot between cobbles on a school trip (2) also the teacher failed to communicate information she was aware of which may have prevented further pain and distress to the child. It is not in dispute that that information was alleged to be the failure to convey to Ms Haynes that child A had told her that her leg had clicked as set out at paragraph 1.2 of the report "*this may have caused Sue Haynes to take a different course of action which may have prevented further pain and distress to child A*." As is set out in Ms Coombes report the child protection allegations are identified as (1) behaving in a way that has harmed or may have harmed a child and (2) fundamental dereliction of duty by failing to effectively communicate with colleagues to safeguard the welfare of a child", which is wording identical to that of the SERVOCA report and therefore can be assumed to relate to the same factual allegations. Further the evidence as summarised in respect of that within the report states "*SH HG and Dr Perkins and even HE herself all state that she insisted that the child with brittle bone disease should walk to the bus. Others disagreed with her and she continued to state that child A would be made to walk when she got off the bus and into school. Basic first aid rules and common sense would dictate that for HE to take this course of action with any child that had sustained an injury to their leg, let alone one with mild brittle bone disease, could place the child at risk of significant harm. When Miss Evans goes on subsequently saying not one witness statement indicates that Miss Evans shared the information regarding child A saying that her leg had clicked. In fact all teaching assistants present knew that hearing that statement would have changed the course of action taken*".

44. It follows, the Claimant submits, that the factual allegations that the Claimant understood she had to meet both from the SERVOCA report and from the head teachers presentation were specifically in relation to that allegation of having insisted that child A should have walked to the bus which appears to be the allegation of harming or potentially harming a child, and of failing to communicate that child A had said her leg had clicked to Ms Haynes in particular. However those matters were not the reasons for her dismissal as set out above. Put simply the appeal panel concluded that allegation 1 "Behaving in a way that has harmed or may have harmed a child" arose not from the specific allegation set out in the SERVOCA report and the head teachers presentation but from a conclusion that she had failed to direct the response to the incident. They did not make any finding that she had failed to notify Sue Haynes that child A stated that her leg had clicked which was a specific factual allegation. However, they concluded that there were other proven allegations specifically in relation to failing to have a fully charged mobile

phone and failing to attempt to contact the parents before she was moved from the Castle.

45. The Claimant's case is that whilst the appeal hearing may have involved a general discussion of her conduct in the course of the events at Cardiff Castle that the panels findings find her guilty of matters which she was not at any stage told were matters for which she was being investigated. In my judgment the Claimant must be right in this submission. There is as a matter of fact no finding that she was guilty of the specific matters in respect of which she was charged but there is a finding that she was guilty of other matters which themselves constituted gross misconduct. In my judgment this is at least arguably procedurally and substantively unfair in and of itself.

46. Moreover, as has been accepted by Mr Smith, that conclusion was based on at least one factual error. The panels summary of the evidence of the parent who had attended Dr Perkins, is in fact almost exactly the opposite of the evidence she actually gave. Specifically Dr Perkins was told at the time that child A had brittle bone disease. She was told that child A was suggesting that her leg had clicked and that whilst she had left the school staff to make the decisions but she was had she had any medical concerns she would have acted accordingly. In other words, that she did not feel that in her capacity as a doctor that anything that was being done could have harmed child A.

47. The Claimant therefore submits that in addition to the fact that the matters for which she was found guilty were not the matters for which she had been charged; that the factual basis was not only incorrect but was completely incorrect. In my judgment all of the propositions set out above as to the fairness of this part of the decision are correct. In my judgment the conclusion that the claimant was guilty of gross misconduct fell outside the range of conclusions reasonably open to the respondent, and had this been the only allegation I would unhesitatingly have held the dismissal to be unfair.

48. For completeness sake I should add at this stage that even if I had decided that the conclusion was reasonable I would have held that the sanction of dismissal fell outside the range reasonably open to the respondent. The reason for that is that I accept the claimant's submissions as set out below. She submits that, in any event, the sanction of dismissal falls self evidently outside any reasonable response to this incident. Standing back and looking at the incident overall there was an incident involving a child with brittle bone disease in which she tripped and hurt her leg and was fearful that it was broken. She was attended by two nominated first aiders and a parent who happened herself to be a qualified doctor. The doctor was aware of all the relevant circumstances which

were that the child had brittle bone disease, the child was fearful that her leg was broken, and that doctor has no criticism of any of the decisions that were taken of the way child A was dealt with. As a matter of fact although the Claimant did not herself direct it, relatively shortly after the incident the school were contacted and were able to contact child A's parents. Child A's mother, as is established in the SERVOCA report, had no criticism at all of any action taken by the school on the day and in addition to the Claimant there were a number of other members of staff present, all of whom had a responsibility for child A. She was not the exclusive responsibility of the Claimant, but no other member of staff underwent any disciplinary investigation or process whatsoever as a result of this. In those circumstances to conclude that the Claimant was guilty of misconduct sufficient to justify dismissal is unsustainable on any basis.

49. Of the remaining allegations the matter which was upheld and which led to her dismissal was allegation 3 which is behaviour which is incompatible with the conduct ethos and precepts of the school as identified in the schools Staff Routines Roles and Responsibilities Document Education Workforce Council Code of Conduct Terms and Conditions of Employment. The findings were as follows: "*The committee had particular regard as to whether or not you were aware of the need to consider how colleagues perceive you and if you treat them with dignity and respect in particular we note that the evidence provided by Kim Thomas about your failure to engage how you made others feel uncomfortable. Chris Jones was very persuasive on this point in particular he reported that you wore your behaviour as a badge of honour and that this was deliberate on your part. When referring to 3 February 2015 incident witnesses used strong words to describe your behaviour as aggressive and confrontational. The committee concluded your behaviour towards colleagues was not acceptable and were satisfied that the pattern of behaviour was over a long period of time. In particular we noted that Chris Jones was working at Llanishen Fach Primary School at the time your previous proceedings concluded. He witnessed your behaviour after you became subject to a warning and were aware of the need to modify your behaviour. We were satisfied that your unacceptable behaviour amounted to gross misconduct and that dismissal was within the range of reasonable responses. We consider the extensive support and guidance given by the school to help you modify your behaviour as a direct result of the previous written warning and through management support and guidance we are also satisfied that you were aware of the need to change. The committee did not have regard to whether a live warning was in place when the unacceptable behaviour occurred. Overall we were satisfied that you were aware that you continued to display behaviours that you needed to remedy and the evidence was that you did not do so. The committee determined that a sanction short of dismissal was unlikely to give confidence that you would behave appropriately or indeed modify your*

behaviour if you continued in your role as teacher at Llanishen Fach Primary School."

50. As is set out above, the committee had particular regard for the evidence of Kim Thomas. Among other complaints set out in her letter are that "*During our recent St David's Day celebrations Miss Evans used totally inappropriate body language towards me. The moment I sat down she turned away throughout the remaining competition time. She refused to participate in conversation on a daily basis she continues this type of behaviour by avoiding eye contact and only speaking to me when spoken to. Even then her responses are monosyllabic and not engaging. Since February 27 Miss Evans behaviour towards specific members of staff has not changed. She is overly polite towards some but clearly not to me. Trying to maintain a professional dialogue with Miss Evans and ensure that she contributes to the development of the team and the school is proving more difficult than ever and particularly so since I provided my last Witness Statement. I feel undermined and her overall persona is having an extremely negative impact on the school. I feel that her actions are purposely designed to undermine me. Her subordination is evidenced in her lack of adherence to school policy and procedures and she is not prepared to engage or to modify her behaviour. I find this unacceptable and it is having a detrimental effect on my personal wellbeing and professional standing within the school*. "

51. These allegations were supported by Chris Jones in his interview:

"How would you describe the relationship between Helen Evans and KT?"

"HE is not as engaged as others within our meetings and generally if KT says something she does not like or agree with she totally disengages. It is very obvious in her body language she sits completely back in her chair and switches off. She doesn't make eye contact and doesn't interact and is very abrupt if asked a question will only respond with one word monosyllabic answers. It is very intimidating and makes the situation awkward even though it isn't directed at me. I wouldn't like to be on the receiving end of that type of behaviour. It is just not nice or professional"

"You said earlier that the foundation phase team gets on well, so from what you just said is it not always the case?"

"It's just that HE does not demonstrate the same professional standard of others. She is not polite and constructive and can be abrupt."

"So are you saying you felt awkward during those meetings due to HE's behaviour and manner."

"Yes, very. Although the behaviour wasn't directed at me I still felt very uncomfortable."

"Do you think HE recognises the impact of the way she interacts with others?"

"I've only known her for two years. I don't know. I've only worked more closely during my time in year 2. I feel that when she doesn't like something she bulldozes it and in turn has no respect for the person the team or their views."

"When you say she bulldozes, explain this to me."

"It is intimidating and can be aggressive. I wouldn't like to be on the receiving end if I was in KT's role."

"How would you describe HE displays her treatment of others to others in the wider team?"

"I believe she wears unprofessionalism like a badge of honour. I don't know whether she has the ability to change, maybe if she had some training."

"What exactly do you mean by a badge of honour? Do you mean proud of the way she behaves/treats others?"

"I don't think she cares about the impact she has on others. She is not aware and not ashamed of the way she behaves."

And he concludes saying "I do not feel there has been any change in HE's behaviour since I worked at LF with her."

52. In my judgment the evidence set out above is sufficient to support the finding in relation to allegation 3. In my judgment the conclusion that the claimant was guilty of the misconduct alleged was reasonably open to the appeal panel on the evidence before it.

Reasonable Sanction

53. The evidence of the respondent, as is set out in the letter dismissing the appeal and which I accept is that the panel decided that each allegation individually merited dismissal. This is not, therefore a case in which a finding that one of the allegations is unsustainable automatically renders the conclusion as to sanction unsustainable. As set out above, given the description of the Claimant's conduct and given that Mr Jones was a

witness she had asked Ms Sheppard to interview, it follows that in my judgment there was sufficient evidence to allow the panel to conclude that she was guilty of misconduct. As this was effectively a repetition of behaviour which had resulted in a warning in June 2014 (although they did not specifically take the warning itself into account) it also followed that they were entitled to conclude in my view that this was a pattern of behaviour that had been continuing for a considerable period of time. In my Judgment given that the panel was entitled to conclude that this was gross misconduct and the pattern of behaviour continuing over time they were also entitled in my view to consider that dismissal was a reasonable sanction.

54. Simply based on an analysis of the material that was before the appeal panel it follows that in my view they were entitled to conclude that the claimant was guilty of the misconduct alleged and that dismissal was a reasonable sanction.

55. As a result in my judgment the question of the fairness of the dismissal involves balancing the fact that in my judgment the appeal panel had sufficient evidence before it to conclude firstly that the claimant had committed the misconduct alleged, secondly that it was reasonably open to them to conclude that this was gross misconduct and thirdly, reasonably open to them to conclude that dismissal was an appropriate sanction with the clear procedural defects outlined above. It must be borne in mind that whilst it is often convenient for tribunals to separate questions of procedural and substantive unfairness in order to properly address issues raised by the parties, in the end s98(4) poses only one question; whether the dismissal was fair or unfair having regard to the reason shown by the employer. In the end in a misconduct dismissal that involves answering the three Burchell questions: was there a reasonable investigation; were the conclusions to the misconduct reasonable ones; and was dismissal a reasonable sanction. In my judgment looked at overall I have concluded that despite the procedural flaws that in the end the appeal panel was entitled reasonably to conclude that that the evidence before it was compelling and justified dismissal and that the dismissal was fair within the meaning of s98(4).

Polkey Reduction / Contributory Fault

56. In the circumstances the question of a Polkey reduction and/or any reduction for contributory fault are not ones I need to address.

Wrongful Dismissal

57. In my judgment I am bound to uphold the claimant's wrongful dismissal claim. The test is different to that in relation to unfair dismissal in that I would need to make findings of fact as to the misconduct. It is not a question of the reasonableness of the respondent's view. As the respondent has not called any evidence as to the misconduct itself it follows that there is no material from which I could conclude that the claimant had as a matter of fact committed gross misconduct justifying summary dismissal.

58. The parties are invited to notify the tribunal within 14 days whether a remedy hearing would be necessary in relation to the claim for wrongful dismissal. On the face of it this would simply be a question of calculation but it may be that a hearing is necessary.

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Employment Judge P Cadney
Dated: 10 July 2017

JUDGMENT SENT TO THE PARTIES ON

10 July 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.