EMPLOYMENT TRIBUNALS

Claimant: Lucy Collier

Respondent: Graveney Trust

Heard at: London South Employment Tribunal
On: 5th January 2017

Before: Employment Judge M.J. Downs

Representation
Claimant: In person
Respondent: Mr J England of Counsel

RESERVED JUDGMENT

IT IS THE JUDGMENT of the Tribunal that the claim for unfair dismissal is not well founded.

REASONS

Introduction and the issues

1. This is a claim for unfair dismissal brought by way of originating application before the Employment Tribunal.

2. The Claimant was dismissed on 16th May 2016 (that decision was confirmed by way of a letter dated 17th May 2016). The Respondents says that the reason for dismissal was misconduct. The Claimant is dissatisfied as to the genuineness of the belief of the Respondent, the reasonableness of their investigation and their conclusions that the Claimant could be dismissed from her post for misconduct. The Respondent is a school that employees 310 persons and is a medium sized concern when considering size and administrative resources.

The Evidence

3. The Tribunal heard from: the Claimant, Ms Lucy Collier; Mr David Milligan, Head Teacher of Tooting Primary School, who decided to dismiss the Claimant; Ms Cynthia Rickman (vice principal, Bursar), who dealt with

various matters around the eventual suspension of the Claimant; and Mr Ian Parkes who dealt with the Claimant's appeal.

4. The Claimant also advanced some character evidence that was of a real solidity and spoke very well of her and which the Tribunal took into account.

5. The Tribunal had the benefit of an agreed bundle of material and at the beginning of the hearing watched the CCTV footage of the incident which had been shown at the original disciplinary hearing. This commences with images of four pupils sitting down. They can be seen to throw their heads back – it is surmised that this is in laughter. The Claimant then enters the room and wags her finger and approaches the group. She stands next to a chair with a bag on it and then makes as if to take the bag. The pupil closest to the bag seeks to prevent this/take back control of the bag. There is a brief period in which both are seen pulling on the same bag. The Claimant is obviously the stronger of the two as she drags the pupil and the chair she is sitting on a short distance across the common room floor. The Claimant then leaves.

6. The evidence and submissions were completed in a day but this did not allow time for the evidence to be considered and a Judgment to be delivered. The Tribunal apologies that pressure of work has meant that there has been a delay in handing down this Judgment.

The Relevant facts

7. The Claimant had been employed by the Respondent since the beginning of the academic year in 2001. She started out as a receptionist. At the time of her dismissal she was the Sixth Form administrative officer. The Claimant was also a qualified first aider.

8. The Respondent's disciplinary rules specify that: "(5) violent or dangerous or reckless behaviour of any kind on school premises; (6) serious abuse towards or assault upon a schoolchildren (sic), employees or members of the public; and (7) maltreatment of school children" are all examples of gross misconduct which may render the employee liable to dismissal."

9. On 14th March 2016 the Respondent says that events came to light –in that it was alleged that the Claimant confronted four students who were playing cards in the 6th form common room – her request to see their identification cards was rejected by two of them and the Claimant was said to have gone off with one of their bags (in evidence she confirmed that she gave no advance verbal warning of this) so as to undertake a search.

10. The Claimant went to the office of the Head of Year 12 (Mr Trimble) and went through the contents of the bag – the four students followed her. After a confrontation in his office, Mr Trimble asked them all to make statements overnight and leave his office. There was some continuation of the confrontation even as the actors left the room.

11. On 15th March 2016 a complaint was made by the parents of one of the children to the School's Principal, Graham Stapleton which was copied to the LADO (Local Authority Designated Officer). The School's Deputy Safeguarding Officer was appointed as Investigating Officer and the

Claimant was notified of the problem. The investigative report that was produced subsequently was authored by two members of staff who had responsibility for safeguarding.

12. After the involvement by the LADO and a report that the Claimant had approached a teacher in the school about the case, contrary to instructions, the Claimant was suspended on 6th April 2016. The Tribunal accepts the evidence of Ms Rickman that she met with the Claimant on 17th March and instructed her not to discuss the incident with anybody other than her Trade Union Representative. At that point Ms Rickman and those responsible for the investigation were actually reasonably sceptical about the allegations. The Claimant was provided (after a few false starts) with quite a lot of information including a very helpful document entitled, "Dealing with allegations against staff." The Claimant provided statements which showed a good understanding of what was being investigated.

13. Between 14th March and 24th March, the Claimant remained at school on normal duties but on 24th March, the last day of term, she approached another teacher to ask information about the background of one of the complainants. This was despite instructions to the contrary. As a result, the Claimant was suspended at the beginning of the new term on 6th April 2016 in accordance with school policy. Again the Claimant produced a good quality document on 8th April seeking to respond to the allegation made against her in regard to disobeying a management instruction. This showed a good understanding of the alleged problem.

14. The four students were interviewed on 8th April followed by the Claimant on 14th April. The Claimant was accompanied by a Trade Union representative. The Claimant was unhappy that the questions asked of the young people were not open questions. The school concluded that there were sufficient safeguards to ensure that the interviews were fair.

15. On subsequent days 21 – 25th April further meetings took place with the students and on 27th April there was an investigatory meeting at which it was decided that there was a case to answer. The Claimant was invited to attend a Disciplinary hearing which took take place on 16th May. The invitation was sent out on 9th May 2016. The Claimant was accused of:
    (i) Bullying behaviour;
    (ii) Physical abuse/Physical assault;
    (iii) Verbal abuse; and
    (iv) Inappropriate touching
    (v) Prejudice
    (vi) islamophobic and discriminatory behaviour.

16. The Claimant was cautioned that these charges were sufficiently grave that one of the possible outcomes was that she would be summarily dismissed (i.e. outcomes included the potential for being dismissed for gross misconduct.

17. The Claimant was also alerted to the fact that she was charged with failing to obey a legitimate instruction but this was not considered to be a major offence (in the language of the school, it was a serious offence). This arose from the allegation that the Claimant had failed to comply with an

instruction from the Vice Principal not to discuss the case with anyone associated with the school other than her union representative.

18. On 16th May 2016, the Claimant was dismissed from the employ of the Respondent. This happened at the conclusion of a disciplinary hearing that was presided over by Mr David Milligan, the Head teacher of the nearby Tooting Primary School (who are part of the Graveney Trust). The advantage of the proceedings being chaired by Mr Milligan is that he did not know the various actors involved and was impartial. He was advised by an HR specialist from Wandsworth Council.

19. The findings of the investigative reports had been presented to the Claimant in advance of the disciplinary hearing at which the Claimant had been present and represented by Mrs Dighne from UNISON. There were additional UNISON observers and a note taker. The Claimant provided very detailed arguments to the meeting in writing.

20. One detail catches the eye – the way that the Claimant agreed and defended her use of the phrase, “laters spotty” and asks whether Graveney teachers are familiar with “The Crucible” by Arthur Miller. This gives some flavour of the uncompromising nature of the defence that was offered. The Claimant complains that, “we are here today as a result of a conspiracy of complainants.”

21. In the course of the hearing the Head teacher was asked to considered five active charges:
    (i) Bullying behaviour;
    (ii) Physical abuse/Physical assault;
    (iii) Verbal abuse; and
    (iv) Inappropriate touching
    (v) Failure to obey a legitimate instruction

22. The first four were major offences and the last was considered serious.

23. Whilst presenting their case, the investigators conceded that there was insufficient evidence to substantiate the allegations of prejudice or islamophobic and discriminatory behaviour.

24. The report set out how the origin of the problem was two separate complaints by parents of different children at the school about the same incident which was said to have taken place on 14th March 2016 (one of them was sent to the LADO as well). Statements were taken from witnesses and some of them were interviewed and CCTV footage was viewed (of the first part of the incident).

25. The investigatory report discloses that there is a fair amount of commonality in the accounts given to it. It appears that the Claimant entered the Common Room as she was concerned about the amount of noise coming from the room and encountered four students playing cards there. She told them to stop shouting and insisted on an apology. She then asked them for their identification cards. Two of the students claimed that they did not have their cards on them. It is said that the Claimant then reached towards the bag of one of them (it is a point of contention whether she knew her or not) and took it – the controversial issue is whether she

actually yanked the bag from her and dragged the student as she pulled the bag from her grasp (the CCTV footage viewed by the Tribunal showed that she did). The report notes that it would be contrary to school policy to use force to take a pupils possessions for the purpose of establishing their identification.

26. The Claimant then took the bag to the office of the Head of Year 12 where the Claimant claimed that she began to look through the bag with Mr Trimble – the latter denies this and states he thought initially the bag belonged to the Claimant. This appears the more credible account. There would then appear to be an altercation between the Claimant and one of the pupils who had followed her into the office of the Head of Year. In essence it would appear that when the pupil said words to the effect of, "you can't touch me," the Claimant responded by saying (approximately), "well yes I can, literally."

27. The Head of Year 12 recorded that the Claimant touched the face of the student to show that she could. It was a patronising move. The Claimant maintained that she touched the pupil's face as she was concerned for him as a trained first aider. She said she hoped he might calm down. In this, the Claimant was mistaken. The whole incident became very heated. The Claimant claims that the pupil said, "you are not my mother" to which the Claimant says she retorted, "thank goodness." The Claimant admitted laughing out loud at one stage.

28. The group was requested to leave the office by Mr Trimble and write up statements for the following morning. There was further tension as they left and the Claimant appears to have turned to one of the pupils outside the room and said, "Laters Spotty." The Claimant described this as a "witty rejoinder" and says that this was in response to being smirked at. The pupil claimed that he thought she make an insulting remark about Muslims. The claimant contended she was threatened with the intervention of the parents of one of the pupils. Mr Trimble did not interpret what was said as a physical threat.

29. There was an examination of an earlier incident of 20th January 2016 but this was not proceeded with by the investigators because of lack of evidence. It would appear that despite this it was mentioned at the disciplinary hearing and considered when the Panel were evaluating the Claimant's long history of employment and lack of previous disciplinary sanction. This was dealt with properly at the appeal hearing.

30. On the balance of probabilities Mr Milligan found that all of the allegations there were still proceeded with were made out. This including the failure to follow an instruction. Mr Milligan adopted the rationale of the investigators. He next invited submissions as what should be the outcome.

31. There was some discussion of the Claimant's long and distinguished record but also of five more recent problematic incidents which had not been properly discussed with the Claimant at the time they arose but were alluded to in an "Attendance, Work and Conduct Report" that was dated 9th May 2016 (and had been provided to the Claimant). Mr Milligan heard argument about this. After a pause for reflection, Mr Milligan announced to the meeting that he had concluded, having taken into account all the

mitigation, that the Claimant should be dismissed summarily from her employment from that date i.e. 16th May 2016. This was confirmed in a letter dated the following day. The Claimant was notified of her right to appeal.

32. The Claimant has been in receipt of correspondence from the Local Authority Designated Officer from Wandsworth Council that confirmed that there had been a concurrent process overseen by Wandsworth, that there had been an expectation that the matter be properly investigated and there was the real possibility of a referral to the Disclosure and Barring Service.

Appeal

33. The Claimant appealed the decision to dismiss her and a hearing took place in a timely fashion on 27th June 2016 before the Vice Chair of the Directors, Ian Parkes (who was also the Chair of the Appeal Committee). Sitting with him were two Directors, Joanna Krienke and Jon Cox supported by a Personnel Officer. The Claimant was represented as before and there was a further UNISON observer at the appeal. The Claimant produced bespoke closely argued written submissions providing detailed reasoning for her propositions including that there had been a conspiracy to dismiss her and that she contested the assertions contained in the Attendance, Work and Conduct Report. In addition the Claimant produced her (powerful) character evidence. The appeal proceeded by way of a review and not a re-hearing. The record of the appeal shows that these matters were considered in some detail at this hearing thereby seeking to remedy any deficiencies in the initial dismissing process.

34. At the conclusion of the meeting on 27th June 2016, Mr Parkes, the Chair of the Panel informed the Claimant that the original decision to dismiss was upheld. This was confirmed by way of a letter of 29th June 2017.

35. In his oral evidence before this Tribunal, Mr Milligan stated that that he had concluded from the CCTV that the Claimant had snatched the bag from the chair. He was particularly struck by the Claimant's lack of calmness. In his evidence he expanded upon his findings disclosing that he believed that what the Claimant had done was to snatch the bag of a pupil and this – combined with her *leaning-in* towards a pupil was evidence of agitation by her. This was all in response to teenage behaviour in a common room – a space where he considered that some freedom was permitted/tolerated.

36. This was in circumstances where all that was required of the Claimant was that she report the incident to a more senior colleague. Instead the Claimant demanded an apology immediately. Mr Milligan said that there are better ways that this matter could have been approached and that the teenagers could have been handled in a more professional and supportive manner. What was expected of the Claimant was that she should act like an adult and uphold professional standards. What occurred fell below this standard. By contrast, the Head of Year 12 had tried to diffuse the situation and didn't want to undermine the Claimant in front of other students

37. Mr Milligan said that the arguments about training - especially the assertion by the Claimant that she should have received physical restraint training are just not relevant in this situation. The incidents for which the Claimant faced dismissal were are about her attitude to the children of the school. It is not apparent that this can be corrected by a training course.

38. He concluded that the Claimant was humiliating and intimidating to the pupils and that the touching of the student on the cheek, in particular, was intended to humiliate him. He rejected vigorously the suggestion that this could have been done as a first aid intervention.

39. As concerns the taking of evidence from the young people, Mr Parkes was clear that the school were not presiding over a court of law and that the challenge to any closed questioning of the young people was inapt.

40. He believed that the Claimant's verbal abuse was a continuum – it wasn't a reasoned discussion with pupils. He did not think that the Claimant's menopause or training record had any bearing on the disciplinary matter.

41. The Claimant's statement in these proceedings extended to 16 pages and gave the most detailed critique possible of her various concerns. The Claimant also gave evidence. At one stage in her evidence, the Tribunal asked whether she would do this again. In her typically disarming way the Claimant began her answer by acknowledging that, "The obvious answer would be to say no" but she went on to stress that at the outset she was "answering a scream – I went to see if I could help." She then went on to say that, "I need training."

The applicable law

42. Section 98 of the Employment Rights Act 1996 ("the 1996 Act") provides, so far as is material, as follows:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason . . . for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> (a) . . .
> (b) relates to the conduct of the employee.
> (4) . . . where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case."

43. In his Judgment in *Orr v Milton Keynes Council* [2011] EWCA Civ 62 Moore Bick LJ provided a summary of the applicable law, “It will been seen that although subsection (4)(b) contains the approach to be adopted when determining whether the dismissal is fair or unfair, it is subsection (4)(a) that contains the essential criterion, namely, whether the employer acted reasonably or unreasonably in treating the reason he has shown for dismissing the employee as sufficient justification for it. (As Lord Simon of Glaisdale put it in *Devis & Sons Ltd v Atkins* [1977] AC 931 at 959B-C, "the reference to "equity and the substantial merits of the case" merely shows that the word "reasonably" is to be widely construed"). An employee who considers that he has been dismissed unfairly may complain to an employment tribunal which must determine whether the dismissal was or was not unfair.”

44. In *British Home Stores v Burchell* [1980] ICR 303 the EAT considered the effect of Schedule 1, paragraph 6(8) of the Trade Union and Labour Relations Act 1974 which provided, so far as material, as follows:

> " . . . the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee."

45. Arnold J. delivering the decision of the EAT explained the function of the industrial (now employment) tribunal to which a complaint of unfair dismissal has been made in the following way:

> "The case is one of an increasingly familiar sort in this tribunal, in which there has been a suspicion or belief of the employee's misconduct entertained by the employers; it is on that ground that dismissal has taken place; and the tribunal then goes over that to review the situation as it was at the date of dismissal. The central point of appeal is what is the nature and proper extent of that review. We have had cited to us, we believe, really all the cases which deal with this particular aspect in the recent history of this tribunal over the past three or four years; and the conclusions to be drawn from the cases we think are quite plain. What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

46. The decision in *Burchell's* case was considered by this court in *Weddel v Tepper* [1980] I.C.R. 286, another decision on the Trade Union and

Labour Relations Act 1974, in which an employee had been dismissed for dishonesty. The industrial tribunal found that although the employer genuinely believed on reasonable grounds that the employee was guilty of dishonesty, it had not given him a sufficient opportunity of refuting the allegations against him and that his dismissal was therefore unfair. Having cited with approval the passage from the formulation of the principles set out by Arnold J. in *Burchell's* case, Stephenson L.J. said at page 297:

> "Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And, it seems to me, they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the industrial tribunal in this case, "gathered further evidence" or, in the words of Arnold J. in *Burchell's* case, post, p. 303 "carried out as much investigation into the matter as was reasonable in all the circumstances of the case." That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably."

44. In *Iceland Frozen Foods Ltd. v. Jones* [1983] ICR 17, 24F-25D Browne-Wilkinson J., giving the decision of the EAT held that it is necessary to determine whether in the particular circumstance of the case the decision to dismiss the employee fell within the band of reasonable responses which the employer might have adopted. These elements are encompassed in the question posed in section 98(4)(a) of the 1996 Act, namely, "whether the employer acted reasonably or unreasonably in treating it [sc. the reason shown by the employer] as a sufficient reason for dismissing the employee".

48. In *Foley v Post Office* [2000] I.C.R. 1284 the court considered the proper approach to the application of section 98. Mummery L.J., with whom Nourse and Rix L.JJ. agreed, stated the position as follows at pages 1287C-1288 C:

> "In my judgment, the employment tribunals should continue to apply the law enacted in section 98(1), (2) and (4) of the Employment Rights Act 1996 giving to those subsections the same interpretation as was placed for many years by this court and the Employment Appeal Tribunal on the equivalent provisions in section 57(1), (2) and (3) of the Employment Protection (Consolidation) Act 1978. This means that for all practical purposes:
> (1) "The band or range of reasonable responses" approach to the issue of the reasonableness or unreasonableness of a dismissal, as expounded by Browne-Wilkinson J. in *Iceland Frozen Foods Ltd. v. Jones* [1983] ICR 17 , 24F-25D and as approved and applied by this court (see *Gilham v Kent County Council (No. 2)* [1985] I.C.R.

> 233; *Neale v Hereford and Worcester County Council* [1986] I.C.R. 471; *Campion v Hamworthy Engineering Ltd* [1987] I.C.R. 966 and *Morgan v Electrolux Ltd* [1991] I.C.R. 369, remains binding on this court, as well as on the employment tribunals and the Employment Appeal Tribunal. The disapproval of that approach in *Haddon v Van den Bergh Foods Ltd* [1999] ICR 1150, 1160E-F, on the basis that (a) the expression was a "mantra" which led employment tribunals into applying what amounts to a perversity test of reasonableness, instead of the statutory test of reasonableness as it stands, and that (b) it prevented members of employment tribunals from approaching the issue of reasonableness by reference to their own judgment of what they would have done had they been the employers, is an unwarranted departure from binding authority.
> (2) The tripartite approach to (a) the reason for, and (b) the reasonableness or unreasonableness of, a dismissal for a reason relating to the conduct of the employee, as expounded by Arnold J. *in British Home Stores Ltd v Burchell* (Note) [1980] ICR 303, 304 and 308G-H, and as approved and applied by this court in *W. Weddel & Co. Ltd v Tepper* [1980] I.C.R. 286, remains binding on this court, as well as on employment tribunals and the Employment Appeal Tribunal. Any departure from that approach indicated in *Madden* (for example, by suggesting that reasonable grounds for belief in the employee's misconduct and the carrying out of a reasonable investigation into the matter relate to establishing the reason for dismissal rather than to the reasonableness of the dismissal) is inconsistent with binding authority.
> Unless and until the statutory provisions are differently interpreted by the House of Lords or are amended by an Act of Parliament, that is the law which should continue to be applied to claims for unfair dismissal."

50. In *Sainsbury's Supermarkets Ltd v Hitt* [203] IRLR 23 the Court of Appeal stressed that the range of reasonable responses test applies as much to the question as to whether the investigation into alleged misconduct was reasonable as it does to the other substantive and procedural aspects of the case.

51. In *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [2009] IRLR 563, the Court of Appeal stated that it is not the function of the employment tribunal to place itself in the position of the employer. Mummery L.J., with whom Lawrence Collins and Hughes L.JJ. agreed, said this:

> "43. It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

52. In Salford Royal NHS Foundation Trust v Roldan [2010] EWCA Civ 522; [2010] IRLR 721 at paragraph 13, Elias LJ said this,

"In *A v B* [2003] IRLR 405 the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. In *A v B* the EAT said this:

> "Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

53. On the question of credibility, Tribunals must be careful to bear in mind that a witness may lie for various reasons, such as shame, misplaced loyalty, panic, fear, distress and the fact that the witness has lied about some matters does not mean that he or she has lied about everything: see R v Lucas [1981] QB 720.

Submissions

54. There was no argument about the applicable law. This case concerns alleged misconduct and neither party dissented from the *Birchall* three limbs, namely the necessity for: genuine belief, real investigation and reasonable grounds. The Respondents argued that the decision to dismiss and the scope and conduct of the investigation fell with the range of reasonable responses and the Tribunal was cautioned against substitution.

55. In her final submissions, the Claimant contended that:
    (i) The Original complaint was vexatious;
    (ii) She was not suspended immediately (thereby demonstrating that this matter was not that serious);
    (iii) She faced a sub-standard investigation – where they didn't ask open questions (i.e. not conducted as if these were ABE interviews and they failed to take account of the intention of the pupils to get the Claimant dismissed).
    (iv) That the Respondent failed to show he considered all points e.g. the menopause;
    (v) The Claimant had not been given correct training and worked in isolation.

56. Most of all the Claimant responded instinctively and without the intention to harm. Her actions did not even come under a reasonable definition of bullying and that, in all of the circumstances including her 15 years of having a clean disciplinary record that dismissal was not proportionate.

57. The Respondent asserted that in the school context an allegation of physical abuse is of the utmost seriousness.

58. Given her history with the school and her role as an administrator the Respondent dubbed the Claimant's arguments about her lack of training as a *red herring.* It was said that her conduct was wrong regardless and that this was a matter of attitude.

59. The Claimant's most significant argument was that one of these parents had complained before and that the accounts of the students were exaggerated/hyperbolic and that the school did not accept their account in their entirety. If their accounts were not accepted then why is it not reasonable for the Respondent to believe the Claimant? In fact, the evidence is that the School was somewhat sceptical about the allegations initially until it became apparent that aspects of them were corroborated by objective evidence.

60. The Respondent would say that it was inappropriate to discount the accounts of the pupils completely. It would be wrong to say because the School disbelieve one aspect of their evidence it should discount everything. In addition, the case against the Claimant had the benefit of corroboration by way of the CCTV and the account of Mr Trimble who had no axe to grind. These are both objective pieces of evidence.

61. On behalf of the Respondent in this case it was said that the principles set out by the Court of Appeal in *Roldam* and *A v B* are inapt. This is not a case of a teacher who can only teach in the environment of a school. The Claimant is an administrator. She is not in a regulated profession or subject of immigration control.

62. Lastly the Respondent would contend that this is a case of a conscious decision to use physical force and they ask the question, "what would a parent think if they saw this footage?" They maintain that the Claimant's conduct is inappropriate – especially so far as the children involved were goaded and subjected to an abuse of authority. They would say that it is particularly striking that the Claimant does not admit that she has done anything wrong.

Application of law to the facts

63. The fact that the Tribunal was able to hear from the two major witnesses was an immeasurable benefit. Hearing from the Claimant and seeing her argue her case in Tribunal brought out some of her very many positive qualities which are not so apparent from her written arguments.

64. The Claimant is intelligent, dogged and fearless. There is no doubt that the Claimant can make a real connection with children and young people. She was committed to her work and to the school. Above all she is humorous. This comes across much more clearly in person that it does on paper. There are also some difficulties in interpreting humour – especially as in this case where the Claimant has a quick caustic wit. There has to be a question as to whether she always reads her audience correctly.

65. Mr Milligan was an impressive witness also. He came across as genuine, caring and knowledgeable. It was very striking that when he deemed the Claimant's conduct to be unacceptable, he was speaking with deep knowledge of the school environment. It would seem that it would be a very bold Tribunal that would adjudge that he was mistaken as to this. Another way of putting this is that Mr Milligan is a living example of why there is wisdom in the higher courts caution about Tribunals substituting their discretion for that of decision-makers.

66. The Tribunal accepted that the Claimant was not a member of a regulated profession nor is she present in the UK on a work visa such that a dismissal could have very serious repercussions indeed. That being said, the Claimant was a long-standing employee, facing very serious allegations in a reasonably large school and may face long-term problems in working with young people as a consequence of the reasons for her dismissal. On that basis it would seem sensible that she should be accorded the courtesy of a rigorous investigative and deliberative process. This was accorded to her in this case.

67. In this case, the School commissioned an investigation from two designated members of staff that was appropriately rigorous – involving as it did, witness statements, interviews, the viewing of CCTV and a hearing. There was a serious attempt at objectivity. The complaint that some of the questioning of the young people involved leading questions is misconceived. This was not a criminal investigation or even one conducted by social services with a view to removing children from a family. This was an investigation into staff misconduct in school. The precepts of "Achieving Best Evidence" did not need to be followed in a context such as this.

68. The investigation was launched in a spirit of appropriate scepticism. The investigators had an open mind – including as to the possibility that the allegations might be vexatious. However, what was crucial was the corroboration provided by the CCTV footage and the evidence of the Head of Year 12 (who was independent). These were the pivotal items of evidence that tended to suggest that the thrust of the case against the Claimant was made out. Despite that the Respondent did not just find that every allegation against the Claimant was made out. They were weighed properly and some allegations dismissed – even in the investigation phase.

69. The Respondent undertook a reasonable investigation and formed a genuine belief as to the Claimant's misconduct.

70. It was made apparent to the Claimant that this matter was serious and certainly by the conclusion of the investigation. It is not correct that the Claimant was misled by the initial failure to suspend her. The School are to be commended for the proportionate way in which they acted. There was no unseemly rush to suspend and a proper recognition that to do so was not a wholly neutral step. It was only implemented when concern started to mount that there was a potential for the Claimant to interfere with the investigation.

71. If one considers the process from the initial notification of the problem to

the conclusion of the appeal, the Claimant was given proper opportunities to challenge the evidence that was relied upon by the investigators,

72. The Claimant is frustrated that some of the evidence she faced is inflated and exaggerated. She feels it is part of a conspiracy to have her dismissed.

73. To an outsider, it is striking how much of the evidence is actually agreed. It does, however, not seem reasonable that the Respondents should only be allowed to rely on agreed matters when several of the assertions made by the Claimant are contradicted by the CCTV footage or the evidence of Mr Trimble – who was objective. Additionally, some of the assertions made by the Claimant just appeared unlikely – such that she only touched one of the students for first aid reasons or that her actions were influenced by lack of training or the menopause.

74. Mr Milligan was entitled in all the circumstances of the case to find that the allegations which the Claimant faced were made out.

75. Some of the actions of the Claimant at critical times had a certain playful quality to them – engaging with a pupil in a contest to gain control of the bag, provoking a student by touching him when he said he could not be touched and signing off with the phrase, “Laters Spotty.” There is a certain lack of solidity and maturity about it. It is conduct which simply does not behove a responsible adult in a school setting.

76. It seems that it would be open to Mr Milligan to adopt a variety of responses to these charges – once found. The finding of the Tribunal is that it would not be unreasonable for him to find that this behaviour by the Claimant was actually an instance of assault on a pupil or pupils/ a physical confrontation with name-calling instigated by the employee of the school. That this involved elements of goading, abuse of authority and bullying. This is likely to come under the definition of “maltreatment” of children – a major offence under the School’s Policy.

77. One of the striking features of the case is that the Claimant appeared to have no insight into how her actions could be interpreted by others. Mr Milligan cited as one of his reasons for dismissal his conclusion that the Claimant did not appear to recognise that her behaviour had been in any way unacceptable. There was no apology or real explanation. The concern that the school had was that they could not be confident that there might not be a repeat. For what it is worth, the Tribunal is quite confident that the Claimant did not mean to do any harm and concluded that she would have been able to strike up a real rapport with many young people but this is not the test that the Tribunal must address.

78. Mr Milligan was entitled to conclude that not only was the Claimant guilty of serious misconduct but that she had no insight into the same. There was no guarantee that the same would not be repeated and that this struck at the very heart of her contract of employment and that, as a result, he was entitled to dismiss the Claimant. Mr Milligan told the Tribunal that he considered all the mitigating evidence about the Claimant’s history but that the circumstances of the Claimant’s conduct towards the students on the relevant date meant that the right outcome was to dismiss the

Claimant. Such a decision was open to Mr Milligan on behalf of the school. It was within a band of reasonable responses open to the School.

79. On that basis, this claim is not well founded.

Employment Judge Downs
Dated: 11 April 2017