Case No: 2601474/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Tracey Irvine	**-v-**	The Mead Educational Trust

Heard at: Leicester **On:** 11 December 2018

Before: Employment Judge Evans (sitting alone)

Representation
For the Claimant: Ms Cindy Chattaway (a friend of the Claimant)
For the Respondent: Mr Bromige (Counsel)

JUDGMENT

1. The Claimant was unfairly dismissed but the Respondent is not ordered to pay her either a compensatory or basic award for the reasons set out below.

2. The Claimant was not dismissed in breach of contract. Her claim for wrongful dismissal fails and is dismissed.

REASONS

Preamble

1. The Claimant was dismissed by the Respondent with effect from 6 March 2018. The Respondent had dismissed her because of the way she had dealt with a vulnerable child with special educational needs in key stage one who was approximately four years old ("the Child") on Friday 18 January 2018. Following her dismissal she presented claims of unfair and wrongful dismissal to the Tribunal on 25 June 2018. The hearing of those claims took place in Leicester on 11 December 2018 ("the Hearing").

2. The Claimant was represented at the Hearing by a friend, Ms Cindy Chattaway. The Respondent was represented by Mr Bromige of Counsel. Before the Hearing the parties had agreed a bundle of documents running to 138 pages. All page references in this judgment are to the bundle page numbers unless otherwise stated.

3. Ms Jenny Slinger (Vice Principal of the Respondent), Mrs Tracey Brown (Chair of Governors at Northfield House Primary Academy), and Kamlesh Kotecha (Trustee of The Mead Trust) gave evidence on behalf of the Respondent. The Claimant gave evidence on her own behalf.

4. At the end of the Hearing there was insufficient time for me to reach a decision and to give an extempore judgment. I therefore reserved my judgment. These reasons deal with whether the dismissal was unfair and/or wrongful, the reduction of any compensatory award under section 123(1) of the Employment Rights Act 1996 ("the 1996 Act") as a result of the application of the principle derived from the case of Polkey v AE Dayton Services Ltd 1988 ICR 142, and the issue of contribution/conduct prior to dismissal.

Preliminary issue

5. At the beginning of the Hearing I explained to the parties that I knew Ms Chattaway as a result of my role as one of the Chairs of Royal Mail's National Appeals Panel ("the NAP"). I explained that the NAP is a panel which hears appeals against dismissal by trade union officials employed by Royal Mail. The panel comprises a Royal Mail employee, an official of the CWU trade union and a lawyer who is the independent Chair. The purpose of the NAP is to take the hearing of appeals for a particular category of employees out of the hands of Royal Mail managers. I explained that I had chaired around 50 such appeals over the last 7 years. I explained that I was not an employee of Royal Mail in my capacity as an NAP Chair: I was paid for the work done on a daily fee basis.

6. I explained that during those 50 appeals I had come across Ms Chattaway on a number of occasions. She had twice been the Royal Mail member of the NAP. She had appeared before the NAP as a witness when she had been the investigator in a case. She had also attended on other occasions to prepare notes and to deal with logistics of the hearing days.

7. I explained that I do not have any social relationship with Ms Chattaway. I explained that I had probably met her professionally on perhaps a dozen occasions over the last 7 years. I explained that I had made some decisions which would probably have displeased her and Royal Mail in the past and others that would probably have pleased her and Royal Mail. That reflected the purpose of my role as Chair of the NAP which was to inject clear independence into the appeals process.

8. I explained that I had disclosed these matters so that both parties would have the opportunity to apply for me to recuse myself. I explained that I would not take it remiss if any such application were made. I explained that, if any such application were made and were successful, the consequence would be that the case would have to be postponed as there was no other employment judge available on the day to hear it. I also reminded the parties that if they did not make an application for me to recuse myself at this stage they would not be able to raise subsequently the issue of apparent bias on the basis of my involvement with the NAP.

9. After I had disclosed my involvement with the NAP I asked Mr Bromige whether he wished to have a short adjournment to consider the matter. He quickly took instructions and said that he did not. The Respondent did not wish to make any application for me to recuse myself. Ms Chattaway for the Claimant also indicated that the Claimant did not wish to make any such application.

The issues

10. It was agreed that the issues for me to determine in the Claimant's claim of unfair dismissal were as follows:

    1) Had the Respondent shown the reason for dismissal? In a misconduct dismissal this requires the Respondent to show that it honestly believed the Claimant was guilty of misconduct.

    2) Was the reason for dismissal a potentially fair reason?

3) Was the dismissal fair pursuant to section 98(4) of the 1996 Act including

   a. Was the dismissal procedurally fair?

   b. Was the dismissal within the range of reasonable responses?

   In a misconduct dismissal in deciding whether a dismissal is fair under section 98(4) the Tribunal will consider:

   c. Whether the employer had reasonable grounds for its belief in the employee's guilt;

   d. Whether at the stage at which that belief in the employee's guilt was formed on those grounds the employer had carried out as much investigation into the matter as was reasonable in the circumstances.

4) If the dismissal was unfair, should compensation be reduced as a result of the Polkey principle, i.e to reflect the chance that the Claimant might have been fairly dismissed if a fair procedure had been followed or in any event.

5) If the dismissal was unfair, whether the compensatory award should be reduced because the Claimant had caused or contributed to her dismissal and whether the basic award should be reduced in light of Claimant's conduct prior to dismissal.

11. In relation to the Claimant's claim of wrongful dismissal, it was agreed that the issue was simply whether the Claimant had committed a repudiatory breach of contract which entitled the Respondent to dismiss her without notice.

The Law

Unfair dismissal

16. Section 94 of the 1996 Act gives an employee the right not to be unfairly dismissed.

17. Section 98(1) of the 1996 Act provides that when a Tribunal has to determine whether a dismissal is fair or unfair it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2) of the 1996 Act. The burden of proof to show the reason and that it was a potentially fair reason is on the employer.

18. A reason for dismissal is a set of facts known to, or beliefs held by, the employer which cause it to dismiss the employee.

19. If the Respondent persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses.

20. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

21. In considering this question the Tribunal must not put itself in the position of the Respondent and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the Respondent. Rather it must

decide whether the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted. A claim will not succeed just because the Tribunal takes the view that the decision to dismiss was harsh if it nonetheless fell within the range of reasonable responses.

22. When the reason for the dismissal is misconduct, the Tribunal should have regard to the three part test set out in British Home Stores Limited v Burchell [1980] ICR 303.

23. First, the employer must show that it believed the Claimant was guilty of misconduct. This is relevant to the employer establishing a potentially fair reason for the dismissal under section 98(1) and the burden of proof is on the employer. Secondly, the Tribunal must consider whether the employer had reasonable grounds upon which to sustain its belief in the employee's guilt. Thirdly, the Tribunal must consider whether at the stage at which that belief was formed on those grounds the employer had carried out as much investigation into the matter as was reasonable in the circumstances.

24. The second and third parts of the test are relevant to the question of reasonableness under section 98(4) and the burden of proof in relation to them is neutral.

25. If the Tribunal concludes that the dismissal is unfair, section 123 of the 1996 Act provides for a compensatory award to be made. Section 123(1) provides:

> *(1) "Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

26. It is therefore necessary for the Tribunal to consider whether the compensation awarded should be reduced to reflect the chance that the Claimant might have been dismissed fairly at a later date in any event or if a fair procedure had been used.

27. In addition, section 123(6) of the 1996 Act requires the Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that the Claimant caused or contributed to their dismissal. In addition, section122(2) of the 1996 Act requires the Tribunal to reduce the basic award if it considers that it would be just and equitable to do so in light of the conduct of the Claimant prior to dismissal.

Wrongful dismissal

28. At common the right of summary dismissal arises when the employee commits a repudiatory breach of contract. The employer has the option of waiving the breach or of treating the contract as discharged by the breach by dismissing the employee.

29. The key issue, therefore, in any claim of wrongful dismissal will often be whether the employee's breach of contract was repudiatory: whether it was sufficiently serious to justify dismissal. That depends on the circumstances. If not justified, the dismissal is wrongful, and the employer is liable in damages.

30. There are no hard and fast rules as to the degree of misconduct necessary for behaviour to amount to a repudiatory breach of contract, although dishonesty, serious negligence or wilfully disobeying lawful instructions will often justify summary dismissal at common law. The Tribunal will consider whether the misconduct has so undermined the trust and confidence inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment.

Submissions

31. Mr Bromige very fairly offered to make his submissions before those of the Claimant, given that Ms Chattaway is not a professional representative. His submissions may reasonably be summarised as follows:

    31.1. The Burchell test was clearly met. In particular, the decision makers at both the dismissal and appeal stage had had the benefit of hearing first hand from the witnesses. They did not just take as read what the investigating officer had reported;

    31.2. The Respondent at each stage therefore had reasonable grounds for believing what it did. The evidence of Ms Higgins if accepted showed that the Claimant had been guilty of gross misconduct and the decision makers at each stage had been entitled to prefer her evidence to that of the Claimant who had said that she could not remember any incident having occurred. The Claimant had failed to put forward a cogent case for why Ms Higgins would have made up the allegation;

    31.3. The fact that Mr Kotecha had accepted that the appeal panel had not reached any conclusion in relation to whether the Claimant was guilty of aggression changed nothing. The appeal panel had genuinely and reasonably believed that the Claimant had used unnecessary physical force in breach of the Child's own positive behaviour plan;

    31.4. The Claimant's failure to acknowledge that the behaviour had occurred meant that she had not demonstrated remorse. This was an aggravating factor. Overall, she was guilty of gross misconduct whether or not she had behaved aggressively;

    31.5. Even though the appeal panel had only decided to dismiss by a majority, that decision was clearly within the band of reasonable responses;

    31.6. If there were procedural issues that made the dismissal unfair (which the Respondent did not accept), a fair procedure would still inevitably have resulted in the Claimant being dismissed given the evidence provided by Ms Hill and Ms Higgins and the Claimant's failure to put forward any positive case;

    31.7. Given the behaviour of which the Claimant was guilty, even if there were procedural issues which meant the dismissal was unfair, it would not be just and equitable for the Claimant to receive any compensation either in the form of a compensatory award or in the form of a basic award. Mr Bromige referred to Steen v ASP Packaging Ltd [2014] ICR 56 in this respect;

    31.8. Turning to wrongful dismissal, on the balance of probabilities the Claimant was guilty of the conduct described by Ms Higgins and that conduct amounted to gross misconduct. Ms Higgins' evidence had withstood questioning on three occasions and the Claimant had not put forward any good reason for Ms Higgins having fabricated her evidence. Mr Bromige noted that Shaw v B&W Group Limited UKEAT/0583/11 reminded me not to conflate the tests for wrongful and unfair dismissal.

32. The submissions of Ms Chattaway for the Claimant may reasonably be summarised as follows:

32.1. The Respondent did not have a reasonable evidential basis for a belief in the Claimant's guilt because the investigation carried out by Ms Slinger was wholly inadequate;

32.2. In particular, the investigation should have considered: (1) had it been necessary to restrain the Child; and (2) if so, had the restraint used been appropriate or inappropriate;

32.3. The evidence available to the disciplinary and appeal panels suggested that it was more likely than not that restraint had been necessary. There was a significant amount of evidence pointing in that direction. The Child was very challenging;

32.4. If restraint had been necessary, the behaviour witnessed by Ms Higgins did not breach the Positive Handling Policy. She had not done anything listed under the "Must not" heading;

32.5. The disciplinary panel had been inappropriately influenced by Mrs Collins' emotive and inaccurate description to it of the evidence. In fact little weight should have been given to her statement because she had not been a first-hand witness, but had just been reporting what she had been told by Ms Higgins and Ms Hill;

32.6. Given that the effect of the decision to dismiss the Claimant was to end her career, and that the alleged conduct for which she had been dismissed could give rise to criminal liability, the investigation should have been more thorough than it was;

32.7. The actions of Ms Hill and Ms Higgins did not suggest that they had witnessed aggressive behaviour. They had delayed reporting the incident. Equally, the Respondent's reaction did not reflect an allegation of aggression – the Claimant was allowed to work unsupervised with children on Monday 22 January 2018;

32.8. The only thing that the Respondent could reasonably have concluded that the Claimant was guilty of was shouting and in all the circumstances she should not have been dismissed for that. It did not amount to gross misconduct;

32.9. The Respondent was aware of difficulties in the relationship between the Claimant and Ms Hill and yet did not appear to have taken into account how these might have affected Ms Hill's reporting of the incident. Further Mrs Collins was aware of these issues and so they may well have affected her own evidence in relation to what had happened;

32.10. Ms Higgins had been appointed to the Claimant's role following her dismissal. This reinforced what the Claimant said about her motivation for making the complaint;

32.11. It was not reasonable to dismiss when the behaviour described by Ms Higgins fell within the boundaries of acceptable restraint techniques;

32.12. Mr Kotecha had stated that the appeal panel had not determined whether the Claimant was guilty of aggressive behaviour and yet had confirmed the decision to dismiss notwithstanding such behaviour being a fundamental part of the charge. The Respondent had therefore dismissed the Claimant without coming to a conclusion on the charge. It must follow that the dismissal was unfair;

32.13. So far as the wrongful dismissal claim was concerned, there was insufficient evidence before me to conclude on the balance of probabilities that the Claimant was guilty of gross misconduct.

Findings of Fact

33. I am bound to be selective in my references to the evidence when explaining the reasons for my decision. However, I wish to emphasise that I considered all the evidence in the round when reaching my conclusions.

General background findings

34. The Claimant was employed by the Respondent as a Level 3 Teaching Assistant ("TA") at Willowbrook Primary Academy ("the School"). Her employment had begun in January 2007.

35. The Claimant began to work as a TA in the classroom of Emma Hill, a teacher, in September 2017. Ms Hill was a relatively inexperienced teacher. She had been qualified for three years. The Claimant had worked as a TA for 25 years. It is clear that they did not get on well. I find Ms Hill did not always agree with the Claimant's way of dealing with classroom situations and told her so. I find that the Claimant did not respond well to this: although she was as a TA the more junior and less qualified member of the classroom team, she was also more experienced. In December 2017 the Claimant asked in effect that she no longer work with Ms Hill (page 60). This request was not resolved prior to the Claimant's dismissal.

Relevant policies and procedures

36. The Respondent has a Behaviour Policy (page 30). This provides as follows in relation to the use of force:

> *it is important that we all understand what acceptable behaviour is. Equally, unacceptable behaviour and the consequences of such behaviour must also be clearly stated. From the outset we recognise that there is a distinction between emotionally disturbed behaviour (which may be a Special Educational Needs issue) and poor behaviour. Most members of the school team are "Team Teach" trained and these members of staff will intervene in a situation where a pupil is committing an offence, injuring themselves or others, or damaging property. The power to use reasonable force also applies to maintain good order and discipline in the classroom.*

37. The Respondent has a Disciplinary Procedure (page 45). This includes a non-exhaustive list of behaviour which can constitute gross misconduct (page 49) and which includes:

> *…(b) physical violence…*
> *(d) harming, or placing at risk of harm, a vulnerable person…*
> *(j) bringing the school or the City Council into serious disrepute…*

38. The Respondent also has a Positive Handling Policy (page 53). Under the heading "Legal Framework" this states:

> *Positive handling should be limited to emergency situations and used only in the last resort. Section 550 A of the Education Act 1996 and DfEE Circular 10/98 allowed teachers, and other members of staff at a school who authorised (see Appendix 2) by the Head teacher, to use such force as is reasonable in circumstances where the pupil may need to be prevented from engaging in behaviours which are likely to cause injury to themselves, others or damage to*

property. This guidance extends this to maintaining good order and discipline, for both on-site and off-site activities.

Positive handling should only be used when all other strategies which do not employ force have been tried and found unsuccessful ***or in an emergency situation.***

39. Under the heading "What does it mean to restrain a child?", the policy states:

… Positive handling is the positive application of force with the intention of protecting the child from harming himself or others or seriously damaging property… The physical intervention must also only employ a reasonable amount of force – that is the minimum force needed to avert injury or damage to property, or to prevent a breakdown in discipline – applied for the shortest period of time (see section on use of reasonable force).

40. In terms of the method of restraint employed, the policy provides guidance (page 57):

Restraint must NOT

- *Involve hitting the pupil*
- *Involve deliberately inflicting pain on the pupil*
- *Restrict the pupil's breathing*
- *involve contact with sexually sensitive areas*

During any incident the restrainer should:

- *Offer verbal reassurance to the pupil*
- *Cause the minimum level of restraint of movement*
- *Reduce the danger of any accidental injury*

Physical intervention can take several forms. It might involve staff:

- *Physically interposing between pupils*
- *Blocking a pupil's path*
- *Holding*
- *Pushing*
- *Pulling*
- *Leading a pupil by the hand or arm*
- *Shepherding a pupil away by placing a hand in the centre of the back; or*
- *(In extreme circumstances) using more restrictive holds*

41. The policy goes on to set out how details of positive handling should be recorded. It also states that they should be reported to the Head teacher.

Information relating to the Child

42. The Child was in early 2018 about four years old. There was a Positive Behaviour Plan for him at page 61 of the bundle. It indicated that his behaviours could include "snatching toys from others, lying under chairs, hurting others by holding wrists/ankles, squeezing children so they cannot move away". Under the heading "preferred method physical intervention" it states:

Sometimes physical intervention other than handholding.
A calming hug and distraction.
Guide away and immediately distract with another activity

43. Under the heading "de-escalation skills – highlight best strategies" it states:

Verbal simple/quick instruction "stop" "come here" "[name] do this",
Limited Choices "this… Or this…"

Supportive touch
Success reminded-rewarded immediately for good activity
Distraction – focus attention on to another task/activity (outside of classroom).

44. There was also further evidence in the bundle relating to his behaviour. An email from Bethany Ronchetti dated 18 January 2018 (page 64) noted:

> *His behaviour and needs are extremely challenging in all kinds of way and the disruption to whole class teaching is becoming a battle in Class 2. The need for SEND support is currently greater in Class 2 therefore it has been decided that Charlene will now be focusing her support in Class 2 with [the Child] during the afternoons.*

Events leading up to dismissal of the Claimant

45. On 19 January 2018 two employees made allegations that the Claimant had dealt with the Child in a way that she should not have. Charlene Higgins, a TA, said that she had seen the Claimant dealt with the Child in a way that she should not have. Ms Hill said she had heard the Claimant deal with the Child in a way that she should not have.

46. The Claimant was informed of the allegation on Tuesday 23 January 2018. It was that she had "acted in a way that was aggressive towards a vulnerable person, a child" (page 66a) and there was an investigatory meeting on Monday 29 January 2018 with Ms Slinger, supported by Ms Jide Okagbue (a Human Resources Advisor), following which the Claimant was suspended.

47. During the investigatory meeting it was explained to the Claimant that it was alleged that she had held the Child's shoulders and pushed him down onto a chair. The Claimant said in reply "no. I wouldn't do that". The notes prepared by Ms Okagbue also recorded the Claimant saying when asked whether she recalled any incident with the Child "One hundred percent nothing happened". The Claimant did not accept this. She said that she had said "100% I was not aggressive". However it was not in dispute that during this meeting the Claimant could not remember anything out of the ordinary happening with the Child. Further, she suggested that Ms Hall and Ms Higgins had made up the allegation:

> *EH and CH probably made [sic] the allegation. EH knows I wanted out of foundation stage. CH wants a full-time Level 3 post. She told me so.*

48. On 29 January 2018 Ms Slinger also interviewed Ms Hill (page 74) and Ms Higgins (page 77). She conducted these interviews after she had interviewed the Claimant. Ms Hill commented of the incident involving the Child:

> *I was in the classroom working on one side of a low bookcase. TI [ie the Claimant] and Charlene Higgins (CH) working on the other side. I heard a loud bang and a lot of commotion. TI was shouting at [the Child]. [The Child] had knocked over a box of wooden bricks. (EH explained that [the Child] has special educational needs). TI was telling him off with a raised voice. I did not see it (the alleged incident) so cannot comment on that. I just saw the aftermath. I asked CH what had happened. CH explained that TI had asked [the Child] to pick up the bricks. He didn't. Voices were then raised to encourage him to pick them up. CH took over and made a game of picking the bricks up. [The Child) was crying and distressed.*

49. Ms Hill went on to comment the when she had gone over to where the Claimant and the Child were:

Other children looked shocked. CH said she saw TI with her hands on RM's shoulders holding him down.

50. When asked what the Claimant had said Ms Hill stated:

> *TI explained that he could have hurt another child. She was talking fast. I felt that TI knew she'd lost control the situation. She knew she'd been seen and that people would not approve of her actions.*

51. Ms Higgins account to Ms Slinger of the incident was as follows (page 77):

> *It was "Explorer Time", somewhere between 1:30 PM and 1:45 PM, I was changing a child into his pants, I heard a commotion, TI was shouting "STOP, STOP" at [the Child]. She then grabbed him by the arm and pulled him to the floor. The Child try to get up but TI held him and pushed him down with her hands on his shoulders. She held him down. I went over and put my arms around him to calm him. TI was angry and said "He's not going anywhere until he's picked this lot up". I felt quite intimidated. I then made a game of picking up the bricks with [the Child]. EH came around the bookcase. We had picked up the bricks. EH asked if everything was okay. [The Child] had now stopped crying. TI had gone off somewhere.*

52. During the course of her interview Ms Higgins also suggested that the Claimant had previously pulled or yanked the Child's arm and that she "talks quite aggressively". The notes record that Ms Higgins became upset on at least two occasions during her interview with Ms Slinger.

53. On 30 January 2018 the Claimant was suspended on full pay (page 79). On 16 February 2018 the Claimant was invited to a disciplinary hearing (page 80). The letter of invitation stated:

> *The Disciplinary Panel will consider the allegation that you acted in a way that was aggressive towards a vulnerable person; a child, which was deemed unnecessary, unprofessional and inappropriate. Furthermore, in doing so you have breached Willowbrook's Positive Handling Policy, RM's Positive Behaviour Plan and the principles of the Behaviour policy.*

54. The letter enclosed the documents which would be considered at the hearing, including the notes of the interviews with Ms Hill and Ms Higgins.

55. Following receipt of the letter and enclosures but prior to the hearing the Claimant prepared and submitted a statement (page 85). This did not deal in any detail with the factual allegations made by Ms Hill and Ms Higgins in their interviews. Rather it simply stated "we categorically deny the allegation that has been presented – quote "on the afternoon of Friday, 19 January 2018, you acted in a way that was aggressive towards a vulnerable person; a child."

56. The disciplinary hearing took place on 5 March 2018 (notes at page 87). The disciplinary panel comprised Mrs Brown (Chair of Governors) and two other governors. The management's case (page 96) was presented to the panel by Mrs Collins, the Principal of the School. Both Ms Higgins and Ms Hill attended the hearing and the Claimant and her representative had an opportunity to ask both of them questions (which they did).

57. The notes record that in her evidence to the disciplinary panel the Claimant:

> *… Denied the allegations made against her. Mrs Irvine noted that she could not recall the alleged incident, noting that nothing out of the ordinary had happened*

on 19 January 2018. Mrs Irvine commented that there were numerous occasions when [the Child] required restraint or intervention. Mrs Irvine explained to the Panel that she would have assertively told [the Child] to stop, placed her arms around [the Child] to restrain and instructed him to pick up the bricks. She noted that the handling would have been reasonable and justified to the situation.

Mrs Irvine felt that Mrs Higgins was annoyed at Mrs Irvine for not changing [the Child]'s nappy.

58. The notes also record that the Claimant gave evidence to the effect that she was aware of the strategies for managing the Child's challenging behaviour.

59. The disciplinary panel unanimously concluded that the Claimant had acted as alleged in the letter setting out the disciplinary charge. There was then an opportunity for management to comment on the Claimant's previous record and the seriousness of the offence and for the Claimant to present any mitigating circumstances. Following this the disciplinary panel deliberated and decided to dismiss the Claimant summarily. The Claimant was told of this decision at the end of the hearing. She was sent a letter of dismissal on 6 March 2018 (page 100). The letter recorded that the panel had found the allegations to be well-founded and that her actions constituted gross misconduct for which the appropriate sanction was summary dismissal.

60. The Claimant appealed (page 102). In her appeal she said she refuted the allegations. She also made the following points:

    60.1. The statements relied upon by the Respondent were "full of contradictions";

    60.2. There had been a 10 day delay before she was asked about the event yet it was clear other "parties" were spoken to "in some detail" at the time of the incident;

    60.3. Neither LADO nor the Police had been contacted and yet her career had been ended as a result of one allegation which she refuted.

61. The invitation to the appeal meeting made plain that its purpose was "to re-hear the evidence in its entirety and to evaluate the Staff Disciplinary Panel's decision and sanction from an independent perspective" (page 107). However, at the beginning of the appeal hearing on 25 April 2018, the Claimant was given a choice of a full re-hearing or an appeal hearing focusing on the grounds of appeal submitted by the Claimant. The Claimant and her union representative chose the latter.

62. The appeal panel comprised Mr Kotecha (a Trustee of the Respondent) and two other governors. At the beginning of the hearing her union representative summarised her grounds of appeal as being that she should not have been dismissed because: (1) of her long service and clear disciplinary record; (2) she had denied aggression; (3) there were contradictions in the statements given; (4) Mrs Irvine was not represented at the investigatory meeting; and (5) the notes of that meeting had not been agreed.

63. Mrs Irvine gave evidence at the appeal. The notes of the hearing began at page 123. She said she thought events "through that day had been typical". She said she had "probably" raised her voice and might have done so when she told the Child to pick up the bricks. However she "couldn't say it happened or it didn't, hand on heart". When asked if she had any recollection of using restraint on the Child on 19th January 2018, she said she had "no specific recollection of using restraint". She accepted that it was likely that there had been physical contact but she had "no

specific recollection of an undue and/or aggressive restraint in terms of [the Child] on 19th January". She also did not recall the Child knocking over the bricks.

64. Ms Higgins gave evidence to the appeal. She had heard a loud noise. She had seen the Claimant pull the Child by the arm and shout "stop, stop". She "saw Mrs Irvine pull him to the floor. She heard Mrs Irvine say that [the Child] "wasn't going anywhere until he had picked up the bricks". Mrs Irvine was sitting on a chair. [The Child] was standing next to her. Mrs Irvine was besides [the Child] and she put her hands on [the Child]'s shoulders and pulled him down". When he had tried to get back up she had "pulled him back down with both shoulders". She had heard the Claimant "aggressively raise her voice".

65. Ms Higgins was asked if the Child had been in danger of harm or of harming others. Ms Higgins answered "No. There were no other children near to him". Ms Higgins said she had reported her concern to Ms Ronchetti not to Ms Hill and that Ms Ronchetti had told her to report the matter to the Principal.

66. Ms Hill gave evidence to the appeal. She said she had "hear loud voices. Mrs Irvine's more so. It had an anxious, distressed tone". She said "it felt like there had been a loss of control". She said she had "heard an aggressive tone within an adult's voice that I found unacceptable". She said that it was "not reasonable" to speak to the Child in that tone. Ms Hill's recollection was that she had spoken to Ms Higgins about it before reporting the matter to Ms Collins.

67. The Claimant and her representative were given an opportunity to ask Ms Higgins and Ms Hill questions.

68. The appeal was dismissed. The panel unanimously concluded that the grounds to uphold the appeal were not made out. In terms of the penalty, they reached a majority decision to uphold the penalty of summary dismissal (that is to say one member of the panel felt that a sanction short of dismissal should have been imposed). A letter setting out the decision was sent to the Claimant on 9 May 2018 (page 136). It stated that the decision to dismiss was upheld and:

> *In addition to the original decision, and at the core of the decision to uphold the dismissal, is the loss of trust and confidence resulting from a total lack of acknowledgement, admission or remorse on your part. The Panel was saddened that after such a long unblemished career this decision was necessary.*

69. However it should be noted that Mr Kotecha explained in his oral evidence to the Tribunal that in reaching this decision the appeal panel had not reached a decision in relation to whether the Claimant had acted aggressively. Rather it concluded that she had acted inappropriately and in breach of the Child's Positive Behaviour Plan, the Respondent's Positive Handling Policy and the principles of its Behaviour Policy.

Findings of fact relevant to wrongful dismissal claim, Polkey and contribution

70. I find that on 18 January 2018 the Claimant acted in an aggressive manner to the Child because she was cross that he had knocked over a box of bricks and would not co-operate in picking them up. I find that the way in which she acted was in breach of the Positive Handling Policy, the Child's Positive Behaviour Plan and the principles of its Behaviour Policy.

71. More specifically, I find that after the Child had knocked over the pile of bricks she shouted at him, pulled down to the ground to make him pick them up, and pushed him back down and held him down when he tried to stand up without completing the task.

72. I find that the Claimant was aggressive because this is what the evidence of Ms Higgins suggested from the first time she was interviewed. She referred to the Claimant talking "quite aggressively" to the Child (page 77) in her investigative interview. Although this was about how the Claimant spoke to the Child generally, it is clear from the context that this is how Ms Higgins felt that she had spoken to him on that occasion: she said that the Claimant had said whilst angry "he's not going anywhere until he's picked this lot up" and that she had felt "quite intimidated" by the Claimant. She confirmed that evidence in the disciplinary meeting and at the appeal.

73. I find that the Claimant's actions breached:

    73.1. **The Positive Handling Policy:** because it is clear that positive handling should only be used when all other strategies which do not employ force have been tried and found unsuccessful. However the evidence of Ms Higgins makes plain that the Claimant manhandled the Child immediately after he had knocked over the box of bricks (which caused a loud bang). It was not a last resort to enforce discipline.

    73.2. **The Behaviour Policy**: because this suggests when read together with the Positive Handling Policy that force should only be used in limited circumstances, and certainly not as a first reaction to unacceptable behaviour.

    73.3. **The Child's Positive Behaviour Plan**: because this suggests that physical intervention should be a "calming hug and distraction" when it had to go beyond hand holding. Clearly, therefore, pulling the Child to the floor, pushing him back down when he tried to get up and holding him down would have been outside his Positive Behaviour Plan.

74. In making these findings I have preferred the evidence provided to the investigation, the disciplinary hearing and the appeal hearing by Ms Higgins and Ms Hill to the evidence provided up to and including the Hearing by the Claimant. This is for the following reasons.

    74.1. Realistically, there were two possibilities: an incident involving the Child knocking over a box of bricks occurred, with the Claimant reacting to that, broadly as described by Ms Hill and Mis Higgins, or it did not, and so the incident was invented by Ms Higgins and Ms Hill who have conspired against the Claimant. The possibility of a third possibility – that there was an incident involving the Child knocking over bricks but that it did not happen as Ms Higgins and Ms Hill say – is, I find, eliminated because the Claimant cannot recall any such incident. I find that if the Child had knocked over a pile of bricks and made a sufficient mess for the Claimant to have required him to do something about that then the Claimant would have remembered that incident.

    74.2. I find that the evidence of Ms Higgins was consistent on the various occasions it was given and that any differences were insignificant and simply reflected the fact that an account will rarely be given in absolutely identical terms each time it is given. I make the same finding in relation to Ms Hill.

    74.3. I find that the evidence of Ms Higgins was consistent with that of Ms Hill and vice versa. I find that the inconsistency in relation to whether or not they spoke together on the day about the incident is not significant.

    74.4. I find that the Claimant has not put forward a plausible reason for Ms Higgins and Ms Hill inventing the incident, as she suggests they have. The reasons she has presented are too insubstantial and, further, were not pursued with any real vigour at either the disciplinary or appeal hearings.

75. I also find that the Claimant in acting as I have found she did in paragraphs 70 to 73 above acted in a way that caused her dismissal. If she had not acted in that manner there would have been no disciplinary proceedings and she would not have been dismissed. Further, I find that by acting in that way the Claimant was guilty of blameworthy conduct: she is an experienced TA. She was aware of the Child's special educational needs and of his Positive Behaviour Plan. She would have been aware that to act aggressively towards him as she did was wrong and that it would upset him (as it did).

76. I have concluded below that there was a procedural failing in the way which the Respondent dealt with the disciplinary proceedings against the Claimant because it failed at the appeal stage to make a finding in relation to whether she had acted aggressively. There was procedural unfairness.

77. I make the following findings about what would have happened if the Respondent had followed a fair procedure. In these circumstances the appeal panel would have made specific findings in relation to whether the Claimant had acted aggressively. I find that if it had there is a 90% chance that it would have come to the conclusion that she had and would have dismissed her. The evidence available to it overwhelmingly pointed in that direction. Further, dismissal would clearly have been within the range of reasonable responses notwithstanding the Claimant's relatively long service and clear disciplinary record. In addition, the fact that the Claimant did not acknowledge that anything happened would have increased the likelihood of her being dismissed because the effect of this was that she showed neither remorse nor insight.

Conclusions

Unfair dismissal

The reason for dismissal

78. I conclude that the Respondent has shown the reason for dismissal. This was the belief by the appeal panel as described in his written and oral evidence by Mr Kotecha at the Hearing that the Claimant was guilty of inappropriate behaviour in how she had dealt with the Child on 18 January 2018 and that the behaviour had been: (1) outside the Child's Positive Behaviour Plan and; (2) in breach of the Respondent's Positive Handling Policy and the principles of its Behaviour Policy.

Was the reason for dismissal a potentially fair reason?

79. I conclude that it was as it related quite clearly to the Claimant's conduct.

Was the dismissal fair pursuant to section 98(4) of the 1996 Act?

80. This is the main issue for me to decide.

Whether investigation was reasonable

81. Ms Chattaway's main attack on the fairness of the dismissal began with the quality of the investigation so I turn to this first. Ms Chattaway described this as "wholly inadequate". In particular she criticized Ms Slinger for having failed to clearly identify a staged process of investigation of what had occurred on 18 January 2018. She said that Ms Slinger should have: (1) considered whether restraint was necessary; and (2) considered, if it were, whether the restraint used had been appropriate or inappropriate.

82. Ms Chattaway is right to say that the decision maker needed to consider both these issues. Ms Chattaway is also right to say that some investigators would have structured their investigation so that the evidence gathering was carried out by reference to these two (and other) questions. However I do not accept that Ms Slinger's failure to proceed in the structured manner advocated by Ms Chattaway meant that the investigation carried out was not a reasonable one for the following reasons:

    82.1. There is a danger of losing sight of what was being investigated and overcomplicating matters. This was an allegation that the Claimant had treated the Child in a way that she should not have done in an incident which lasted probably no more than thirty seconds. What was important was that Ms Slinger obtained a full account from relevant witnesses of what had occurred in those 30 seconds, not that she did this by reference to particular issues which would subsequently need to be considered by the disciplinary panel. I am satisfied that she did this when she interviewed the only two witnesses (apart from the Claimant whom she also interviewed): Ms Higgins (who saw the incident) and Ms Hill (who heard it).

    82.2. The disciplinary and appeal panels did not have to rely only on the written record of the accounts provided by Ms Higgins and Ms Hill which Ms Slinger had prepared. They also heard from both Ms Higgins and Ms Hill in person which included hearing their answer to questions posed by the Claimant and her representative.

    82.3. Throughout the process (i.e. when interviewed by Ms Slinger, by the disciplinary panel and by the appeal panel), the Claimant said that she had no specific recollection of the incident. Her evidence was in reality confined to how she *would have* behaved if the Child had refused to pick up bricks which he had knocked over (she had no recollection of him having done this). The lack of any positive account of what had occurred by the Claimant inevitably reduced what might otherwise have been the necessary extent of a reasonable investigation.

83. Ms Chattaway also argued that a reasonable investigation would have been more extensive in the circumstances of this case because of the potentially career ending consequences of dismissal for the Claimant. It is the case as Ms Chattaway suggested that the more serious the allegations against the employee, the more thorough the investigation should be. Further, if the consequence of dismissal for an employee is that their career may be blighted, a Tribunal will scrutinize the employer's procedures all the more carefully. However I do not accept that taking these matters into account the investigation was not reasonable in this case. All relevant witnesses were interviewed. There is no significant suggestion that relevant documents were ignored. This is also perhaps reflected in the fact that Ms Chattaway did not identify any significant avenues of investigation which should have been pursued but were not – for example witnesses who should have been interviewed but were not.

84. Overall, therefore, I conclude that the Respondent carried out what was in all the circumstances of the case a reasonable investigation.

Whether Respondent had reasonable grounds of its belief in the Claimant's guilt

85. The witness evidence available to the appeal panel can reasonably be summarised as follows when the investigatory interviews, the record of the disciplinary appeal panel hearing and the evidence given to the appeal panel are all taken into account:

    85.1. **Ms Higgins:** Ms Higgins heard a commotion, heard the Claimant shouting, and saw the Claimant grab the Child and pull him to the floor and then

pushed him down and held him down when he tried to get up in order to require him to pick up some bricks which he had knocked over. The Claimant was angry and when she said that the Child was not going anywhere until he had picked up the bricks Ms Higgins had found that intimidating. The Child had been upset. Ms Higgins evidence did not suggest that the Child had done anything which put himself or other children at risk. In the investigative interview she referred to the Claimant talking "quite aggressively" when she handled the Child generally. In the appeal hearing she said when asked that the Claimant had "aggressively" raised her voice when dealing with the Child on 18 January. I find that her evidence was consistent on the various occasions when she gave it.

85.2. **Ms Hill:** She had not seen the incident but had heard it. There had been a bang, a commotion and she had heard the Claimant telling the Child off "with a raised voice". In the aftermath the child had been crying and distressed. Other children looked shocked. The Claimant had referred to the possibility of the Child hurting other children but was talking fast and "knew she'd been seen and that people would not approve of her actions". At the appeal hearing she said she had "heard an aggressive tone" in the Claimant's voice. I find that her evidence was consistent on the various occasions when she gave it and, also, consistent with that of Ms Higgins other than in relation to whether they had spoken about the incident later that afternoon. I find, however, that this is not a matter which affects the cogency or consistency of their evidence to any significant extent. I find that it is simply the case that they have different recollections.

85.3. **The Claimant:** she had no recollection of any specific incident involving the Child on 18 January 2018. However if he had knocked over the bricks (which she did not remember him doing) she would not have acted as alleged. She said that Ms Higgins and Ms Hill had made up the incident.

86. The disciplinary and appeal panels also had a variety of documentary evidence available to them, including the policies in relation to which I have made findings above.

87. The Claimant argued that the evidence available to it did not provide reasonable grounds for her guilt for various reasons. I analyse these individually:

87.1. **No or insufficient evidence to suggest that restraint wrongly used:** Ms Chattaway submitted that the evidence showed that it was frequently necessary to restrain the Child and that there was no or insufficient evidence to show that restraint was wrongly used on 18 January 2018. Further, the restraint used did not come under the heading of "must not" in the Positive Handling Policy. I accept that the evidence does show that it was frequently necessary to restrain the Child. However there quite clearly was evidence to show that restraint was wrongly used on 18 January 2018. The evidence of Ms Higgins and Ms Hill suggests that force was used by the Claimant to compel the Child to comply with her instruction that he should pick up bricks that he had knocked over, and that she gave that instruction angrily with a raised voice. If that were the case, the use of force would have been outwith both the Behaviour Policy and the Positive Handling Policy. The Positive Handling Policy makes plain that "positive handling should only be used when all other strategies which do not employ force have been tried and found unsuccessful". The evidence of Ms Higgins and Ms Hill suggested that in this case it had been used inappropriately (i.e. when it should not have been used at all) as the result of the Claimant becoming frustrated and/or angry with the Child's behaviour. The Behaviour Policy also suggests when read together with the Positive Handling Policy that force should only be used in limited circumstances, not as a first reaction to unacceptable behaviour.

87.2. The fact that the force used did not involve any of the "must not" items does not assist the Claimant if force should not have been used at all. Further, the Child's Positive Behaviour Plan suggests that physical intervention should be a "calming hug and distraction" when it had to go beyond hand holding. Clearly, therefore, pulling the Child to the floor, pushing him back down and holding him down would have been outside his Positive Behaviour Plan.

87.3. Overall, therefore, there was clearly sufficient evidence before the disciplinary and appeal panels to enable them to reasonably conclude that the Claimant had used force/restraint when she should not and that her use of it had been outside the Respondent's policies and the Child's Positive Behaviour Plan.

87.4. **Ms Collins evidence:** the Claimant alleged that Ms Collins had during the investigation and at the disciplinary panel hearing incorrectly summarised the evidence given by Ms Hill and Ms Higgins both in her capacity as a witness interviewed by Ms Slinger and in her capacity as the presenter of management's case at the disciplinary hearing. This had resulted in the panel giving too much weight to her evidence and consequently undermined its grounds for believing in the Claimant's guilt. I reject this contention. I accept that Ms Collins rehearsing of the evidence of Ms Hill and Ms Higgins is open to criticism. However, having read the notes of the disciplinary hearing and having heard from Mrs Brown who chaired the disciplinary hearing and Mr Kotecha who chaired the appeal hearing, I am satisfied that their findings and conclusions were based above all on the accounts of the actual witnesses to the incident on 18 January 2018. I conclude little weight was given to the evidence of Ms Collins/her summary of the evidence of others.

87.5. **The weight to be given to the account of Ms Higgins and Ms Hill:** Ms Chattaway submitted that various matters meant that the account given by Ms Higgins and Ms Hill was implausible or that their credibility as witnesses was called into question with the result that little weight should be given to their evidence:

87.5.1. **Delay in reporting:** Ms Higgins had not reported the incident immediately it happened, but later that afternoon (to Ms Ronchetti initially and then to Ms Collins). Equally, Ms Hill had not reported it at the beginning of the meeting she had had with Ms Collins that afternoon but later on in that meeting. If the incident had been as serious as they both suggested, it would have been reported immediately. I reject this contention. There are obviously good reasons for the incident not being reported the moment after it happened: (1) it had finished, there was no suggestion that the Claimant was going to repeat the behaviour that day, quite the reverse given Ms Hill believed the Claimant knew she had been seen doing something that she should not have done; and (2) there was a classroom full of children to be dealt with. I also do not find that the fact that it was not the first thing that Ms Hill mentioned to Mrs Collins in her meeting points to the incident not having happened as Ms Hill describes. This is far too nuanced a point. The bottom line was that Ms Hill reported the matter to Mrs Collins within hours of it happening.

87.5.2. **Motivation of Ms Higgins and Ms Hill:** The Claimant has argued throughout that Ms Higgins and Ms Hill must have conspired to invent the incident because of their dislike for her. Ms Hill found her difficult to work with. Ms Higgins was cross that she had had to change a nappy that the Claimant should have changed and wanted her job. It must be said that these points were not pursued with much enthusiasm or energy at either the disciplinary hearing or the appeal hearing, including when the Claimant and

her representative had the opportunity to ask Ms Hill and Ms Higgins questions. It is, however, clear that the disciplinary panel and the appeal panel were aware of them and took them into account. I conclude that it cannot be said that the decision makers gave too much weight to the evidence of Ms Higgins and Ms Hill in light of their possible motivation for making up the allegation. The grievances, such as they were, between the three employees were fairly minor, they were on display to the decision makers, the decision makers cannot reasonably be criticized for deciding that they did not undermine the evidence of Ms Higgins and Ms Hill.

87.6. Overall, therefore, I do not accept that the decision makers erred in the weight they chose to give to the evidence of Ms Higgins and Ms Hill and that if they had had approached it correctly they could have had no reasonable grounds for their belief in the Claimant's guilt.

87.7. **Lack of supervision:** I also do not accept that the fact that the Claimant was allowed to work unsupervised one to one with children at the beginning of the following week was a significant matter pointing away from her guilt which the decision makers failed to take into account. Considered in the round, it suggested no more than a lack of surefootedness on the part of Ms Collins in relation to how to proceed.

88. Overall, it was clearly reasonable for both the disciplinary panel and the appeal panel to prefer the evidence of Ms Higgins and Ms Hill (that the incident had occurred as they had described) to that of the Claimant (that there had been no incident). In these circumstances, and in light of the contents of the Respondent's policies and the Child's Positive Behaviour Plan, the Respondent quite clearly did have reasonable grounds for its belief in the Claimant's guilt.

Difference between the charge and the conclusions of the appeal panel

89. In light of Mr Kotecha's evidence to the Tribunal, I have found above that the appeal panel concluded that that the Claimant was guilty of inappropriate behaviour in how she had dealt with the Child on 18 January 2018 and that the behaviour had been (1) outside the Child's Positive Behaviour Plan and; (2) in breach of the Respondent's Positive Handling Policy and the principles of its Behaviour Policy.

90. However, the charge was that:

> *you acted in a way that was aggressive towards a vulnerable person; a child, which was deemed unnecessary, unprofessional and inappropriate. Furthermore, in doing so you have breached Willowbrook's Positive Handling Policy, RM's Positive Behaviour Plan and the principles of the Behaviour policy.*

91. Mr Kotecha was very clear in his evidence at the Hearing that the appeal panel had not determined whether the Claimant had acted aggressively, notwithstanding the fact that this was what the charge alleged and that in her grounds of appeal she had clearly denied behaving aggressively. Rather he said the panel had concluded that she had been guilty of inappropriate behaviour.

92. Mr Bromige argued that this did not matter because the significance of aggression to the charge was that this was deemed to be unnecessary, unprofessional and inappropriate and also in breach of the various policies mentioned. Consequently if having heard all the evidence the appeal panel had concluded that the behaviour was inappropriate and in breach of the various policies mentioned, it mattered not that the appeal panel had not determined whether it was aggressive.

93. I disagree. In order to properly defend herself the Claimant needed to know exactly what she was charged with. She understood that to be aggressive behaviour. Consequently, although her defence was limited by what she said was a lack of recollection of anything having occurred, she was clear at each stage that she would not have acted aggressively. If the charge had been worded differently then the Claimant might have put forward a different defence.

94. As a result of this procedural defect I conclude that the Claimant's dismissal was unfair.

95. The Claimant made other criticisms of the fairness of the procedure used/the outcome at different stages. These were not ultimately relied upon by Ms Chattaway but since she is not a professional representative I deal with them briefly here.

    95.1. There was a suggestion that there was a procedural failing because the Claimant was not allowed to be accompanied by a union representative at the investigatory meeting. I conclude there was no such failing, not least because the Claimant accepted in her oral evidence to the Tribunal that she had chosen to go ahead on the day with a colleague accompanying her when her union representative had been unavailable at the last minute as the result of a personal matter.

    95.2. The Claimant suggested that Ms Okagbue had usurped the role of either the investigator or the decision makers (or both). I find that this was not the case. She asked questions but the relevant decisions were taken by the investigator and the decision makers.

    95.3. The Claimant suggested that the fact that the notes of her investigatory meeting were not agreed and that the version without her comments were sent to the disciplinary panel was a procedural failing which made the dismissal unfair. I have concluded that it was not. The disciplinary panel was provided before the hearing with a copy of the notes of the investigatory meeting showing the amendments she wished to make and which were and were not agreed. The Claimant was not disadvantaged, especially given her lack of any meaningful recollection of what had happened on the day in question.

    95.4. The Claimant suggested that she was unfairly disadvantaged by not being interviewed until 29 January. I find that she was not. She was alerted in broad terms to the allegation on 23 January and there were good reasons for the subsequent delay (of less than a week) before she was interviewed.

    95.5. The Claimant suggested that she should not have been dismissed for something which had not been reported to LADO or to the Police. However I am satisfied that the incident did not fall within the category of incidents which had to be reported to LADO or the Police and that this did not prevent it from being categorized as gross misconduct.

If the dismissal was unfair, should compensation be reduced as a result of the Polkey principle, i.e to reflect the chance that the Claimant might have been fairly dismissed if a fair procedure had been followed or in any event.

96. I have found above that if the Respondent had followed a fair procedure the appeal panel would have reached a conclusion on whether the Claimant had acted aggressively and that there is a 90% chance that it would have concluded that she had and so she would have remained dismissed on that basis on the date that she was in any event dismissed. The evidence available to it overwhelmingly pointed in that direction. Further, dismissal would clearly have been within the range of reasonable responses notwithstanding the Claimant's relatively long service and

clear disciplinary record. In addition, the fact that the Claimant did not acknowledge that anything happened would have increased the likelihood of her being dismissed because the effect of this was that she showed neither remorse nor insight.

97. The Claimant's compensatory award should therefore be reduced by 90% on that basis.

If the dismissal was unfair, whether the compensatory award should be reduced because the Claimant had caused or contributed to her dismissal and whether the basic award should be reduced in light of Claimant's conduct prior to dismissal.

98. I have set out above what conduct gave rise to the possibility of contributory fault and why that conduct was blameworthy. I find that that conduct caused the Claimant's dismissal completely. Her dismissal resulted from the conduct and from nothing else. Without that conduct, quite simply, the Claimant would not have been dismissed.

99. In these circumstances, and taking into account the very narrow basis on which I have found the dismissal to be unfair, I find that it is just and equitable to reduce the Claimant's compensation by 100%. She is quite simply the author of her own misfortune. For the same reasons, I reduce her basic award by 100%.

Whether the Claimant had committed a repudiatory breach of contract which entitled the Respondent to dismiss her without notice.

100. In light of my findings of fact above, I find that the Claimant committed an act of gross misconduct. First, her actions arguably fall within the express definition of gross misconduct which refers to "harming, or placing at risk of harm, a vulnerable person" – it is highly arguable that she placed the Child at risk of harm by treating him as I have found she did. Secondly, that definition is non-exhaustive. I find that the Claimant's behaviour – using inappropriate physical force against a vulnerable child with special needs in a fit of anger – was gross misconduct because it undermined the trust and confidence of the Respondent inherent to the particular contract of employment of the Claimant. That is because that contract required the Claimant to care for vulnerable children including those with special educational needs in accordance with the Respondent's policies.

101. The Claimant's claim of wrongful dismissal therefore fails and is dismissed.

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Employment Judge Evans

Date: 15 January 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS