EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs Rachael Lockwood	v	**St. Margaret's Clitherow Catholic Academy Trust**

PRELIMINARY HEARING

Heard at: **Leeds by CVP** **On:** **27 & 28 November 2020**

Before: **Employment Judge Rogerson (sitting alone)**

Appearance:

For the Claimant: **Mr Simon Harding (Counsel)**

For the Respondent: **Mr Graham Price (Counsel)**

RESERVED JUDGMENT

The complaints of unfair dismissal and wrongful dismissal fail and are dismissed.

REASONS

Issues

1. The claimant was employed as a primary school teacher from September 2013 until 8 March 2020 when she was dismissed for two alleged acts of misconduct of making inappropriate comments towards a pupil and deliberately pushing that pupil causing the pupil to fall backwards onto the floor. The claimant admitted making the inappropriate comments but denied pushing the pupil. The respondent found both allegations were proven and treated the misconduct as gross misconduct which the respondent says entitles it to summarily dismiss. The claimant complains that the dismissal was a wrongful dismissal because she says the disputed conduct was not sufficiently serious for it to be treated as gross misconduct, and the dismissal was unfair because the investigation was flawed, the disciplinary hearing proceeded in her absence, and a relevant witness was not called to give evidence at the Appeal.

2. Both parties were represented by counsel at this hearing and had agreed and identified the issues to be determined for each complaint and the applicable law. In these reasons I will set out my findings of fact on the disputed conduct (the alleged push) in more detail than the admitted misconduct (the comments) although both acts are relied upon for the dismissal decision.

3. I heard evidence for the respondent from:

   i. Mrs Anne Parr (Head Teacher and investigating officer)

   ii Mrs Corrine Howie (HR Director)

   iii Miss Amy Rice (Chief Executive Officer and dismissing officer)

   iv Mr Mark Yeung (Trust Director and Chair of the appeal panel).

   For the claimant I heard evidence from the claimant. I also saw documents from an agreed bundle of documents which were provided to me in electronic form. From the evidence I saw and heard I made the following findings of fact.

Findings of Fact

4. The claimant was employed as teacher at 'Our Lady and St Peter RC Primary School' teaching pupils aged 5 to 11. The school falls within the remit of the Academy Trust, which is the respondent in this case. The claimant's employment began on 1 September 2013 and she had no disciplinary record prior to her dismissal on 8 March 2020.

5. On 15 October 2019, (the time in question), Mrs Claire Woodmansey, a teaching assistant, made a complaint about the claimant and provided the respondent with a handwritten statement of the events she had witnessed in the 'Consequences Room' involving the claimant and Pupil A (aged 6). Pupil A's parents are separated. He lives with his mum and has contact with his dad who he visits on weekends. Social Services have had some previous involvement with the family. Pupil A has an 'Educational Health Care Plan' ('EHCP') to support his social emotional and behavioural needs. This support includes 'one to one' teaching assistant support provided by Mrs Woodmansey, at lunch times

6. Mrs Woodmansey reported that at lunch time on 15 October 2019, the claimant had a discussion with Pupil A because she felt his behaviour was worse after he had been staying with his dad. The claimant told Pupil A that "*maybe I should stop you seeing dad then and make a call to Social Services and they will stop you seeing him*". Mrs Woodmansey reported that at this point Pupil A looked upset and anxiously said "*no, no, please don't do that he does all the fun things with me*". The claimant had asked, "like what?" and Pupil A had replied "*swimming bikes and walks on a night*", The claimant replied, "*you should be in bed*". Mrs Woodmansey also reported that the claimant had questioned Pupil A about pushing another boy, Pupil C. Pupil A had denied pushing Pupil C. The claimant told Pupil A that she would demonstrate a push and then proceeded to push Pupil A, causing him to fall backwards onto the floor.

7. On 15 October 2019, the claimant had herself reported the 'push', by making an entry into the respondent's Child Protection Online Management System (CPOMS). In that record, the claimant admits she had given Pupil A "gentle push" and that she had apologised to Pupil A for pushing him. The entry made by the claimant at 18:21 states: "*Pupil A was brought in at lunch time by Mrs Woodmansey because he had repeatedly punched Pupil B on the arm. He said*

he was playing a game. I said I didn't think that was a game and if he hurts people then people won't want to play with you, will they? He said no. I said would it be okay if I punched you on the arm? He didn't reply I said or on your face? He said that would be worser. I said any type of hitting is not good. I then asked him about what happened on the way home from school. He said it was with pupil C. He said he had pushed him and then changed his mind and said it was that he hugged him a bit tight. I asked him if he did push him like this and gave him a gentle push. He rolled backwards, got up and said Yes. I said don't be unkind and hurt people please. And I am sorry for pushing you. I think you should say sorry to pupil C. He said Yes".

8. The claimant's self-reporting of the incident was the most contemporaneous account the claimant provided of the disputed push. She uses the word 'push' to describe her physical contact with Pupil A. She says Pupil A rolled backwards and that she apologised to Pupil A for 'pushing' him.

9. On 17 October 2019, the claimant was suspended from duty on full pay to investigate her alleged conduct on 15 October 2019. The suspension was confirmed in writing on 21 October 2019 and the claimant was invited to an investigatory interview on 5 November 2019 (pages 69 - 70). The claimant was told that the investigation would be conducted by Mrs Anne Parr, Head Teacher, with the assistance of Human Resources.

The investigation

10. The claimant's investigation interview notes are at pages 78 – 94, the notes are annotated with any changes that the claimant wished to make after the interview. What was clear from the notes was that at the end of the investigation meeting the claimant in response to a question from her representative confirmed that she felt she had a fair investigative meeting.

11. During the interview open questions were asked by Mrs Parr and the answers the claimant gave were explored for clarification purposes, to understand the answers given and to ensure the claimant had a full opportunity to provide her account of the events under investigation.

12. The only witnesses to the alleged events of 15 October 2019 were Pupil A, Mrs Woodmansey and the claimant. Mrs Parr interviewed the claimant and Mrs Woodmansey. Pupil A was interviewed by Ms Stone who is suitably qualified to interview young children in line with safe-guarding guidance and good practice. It is agreed Pupil A is a very intelligent boy with good cognitive understanding. Miss Stone, asked Pupil A to "*tell her what had happened in the room on the day*" and a series of follow up questions. The record of the interview is at page 68. Pupil A recalls being questioned about whether he had pushed another child, Pupil C at home time. He denied 'pushing' Pupil C instead suggesting it was a "squeezy hug". The notes then record as follows:

    Claimant: "*no, you weren't, you pushed him, would you like it if I pushed you*?

    Pupil A: I said "*no*".

    Mrs Stone: Then what happened?

    Pupil A: Then she said: "*I'll show you what pushing is and then she pushed me over*".

    Mrs Stone: How did she push you over?

Pupil A: "*Like that*". He demonstrated with one hand.

What happened to you?

Pupil A: I fell on my bottom, then she said: "*get up now*". I said: "*I forgive you*".

13. In cross examination, it was put to Mrs Parr that Pupil A, as a 6-year-old child with some 'difficulties', would not have had the 'self-awareness' necessary to provide a reliable account of the alleged push. Mrs Parr did not agree. She was satisfied Pupil A was providing his 'statement of truth'. He was a very intelligent boy, who had given truthful answers to questions asked in an appropriate manner. His answers were also supported by the other evidence (Mrs Woodmansey statement, the claimant and the CPOMS report). There was no reason for her to disregard Pupil A's account or treat it as unreliable. I agreed that it was reasonable for Ms Parr to form that view on those grounds as the investigating officer. Open questions were asked of Pupil A and words were not 'put into his mouth'. Ms Parr was entitled to regard that evidence and conclude that Pupil A was providing his statement of truth.

14. The other area of challenge put to Mrs Parr was that she had been more rigorous in her questioning of the claimant compared to Mrs Woodmansey. While there were differences in some of the details provided, those differences were properly identified by Mrs Parr and were investigated and challenged where necessary. After that process, Mrs Woodmansey maintained the account she had given was accurate. Mrs Parr properly considered the 'internal and external' inconsistences in the evidence gathered during the investigation to establish the facts. What was important to her was that the central facts around the 'push' were not in dispute. Importantly, no deficiencies in the investigation were identified. It was not put to Mrs Parr that she could have asked any further questions or pursued any further line of enquiry as part of a reasonable investigation.

15. In exploring the central facts and any 'internal' inconsistencies Mrs Parr asked the claimant the following questions:

    Question 20. Mrs Parr: "You said on CPOMS you gave Pupil A, a 'gentle push', why did you feel it necessary to demonstrate on Pupil A how he pushed Pupil C?

    Claimant: "*I asked Pupil A what had happened the day before with Pupil C, Pupil A replied that he had pushed him, then he said he gave Pupil C a bear hug too tight, I asked him whether it was a bear hug or a push and he didn't answer. I wanted to demonstrate what a push was to ascertain the truth*".

    Question 21. Mrs Parr: "Do you think it was appropriate for you to push Pupil A"

    Claimant: "*There was no force in the push, it wouldn't push a fly over, force was minimum and in my opinion, would not cause a two-year-old to fall over, pupil A was being dramatic when he fell and rolled over on the floor*."

    Mrs Parr asked the claimant if her actions towards pupil A were in line with the teachers' standards the claimant replied, "*for Pupil A yes, any other child then no"*.

16. On 2 December 2019, Mrs Parr wrote to the claimant confirming that the disciplinary investigation, had been completed and that she had concluded that there were sufficient grounds to hold a disciplinary meeting into two allegations of misconduct. The allegations were identified as follows:

a) "that at lunch time on Tuesday 15 October 2019, in the "consequences room" you made two inappropriate comments to pupil A which caused him to become upset and anxious and

(b) that at lunch time on Tuesday 15 October 2019, in the consequences room you deliberately pushed pupil A with force causing the child to fall backwards onto the floor.

17. By a letter dated 19 December 2019, the claimant was invited to a disciplinary hearing (see pages 102 – 103) and was informed that if proven, the allegations could be treated as gross misconduct. The applicable policies were identified in the letter. These were the School's Behaviour and Disciplinary Policy, the School's Strategic Child Protection and Safeguarding Policy, the Staff Code of Conduct and Professional Teachers Code of Conduct. The claimant was warned that if these policies were breached and the breach was serious it could give rise to concerns about the claimant's suitability to work as a teacher at the school and potentially the trust and confidence placed in her as a teacher. A detailed management statement of case was included with appendices setting out all the evidence gathered in the investigation together with copies of all the applicable policies and procedures.

18. During cross examination, the claimant was taken to those policies and she confirmed that she understood them and how they applied to her in relation to each allegation. She confirmed that her last training on safeguarding issues was in April 2019. The claimant confirmed that she understood if either allegation was proven it could be treated as gross misconduct which could result in disciplinary action up to and including dismissal without notice. She also agreed that allegation 1 (inappropriate comments made to Pupil A on 15 October 2019) was admitted misconduct which could be treated as gross misconduct resulting in her dismissal.

19. The disciplinary invitation letter, explained what the procedure would be at the disciplinary hearing. First the management case would be presented by Mrs Parr. and then the claimant's case would be presented by the claimant and her Union Representative. The claimant had been provided with all the evidence and the investigation report and had time to prepare her case before the hearing

Postponements of the disciplinary hearing.

20. The claimant requested 2 postponements of the disciplinary hearing due to the unavailability of her Trade Union Representative. Both postponements were granted. The claimant was absent from work due to sickness from 20 December 2019. Her absence was covered by a fit note citing 'stress at work'.

21. The respondent sought advice from Occupational Health to assess the claimant's fitness to attend a disciplinary meeting. Occupational Health provided a report dated 30 January 2020 advising that there was 'no medical reason' why the claimant could not participate in a formal hearing. Counselling sessions were recommended to help the claimant to effectively participate in a disciplinary hearing and it was the opinion of Occupational Health that the unresolved disciplinary process was causing the claimant stress.

22. Following receipt of that report the respondent provided the claimant with counselling sessions. By letter dated 6 March 2020, the disciplinary hearing was rescheduled to take place on 18 March 2020. The letter informed the claimant that if she felt unable to attend the meeting then it could either be heard in her

absence or she could ask her union representative to attend the meeting and represent her. The letter made it clear that the claimant had exercised her right to postpone the meeting on two previous occasions and that the meeting would be going ahead on 18 March 2020. The letter went on to ask the claimant to confirm the names of any witnesses the claimant intended to call and the capacity in which they would be attending. The claimant did not request that the respondent called any witness to attend the disciplinary hearing.

Disciplinary Hearing

23. On the day of the disciplinary hearing, the claimant's union representative Mr Nidd provided a letter from the claimant's GP stating that she "*would struggle to engage with a work-related meeting at this time*". The claimant's representative had decided that he would attend the hearing on the claimant's behalf having prepared for the hearing himself and having the claimant's written representations. Mrs Howie, Head of Human Resources advised the disciplinary manager, Miss Rice that the disciplinary meeting should proceed in the claimant's absence. She explains her position at paragraph 27 of her witness statement: "*Acknowledging that the indication from the GP was that the claimant's health was deteriorating, the previous advice from Occupational Health Assessor regarding delay, the fact that the claimant had support from the union representative and the fact that the claimant would have a right of appeal, I reached the decision that it was in the claimant's best interests that the disciplinary meeting should go ahead*.

24. Miss Amy Rice, the Chief Executive Officer conducted the disciplinary hearing and decided the hearing should proceed in the claimant's absence. The claimant's trade union representative, Mr Nind was informed that he could request adjournments at any time to enable him to contact the claimant if he wanted to. Mr Nind did not exercise this right during the meeting. Mr Nind presented a summative statement on behalf of the claimant in which he confirmed that the claimant felt that having a decision would "*help her to get better"*. He did not request an adjournment of the hearing. On the contrary, the claimant's representative attended ready to proceed and wanted to rely on the written statements provided and the oral representations made at the hearing. The claimant had produced a lengthy statement for the meeting addressing each of the allegations made. The meeting was adjourned to read the claimant's statement. Questions were asked on the claimant's behalf via her representative. The transcript of the disciplinary hearing records that Mr Nind made observations, asked questions and actively participated in the hearing on the claimant's behalf. The claimant had provided Mr Nind with two 'character' references which were also provided to Miss Rice at the hearing.

25. Mrs Woodmansey did not attend the disciplinary hearing to give evidence. The respondent's disciplinary policy provides that the disciplinary manager is not required to hear oral evidence and may rely on written evidence. Neither the claimant nor the claimant's trade union representative had requested Mrs Woodmansey's attendance at the disciplinary meeting. Miss Rice did not consider it was necessary to have her in attendance. If the written evidence was inadequate and if there were any unanswered questions she would have adjourned the meeting and made that request.

26. Miss Rice provided a detailed outcome letter dated 24 March 2020. Firstly, she deals with the decision made to proceed with the disciplinary hearing, in the

claimant's absence, and then her conclusions on each allegation. I have set out the relevant parts of the letter in full because the letter clearly explains why Ms Rice made her decision and how she assessed the evidence. I accepted that evidence which was not challenged (highlighted text my emphasis). The letter states:

"previous advice sought from Occupational Health in January 2020, stated that there was no medical reason why you could not participate in a formal meeting but recommended that, in order to assist you build up your emotional resilience counselling should be offered and that the meeting should not take place for two or three weeks following this, the report also stated a resolution to your case would be of benefit to your health. Furthermore, your summary statement presented by Mr Nind, described how you felt that getting a decision would help you with your recovery and allow you to have closure of the case. Before making a decision, I also considered the questions raised by Mr Nind at the beginning of the hearing about whether or not you would be at a detriment due to the fact that you were not present at the hearing. Having listened to all of the information presented during the case I was satisfied that you were not at a detriment by virtue of not being present – Mr Nind presented a thorough case on your behalf which was further supplemented with the detailed submission you provided. At the end of the hearing I had no unanswered questions and was satisfied that I understood the full picture as it was being presented.

Therefore, having satisfied the above, I gave consideration to all of the evidence presented and took into account the written and verbal presentations made. In reaching my decision I have concluded the following:

Allegation one There is ***no disputing the fact that comments about a punch on the arm or face were made alongside a suggestion that Pupil A should not see his dad.*** *Whilst there is no clarity on whether you told pupil A that you would make a call to Social Services,* ***there is no doubt that you knew Pupil A and would have understood the impact that preventing him from seeing his dad would have on his personal circumstances.*** *However, I acknowledge that you have clearly reflected on your comments and have said that you would handle the situation differently if any a similar circumstance arose again in the future. Taking the above into account I upheld allegation one.*

Allegation two ***This allegation centres around whether or not, you pushed Pupil A and that the force of the push was enough for him to fall over****. Having considered the evidence in relation to this allegation I found that* ***you were very inconsistent****. For example, on* ***CPOMS, which you completed on the evening of the incident you said that you gave Pupil A, a "gentle push"*** *likewise during the investigation you also said that "there was no force to the push" and you also stated that you "pushed him to show him that it was not nice to push people" but that the atmosphere was calm and there was laughter at the end".* ***In the statement that Mr Nind presented on your behalf you were very clear in your assertion that you did not push Pupil A****. This is in stark contrast to the witness statement which said that Pupil A fell from the force of your push quite a way back and that the atmosphere was not jovial and that it was not funny. Furthermore, both witnesses, Miss Stone (witness to allegation one) and Mrs Woodmansey (witness to both allegations) use words such as abrupt, aggressive and angry to describe your demeanour.*

I considered the representation you made during the investigation that Mrs Woodmansey was completing the consequences log book at the time of the incident and therefore could not have seen what occurred. However, the evidence presented at the hearing was that the book took a matter of seconds to complete as it is only a case of adding the child's name to the log. I also considered the witness statement made by Miss Stone which described how Mrs Woodmansey completed the consequences book as soon as she brought Pupil A into the room. Miss Stone was not in the room when the push happened therefore, based on the balance of probability I am satisfied that Mrs Woodmansey was not completing the book at the time of the incident as she was doing that when Miss Stone was still in the room and therefore was more likely than not to have witnessed what occurred.

Having concluded that Mrs Woodmansey was more likely than not to have witnessed the incident, I then went on to consider the vary contrasting statements and questions whether there was any reason for your colleague to exaggerate what she had seen. However, there was nothing to suggest that this was the case and indeed the evidence presented indicated that there was a previous good relationship. Therefore, on the balance of probabilities I conclude that it was more likely that you did push Pupil A and that the push was with enough force for him to fall over.

In view of the above I upheld allegation two. ***Both allegations amount a serious breach of the relevant code of conduct, the school's strategic child protection policy and professional teaching standards and therefore I concluded that the allegations amount to gross misconduct.***

I looked at whether there was any sanction, I could have imposed that was less than summary dismissal. I took into account your long service as a teacher and your previous good conduct, with no previous disciplinary sanctions alongside the content of the character references provided by Mr Nind at the hearing.

Furthermore, I considered the detail that you provided in your summative statement, read out by Mr Nind at the hearing. The statement detailed the financial impact the loss of your job would have on your circumstances. However, I also looked at your responses to the allegations. You had clearly reflected on the comments you had made and had stated that you had learned from them but that does not detract from the fact that they are a serious breach the conduct expected of you in your role as a teacher. Furthermore, you have ***both minimised the seriousness of allegation 2 from the beginning and then latterly you denied pushing pupil A, despite previously saying you had done so.***

Having considered all of the above, ***I need to satisfy myself that I could trust you in a future role****, even with a voluntary demotion or a move which might accompany a final written warning. However,* ***any position that you may work in through a school setting would carry the same adult/child relationship and I would need assurance that you would act with absolute integrity and that there would be no repeat of this breach of standards. Based on your approach to the second allegation I did not have this assurance and therefore I had no alternative but to move to summary dismissal from employment. This means that you are dismissed from your post with immediate effect and without notice from the date of the hearing".***

27. Miss Rice provided a detailed explanation in her statement of why she *considered both allegations amounted to a serious breach of the policies.* Her statement *says:*

    East Riding Safeguarding Children Board School Staff and Volunteer Code of Conduct

    All staff have the following responsibilities in line with keeping children safe in education (KCSIE) 2018 to ensure the safeguarding of children

    - "Work and behave safely and responsibly at all times to fulfil your duty of care and not abuse in any way your position of trust"

    Do

    - Be aware that even well intentioned physical contact may be misconstrued by the child, an observer or by anyone to whom this action is described and should be avoided if not appropriate
    - Adhere to the school's behaviour management and physical intervention policy and use physical intervention as a last or emergency resort in order to prevent harm to the pupil or others
    - Be aware that there is no exact definition of reasonable force and allegations of assault can be made against staff.

    Do not

    - Behave in a manner which could lead any reasonable person to question your suitability to work with children or act as a role model
    - Indulge in horseplay or other physical contact intended as a joke in an attempt to diffuse challenging situations
    - Touch a pupil in a way which may be considered indecent, inappropriate or aggressive
    - Use physical intervention in a punishment
    - Use more force than required for longer than required
    - Touch in a way that could be seen or portrayed as inappropriate
    - Use sarcasm, demeaning or insensitive comments or degrading treatment.

    The School's Strategic Child Protection and Safeguarding Policy

    Staff must only use physical intervention as a last resort to protect the safety of children or adults.

    Professional Teaching Standards

    Teachers uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school by …

    - Treating pupils with dignity, building relationships routed in mutual respect, and at all times observing proper boundaries appropriate to a teacher's professional position.

28. Miss Rice concluded that the two allegations amounted to gross misconduct. She considered whether there was any sanction she could impose that was less than summary dismissal and took into account the following:

    a. The claimant's long service as a teacher and her previous good conduct, with no previous disciplinary sanctions alongside the content of the character references provided by her union representative at the hearing

    b. The detail provided in the documents presented by the claimant in her statement and in her summative statement

    c. The financial impact in the event of dismissal on the claimant, the detail of which was set out in the summative statement read out at the hearing by the claimant's union representative

    d. The claimant's responses to the allegations. Miss Rice could not take the risk of a future breach of the standards as the claimant had not demonstrated sufficient insight into her behaviour to give her any confidence in the claimant going back into a classroom environment.

Appeal

29. Miss Rice confirmed the claimant's right of appeal which was exercised. The claimant was informed the appeal was to be conducted as a rehearing of the claimant's case.

30. The appeal was heard by way of video conference on 20 October 2020. The appeal panel comprised the Chair Mr Mark Yeung (Trust Director), Miss Maria Foxton and Mr Andrew Kirilic. The claimant attended the hearing remotely and was supported by her trade union representative, Mr Jonathan Bacon who presented the claimant's case. Mrs Howie, Head of Human Resources was also present to advise the panel.

31. Mrs Woodmansey had been called to attend but was unable to attend due to her ill health. Mr Yeung explained that while his preference was for Mrs Woodmansey, to be available to answer any questions, if they arose, he concluded that it was important that the meeting went ahead to avoid any further delay.

32. Mr Yeung explained that the panel were conscious of the fact that the process had been ongoing since November 2019 and needed concluding for the benefit of the claimant. Also with the nature of Mrs Woodmansey's illness there was considerable uncertainty around when she might be able to attend if the appeal hearing was adjourned. Furthermore, it was confirmed to the claimant at the beginning of the appeal that if it transpired during the hearing that the panel had any questions or concerns that required a response from Mrs Woodmansey then the hearing would be adjourned before any decision was made. By the end of the appeal hearing, Mr Yeung confirmed that the panel were satisfied they had a full understanding of the claimant's case and her account of the incident. There were no unanswered questions. The panel were content there had been a thorough investigation during which Mrs Woodmansey's version of events had been appropriately questioned and challenged. The panel had no reason to doubt that Mrs Woodmansey had witnessed the incident and the central facts were not in dispute. The panel concluded that there was no benefit in interviewing her further.

33. The panel considered the evidence presented taking into account all the written and verbal evidence provided. They concluded that in relation to allegation one, whilst Miss Rice's finding upholding that allegation had not been challenged by the claimant it was important for the panel to review the evidence and evaluate it for themselves given that the appeal hearing was a re-hearing. Mr Yeung confirmed that the panel were extremely concerned by the nature of this allegation given the potential emotional impact on the child of telling the child that future contact with a parent should be stopped. The panel concluded that the claimant painted a bleak picture to the pupil before then making physical contact with him and upheld Miss Rice's conclusion in respect of allegation one.

34. In relation to allegation two and whether or not the claimant had deliberately pushed pupil A and whether the force of that push was enough to cause him to fall over, the panel considered the claimant's representation that Mrs Woodmansey was 'mistaken' in her interpretation of the incident because she was completing the consequences log book at the time and could not have seen what occurred.

35. The evidence presented at the appeal hearing was that the log book took a matter of seconds to complete and was only a case of adding the child's name to the log and that would have happened at the beginning of the interaction with the child that followed. The panel considered whether there was any reason for Mrs Woodmansey to exaggerate what she had seen, however, there was no evidence presented to suggest that. No issues were raised in terms of the personal or working relationship between Mrs Woodmansey and the claimant. At the appeal when the claimant's representative was asked to identify (page 224L) the extent to which he thought Mrs Woodmansey was mistaken his response was "*in the belief that there was force*". No inconsistences in Mrs Woodmansey's account were identified at the appeal hearing, it was a question of the weight that should be attached to the evidence when it was considered with the rest of the evidence. The panel concluded that Mrs Woodmansey was more likely than not to have witnessed the incident in the way she described and there was no evidence or reason for the panel to believe that she had exaggerated what she had seen.

36. Mr Yeung confirmed that the panel considered at length the claimant's representation of the incident and her rationale for her actions. The claimant stated she did not push pupil A and that she merely touched him to demonstrate what a push was to obtain the truth from him. However, during the appeal meeting the claimant stated on a number of occasions that Pupil A knew what a push was, the panel felt that the claimant's own account of the incident had an '**edge of aggression**'. Further, in the claimant's statement she stated that she said to Pupil A "*I am sorry for pushing you*". The claimant stated that she said this to show the pupil that you always say sorry if you have touched someone. The panel could not understand why the claimant had apologised to the pupil, unless she had pushed him. If, as by the claimant's own evidence she was demonstrating that you would apologise, then why didn't she explain this to the pupil i.e. that if you did push someone then you would apologise.

37. Consequently, the panel did not consider this a credible explanation for the claimant's actions and concluded that it was most likely that she did push the pupil and the push was with enough force to cause him to fall over. Mr Yeung confirmed the panel was **'extremely concerned**' by the comments the claimant made to pupil A and that the claimant made physical contact with a vulnerable

child to 'demonstrate a point'. Further, the panel was concerned that **the claimant maintained that the latter was appropriate for pupil A but not any other child**. Taking the above into account the panel upheld Miss Rice's conclusions in respect of allegation two.

38. In deciding whether to uphold Miss Rice's decision to summarily dismiss the claimant from her employment Mr Yeung confirmed that the panel considered the claimant's disciplinary and service record, any mitigating circumstances and the gravity of the case.

39. Mr Yeung confirmed that the two other panel members are experienced primary school teachers, both felt very strongly that touching a child, especially a vulnerable child, was a very poor decision. Whilst the claimant accepted that her comments were inappropriate the claimant has not expressed any regret for her physical interaction with pupil A. The claimant repeatedly stated that her only regret was in previously using the word "push" to describe the incident. The lack of recognition of the seriousness of the incident was a concern to the panel. The panel decided to uphold in full Miss Rice's original finding of gross misconduct and confirmed that the decision to dismiss was appropriate in the circumstances.

Applicable Law

40. Section 98(1) provides that it is for the employer to show the reason for the dismissal and that reason is a 'potentially' fair reason. Section 98(2)(b) provides that a potentially fair reason for dismissal is one relating to the conduct of the employee.

41. Section 98(4) provides that "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.

42. The guidelines established in **British Home Stores-v Burchell 1978 IRLR 379,** apply in conduct dismissals. Has the respondent shown it had a genuine belief that the claimant was guilty of the misconduct, and then applying a neutral burden of proof, did the respondent have reasonable grounds to sustain that belief at the stage it was formed, and was a reasonable investigation conducted?

43. Those guidelines are used regularly by Tribunals and have been upheld more recently by the Court of Appeal in **Graham v Secretary of State for Work and Pensions (Jobcentre Plus) 2012 EWCA Civ 903 2012 IRLR 75**. Aikens LJ provides a useful summary of how the Tribunal should approach its task:

> 35 '…*once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an*

investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, ***by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable.***

44. In the context of section 98(4) ERA 1996, the three relevant elements to consider are: Did the employer have reasonable grounds on which to sustain his belief; Had the employer carried out as much investigation as was reasonable; and was dismissal a fair sanction to impose in all the circumstances?
45. Tribunals need to consider the whole of the disciplinary procedure including any appeal process and how the appeal is conducted, to decide whether it cures any earlier procedural defect. (OCS-v-Taylor)
46. For the wrongful dismissal (breach of contract in relation to notice pay), a very different legal question must be answered because the Tribunal does have to decide on the balance of probabilities whether the claimant was in breach of contract to the extent that her conduct might be regarded as repudiatory which entitles the employer to summarily dismiss? It is only if the respondent was not so entitled, that the claimant is entitled to damages for the breach by way of notice pay.

Conclusions

47. The first issue to determine is whether the decision makers: Miss Rice (at dismissal) and Mr Yeung (at appeal) had a genuine belief that the claimant had committed the two acts of alleged misconduct. The claimant does not challenge the respondent's genuine belief and I am satisfied that Miss Rice and Mr Yeung as the Chair of the Appeal Panel genuinely believed the claimant had committed the admitted act of making the inappropriate comments to Pupil A causing him anxiety and upset, and the disputed act of deliberately pushing Pupil A causing him to fall backwards.
48. The second issue to determine applying a neutral burden of proof, is did the respondent have reasonable grounds to sustain that belief at the stage it was formed, and was a reasonable investigation conducted?
49. The claimant admitted making inappropriate comments to Pupil A which caused him anxiety and upset and that it was misconduct that could be treated as gross misconduct under the respondent's policies and procedures (see paragraph 18) Miss Rice explains her findings on that conduct and its seriousness; "*There is* ***no disputing the fact that comments about a punch on the arm or face were made alongside a suggestion that Pupil A should not see his dad.*** *Whilst there is no clarity on whether you told pupil A that you would make a call to*

Social Services, ***there is no doubt that you knew Pupil A and would have understood the impact that preventing him from seeing his dad would have on his personal circumstances.*** At the Appeal hearing the panel reviewed the evidence and evaluated for themselves the seriousness of the misconduct. Mr Yeung confirmed that the panel were extremely concerned by the nature of this allegation given the potential emotional impact on the child of a teacher telling him that, future contact with a parent should be stopped. The panel had concluded that the claimant painted a '*bleak picture*' to the pupil before then making physical contact with him and found it was sufficiently serious to be treated as gross misconduct.

50. The claimant denied deliberately pushing Pupil A with force causing him to fall backwards onto the floor at the disciplinary/appeal hearing and at this hearing. The findings of fact about the investigation carried out by Mrs Parr are at paragraphs 10—20. No failures in the investigation process have been found and no further investigative steps were identified. All relevant witnesses were interviewed, a written record of the interviews was made and each witness had the opportunity to check the accuracy of the record. Internal and external inconsistencies in the evidence gathered were identified and challenged to establish the central key facts.

51. At this hearing, the claimant challenged the reasonableness of the investigation, attacking the credibility and reliability of the evidence of Pupil A and Mrs Woodmansey. Pupil A is described as a very intelligent '6' year old boy. He was interviewed as part of the investigation with the appropriate checks and balances put in place to take account of his age. It was reasonable for Mrs Parr to treat the account given by Pupil A as his 'statement of truth'. It was reasonable for her not disregard his account or treat is as unreliable. It is surprising the claimant has attacked Pupil's A's credibility in the way she does when his account (paragraph 12) was entirely consistent with her own initial account of the events in the CPOMS report (paragraph 7 and 8). It appears, that Pupil A's credibility is being attacked because it is not helpful to the claimant's case. Mrs Parr is also criticised for her different approach in questioning the claimant in contrast to Mrs Woodmansey. There were no examples of any inappropriate questions asked by Mrs Parr. In fact, the claimant's perception of her interview at the time was that it was 'fair'. Any inconsistencies (internal/external) were properly explored and challenged by Mrs Parr as part of her investigation. It is important to draw a distinction between an interview with a witness reporting alleged misconduct who is recalling events to provide her employer with that account as part of an investigation and an interview with the employee that is alleged to have committed that misconduct. The latter can be expected to be more rigorously questioned in an investigative interview than the former. Again, my view is that this is another diversionary tactic by the claimant who wishes to focus on other accounts instead of examining the inconsistencies in her own account. I was satisfied all the relevant evidence was gathered in a reasonable way, it was properly considered and tested by Mrs Parr, as part of a reasonable investigation.

52. Did the respondent have reasonable grounds to sustain the belief that the claimant deliberately pushed pupil A with force causing him to fall backwards onto the floor? Before dealing with the respondent's grounds for that belief I will deal with the decision made by Miss Rice to proceed with the disciplinary hearing in the claimant's absence. My findings of fact are set out at paragraph 20-24. The

disciplinary hearing had been postponed twice previously. The respondent had obtained occupational health advice confirming there was 'no medical reason' why the claimant could not participate in a hearing. It also advised against delaying a decision because the unresolved process was causing the claimant stress. The claimant was represented by Mr Nind, her union representative. He was ready to proceed with the disciplinary hearing on the claimant's behalf. He did not apply for an adjournment, before or during the hearing. If he had felt he was unable to represent the claimant properly, it is surprising that he agreed the hearing could proceed in the claimant's absence. On the contrary, he confirmed the claimant wanted a decision and delay was not in her best interests. He actively participated in the hearing. The claimant and Mr Nidd provided written representations and evidence (the character references provided). Miss Rice was left with no unanswered questions. Her outcome letter reflects the fact that she considered the representations made on the claimant's behalf. The claimant had the right to appeal and exercised that right. The appeal was conducted as a rehearing to correct any 'perceived' procedural defect in holding the disciplinary hearing in the claimant's absence. Against those facts, Mr Harding submits that the claimant provided a Doctor's note confirming that she was unable to participate in person. Mrs Howie is not medically qualified to make an assessment and should have delayed the hearing to seek further medical advice. While I agree that Mrs Howie is not medically qualified, the respondent had obtained medical advice confirming there was no medical reason why the claimant could not participate. Counselling sessions were provided and further delays were not in the claimant's best interests. Mr Nind agreed and chose to proceed with the hearing instead of seeking an adjournment. The disciplinary process did not end there. The claimant had a right of appeal which she exercised. She attended the appeal which was conducted as a 'rehearing'. The whole disciplinary process, including the appeal needed to be taken into consideration when deciding the fairness of the disciplinary process. For all those reasons it was reasonable for the disciplinary hearing to proceed in the claimant's absence and the disciplinary process, as a whole, was fair.

53. Looking then at the grounds for Miss Rice's belief, at the dismissal stage that the claimant had committed the second alleged act of misconduct (paragraph 26). She concluded that: ***This allegation centres around whether or not, you pushed Pupil A and that the force of the push was enough for him to fall over****. Having considered the evidence in relation to this allegation I found that* ***you were very inconsistent****. For example, on* ***CPOMS, which you completed on the evening of the incident you said that you gave Pupil A, a "gentle push"*** *likewise during the investigation you also said that "there was no force to the push" and you also stated that you "pushed him to show him that it was not nice to push people" but that the atmosphere was calm and there was laughter at the end".* ***In the statement that Mr Nind presented on your behalf you were very clear in your assertion that you did not push Pupil A****.*

54. Miss Rice found the claimant's evidence was inconsistent and unreliable. She preferred the contemporaneous evidence and rejected the claimant's arguments about the unreliability of the other witness evidence. She found Mrs Woodmansey had not (and had no reason to) exaggerate her evidence. It was for Miss Rice to decide the facts on the evidence presented to her based on the balance of probabilities. She clearly explains how she assessed the evidence to make her findings. She concludes "***Both allegations amount a serious breach***

of the relevant code of conduct, the school's strategic child protection policy and professional teaching standards and therefore I concluded that the allegations amount to gross misconduct". The claimant understood those policies how they applied to her and why the conduct if proven could be treated as gross misconduct. She had received recent relevant training on safeguarding issues. Miss Rice having found both gross misconduct proven clearly explained in her outcome letter and at this hearing (paragraph 27 and 28) why she decided to dismiss the claimant rather than impose any other sanction Essentially the breaches were so serious and so concerning for Miss Rice that she could not risk returning the claimant to the classroom as a teacher. Unfortunately, the claimant was maintaining a position that was unsustainable based on the evidence. Even at this hearing the claimant has tried to argue that it is all about 'semantics' rather than admit that she pushed Pupil A.

55. At the appeal hearing conducted as a rehearing, the claimant did attend and was represented by Mr Bacon. The claimant's focus at that hearing was on Mrs Woodmansey failure to attend to give evidence. Mr Yeung explained the approach taken by the appeal panel and the reasons for that approach (paragraph 32). It was reasonable for the respondent not to call Mrs Woodmansey to give evidence at the appeal hearing and to rely instead on all the written evidence and any representations made by or on behalf of the claimant. It was not clear what questions would have been asked if Mrs Woodmansey had attended. Mr Bacon provided very little information by way of clarification at the Appeal hearing about what it was he would have asked her if she had attended (see paragraph 35). While Mr Harding suggests that Mrs Woodmansey would have been cross examined 'at length' at the appeal, his submission is not supported by the facts. It is not clear what questions would have been asked to address the internal inconsistencies in the claimant's account, coming from the undisputed contemporaneous CPOM document. In most employment tribunal cases of unfair dismissal, employers do not usually call live evidence at the disciplinary hearing, relying on the written statements obtained during the investigation. Mrs Parr ensured witnesses had the chance to check the accuracy of the answers they gave and addressed any inconsistencies in the evidence during the investigation process.

56. The appeal panel reviewed all the evidence for both allegations afresh and their conclusions are set out at paragraphs 36-39. They upheld Miss Rice's findings and conclusions in relation to both allegations finding that in relation to the 'push' the claimant had an 'edge of aggression' and her admitted comments were extremely concerning. They concluded that whilst the claimant accepted that her comments were inappropriate the claimant had not expressed any regret for pushing Pupil A. She had attempted to justify treating him differently. The claimant repeatedly stated that her only regret was in previously using the word "push" to describe the incident. The lack of recognition of the seriousness of the incident was a concern the panel felt they could not ignore upholding the decision to dismiss. Mr Harding submits that there was 'minimal or no force used' and that the decision makers had already made up their mind making the dismissal fundamentally unfair. I disagree. There was no evidence to support the submission made that the outcome was predetermined. The outcome was decided based on admitted misconduct and proven misconduct. There was no dispute that the conduct could be treated as gross misconduct which would entitle the employer to dismiss without notice.

57. I considered then whether the sanction of dismissal falls within the band of reasonable responses open to an employer. I remind myself that it is not my role to substitute my decision for that of the school, which was faced with these circumstances and had to be satisfied it could trust the claimant to return as a teacher in its school. The rules and regulations that the respondent applies at the school are set by the respondent are for the protection of the children and for the staff. The claimant understood what the rules were and why they had to be followed. The respondent has explained why the proven misconduct was treated as gross misconduct. Mr Harding submits for the claimant to lose her job after "a few wrong words and a touch is extremely unfair". Mr Price submits that this demonstrates a continuing lack of awareness by the claimant who still attempts to minimise the seriousness of her conduct. Her approach supports the view that was taken by the respondent at the time that the conduct was serious and posed a real risk if she was returned to the classroom as a teacher. I agreed with Mr Price that the respondent is best placed to assess the risks. I do not interfere with the assessment of the risk made by Miss Rice which was revaluated and confirmed on Appeal. It clearly influenced the decision made to dismiss the claimant. Dismissal falls within the band of reasonable responses and the dismissal was procedurally and substantively fair.

58. For the wrongful dismissal complaint, I must decide on the balance of probabilities whether the respondent has proved the claimant was in breach of contract to the extent that her conduct might be regarded as repudiatory which entitled the respondent to summarily dismiss? For the disputed 'push' the respondent must prove on the balance of probabilities that the allegation of misconduct is proven and is sufficiently serious to be treated as gross misconduct. I agree with and adopt the findings of fact made by Miss Rice on both allegations which are reasonable findings to make based on the evidence gathered in the investigation. The claimant agrees that both acts of misconduct can be treated by the employer as gross misconduct. She does not advance any arguments at this hearing to persuade me that the acts of misconduct (admitted and proven) were not sufficiently serious to be treated as a repudiatory breach of contract. The respondent was entitled to dismiss without notice and was not acting in breach of contract. For those reasons both complaints fail and are dismissed.

Employment Judge Rogerson

2 February 2021