THE INDUSTRIAL TRIBUNALS

CASE REF: 4115/17/IT

CLAIMANT: **Eileen Ward**

RESPONDENTS: **1. Education Authority**
2. Board of Governors of Carrick Primary School

DECISION

The decision of the tribunal is that the claimant was fairly dismissed on the basis of some other substantial reason.

Constitution of Tribunal:

Employment Judge: **Employment Judge Wimpress**

Members: **Mr N Jones**
Mr A White

Appearances:

The claimant was represented by Mr Joseph Kennedy, Barrister-at-Law, instructed by Shean Dickson Merrick Solicitors.

The respondent represented by Ms Rachael Best, Barrister-at-Law, instructed by the Education Authority Solicitors.

SOURCES OF EVIDENCE

1. The tribunal heard oral evidence from the claimant, Mrs Audrey Stewart, Mr Kenneth Belshaw, Reverend Nigel McCullough and Ms Marcella Leonard all of whom provided witness statements. The panel also received a witness statement from Mr John Mason who was unable to attend the hearing due to ill health. The respondents withdrew a statement by Reverend White during the course of the hearing on the basis that they did not consider it necessary for the tribunal to receive his evidence as it covered much of the same ground as Reverend McCullough's evidence. The tribunal was also provided with an agreed bundle of material and received some additional material during the course of the hearing.

THE CLAIM AND THE RESPONSE

2. The claimant alleged that she had been unfairly dismissed by the respondents. The respondents denied that the claimant had been unfairly dismissed and contended that she had been fairly dismissed for some other substantial reason.

THE ISSUES

3. Whether the claimant was unfairly dismissed and if so what compensation was she entitled to.

THE FACTS

4. The claimant was employed by the respondents from 7 January 2002 to 2 September 2017 as a Special Needs Teacher at Carrick Primary School ("the School").

5. On 12 October 2012 the claimant was involved in an incident at the School during which a child suffered a fracture of the arm. The then Principal, Mr Bryan Jess, reported to the Board of Governors at a meeting that a complaint had been received from a parent who alleged that Mrs Ward had assaulted her child on 12 October 2012. Mr Jess reported that this allegation had been investigated and, after consultation with and advice from Southern Education and Library Board's Safeguarding team, the claimant met with Mr Jess who advised her of the inappropriateness of the manner in which she had handled the child and that she was to make herself familiar with the Staff Code of Conduct to ensure that a similar incident would not occur in the future. No further action was taken against the claimant.

6. On 11 October 2013 an incident took place in the School toilets involving the claimant and two children. The matter was reported to Social Services and the PSNI. Social Services took no further action. The PSNI prepared a file on the matter which was sent to the Public Prosecution Service which directed no prosecution.

7. On 14 October 2013 the claimant was suspended by the Board of Governors.

8. On 20 January 2014 disciplinary proceedings were instigated by the Board of Governors.

9. On 12 February 2014 a preliminary investigation was undertaken in accordance with Disciplinary Procedure TNC 2007/5 by the Disciplinary Authority which consisted of Mr K Belshaw, Mrs P Black, Mr S McCleary and Mr A Orr. Mr Belshaw was Chair of the Disciplinary Authority.

10. On 20 February 2014 the preliminary investigation concluded and it was decided that disciplinary action should proceed. The claimant was charged with two matters under the Disciplinary Code – (1) Grabbing one child by the shoulder causing scrape marks on the top of his shoulder and the base of his neck and (2) shaking another child.

11. On 12 March 2014 the disciplinary hearing took place. The Disciplinary Panel was chaired by Mr Belshaw. During the course of the hearing two further allegations came to light and the claimant was given the opportunity to respond to these further allegations at a reconvened hearing on 14 May 2014. The additional charges were – (3) creating and maintaining personal record books off school premises which contained highly sensitive information relating to pupils in her class, their families and details of incidents of a possible safeguarding nature, some of which allegedly took place outside school property, a Personal Incident Book, in breach of

paragraph 7.2 of the School's Child Protection Policy and (4) leaving a child unattended during a parent/teacher meeting on 11 October 2013 in breach of her duty of care.

12. On 27 June 2014 Mr Belshaw wrote to the claimant and informed her of the Disciplinary Panel's decision. The Disciplinary Panel found that all four charges were substantiated and that claimant's behaviour constituted gross misconduct. Accordingly, the Panel proposed that a determination should be made by the Board of Governors that the claimant be summarily dismissed from her employment as a teacher. The claimant was advised of her right to make representations to the Board of Governors within ten working days of receipt of the letter.

13. On 30 June 2014 the claimant informed the Disciplinary Authority that she wished to exercise her right to make representations to the Board of Governors. A Representations Panel was convened which consisted of Governors who had no previous dealings with the matter. The panel was comprised of Reverend J White (Chair), Reverend N McCullough, Mr G Lawson and Mr S Gardiner.

14. On 30 September 2014 a representations meeting took place. The claimant was represented by her Union Representative, Mrs Stewart. According to Reverend McCullough the claimant denied involvement in the incident, alleged that other members of staff were not telling the truth, that the children were not being truthful and that people wanted rid of her. The claimant did not give any explanation for what had occurred. During subsequent discussion the Representations Panel agreed with the decision of the Disciplinary Panel that the claimant should be dismissed.

15. On 2 October 2014 the Board of Governors met and decided that the claimant's employment should be terminated subject to an appeal to the Labour Relations Agency ("LRA").

16. On 3 October 2014 Mr Gardiner, the Chairman of the Board of Governors, wrote to the claimant and informed her that the Board of Governors had met on 2 October 2014 and made a determination that she be summarily dismissed from her employment as a teacher at the School and advised that she had a right of appeal to an Independent Appeal Committee ("IAC") established by the LRA within 10 working days of receipt of the letter. Mr Gardiner also advised that the Board of Governors remained concerned about the Personal Incident Book maintained by the claimant and warned the claimant that unless she surrendered this document within 7 days further disciplinary action would be initiated.

17. The claimant appealed against her dismissal by letter dated 15 October 2014 to the IAC. As explained in TNC 2007/5 the LRA's role is to provide an independent administration for appeals on behalf of the employing authority including appointing an independent chairperson to the IAC which is comprised of the chairperson plus one panel member nominated by the Teachers' side and the other nominated by the Management side of the Teachers' Negotiating Committee.

18. The IAC appeal hearing took place on 16 December 2014. Mr Belshaw chaired the panel that attended the appeal hearing. A written submission was made by the Board of Governors to the IAC.

19. In December 2014 the IAC gave its decision on the appeal. It found that the disciplinary panel was not reasonable in finding Charges (3) and (4) proven. In

relation to Charges (1) and (2) the IAC concluded that it was reasonable for the disciplinary panel to find that the claimant had committed these offences and that they constituted gross misconduct but that the disciplinary panel had failed to consider all of the band of reasonable responses, had failed to take into account any mitigating factors and gave little or no consideration to any decision other than summary dismissal. Having regard to the claimant's clear disciplinary record and her lengthy service the IAC substituted a Final Written Warning for dismissal.

20. In addition to overturning the Board of Governors' decision the IAC made three recommendations which were as follows:

    (1) That staff are informed of the policies regarding record holding and keeping of personal information on pupils.

    (2) That a suitable mediation professional should engage with the claimant and the School to outline the benefits of mediation and make every effort to try to get both parties into mediation, to ease a return to work.

    (3) That the Southern Education and Library Board ("SELB") should assist the School to develop a reasonable plan for 'intensive monitoring' of the behaviour in class of the claimant and to provide support for the School on a training plan on behavioural modification and the appropriate level of control of children with special needs both inside the classroom and in other areas of the School.

    Only the second and third recommendations are of direct relevance to these proceedings.

21. Mr Belshaw reported the IAC's decision and recommendations to the Board of Governors at their meeting on 12 January 2015. According to Mr Belshaw the Board of Governors instructed the Principal, Mr Jess, to take steps to reintegrate the claimant into the School in accordance with the recommendations of the IAC. Mr Belshaw regarded reintegration as essential given that the claimant had been out of the School from October 2013 when she was suspended. Reverend McCullough gave evidence that the Board of Governors were concerned for the safety of the children, noting that the IAC agreed that it was reasonable for the Governors to determine that the toilet incident had taken place. A risk assessment was spoken about as part of the reintegration plan and Reverend McCullough's understanding was that all the recommendations would subsequently be implemented if the risk assessment was satisfactory. Reverend McCullough disputed the claimant's allegation that the risk assessment was a way of bypassing the IAC conclusions and maintained that it was commissioned to help in the process of reintegration. The Board of Governors' decision was communicated to the SELB. As a result Mrs Marion Ferguson, Senior Resources Manager of the SELB, engaged a Social Work Consultant, Ms Marcella Leonard, to undertake a risk assessment in respect of the claimant.

22. On 11 February 2015 Mrs Ferguson sent an email to Ms Leonard outlining what was required. Mrs Ferguson's email set out the third recommendation in full and continued as follows:

    "It is the view of the Board of Governors that to ensure the success of Mrs Ward's reintegration as well as the safety of pupils in attendance at Carrick Primary School, it is essential that an appropriate risk assessment be carried out which will not only evaluate the likelihood of Mrs Ward repeating her

actions of 11 October 2013 but also identify appropriate control measures. The outcome of such a risk assessment will therefore inform the development of a reintegration plan."

Mrs Ferguson also provided contact details for herself, Mrs Stewart and Mr Jess together with a three page background note which included a succinct summary of the relevant facts in relation to the charges against the claimant that were proven.

23. On 12 February 2015 the Chair of the Board of Governors, Mr Gardiner, wrote to the claimant and advised her of the decision to conduct a risk assessment and that it was to be undertaken by Ms Leonard. Mr Gardiner then explained the rationale for the Risk Assessment in similar terms to the instructions to Ms Leonard:

"The Board of Governors note that the Independent Appeal Committee recommended that the SELB assist the school to develop a reasonable plan for "intensive monitoring" of your behaviour in class and provide support to the school on a training plan on behavioural modification and the appropriate level of control of children with special educational needs both inside the classroom and in other areas of the school. It is the view of the Board of Governors that to ensure the success of your reintegration as well as the safety of pupils in attendance at Carrick Primary School, it is essential that an appropriate risk assessment be carried out which will not only evaluate the likelihood of you repeating your actions of 11 October 2013 but also identify appropriate control measures. The outcome of such a risk assessment will therefore inform the proposed reintegration plan."

Mr Gardiner went on to indicate that the Board of Governors was very mindful of the recommendation that a suitable mediation professional should engage with the claimant and the school and would take such action as is necessary with regard to mediation once the risk assessment is complete and a reintegration plan finalised.

24. On 19 February 2015 the claimant wrote to Mr Gardiner concerning the proposed risk assessment. The claimant stated that she had no objection in principle to the proposed assessment but wanted to know the framework within which it would be conducted. The claimant also raised a number of specific queries namely – (1) the precise basis upon which this risk assessment has been determined as appropriate, in particular the thought process of the decision maker and how this will assist in her reintegration back into the classroom setting, (2) the basis on which Ms Leonard was selected including details of her work and experience in particular in the context of child protection issues, (3) all details furnished to Ms Leonard by Mr Jess, (4) evidence of the claimant's child protection training. The claimant concluded the letter by indicating that she harboured concerns about the process thus far. The claimant did not receive any reply from Mr Gardiner.

25. On 30 March 2015 Ms Leonard emailed Mr Jess and sought feedback on a number of issues to assist in the assessment. These were (1) details of any previous allegations or concerns of physical behaviour towards pupils (2) concerns raised by any parent, pupil or staff member about the claimant's general behaviour or attitude towards pupils (3) the claimant's relationship with teaching and non-teaching colleagues, (4) any concerns raised in inspections and (5) whether the claimant had attended all child protection training prior to the incident.

26. On 29 April 2015 Mr Jess provided a detailed response to Ms Leonard in relation to each point raised by her which may be summarised as follows:

(1) Mr Jess referred to the claimant being quite frequently seen to pull children from one activity or place to another and she was spoken to any time it was seen. Mr Jess then described the events of 8 October 2012 in detail. As a result Mr Jess warned the claimant and told her that no pupil should have their arm grabbed. The South Eastern Health and Social Care Trust subsequently made a formal written complaint which resulted in these instructions being reiterated to the claimant. During lesson observation on 16 October 2012 Mr Jess observed the claimant holding children by the jumper and pulling them reasonably gently from activity to activity. Mr Jess subsequently instructed the claimant not to move pupils around like this. Adverse reference was also made to a P5 pupil sitting on the claimant's lap.

(2) No parent, pupil or staff member raised any concern about the claimant prior to the incident on 11 October 2013 except for the incident on 8 October 2012. Subsequent to the claimant's suspension one classroom assistant claimed to be very upset about her treatment by the claimant and was concerned about what would happen when the claimant returned.

(3) Mr Jess described the claimant's relationship with other teachers as being cool and professional. Mr Jess also described the claimant's body language during a visit by a Reporting Inspector as giving the impression of total dismissal and disinterest.

(4) Mr Jess referred to a school inspection that took place in January 2012 while the claimant was off sick. The inspection found that the claimant's practice was inadequate. As a result intensive support was arranged for the claimant in the school. The minutes recorded little engagement by the claimant and little appetite for improvement.

(5) The claimant attended all child protection training that was provided.

27. Ms Leonard met with the claimant and her union representative, Mrs Stewart, on 26 March 2015 and 26 May 2015**.** The claimant found these interviews upsetting. She did not like Ms Leonard's manner which she described as hostile and accusatory. The claimant also resented its intrusiveness particularly with regard to her private life and family history. Ms Leonard also forwarded Mr Jess a list of questions and met with him on 14 May 2015 and he provided documentation in seven appendices.

28. Ms Leonard completed her report on 3 June 2015. The key components of Ms Leonard's risk assessment were set out in paragraphs 3 and 4 of the report. In summary form these were as follows:

3.2 The three children have more likely than not had a negative experience in the company of Mrs Ward.

3.3 The claimant was dismissive and wanted to highlight points relating to the procedures of interviewing the children and/or their accounts.

3.4 The claimant extensively minimised the impact on the children. She was dismissive of the children's ability to tell a coherent account and stated "sure one was brain damaged and his word was taken, sure police couldn't even interview him".

3.7 Although denial of an incident of perceived harm is not an indicator of future risk the lack of insight and personal reflection to demonstrate empathy for how others have experienced one's behaviour is a risk factor.

3.8 The claimant presented in interview as a person wronged by a school community. She had no insight into how her behaviour had caused 3 young children upset and distress sufficiently for them to tell their Principal about their teacher.

3.11 The claimant was defensive and passively aggressive. Of concern to Ms Leonard was the claimant's inability to reflect on the impact of the allegations on those impacted by the events.

3.12 The claimant's lack of ability to recognise the impact on others of her actions, especially when those are children with special needs, was of concern to Ms Leonard. This was further evidenced in the claimant's response to the recommendation of what training did she believe she may require to assist an return to teaching which was *"I don't need training, I am the best qualified teacher in the school, I don't feel I need any more training*". When training in behaviour management, safeguarding, awareness of how to keep safe were suggested the claimant could not recognise the need for any of these training themes.

3.16 The claimant presented with no insight into her behaviour, is passively aggressive in her manner when challenged and seeks to dismiss others by questioning their ability and capability. She demonstrated no acknowledgement of any fault on her side, no insight into how her behaviour and attitude towards the children and colleagues may need to be addressed as well as considering the impact on others.

3.18 The claimant's lack of emotional awareness and empathy for the children and the staff affected by her behaviour is of concern. She is unable to demonstrate emotional awareness of the impact on children, and specifically those whom she knows and taught.

4.2 Throughout the assessment the claimant was unable to demonstrate insight and victim awareness.

4.3 Mrs Leonard had concern regarding the claimant's overarching need to be vindicated, need to receive apologies from specific personnel which blocks her from being able to recognise how this will affect the child victims of her behaviour.

4.4 The claimant's dismissive attitude of impact and her need to be vindicated would emotionally be detrimental to the children.

4.6 Ms Leonard recommended a range of education including victim Impact including children, parents and staff, behaviour management, self awareness of attitudes and behaviours on others and child protection. Ms Leonard further stated that she would support training in recognising vulnerable situations but she did not consider that the claimant required training in the management of classroom assistants

4.7 Ms Leonard considered that training would only be effective if the claimant fully
engages and acknowledges that she requires the training. At this stage the claimant did not recognise she requires any training in behaviour management, child protection, managing children and understanding the impact of her behaviour on others.

4.8 Without acknowledging the need for training to improve her insight into her behaviour, there is a possibility of repeat of similar physical inappropriate manhandling of children. Of more significant concern to Mrs Leonard was the claimant's lack of understanding of the emotional impact on the children and therefore returning without recognizing this and being open to training on this is of concern.

4.9 With regard to risk Ms Leonard stated that it was not her opinion that the claimant physically assaulted the children but that in that moment she was unable to manage her behaviour and reactions. Nor was it Ms Leonard's opinion that that the claimant presented a significant risk of repeating physical assaults on children but as indicated at 4.8 there was a possibility that if she did not reflect and learn on what are her triggers for losing her control. Ms Leonard considered that the claimant's constant dismissive attitude towards the children and her colleagues was the most significant aspect which required addressing.

4.10 Ms Leonard therefore recommended training to address both the physical behavioural management issues as well as the emotional/empathy issues must be completed. Following this ongoing supervision and monitoring of the claimant's interaction with children was recommended.

4.11 Finally, Ms Leonard recommended that if the claimant was returning to the School preparatory work should be undertaken with the children to ensure that they were not traumatised by her return.

29. In her witness statement Ms Leonard commented that during the assessment the claimant was keen to point out discrepancies and perceived faults within the investigation process and Ms Leonard made it clear that these were not the focus of this assessment and did not indicate the likelihood of risk. Ms Leonard also stated that she was concerned during the assessment that the claimant extensively minimised the impact on the children and was unable to consider their thoughts, worries and possible fear that they may have experienced at the time and since. Ms Leonard drew attention to the claimant's comment that one child was brain damaged and his word was taken when the police could not interview him and contrasted this with her own view that children with special needs and learning difficulties do not have the brain development for complexity of thought which lying successfully requires. Although Ms Leonard did not view the denial alone to be an indicator or risk, she considered that empathy and ability to recognise and accept how others may have been impacted are critical factors in preventing the reoccurrence of negative behaviour and the claimant did not present herself as someone who had these qualities. Ms Leonard also recorded in her report that after discussion with her Union representative the claimant stated that she would accept training in managing classroom assistants and keeping herself safe in vulnerable situations. Ms Leonard further commented in her report that the claimant identified no specific training to assist her in understanding the behaviour of the children in the school or how to manage this behaviour safely with the welfare of the child at

the focus. Ms Leonard also stated that the claimant viewed the process of mediation as an opportunity to tell different parties where she perceived they had failed in their role within the situation. In Ms Leonard's personal opinion the claimant lacked empathy and willingness to reflect to any degree which would render any return to employment training superficial.

30. On 9 October 2015 Mr Gardiner sent a copy of Ms Leonard's report to the claimant and Mrs Stewart. Mr Gardiner advised that the Board of Governors had delegated the Staffing and Finance Committee to consider what appropriate action to be taken to implement the report's findings and invited the claimant to forward any comments within 14 days of receipt of his letter.

31. On 15 October 2015 the claimant wrote to Mr Gardiner and expressed her shock and disappointment about Ms Leonard's disclosure of highly confidential personal information. The claimant requested the names of those who had received the report. The claimant indicated that she needed more time to consider the content of the report and indicated that it was likely that she would require an independent second opinion. The claimant also asked Mr Gardiner for his initial response and how they might progress matters.

32. No further correspondence was exchanged until 27 January 2016 when Mr Gardiner responded to the claimant's letter of 15 October 2015. Mr Gardiner stated that sufficient time had elapsed to allow the claimant to fully reflect on the content of the report and invited her comments within 14 days. Mr Gardiner also responded to the claimant's concerns about the distribution of the report and advised her that it was being treated as a confidential document.

33. On 9 February 2016 the claimant wrote to Mr Gardiner in relation to the risk assessment. The claimant expressed her unhappiness with the risk assessment and indicated that she did not consider that Ms Leonard was properly qualified to provide it. The claimant requested that a second opinion be obtained from a suitable medically qualified individual or a medically qualified occupational health physician. The claimant further requested that Ms Leonard's report should be withdrawn completely. The claimant also reiterated that the IAC did not recommend a risk assessment but rather recommended mediation and intensive monitoring. The claimant also complained about the lack of feedback and requested the identity of everyone who had received a copy of the report together with an assurance that it would not be shared with any third parties.

34. On 8 March 2016 Mr Gardiner replied to the claimant's letter of 9 February 2016. Mr Gardiner referred back to his letter of 12 February 2015 in relation to the rationale for the risk assessment and the identity and role of the consultant. Mr Gardiner explained that the requirement for a risk assessment was established by the fact that the IAC was of the view that the decision of the Board of Governors that the 'Toilet Incident' did take place on 11 October 2013 and that one child was scraped and another shaken by the claimant was reasonable. Mr Gardiner went on to state that the Board of Governors was satisfied that Ms Leonard's report fulfilled the remit to evaluate the likelihood of the claimant repeating her actions of 11 October 2013 and had provided comprehensive conclusions and recommendations. Mr Gardiner went on to state that the Board of Governors could not see any merit in obtaining further reports and was unable to accept the claimant's submission that Ms Leonard's report should be withdrawn. In relation to the IAC's recommendation that mediation take place, Mr Gardiner again placed reliance on his letter of 12 February 2015 in which the claimant was advised that the "Board of Governors will

obviously take such action as is necessary with regard to mediation once the risk assessment is complete and a reintegration plan finalised." Finally, Mr Gardiner advised that it was the intention of the Board of Governors to request a meeting with the claimant to discuss the findings of the risk assessment and to consider what action required to be taken.

35. Reverend McCullough was appointed along with Mr Giles Dawson and Reverend John White to a Sub Committee of the Board of Governors in order to meet with the claimant and discuss the findings of the Risk Assessment Report.

36. The Sub Committee (and Mrs Marion Ferguson) met with the claimant on 20 May 2016. The claimant was accompanied by her Trade Union Representative Mrs Audrey Stewart. Mrs Ward presented a verbal and written statement in which she detailed her dissatisfaction with the report. She felt that the Board of Governors had been "feeding" Mrs Leonard information to influence the outcome. The claimant was also concerned that the report contained excessive detail about her personal life. In his evidence to the tribunal Reverend McCullough stated that the Sub Committee paid that section of the report very little attention, concentrating rather on what it said about the ability of the claimant to be reintegrated into the school. The claimant continued to deny her involvement in the toilet incident and her need for further training. After the claimant and Mrs Stewart had left, the Sub Committee discussed what they had heard and concluded that their experience in the meeting had corroborated the Risk Assessment in that the claimant did not recognise her need for training and seemed to have no insight or appreciation of the impact of her actions on the children involved. She maintained that everything that had happened was the fault of someone else. The Sub-Committee agreed that dismissal should be contemplated.

37. On 3 June 2016 Reverend McCullough wrote to the claimant (Step 1 letter). After referring to the claimant's representations at the meeting on 20 May 2015, the outcome of the IAC hearing and the Board of Governors' letter of 12 February 2015 the letter stated as follows:

> *"Accordingly the Sub-Committee is satisfied that a clear and justifiable rationale to conduct a risk assessment as communicated to you and your representative Ms Audrey Stewart (UTU) on 12 February 2015, was established by the findings and recommendations of the Independent Appeal Committee. The Sub Committee further considers that there is no basis in fact for your assertion that the process was an attempt to keep you from your position as a teacher as the remit above had clearly demonstrated.*
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> *The Sub-Committee has concluded that your representations to it reinforced Ms Leonard's findings that you are unable to demonstrate insight and empathy for the children affected by your actions. It also notes Ms Leonard's comment that the lack of ability to recognise the impact on others of one's actions, especially when those are children with special needs, is a concern.*
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> *The Sub-Committee has also noted that during the assessment you did not engage in any positive fashion with regards to the recommended training necessary to assist a return to your teaching role. It is clear from your representations that you continue not to recognise that you require training in the areas of behaviour management, child protection, managing children and understanding the impact of your behaviour on others. The Sub-Committee can therefore only but accept Ms Leonard's finding that without you*

acknowledging the need for training to improve your insight into your behaviour, there is a possibility of similar inappropriate manhandling of children by you.

Accordingly, the Sub-Committee has come to the preliminary view that the only viable option worthy of consideration by the Board of Governors is that contemplation be given to your dismissal from your post of teacher at Carrick Primary School on the grounds of some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which you hold. The Sub-Committee has come to the view in light of Ms Leonard's conclusions and findings (and your own contribution to the risk assessment process and your subsequent responses) and concluded that your reintegration into your teaching role at Carrick Primary School may well not be practically possible as there are currently no grounds for believing that a reasonable plan for "intensive monitoring" of your behaviour in class and a training plan on behavioural modification and the appropriate level of control of children with special educational needs (as recommended by the LRA) can be effectively implemented. In this regard the Sub-Committee shares Ms Leonard's significant concern about your lack of understanding of the emotional impact of your actions on the children in your care and the risks that would undoubtedly arise should you return to your teaching role without recognising this and being open to appropriate training."

The letter also referred to the claimant's statement that 'This is precisely how I can undermine the credibility of the children. I am therefore perfectly entitled to do this. She on the other hand ignores any attempts to demonstrate to her that the children actually lack credibility'. The Sub-Committee concluded that this reinforced Mrs Leonard's findings that Mrs Ward did not demonstrate insight or empathy for the children affected by her actions.

The letter then concluded:

"In accordance with the Statutory Dispute Resolution, Dismissal and Disciplinary Procedures, Standard procedure (copy attached), you are therefore invited to meet with the Sub-Committee (Step 2 meeting) which has been established by the Board of Governors to consider the contemplated termination of your employment on the grounds of some other substantial reason."

The date for the meeting was given as 10 June 2016 and the claimant was advised of her right to be accompanied by a Trade Union Representative or teaching colleague.

38. The date of the Step 2 meeting subsequently changed to 16 June 2016 and Reverend McCullough advised the claimant of the new date (28 June 2016) by letter dated 16 June 2016.

39. On 24 June 2016 Reverend McCullough received an email letter requesting disclosure of documents from the claimant's union representative, Mrs Stewart, dated 23 June 2016. Mrs Stewart requested the provision of documentation including all documents relied upon by the Board of Governors in reaching the conclusion set out in Reverend McCullough's letter of 3 June 2016 namely that the claimant's reintegration into her teaching role at Carrick Primary School might well not be practically possible as there were currently no grounds for believing that a

reasonable plan for intensive monitoring of her behaviour in class and a training plan on behavioural modification and the appropriate level of control of children with special educational needs (as recommended by the LRA) could be effectively implemented, copies of any proposed plans/action plans for training and intensive monitoring, minutes of all meetings where the recommendation was discussed, professional guidance documents relied upon and details of all experts consulted, copies of all correspondence with Ms Leonard and all documents that were furnished to her prior to the commencement of her assessment, copies of all correspondence and documents relating to the choice of Ms Leonard, documents explaining the decision not to reply to the claimant's letter of 16 February 2016, the selection policy for the engagement of Ms Leonard, Ms Leonard's terms of engagement and fee arrangement, documents in relation to the decision to seek a risk assessment, minutes of all meetings where the risk assessment was discussed and any draft report together with correspondence regarding amendments, documents in which the recommendation of mediation was discussed or advice sought in relation to same and the minutes of any meeting where the LRA Appeals Panel decision was discussed together with all correspondence between the Board of Governors and any third party about its decision and recommendations. Mrs Stewart concluded her letter with a request that the documents be forwarded in advance of the meeting to allow sufficient time for them to be considered and she reserved the right to seek an adjournment if the documents were not forthcoming or not forthcoming in sufficient time.

40. On 27 June 2016 Reverend McCullough replied to Mrs Stewart. He reiterated the Sub-Committee's preliminary view as set out at paragraph 37 above and explained that the meeting on 28 June 2016 was a Step 2 meeting the aim of which was to provide the claimant with an opportunity to meet with the Sub Committee which was considering the contemplated termination of the claimant's employment on the grounds of some other substantial reason. Reverend McCullough went on to state that the Disciplinary Procedure for Teachers in Grant-Aided Schools did not apply in this case. Reverend McCullough did not engage in detail with Mrs Stewart's request for disclosure and instead indicated that the documentation being relied upon was the risk assessment together with the written presentation given by the claimant at the meeting on 20 May 2016.

41. On 28 June 2016 the Sub-Committee met with the claimant and Mrs Stewart. Reverend McCullough commenced the meeting by welcoming everyone and explaining the reason for the meeting. Mrs Stewart then stated that she had not received the documents that she had requested and indicated that the claimant would not engage in the meeting unless she received all documents. Reverend McCullough indicated that the claimant had been given the relevant document namely the risk assessment. After a further exchange there was a short break. When the meeting reconvened Reverend McCullough stated that the panel had considered the request for documentation, that the risk assessment was the only relevant document and that the other documents were not relevant for this meeting. Mrs Stewart disagreed with this statement and a further exchange of views ensued during which Reverend McCullough stated that the claimant did not recognise any training needs to which the claimant responded that she was not offered any training. Reverend McCullough replied to the effect that the risk assessment found that the claimant did not recognise the need for training. After some further exchanges about the IAC's findings and disclosure Mrs Stewart requested a break. When the meeting resumed the claimant stated that she was adjourning the meeting until she was provided with the minutes and documents requested. Reverend McCullough responded that the risk assessment was the relevant

document and that the other documents were either not in existence or were not relevant. Mrs Stewart then indicated that they were not engaging any further today and they left the meeting. Thereafter the Sub-Committee proceeded to consider the evidence and following discussion it was agreed that a proposal should be forwarded to the Board of Governors that the claimant be dismissed from her post.

42. On 25 July 2016 Reverend McCullough wrote to the claimant informing her of this decision. The material portions of the letter read as follows:

> *"The purpose of the meeting …. was to provide you with an opportunity to discuss with the Sub-Committee the preliminary view that your reintegration into your teaching role at Carrick Primary School may not be practically possible as there are currently no grounds for believing that a reasonable plan for "intensive monitoring" of your behaviour in class and a training plan on behavioural modification and the appropriate level of control of children with special educational needs (as recommended by the LRA) can be effectively implemented.*
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> *Unfortunately you chose not to engage in any discussions with the Sub-Committee on the basis that you considered that you had not been provided with the information and documentation as requested by email of 23 June 2016 from your trade union representative Mrs Stewart (UTU). You were however advised that the Sub-Committee was satisfied that you had been provided with all relevant documentation; namely the decision of the Independent Appeal Committee, the Risk Assessment Report compiled by Ms Leonard and your written statement which you presented at the previous meeting on 20 May 2016.*
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> *You were advised that no action plans for training or intensive monitoring have been developed as you have clearly previously communicated to both Ms Leonard and subsequently to the Sub-Committee that you do not accept that any training on any of these areas is required. When you stated that no offer of training had ever been made to you, the Sub-Committee directed you to paragraph 4.7 and 4.8 of the Risk Assessment report:-*
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> *4.7 However, it must be noted that training can only be effective if Mrs Ward fully engages and acknowledges she requires the training. At this stage as noted earlier in the report, Mrs Ward does not recognise she requires any training in behavioural management, child protection, managing children and understanding impact of her behaviour on others.*
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> *4.8 Therefore, without acknowledging the need for training to improve her insight into her behaviour, there is a possibility of repeat of similar manhandling of children. However, of more significant concern is the lack of understanding of the emotional impact on the children and therefore returning without recognising this and being open to training is of concern.*
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> *The Sub-Committee was particularly concerned that in response to this you asked "what manhandling of children?" When you were reminded of the decision of the Independent Appeal Committee you stated, "This is not a re-trial – I'm not opening that again."*

It is regrettable that you and your trade union representative chose not to engage in any positive manner with the Sub-Committee but instead exited the meeting leaving the Sub-Committee with no alternative other than to consider the matter in the absence of any constructive input from you.

Accordingly, the Sub-Committee having taken into account the decision of the Independent Appeal Committee, the findings and conclusions contained in the Risk Assessment report, your responses to these matters and your failure to engage in a meaningful manner in any discussions on a way forward, has come to the view that that your effective reintegration into your teaching role at Carrick Primary School ***is not*** *practically possible. The Sub-Committee therefore proposes that a determination is made by the Board of Governors that your employment as a teacher at Carrick Primary School should cease on the grounds of some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which is held by you.*

In accordance with Schedule 2 paragraph 5.6 of the Education (NI) Order, you have the right to make written and/or oral representations with respect to this proposal to a further Sub-Committee appointed by the Board of Governors for this purpose. If you chose to avail of this right you should inform me of your decision in writing no later than Friday 19 August 2016."

43. On 15 August 2016 Mrs Stewart submitted written representations (dated 28 July 2016) which were drafted by a lawyer to Reverend McCullough in response to his letter of 25 July 2016. The representations made a number of points which were set out in eleven separate paragraphs which can be summarised as follows:

(1) The failure to provide essential documents and information in advance of the meeting on 28 June 2016.

(2) The failure to documents and information in breach of the TNC agreed procedures.

(3) The failure of the Sub-Committee to comply with their contractual obligations and follow a fair process. When it became clear that there was no intention to comply with a fair process the claimant had no option but to indicate that she could not engage further in the meeting. The documentation and information was not forthcoming since the date of the hearing and the claimant was now invited to make representations about a decision made in her absence and without this material. Representations were therefore made under protest.

(4) The IAC recommended mediation and made no reference to the risk assessment. The natural consequence of the IAC's recommendation of a final written warning was a return to work and if they considered a risk assessment necessary before such a return they would have said so.

(5) The risk assessment was criticised on the basis that it proceeded on the assumption that the claimant was guilty whereas the IAC made no determination of guilt.

(6) The risk assessment made no reference as to how monitoring would be planned or conducted. The claimant cooperated fully with Ms Leonard and participated in the risk assessment in good faith in the expectation that it would result in a monitoring process being proposed.

(7) In relation to the suggestion in the letter of 3 June 2016 that the claimant raised no issues about the risk assessment at the time, the representations pointed out that the claimant did write to the Board of Governors and raised serious concerns about the risk assessment which were ignored.

(8) The representations stated that the claimant questioned the choice of Ms Leonard to conduct the risk assessment; documents in relation to her engagement were not provided and confidential and personal information about the claimant was circulated. The failure to obtain a second opinion from a suitably qualified person was also criticised.

(9) The claimant was not offered any training and it was submitted that she would have fully engaged in any training offered. Likewise the claimant would have fully engaged in any monitoring proposed.

(10) No effort was made to offer mediation and the representations emphasised the importance of mediation in light of comments made by Mr Belshaw at the IAC hearing that he did not want the claimant to return to the School. The representations also questioned the impartiality and open mindedness of the Sub-Committee in assessing whether the claimant should be dismissed.

(11) Finally, the representations suggested that the reliance on "some other substantial reason" appeared to be an unlawful attempt to avoid complying with the IAC's recommendations.

44. On 6 September 2016 Mr Gardiner, the Chairperson of Representations Sub-Committee, wrote to the claimant and informed her that it proposed to meet on 5 October 2016 to consider her written representations and advising her of her right to make oral representations. The Representations Sub-Committee was comprised of Mr Gardiner, Mr Belshaw and Mr Orr.

45. On 19 September 2016 the claimant advised that she would not be attending Representations Sub-Committee meeting and asked that it consider the written representations submitted on her behalf by Mrs Stewart on 15 August 2016.

46. The claimant's written representations were discussed at a meeting of the Representations Sub-Committee on 5 October 2016 in advance of the Board of Governors meeting on 6 October 2016. The claimant did not attend. According to Mr Belshaw the meeting lasted an hour and a half during which time the Sub-Committee considered the written submission paragraph by paragraph and concluded that there was nothing new in the submission to justify changing the decision to dismiss. Following the meeting Mr Belshaw prepared a note to this effect to inform his presentation to the Board of Governors.

47. The Board of Governors duly met on 6 October 2016. Mr Belshaw reported on the outcome of the Representations Sub-Committee's consideration of the claimant's representations and the Board of Governors decided that the claimant should be dismissed. Mr Belshaw was asked to liaise with the Education Authority regarding next steps. The Board of Governors met again on 10 November 2016 but there was no substantive discussion of the matter. It was noted that the Education Authority was to write to the claimant but had not yet done so. Mr Belshaw was asked to chase this up.

48. The Board of Governors met again on 3 January 2017 and at this meeting they formally accepted the Representations Sub-Committee's recommendation to terminate the claimant's employment.

49. On 23 January 2017 Mr Gardiner wrote to the claimant and advised her of their decision. In his letter Mr Gardiner addressed all of the matters contained in the representations of 15 August 2015.

(1) Mr Gardiner maintained that the claimant had been provided with all of the documents relied upon namely the risk assessment, the IAC's decision and the claimant's written statement dated 16 May 2016 which was presented at the meeting on 20 May 2016.

(2) Mr Gardiner stated that in the absence of any mention of a specific TNC the matters under consideration related entirely to the risk assessment and drew attention to the opportunities afforded to comment on and discuss it including meetings at which the claimant was accompanied by her trade union representative. Mr Gardiner concluded this paragraph stating that the Board of Governors could find no evidence to support the claimant's contention that any rights were denied to her.

(3) In relation to the fairness of the process Mr Gardiner pointed out that the Sub-Committee met with the claimant on two occasions and echoed the comments of the first Sub-Committee that it was regrettable that the claimant chose not to engage with it on 28 June 2016.

(4) Mr Gardiner stated that the Board of Governors was satisfied that the risk assessment process was established by the IAC's findings and that the decision to undertake a risk assessment was compliant with the recommendation that "the SELB assist the school to develop a reasonable plan for intensive monitoring of the behaviour in class of the claimant and to provide support for the School on a training plan on behavioural modification and the appropriate level of control of children with special needs both inside the classroom and in other areas of the School." Mr Gardiner also drew attention to the contents of his letter of 12 February 2015 in which he explained the relevance of the risk assessment to the consideration being given to a suitable mediation process.

(5) Mr Gardiner stated that the Board of Governors could not accept the assertion that the risk assessment proceeded on the assumption that the claimant was guilty and reiterated that the rationale for the risk assessment was clearly established by the conclusions and recommendations of the IAC.

(6) In relation to the proposed monitoring process Mr Gardiner drew attention to the failure of the claimant to engage in a positive manner in any discussions on a way forward at the meeting with the Sub-Committee on 28 June 2016.

(7) & (8) The Board of Governors was satisfied that the claimant was provided with all relevant documentation.

(9) The Board of Governors noted the contents of Reverend McCullough's letter to the claimant of 21 July 2016 in which he recorded that having directed the claimant to paragraphs 4.7 and 4.8 of the risk assessment she refused to engage any further with the Sub-Committee.

(10) No direct response was made to paragraph 10.

(11) Mr Gardiner advised the Board of Governors that clarification as to the nature of "some other substantial reason" was set out in Reverend McCullough's letter of 16 June 2016.

Mr Gardiner then set out the Board of Governor's final decision which read:

> *"Accordingly, I now wish to inform you that the Board of Governors has determined that that your employment as a teacher at Carrick Primary School should be terminated on the grounds of some other substantial reason. Namely that in light of the findings and conclusions contained within the Risk Assessment report compiled by Ms Leonard, together with your contribution to the process and your responses to these matters, your reintegration into your teaching role as (sic) Carrick Primary School is not practically possible as there are no grounds for believing that a reasonable plan for intensive monitoring of your behaviour in class and a training plan on behavioural modification and the appropriate level of control of children with special educational needs (as recommended by the Independent Appeals Committee) can be effectively implemented."*

Mr Gardiner concluded by advising the claimant of her right of appeal in accordance with paragraph 5(7) of Schedule 2 of the Education (NI) Order 1998 before notification of the determination is made to the Education Authority and that the Chief Executive of the Education Authority had been asked to establish a panel to hear the appeal so that it could be heard by members with no previous involvement in the matter. The deadline for the appeal was given as by 3 February 2017.

50. On 27 January 2017 the claimant appealed in writing against the determination to terminate her employment as a teacher in accordance with paragraph 5(7) of Schedule 2 to the Education (NI) Order 1998.

51. On 15 February 2017 the claimant's solicitors wrote to Mr Gardiner and complained on the claimant's behalf about the claimant not being permitted to return to school; monitoring not being implemented; a mediation process not being set up and queried the basis for dismissing the claimant for some other substantial reason. The solicitors stated that the claimant believed that the conduct and decisions of the Board of Governors was a clear attempt to circumvent and avoid implementing the decision of the LRA [IAC] and criticised the departure from agreed TNC procedures. The solicitors objected to the Education Authority being involved in the establishment of a panel to hear the appeal and sought copies of relevant documents in advance of any appeal to include all documents furnished to Ms Leonard before the risk assessment was prepared and records of the interview with Mr Jess. The letter concluded by seeking confirmation that the appeal would lie to the LRA [IAC] and documents to include the minutes of the Board of Governors meetings on 5 October 2016 and 3 January 2017.

52. On 22 February 2017 the claimant made a subject access request to the School in which she sought a wide range of documents pertaining to her case.

53. On 16 March 2017 Mr Gardiner wrote to the Director of Human Resources in the Education Authority and requested that a panel be established to hear the claimant's appeal. Mr Gardiner pointed out that every member of the Board of Governors had participated in the process and that to ensure that the claimant received a fair process it was felt that her appeal should be heard by a panel that had no previous involvement in any aspect of her case.

54. On 11 April 2017 Mr Gardiner replied to the claimant's subject access request. The reply set out in tabular form all of the documents and information sought. The response to most of the material sought was "None". The exceptions were a handwritten note record taken by Mrs Ferguson of the meeting on 26 June 2016 and correspondence with Ms Leonard and documents that she was furnished with prior to commencing the risk assessment.

55. By letter of 27 April 2017 the claimant was invited to attend an appeal meeting on 10 May 2017. The letter indicated that the Appeals Panel would give its decision within 5 days of the meeting. The meeting was subsequently re-scheduled on 17 May 2017.

56. On 28 April 2017 Mr Gardiner replied to the letter from the claimant's solicitors of 15 February 2017. Mr Gardiner drew attention to the rationale for the processes followed by the Board of Governors in its letter of 23 January 2017 and confirmed that the Board of Governors had provided the claimant with all of the documentation that it had relied upon throughout the process namely the LRA [IAC] report and the risk assessment. Mr Gardiner also stated that the only other documents considered were statements that the claimant provided to the Sub-Committee and he also confirmed that no documentation was provided by the Board of Governors to Ms Leonard. In relation to the appeal route Mr Gardiner confirmed that the referral of an appeal to the LRA [IAC] was not available other than on foot of the agreed TNC procedures which were not applicable in the present case and that any appeal would be heard by senior Education Authority officers with no prior involvement in the matter or connection with the School. Mr Gardiner concluded by indicating that if the claimant wished to appeal she should notify him in writing no later than 5 May 2017. This last comment was superfluous as the claimant had already appealed by letter dated 27 January 2017.

57. An Appeals Panel was constituted which comprised Mr John Mason, Assistant Senior Education Officer and Head of Human Resources and Mrs Jill Trotter, Assistant Senior Education Officer. Both were employees of the Education Authority. Neither were available to give oral evidence to the tribunal. Mr Mason provided a witness statement and it was envisaged that he would give oral evidence but in the event he was unable to attend the tribunal hearing due to ill-health. Mrs Trotter was unavailable as she was on holiday abroad. The respondents were content to proceed in their absence and to rely upon Mr Mason's witness statement.

58. The claimant attended the appeal meeting on 17 May 2017 together with Mrs Stewart. At the start of the meeting Mr Mason indicated that neither he nor Mrs Trotter had any prior involvement in the matter and had only been provided with access to documentation once the appeal panel had been established. Mr Mason stated that they had read the letter of appeal and had set aside the morning for the meeting and that arrangements would be made for an adjournment if necessary. In response Mrs Stewart stated that the process was unfair and flawed; that they reserved all rights and participated in the appeal process under protest. Mrs

Stewart further indicated that they had a written submission which they would provide to the panel and then leave. Mr Mason stated that they would prefer to read the submission and call them back. The claimant and Mrs Stewart left a four page written submission and seven appendices with the panel and agreed to remain in the building.

59. The claimant's written submissions commenced with two complaints firstly about outstanding documents and information and secondly that the conduct of individuals involved in the dismissal process was being determined by their colleagues despite her request for an independent panel. The claimant further stated that she was therefore presenting the appeal under protest and contended that the process was fundamentally unfair and defective. The claimant went on nonetheless to make submissions banded under four headings and a conclusion –

(1) Risk Assessment – The claimant contended that a Risk Assessment proceeded on the basis of the assumption of guilt whereas the IAC had made no finding of guilt against her but rather had determined that one aspect of the Board of Governor's decision was reasonable in the light of the facts and that the instruction by Mrs Ferguson that the claimant should be assessed as to the risk of repeating her actions which prejudiced the possibility of a fair and unbiased report. If the IAC considered that a Risk Assessment was necessary they would have said so. Despite a recommendation of mediation by the IAC the Board of Governors took no steps to facilitate a mediation process. There was no reference in the Risk Assessment as to how any sort of monitoring. The claimant disputed the statement that she took no issue with the Risk Assessment. The claimant questioned the choice of Ms Leonard to conduct the Risk Assessment which included comment about the claimant's mental state as she had no medical qualification. The claimant pointed out that she had requested a second opinion but this was ignored. There was no opportunity for the claimant to comment on the accuracy or completeness of the Risk Assessment prior to circulation. The claimant contended that the Board of Governors had undertaken a Risk Assessment when none was necessary or recommended and then used it to avoid implementing the IAC's clear and unambiguous decision that she should be permitted to return to work and that the Board of Governors was required to adhere to the IAC's decision.

(2) Training – The claimant stated that she had not been offered any training but was willing to undergo any proposed training and was also more than willing to co-operate with any monitoring process to aid her return to work. The claimant took issue with the implication in the letter of 3 June 2016 that she had declined training and pointed out that she had not been offered any training. The claimant stated that she was asked during the Risk Assessment what training she felt she needed and expressed her opinion and that if relevant training was offered she would participate in this.

(3) Mediation – No effort had been made to offer mediation despite a lengthy passing of time. The claimant considered mediation essential as she had lost faith in the Board of Governors because of the way the disciplinary process had been conducted. The claimant also drew attention to the comments of the Chair of the Sub-Committee at the IAC hearing when he expressed the opinion that he did not want the claimant to return to the School as a further reason why mediation was essential.

(4) Some Other Substantial Reason – The claimant contended that this was being used as a device to prevent her return to work.

(5) Conclusion – The claimant again emphasised that the Risk Assessment proceeded on an assumption of guilt and that dismissal for "some other substantial reason" was an unlawful attempt to avoid complying with the IAC's recommendation. The claimant also drew attention to section 8, paragraph 8.10 of Discipline Procedures Ref. TNC 2016\2 which provided that "The decision of the Appeal Committee shall be final and binding on both parties."

60. The panel took an hour to read the written documentation following which the claimant and Mrs Stewart returned. Mr Mason reiterated that the panel was independent and had not been provided with documents until the appeal was organised. He then went on to make a couple of points about Ms Leonard's report being shared and the panel would do what it could to ensure that it was not disclosed further. Mr Mason then asked if there was anything in particular that they wished to draw the panel's attention to. The claimant responded that everything was in print and that there was nothing further to add. Two other matters were touched on briefly. Mr Mason asked a question about disclosure to which the claimant responded that there was still documentation outstanding. He also clarified and corrected a date in the written submission. Mr Mason again asked if there was nothing else that they wished to raise and Mrs Stewart replied that the documentation was detailed. Mr Mason indicated that they would give a written decision but that this was unlikely to be within 5 days. Following some further brief discussion about redaction of documents and confidentiality Mr Mason concluded the meeting and stated that the panel would give full consideration to the claimant's submission in reaching its decision.

61. The Appeals Panel decided not to uphold the claimant's appeal. Mr Mason informed the claimant of the Appeals Panel's decision by letter of 1 June 2017. Neither Mr Mason's letter nor his witness statement contain detailed reasoning for this decision or any analysis, comment on or engagement with the claimant's written submissions. Instead the letter set out a history of the matter, recounted what was said at the appeal meeting and included extensive quotations from the Board of Governors' letter of 12 February 2015 explaining the rationale for the Risk Assessment and Reverend McCullough's letter of 3 June 2016 (see paragraph 37 above) which explained how the Sub-Committee reached its preliminary view that the Board of Governors should consider dismissing the claimant on the grounds of some other substantial reason. Tied in to these two quotations were three paragraphs in the form of conclusions which read as follows:

> *"The Appeal Panel is satisfied that the Board of Governors gave consideration to the decision and recommendations of the Independent Appeal Committee following the appeal hearing at the LRA on 16 December 2016."*
>
> *"The Appeal Panel having considered all of the available documentation is satisfied that the Board of Governors was entitled to make the recommendation that you should be dismissed from your post."*
>
> *"It is the decision of the Appeal Panel, having considered all of the information, that your appeal is not upheld. The Appeal Panel has determined that the decision taken by the Board of Governors was correct to recommend dismissal on the grounds of some other substantial reason. The Chair of the Board of Governors of Carrick Primary School will be notified accordingly."*

62. In his witness statement Mr Mason stated that he had to consider how the Board of Governors had reached that conclusion and this required him to consider the report from the IAC hearing on 16 December 2014. He noted that four allegations were considered by the Board of Governors as gross misconduct and that the first two of these allegations were as follows:

(1) That Mrs Ward, on the morning of 11 October 2013 at a toilet adjacent to her classroom removed three boys from a single toilet and in the process she grabbed one of the boys causing scrape marks on his neck and shoulder.

(2) That during the same incident she also shook another child. Both incidents were referred to during submissions as the 'Toilet Incident'. Mr Mason then goes on to comment –

> *"Contrary to Mrs Ward's view that the Independent Appeals Panel did not find her guilty, their report states:*
>
> *"With regard to the first two allegations regarding the 'Toilet Incident', after investigation of the evidence and direct questioning of the appellant regarding her recollection of events, the independent appeal committee were not convinced by Mrs Ward's contention that she merely told the boys to leave. This conclusion was based on the many anomalies and changing version of events given by her to the police, the board of governors, in her submissions and upon direct questioning by the independent appeal committee."*

And

> *"It is the Independent Appeal Committee's view that, based on the information the Board of Governors had available to it at the time, its decision that the 'Toilet Incident' did occur and that one child was scrapped [sic] and the other was shaken by Mrs Ward* ***was*** *reasonable."*

This would appear to represent the only direct engagement with any of the claimant's submissions. As with Mr Mason's letter of 1 June 2017 there is the same lengthy quotation from Reverend McCullough's letter of 3 June 2016 (see paragraph 37 above) which does address the issue of training and Mr Mason may be taken to be endorsing what Reverend McCullough said on this topic in his letter.

THE LAW

Substantive Unfairness

63. Article 130 of the Employment Rights (Northern Ireland) Order 1996 insofar as relevant provides as follows:-

> *"130. - (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

(b) *that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

…….

(3) Where the employer has fulfilled the requirements of paragraph (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."*

Some Other Substantial Reason

64. This ground has been the subject of judicial comment in a number of cases which are helpfully referred to in written submissions. In ***Leach v Office of Communications [2012] ICR 1269*** Lord Justice Mummery sitting in the English Court of Appeal stated as follows**:-**

"52. *First, the question for the ET was whether the Respondent's reason for dismissal of the Claimant was "some other substantial reason" within the meaning of s.98(1)(b) of the 1996 Act. Was it a reason which a reasonable employer could rely on to justify a dismissal as fair for the purposes of s.98(4)? That is essentially a question for the ET's assessment on the facts found in the particular case. Its decision can only be appealed if a question of law arises from it. The Claimant is not entitled to re-argue the facts of the case in the hope that he can persuade this court to make a different assessment more favourable to him.*

53. Secondly, the employment tribunal was entitled to conclude, on the facts of the case as found by it, that the reason for the claimant's dismissal was a "substantial reason" within section 98(1)(b). The mutual duty of trust and confidence, as developed in the case law of recent years, is an obligation at the heart of the employment relationship. I would not wish to say anything to diminish its significance. It should, however, be said that it is not a convenient label to stick on any situation, in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate. The circumstances of dismissal differ from case to case. In order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the employment tribunal has to examine all the relevant circumstances. That is what the employment

tribunal did with regard to the nature of the employer's organisation, the claimant's role in it, the nature and source of the allegations and the efforts made by the employer to obtain clarification and confirmation, the responses of the claimant, and what alternative courses of action were reasonably open to the employer. The employment tribunal could have reasoned its decision on this point in more detail or at greater length, but I do not think that the decision is flawed for want of reasons, or by an error of law or by plain perversity."

65. In ***Harper v National Coal Board [1998] IRLR 260 at para 8*** it was held that a reason for dismissal would be capable of being substantial at the Article 130(1)(b) stage provided that it was more than "*a whimsical or capricious reason which no person of ordinary sense would entertain*".

66. In ***Kent County Council v Gilham: [1985] IRLR 18, CA, [1985] ICR 233*** Lord Justice Griffiths stated that if on the face of it the reason given by the employer could justify the dismissal, then it is a substantial reason and the tribunal's enquiry should then move on to consider the fairness of the dismissal. Lord Justice Griffiths went on to say that at the stage of considering whether an employer has established some other substantial reason for dismissal, 'The hurdle over which the employer had to jump at this stage of an enquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the enquiry moves on to s.57(3) [the equivalent of Article 130(3)], and the question of reasonableness.'

67. In ***Turner v Vestric Ltd [1981] IRLR 23, [1980] ICR 528*** **EAT** the Employment Appeal Tribunal addressed the situation where an employee was dismissed for some other substantial reason following a breakdown in working relationships. It was not in dispute that a breakdown of this nature was capable of constituting a proper and substantial reason for dismissal but the EAT held that the breakdown in working relationship must be irremediable and the employer should seek to improve relationships, before dismissing.

Procedural Fairness

68. When an employer is considering dismissing an employee it must follow the statutory dismissal procedure. This is the minimum procedure which must be followed in every case to which it applies. In the present case the standard procedure applies which is as follows:-

"Step 1: statement of grounds for action and invitation to meeting.

1. - (1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2. - (1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless –

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

3. - (1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

(5) After the appeal meeting, the employer must inform the employee of his final decision."

69. Schedule 2 to the Education (Northern Ireland) Order 1998 imposed obligations on the respondents in terms of the process to be followed in relation to the termination of a teacher's employment and provides as follows:

"5.—(1) Where the Board of Governors of any school to which this Schedule for the time being applies determines that any person employed to work at the school under a particular contract of employment should cease to work there under that contract, it shall notify the employing authority in writing of its determination and the reasons for it.

(2) If in a case within sub-paragraph (1)—

(a) the person concerned is employed under the contract of employment in question to work solely at the school; and

(b) he does not resign, the employing authority shall, before the end of the period of one month beginning with the date on which the notification under sub-paragraph (1) is given in relation to him, either give him such notice terminating that contract with the employing authority as is required under that contract or terminate that contract without notice if the circumstances are such that it is entitled to so do by reason of his conduct.

(3) If in a case within sub-paragraph (1) the person concerned is not employed under the contract of employment in question to work solely at the school the employing authority shall require him to cease to work at the school.

(4) In any case within sub-paragraph (3) no part of the costs incurred by a board in respect of the emoluments of the person concerned under the contract of employment in question, so far as relates to any period falling after the expiration of his contractual notice period, shall be met from the school's budget share.

(5) In relation to any such person, the reference in sub-paragraph (4) to his contractual notice period is a reference to the period of notice that would have been given under the contract of employment in question for termination of that contract if such notice had been given on the date on which the notification under sub-paragraph (1) was given in relation to him.

(6) The Board of Governors of such a school shall make arrangements for affording to any person in respect of whom it proposes to make any determination under sub-paragraph (1) an opportunity of making representations with respect to the action it proposes to take, including (if he so wishes) oral representations to such person or persons as the Board of Governors may appoint for the purpose, and shall have regard to any representation made by him.

(7) The Board of Governors of such a school shall also make arrangements for affording to any person in respect of whom it has made such a determination an opportunity of appealing against it before it notifies the employing authority of the determination.

(8) The relevant officer of the employing authority shall be entitled to attend, for the purpose of giving advice, all proceedings of the Board of Governors relating to any determination under sub-paragraph (1) and the Board of Governors shall consider any advice given by a person entitled to attend such proceedings under this sub-paragraph before making any such determination.

6.—(1) Subject to sub-paragraph (2), the employing authority shall not dismiss a person employed by it to work solely at a school to which this Schedule for the time being applies except as provided by paragraph 5.
(2) Sub-paragraph (1) shall not apply in any case where the dismissal of the person in question is required to comply with—
(a) Article 35(3); or
(b) any regulations made under Article 88A of the 1986 Order."

SUBMISSIONS

70. The tribunal received helpful oral and written submissions. Copies of the written submissions are appended to this decision.

71. Mr Kennedy on behalf of the claimant submitted that the dismissal was in reality a conduct dismissal and as such the claimant should have been afforded the benefit of the disciplinary procedure provided by TNC 2007/5 which included an appeal to the IAC rather than the minimum statutory procedure. Mr Kennedy submitted that the respondents should not be allowed to avoid doing so by failing to put in place an agreed procedure for SOSR dismissals. In his written submissions Mr Kennedy helpfully summarised the alleged unfairness at paragraph 36 as follows:

    a. Risk Assessment carried out based upon information provided to Marcella Leonard by the EA and Mr Jess to which the claimant was not privy.

    b. Basing the decision to dismiss upon the Risk Assessment in circumstances where the process was unfair – including what had been provided to Ms Leonard – and where the findings were superseded by events including offers to engage with any training offered;

    c. Refusing to address the issues of training, monitoring or mediation prior to making a decision as to the claimant's continued employment.

    d. Dismissing without proper consideration the representations from the claimant and made on her behalf regarding willingness to undergo training.

    e. The respondent failed to take all proper, sensible and practical steps to see if the situation could be improved – indeed the Board of Governors' own wording was that "*reintegration…may well not be practically possible…"* This attitude reveals the lack of rigour and conscientiousness of the school in dealing with the issue of the IAC recommendations and looking to get the claimant back into the school.

    f. The two Board of Governors members who gave evidence were disappointed with the decision of the IAC and Mr Belshaw accepted that he disagreed with the decision. The attitude of the Board of Governors in dealing with this was clearly influenced by their earlier involvement.

    g. Mr Belshaw provided a note of his update to the Board of Governors on 6 October 2016 from the Representations Committee – the note clearly reveals the attitude of the BOG wherein it opens "*Governors will recall that BOG decision to dismiss Mrs Ward was replaced by the LRA to a one-year final warning* ***despite*** *the fact that the LRA found that the Governors decision that the "toilet incident" had occurred.*" The update goes on to refer to the Risk Assessment and its '*comprehensive conclusions and recommendation'* in spite of the fact that Mr Belshaw had not seen the Risk Assessment prior to these proceedings.

    h. The Board of Governors initially convened a Representations hearing but then changed tack and held an appeal with persons appointed from SELB. Mr Belshaw was involved in the Representations committee on 5 October 2016 – he initially did not recall his involvement in that process but uncovered a briefing that he had given to the BG on 6 October 2016. Mr Belshaw (and the other members of the BOG other than Reverend McCullough, Reverend White

and Mr Gardiner) did not see the Risk Assessment and was part of a rubber stamping exercise in October 2016 and January 2017. There is no evidence of anxious or any scrutiny of the recommendation to dismiss the claimant.

i. The appeal process was convened following on from the decision to dismiss being finalised in January 2017. The appeal was populated by two members of staff form the EA which had been advising the Board of Governors throughout the process. The outcome letter (quotes large sections from the correspondence provided by the Board of Governors to the claimant when dismissing her. The conclusion is that the appeal panel was satisfied that the Board of Governors was entitled to make the recommendation that the claimant should be dismissed. The final paragraph states that "*It is the decision of the Appeal Panel, having carefully considered all of the information, that your appeal is not upheld"* – the appeal outcome letter makes no reference to training, mediation or monitoring (save where it quotes from the Board of Governors). The appeal outcome letter reveals no actual consideration of the issues.

j. At no stage during the claimant's 3 year and 8 month suspension was consideration given to an alternative to suspension or ending the suspension. That demonstrates the lack of willingness on the part of the school to return the claimant to work.

72. Mr Kennedy also sought to contend that in addition to the ostensible reason for dismissal irreconcilable personality clashes were in play. Mr Kennedy based this on Reverend McCullough's statement in which he referred to the claimant making unsubstantiated allegations about fellow staff members. In this context Mr Kennedy drew attention to the absence of steps being taken to implement mediation or to seek to ascertain whether or not the relationships could continue.

73. Ms Best on behalf of the respondent emphasised that the claimant was in a position of trust and that the protection of children must be paramount. The claimant failed to engage properly in the process or at all notwithstanding the acceptance by her representative that it was a reasonable approach for the Board of Governors to take. Ms Best drew attention to the claimant's assertion that she did not require training and poured cold water on the legal submissions to the effect that she would engage and contrasted this with what the claimant actually said to Ms Leonard and the Sub-Committee. In relation to the non-provision of documents Ms Best submitted that the documents sought were not relevant and noted that Mrs Stewart did not make any complaint about documents in her evidence to the tribunal. In relation to the criticism of the appeal decision by Mr Kennedy, Ms Best pointed out that the claimant made no complaint about the conduct of the appeal meeting or its findings and submitted that there was no substance in the criticism of the make-up of the appeal panel other than the legal submission that the appeal ought to lie with the IAC on the basis that TNC 2007/5 ought have been utilised. Ms Best submitted that the respondents had shown a valid reason for the dismissal on the ground of some other substantial reason that was neither whimsical nor capricious and that the decision to dismiss for some other substantial reason was both reasonable and within the band of reasonable responses. In relation to procedural fairness Ms Best submitted that the respondents had complied fully with the 3 step statutory procedure and Schedule 2 of the Education (NI) Order 1998.

CONCLUSIONS

74. The risk assessment clearly lies at the heart of the decision to dismiss the claimant. The purpose of the risk assessment was to evaluate the likelihood of Mrs Ward repeating her actions of 11 October 2013 and to identify appropriate control measures. We have set out Ms Leonard's conclusions above.

75. The claimant's principal difficulty was that she persisted in contesting findings of the original disciplinary tribunal which were upheld on appeal by the IAC, a body which she clearly had confidence in. A prudent and sensible course would have been for the claimant to have accepted that she had been found to have acted inappropriately and seek to persuade her employer that she could adapt her behaviour in light of the findings. However, throughout the process the claimant insisted on continuing to challenge the findings rather than seeking to assure her employer that she could safely return to work. Mrs Stewart accepted that it was reasonable for the second respondent to commission a risk assessment and did not have any issue with it in principle. The claimant's main concern was the disclosure of personal and private information and with Ms Leonard's approach to the matter. Having heard Ms Leonard give evidence we can see that she would be quite forthright and challenging in her approach. We were troubled that we had not got the heart of why a risk assessment was sought and we would have preferred to have heard evidence from the respondent directly on this point. Unfortunately Mrs Ferguson was unwell and Mr Gardiner, the recipient of her advice, was not called to give evidence. However, on the basis of the evidence that we have received and Mrs Stewart's acceptance that a risk assessment was a reasonable step to take we consider that it was a legitimate approach. Even if it was not it would have been difficult if not impossible for Board of Governors to have ignored Ms Leonard's assessment.

76. The key issue for the second respondent was what it should do when faced with a risk assessment which called into question the claimant's suitability as a teacher of children with special needs given a propensity for manhandling children in a manner which was carried out by Ms Leonard did not seal the claimant's fate. Notwithstanding many caveats Ms Leonard did not say that the claimant could not return to work but rather that she first required training and intensive monitoring (in class) thereafter. Ms Leonard's report informed the Board of Governors but did not bind it. However, throughout the claimant's submissions to the Sub-Committee and the Representations Committee she insisted that she did not need training and wasted time and energy complaining about intrusion into her private affairs and personal circumstances instead of seeking to persuade her employer that she was prepared to engage in whatever training was required to assist her reintegration. Such concessions as she made about training were both guarded and limited. The claimant also continued to rail against the factual findings of the original disciplinary panel. That is not to say that those findings were not of importance. On the contrary they were of central importance and featured strongly in Ms Leonard's report. One only has to consider the exchange with Ms Leonard in which, according to the claimant and Mrs Stewart, Ms Leonard said "You did it and got away with it" to understand its significance. Ms Leonard could not recall making this comment but it seems to us to be in keeping with her forthright and challenging approach. Further, as Mr Kennedy correctly accepted for training to be effective there needed to be full engagement and acknowledgment that training was required. Having considered the claimant's written and oral evidence together with the respondents' evidence we do not believe that there was either full engagement or acknowledgment on the part of the claimant. The respondents reached the same conclusion which cannot in our view be faulted.

77. We consider that dismissals for some other substantial reason require a two stage approach as endorsed by the Court of Appeal in ***Leach v OFCOM.*** The first issue for us is therefore whether the respondents' reason for dismissal of the claimant was "some other substantial reason" within the meaning of Article 130(1)(b) of the Employment Rights (Northern Ireland) Order 1996. We are satisfied that the respondents have shown that the reason is a substantial reason and is not whimsical or capricious and could justify the dismissal of the claimant. Secondly, we conclude, on the facts of the case as found by us the respondents have shown that the substantial reason justifies dismissal. In so finding we are mindful that the tribunal must not substitute its view for that of the employer and a dismissal that is within the range of reasonable responses the dismissal will normally be regarded as fair. We are satisfied that the reason for dismissal in the present case was both within the range of reasonable responses and fair.

78. As Mr Kennedy correctly points out a dismissal will not necessarily be procedurally fair simply because the minimum statutory procedure has been followed. There are numerous other ways in which a dismissal may be unfair such as the failure to call material witnesses, the failure to consider alternative sanctions to dismissal or the misapplication of the standard of proof, to name but a few. It is striking that in the present case the respondents decided to utilise the minimum statutory procedure as its template particularly given that the relevant agreed procedure for an ordinary dismissal, TNC 2016/02, provides for the maximum degree of fairness including an appeal to the IAC which is then chaired by a LRA nominee. This stark contrast is unsettling to say the least. Mr Kennedy submitted that the reason for doing this was that the second respondent wanted to avoid an appeal to the IAC because it had provided an unwelcome outcome in the claimant's previous appeal. However, no evidence was produced to substantiate this or to challenge the written rationale provided by the second respondent. In these circumstances we consider that the best course is to step back and examine the procedure that was adopted and decide whether or not it delivered fairness bearing in mind that a fair procedure does not mean a perfect procedure. As with all dismissals reasonableness is key. We consider however that reliance on the minimum statutory procedure in a sphere where detailed TNC procedures exist for other types of dismissal is unwise and creates the impression of a two tier system. We can see no good reason why there should not be a separate written procedure for SOSR dismissals even though these may be comparatively rare. However, it seems to us the procedure adopted was a fair one notwithstanding the use of the minimum statutory procedure as a touchstone. In particular the procedure included important safeguards such as having a Representations Sub-Committee making recommendations to the Board of Governors, permitting the claimant to make separate representations to the Board of Governors and ensuring that the appeal was heard by independent persons in the form of two members of the EA. In this regard we note that the procedure also complied with the statutory procedural requirements contained in Schedule 2 of the Education (NI) Order 1998.

79. We turn next to the individual criticisms made of the procedure and we address these in the same order as Mr Kennedy did.

    a. Throughout the process the claimant made complaint about the failure to provide her with relevant documentation. The second respondent's position, as articulated by Reverend McCullough, was that the claimant was provided with all relevant material namely the risk assessment, the IAC's decision and the claimant's written statement dated 16 May 2016. Of particular concern to

the claimant was the failure to disclose the contents of Ms Jess's email to Ms Leonard. All of the comments that Mr Jess made were adverse to the claimant and can be assumed to have been influential. This email was not disclosed to the claimant until long after the risk assessment had been completed. However, it is not clear what the claimant could or would have been able to say against it had it been disclosed. There is no suggestion that Mr Jess's comments were inaccurate in any way. It is clear from Mr Jess's input that he had a number of serious concerns about the claimant and he was duty bound, when asked, to place them before Ms Leonard. Theoretical or abstract unfairness is not enough. The claimant's request for disclosure was met with a response in which the Board of Governors advised that the only documents being relied upon were the Risk Assessment and the written presentation previously provided.

b. If it were truly the case that Ms Leonard's findings had been superseded by events there would be some strength in this submission but having reviewed the written material and heard the claimant's oral evidence we are not persuaded that the claimant was genuinely prepared to undertake relevant training in a spirit that would have made it effective and we therefore consider that the second respondent acted reasonably in deciding to dismiss the claimant on this basis.

c. Training, monitoring and mediation were all dependent upon the findings of the risk assessment. In view of the contents of the risk assessment the second respondent could not be faulted in deciding to dismiss the claimant.

d. We have no reason to believe that the representations made by the claimant and on her behalf were not properly considered. The second respondent was however entitle to attach such weight to the representations as it considered appropriate.

e. The conclusion of the Board of Governors that "*reintegration…may well not be practically possible…"* does not in our view reveal a lack of rigour and conscientiousness in dealing with the issues but rather points to a serious engagement by the Board of Governors who were grappling with a difficult decision.

f & g. It is clear that those members of the Board of Governors who were involved in the initial disciplinary process disagreed with the IAC's decision. Mr Belshaw in particular was the subject of the criticism in this regard and we were not impressed with his evidence. As Mr Kennedy reminded us Mr Belshaw briefed the Board of Governors about the risk assessment in glowing terms despite not having read it prior to these proceedings. However, his verbal summary that he provided to the Board of Governors was accurate and it is correct that the IAC found that what was clearly the most serious aspect of the disciplinary proceedings had occurred. However, no doubt conscious of the problems that the previous involvement of some members threw up the Board of Governors quite properly sought to minimise the scope for unfairness by convening various sub-committees to advise it.

h. Notwithstanding these measures Mr Belshaw was further criticised for his potential involvement in a Representations hearing which in the event did not proceed according to Mr Kennedy. In his evidence to the tribunal Mr Belshaw did not initially recall his involvement and again we were less than

impressed with his evidence. Mr Kennedy commented that a Representations hearing did not in fact take place or was abortive. We are not sure that this is an accurate characterisation of what occurred. The history of the matter as recorded above includes a meeting of the Representations Sub-Committee on 5 October 2016 which the claimant did not attend but asked for her written submissions to be considered. Nor do we accept Mr Kennedy's submissions that this part of the process amounted to no more than a rubber stamping exercise. The evidence that we have heard particularly from Reverend McCullough points to a proper evaluation being undertaken. Mr Kennedy's submission to the effect that there ought to have been anxious scrutiny of the recommendation to dismiss the claimant pitches the matter too high in our view. What we have to assess is the reasonableness of the decision and the process leading up to it. We are satisfied that there was sufficient scrutiny of the decision.

i. We have not been provided with any evidence that some in the EA may have had prior knowledge of or involvement with the claimant's case. All we know is that Mrs Ferguson of the EA was directly involved in advising the Board of Governors but she had no visible role in the appeal. This point also appears in the claimant's claim form but it appears speculative at best. The outcome letter is criticised for not engaging directly with some of the main issues in particular training, mediation and monitoring. This complaint does not appear in the claimant's claim form and appears to be a belated attempt to impugn a letter that hitherto had not been the subject of criticism. The respondents did not call either member of the panel to give evidence due to a combination of ill-heath and unavailability but also clearly having in mind the limited scope of the challenge to the appeal. Had the claim form included a complaint about the outcome letter a different approach would no doubt have been taken. In any event having considered the contents of the outcome letter we are satisfied that it provided sufficient information to the claimant as to why her appeal was not upheld.

k. A period of suspension that lasted for three years and eight months is on any view undesirable to say the least. The procedures utilised in the dismissal for some other substantial reason were cumbersome even if they had the laudable aim of providing a fair process. While this may be laid mainly at the door of the respondents the claimant was also at fault having failed to respond promptly to the opportunity afforded to her to comment on the risk assessment. The respondents should examine their procedures to see what lessons can be learned.

80. We are satisfied that the claimant was fairly dismissed on the ground of some other substantial reason namely that in light of the findings and conclusions contained within the Risk Assessment report compiled by Ms Leonard, together with the claimant's contribution to the process and her responses to these matters, her reintegration into her teaching role at the School was not practically possible as there were no grounds for believing that a reasonable plan for intensive monitoring of her behaviour in class and a training plan on behavioural modification and the appropriate level of control of children with special educational needs (as recommended by the IAC) could be effectively implemented. We consider that dismissal was both intrinsically reasonable and falls squarely within the band of reasonable responses. We do not accept the feint suggestion that irreconcilable personality clashes played any part in the decision to dismiss the claimant.

81. We are not persuaded that the process was procedurally unfair and there was no suggestion that it did not fully comply with the minimum three stage statutory procedure. In our view the process adopted was conspicuously fair and went well beyond the statutory minimum. From the point of view of consistency there would be a lot to be said for a process being devised for dismissals on the ground of some other substantial reason so that they would fall into line with conduct and capability dismissals but the failure to have such a process in place does not of itself render the claimant's dismissal unfair.

82. We do not propose to address in detail the submissions made in relation to ***Polkey*** and pension loss in this decision as these issues are academic in view of our overall conclusions. The parties' respective positions on these issues are clearly set out in their written submissions. What we can say with a degree of confidence is that had the claimant succeeded in persuading us that her dismissal was unfair it almost certain that we would have made a significant ***Polkey*** reduction to any compensation as well as a deduction for contributory behaviour. The pension loss, if any, appears to be minimal and we are pleased that the claimant will have the benefit of this at retirement age. We are not without sympathy for the claimant who came across as a dedicated teacher but one with significant deficiencies which could not easily be remedied. Rather than continue to fight a battle that was already lost in view of the original disciplinary panel's decision, and subsequently the IAC's, the claimant ought to have focussed her energies on persuading the School that with appropriate training she could have been successfully reintegrated at the School. At the very least this would have placed her in a better position to contest any adverse decision in a tribunal.

83. The claimant's claim must therefore be dismissed.

Employment Judge:

Date and place of hearing: 23-27 April 2018 and 10 May 2018, Belfast.

Date decision recorded in register and issued to parties:

IN THE OFFICE ON THE INDUSTRIAL TRIBUNAL AND
FAIR EMPLOYMENT TRIBUNAL

CASE REF: 4115/17 IT

BETWEEN:

EILEEN WARD

CLAIMANT

-AND-

EDUCATION AUTHORITY
&
BOARD OF GOVERNORS FOR CARRICK PS

RESPONDENTS

CLAIMANT'S SUBMISSIONS

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1. Article 130 of the Employment Rights (Northern Ireland) Order 1996 insofar as relevant provides as follows:-

> "130. - (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is ... some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (3) Where the employer has fulfilled the requirements of paragraph (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."

2. In a dismissal for some other substantial reason the focus of the tribunal's consideration must be whether or not the employer acted reasonably in dismissing the employee on this basis. It is accepted that, as with a misconduct case the tribunal must not substitute its view for that of the employer and as long as dismissal is within the range of reasonable responses the dismissal will be fair.

3. Where an employer dismisses an employee for some other substantial reason he must show that the reason is not whimsical or capricious and if he does so it is capable of being substantial. If, on the face of it, the reason could justify the dismissal then it will pass as a substantial reason. The employer must also show that the substantial reason justifies dismissal.

4. SOSR dismissals are covered in Harvey on Industrial Relations and Employment Law ("Harvey") at Div DI 12. – Paras 1851 - 1950.

5. SOSR has been considered in a number of cases and the types of claim where it can operate (though potentially open-ended) has been set out in Harvey as falling broadly into 3 categories:-

   -- protection of business interests;
   -- other potentially substantial reasons;
   -- statutory substantial reasons.

6. Of the above, only the second appear to even potentially apply, and these are broken down as follows:-

   -- temporary engagements;
   -- the employer's genuine belief in a fair reason;
   -- personality differences;
   -- dismissals at the behest of third parties;
   -- imprisonment;
   -- breakdown of trust and confidence; and
   -- some residual reasons.

7. The reason for the claimant being dismissed cannot be said to fit easily into any of the specific categories. The core consideration here is whether or not the reason is sufficiently substantial rather than whether or not it fits into a category – the statutory provision does not list categories that might constitute SOSR.

8. Initially the claimant was disciplined for misconduct and was dismissed for gross misconduct. The claimant appealed under the agreed procedure (TNC 2007/5) and the Independent Appeal Committee ("IAC") appointed by the LRA held that a final written warning was to be substituted for the dismissal. The IAC recommended that a mediation professional be engaged and that the SELB should assist the school in developing a reasonable plan for 'intensive monitoring' of the behaviour in class or the claimant and provide support to the school on a training plan on behavioural modification and the appropriate level of control of the children (**Page 78 & 79**[1]).

9. On 12 January 2015, the BOG instructed the then principal of the school Brian Jess to *"put in place the steps necessary for the re-integration of the member of staff to the school."* (**Page 79**) Marian Ferguson (SELB) then writes to Marcella Leonard on 12 February 2015 (**Page 80**) instructing her to compile a Risk Assessment – there is no discussion with the claimant regarding this being required and no notes or record of the decision making process that led to this being requested – it was certainly not recommended by the LRA nor instructed to be put in place by the BOG when discussed at the BOG meeting on 12 January 2015.

10. Marcella Leonard was provided with a briefing by the SELB who did not provide a copy of the same materials to the claimant (**Page 80 - 86**). When the claimant sought clarification and further documents/information in correspondence dated 19 February 2015 (**Page 90**) this was ignored and Marcella Leonard was not provided with evidence of the claimant's updated Child Protection training or other potentially relevant material. The claimant, and her union representative, Ms Audrey Stewart, met with Marcella Leonard twice – the experience and demeanour of Marcella Leonard was described by the claimant as being very intimidating and her manner and approach as being very aggressive by Ms Stewart. After the first meeting, Marcella Leonard posed certain questions (**Page 93**) to Brian Jess following a conversation (of which there is no note) and was provided with a lengthy

[1] References to Pages are in Tab C unless otherwise stated

response including reference to the claimant having been seen quite frequently to pull children unnecessarily and having been spoken to any time it was seen, as well as descriptions of the claimant's relationships within the school (**Page 101 - 103**). Again, the claimant was not provided with copies of this information and went into the second interview without fully knowing what she stood accused of. During the second meeting both the claimant and Ms Stewart recollect Marcella Leonard as stating that the claimant "*did it and got away with it*". Marcella Leonard did not deny that she had said words of that nature. The evidence given by Marcella Leonard was at its core contradictory – at one stage she said that she believed that anyone could change and later changed that to say that she did not believe that the claimant could change.

11. Furthermore, the recommendations from Marcella Leonard's report were based upon the briefings from Brian Jess and Marian Ferguson (without the fairness of the claimant having seen these). The staff and children in the school who would be dealing with the claimant were not spoken to by Marcella Leonard.

12. Marcella Leonard made the statement in her report that children with special needs and learning difficulties do not have the brain development for complexity of thought that lying successfully requires (**Page 119, Para 3.4)** yet changed this when challenged. Further, she made assessments and findings on the effect on the children without having assessed any material specific to the actual reactions of the children (**Page 122, Para 4.1**) stating that "*similar to all children who have suffered abusive experiences, they will have worried about the consequences, how Mrs Ward will react to them and whether they will get in trouble.*"

13. The report made recommendations regarding the appropriate training that could be put in place – it did not state that no training could be put in place nor that no training would be effective. The report does state that for training to be effective there needed to be full engagement and an acknowledgment that training was required. (**Pages 123 – 124, Para 4.1 – 4.11**)

14. The claimant objected to the contents of the report and asked for a second opinion. The BOG rejected this request and confirmed that the report fulfilled the remit to evaluate the likelihood of the claimant repeating her actions (**Page 133 Para 4**) – this is a very different purpose than the one stated and refers to the conduct of the claimant rather than anything

else. This is a significant point and undermines the case that this dismissal is not about conduct. In the same paragraph the writer (Mr Gardiner) confirms that the claimant fully co-operated. The final paragraph on the page referred to the finalisation of a reintegration plan.

15. The BOG, on advice from the SELB/EA, did not engage the disciplinary procedures for a second time, instead relying upon the statutory disciplinary and dismissal procedures. The BOG was wrong to do so as there was no SOSR agreed procedure and there was no good reason for derogating from an agreed procedure and using a minimum statutory procedure (which avoided the appeal to the LRA appointed IAC) without good reason. The use of a procedure which has not been agreed and which provides less protection and a less rigorous process simply on the basis that a different tag is placed upon the reason for the dismissal is not reasonable. Further and fundamentally, the EA, via schools, hold a near monopolistic position in terms of being employers of teachers in Northern Ireland as such the procedures in place for the dismissal of a teacher should be as fair, impartial and robust as possible – thus the important role of agreed procedures and the LRA/IAC in dismissal decisions.

16. TNC 2007/5 (**Page 1 - 11**) states that the primary purpose of the procedure is behaviour modification rather than the imposition of sanctions (1.1) and confirms that "*the appeal in the case of dismissal is to the Independent Appeals Committee…*"

17. The EA/BOG is attempting to gain an advantage by avoiding the independent appeal committee on the basis that it has not put in place an agreed procedure – a situation that should not be permitted to succeed especially if the primary purpose of the disciplinary procedure is behaviour modification – which was core to this dismissal.

18. The BOG went on to invoke a second process culminating in a second decision to dismiss the claimant, on the second occasion the reason for the dismissal is SOSR. The basis for the SOSR decision (**page 175**) is "*The sub-committee has … concluded that your reintegration into your teaching role at Carrick Primary School may well not be practically possible as there are currently no grounds for believing that a reasonable plan for "intensive monitoring" of your behaviour in class and a training plan on behavioural modification and the appropriate control of children with special educational needs (as recommended by the LRA) can be effectively implemented.*"

19. The claimant in this case faced a hurdle that she could not overcome. The school, via the BOG, had decided that there would be no training proposed as they had decided that there were no grounds for believing that plans could be effectively implemented. The claimant could not, other than indicate a willingness to undergo training, do anything to move the process on. The intransigence of the BOG meant that the claimant could never return. The conclusion of the BOG appears to have been a hybrid decision wherein the claimant's capability was at issue (the need for training/monitoring) and that capability could not, in the mind of the school, be addressed as a result of the claimant's perceived attitude (which would be a matter of conduct).

20. In any event, even if the BOG is found to have been entitled to rely upon and use the Statutory Procedure it is only a minimum and does not mean that, even where fully followed, that the procedure has been fair. In this case, the claimant contends that it is not fair as the decision to dismiss was in reality taken prior to meeting the claimant. The wording used in the penultimate substantive paragraph on **page 151a** of the bundle from the BOG letter to the claimant of 3 June 2016 where the BOG refers to SOSR and states, *inter alia*, that "*there are currently no grounds for believing that a reasonable plan for "intensive monitoring" of your behaviour in class ... can be effectively implemented.*" This submission is bolstered by the inclusion at the end of the BOG notes from the meeting on 20 May 2016 (**page 148**) which states "*can't be reintegrated can't dismiss SOSR*" – after the claimant had attended the meeting and voiced her dismay that there had been no "*suitable mediation process. Ease RTW. No attempt made so far to comply with this recommendation. Chosen to ignore recommendation – SELB reasonable plan – rel. support plan – training. In spite LRA rec's – no progress has been made RTW*" (**page 144 – note from meeting on 20 May 2016**)

21. Following on from this the claimant requested classes of documents from the BOG (**P153 – 156**) including the evidence against the claimant, any documents relied upon to reach the conclusion that reintegration would not be possible and any proposed training plans/action plans. The was met with a response wherein the BOG confirmed that the only documents being relied upon were the Risk Assessment and the written presentation previously provided (**P157**). The claimant had previously indicated a willingness to undergo training to Marcella Leonard and with no plan provided she could not indicate

whether or not she would undertake any training beyond that suggested by her. The parties then met on 28 June 2016 (**Page 159 - 161**). The notes confirm that the claimant and her TU rep, Ms Stewart, raised the issue of training and documentation and confirmed that they would not engage further until they had the documents and sought a copy of the BOG minutes where training was discussed and wanted the meeting adjourned. This was refused and the meeting concluded in the absence of the claimant and her TU rep.

22. The recommendation dated 25 July 2016 is contained in the papers (**Page 162 – 163**) and states that the claimant refused to engage in a meaningful manner in any discussions on a way forward (**Page 163 Para 4**) – this is unfair and inaccurate as the claimant had, as was acknowledged, fully engaged with Marcella Leonard (**Page 133 Para 4**) and the BOG letter of 25 July 2016 states that the claimant chose not to engage as she considered that she was not provided with information and documentation as requested (**Page 162 Para 3**).

23. The claimant made written representations (**page 165 - 168**) to the BOG (for the abortive Representations Committee) held in October 2016. These included representations regarding the fairness of the procedure adopted as well as referencing the IAC recommendation and confirming that the claimant would "*have fully engaged with such training*" and with any process of monitoring (**Page 167 Numbered Para 9**). Nowhere in the papers is this reflected or considered. The notes from the BOG meeting where the dismissal was decided upon makes no mention of this (**Page 172a – 172c**) and the letter confirming the dismissal relies upon the letter from Rev McCullough dated 16 June 2016 – which predated the written representations for the claimant – that the only "*viable option worthy of consideration… is that consideration be given to… dismissal*" (**Page 175 Para 4**).

24. The same letter (**Page 175 Para 3**) also contains a fundamental inaccuracy wherein it states that as regards paragraph 9 of the claimant's letter (regarding training and monitoring) (**Page 167 Numbered Para 9**) that the claimant refused to engage any further with the sub-committee when in fact the claimant sought the further information and documentation before further engaging – in reality the committee had pushed ahead in any event. The reliance upon the letter from Rev McCullough is also misplaced as it predated the written representations which should, if looked at fairly, have merited a

change in position by the BOG as the claimant was explicitly and unconditionally warranting that she would engage with training and monitoring.

25. As regards the appeal, this took place on 17 May 2017, with the claimant again relying upon written representations. The panel asked no question probing the offer to engage with training and monitoring (**Page 197 - 198**). The written submission provided by the claimant (**Page 199 – 202**) repeated the willingness to undergo training and monitoring and specifically repudiated the contention that the claimant had declined training (**Page 201 Para 2.2 & 2.3**). The claimant also contested the validity of the process used in the second procedure. The appeal panel issued its decision in correspondence dated 1 June 2017 – nowhere does it mention training other than as contained in a 'cut-and-paste' section from the earlier findings of the BOG. The absolute absence of enquiry on these points renders the appeal clearly unfair and unreasonable.

26. At no point have the BOG or EA considered what training/monitoring could be put in place. Even when unequivocal offers to engage with any training offered were made by the claimant those were rejected out of hand by the BOG or ignored by the appeal panel.

27. The witness statement of John Mason (**Page 8 Para 30 Tab B**) states that the appeal panel "*having carefully considered all of the available documentation was satisfied that the Board of Governors was entitle to make the recommendation that Mrs Ward should be dismissed from her post.*" It is impossible to divine what that careful consideration was and whether or not the issue of training/monitoring was properly or at all considered.

28. As was confirmed in *Leach v Office of Communications [2012] ICR 1269*:-

> "***53*** *Secondly, the employment tribunal was entitled to conclude, on the facts of the case as found by it, that the reason for the claimant's dismissal was a "substantial reason" within section 98(1)(b). The mutual duty of trust and confidence, as developed in the case law of recent years, is an obligation at the heart of the employment relationship. I would not wish to say anything to diminish its significance.* ***It should, however, be said that it is not a convenient label to stick on any situation, in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate. The circumstances of***

dismissal differ from case to case. In order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the employment tribunal has to examine all the relevant circumstances. *That is what the employment tribunal did with regard to the nature of the employer's organisation, the claimant's role in it, the nature and source of the allegations and the efforts made by the employer to obtain clarification and confirmation, the responses of the claimant, and what alternative courses of action were reasonably open to the employer. The employment tribunal could have reasoned its decision on this point in more detail or at greater length, but I do not think that the decision is flawed for want of reasons, or by an error of law or by plain perversity."* (Emphasis Added)

29. The reliance on SOSR requires that the reason be both substantial and sufficient. In *Leach* the claimant was accused of paedophile activity and the employer dismissed the claimant after a seeking further confirmation, clarification and information.

30. In the instant case, there is nothing to suggest that the staff, parents or pupils were implacably opposed to the claimant returning to the school. The claimant has referred to *Lewis v BOG of Bleary PS & SELB 1668/13IT* however (bearing in mind that a decision of the OITFET is not persuasive) the Risk Assessment in that case found that there had been a breakdown in the relationships with the claimant playing a major part in that and that the claimant had not been willing, able or keen to return to work and "*previous medical advice had indicated that the claimant was not fit to return to work and had no wish to return to work because of her negative views of the school...*" (**See paras 3.26, 3.17 & 3.25**) the circumstances are very different here.

31. The tribunal is also asked to bear in mind that fact that the claimant had been teaching in the school from 2002 until 2013 as a Special Needs teacher in the Learning Support Centre. The claimant had a clear disciplinary record throughout her time. The former principal reported incidents of physical handling of children to Marcella Leonard – but there was never any disciplinary action save for the claimant being spoken to about the putting on of a coat onto a child in 2012. What is of note in that incident is that the complaint was never substantiated nor fully investigated – for instance, the claimant was not in charge of

the child when the child was injured and there was no formal investigation establishing the facts.

32. *Turner v Vestric Ltd [1981] IRLR 23, [1980] ICR 528, EAT* a breakdown in working relationship must be irremediable, and the employer should seek to improve relationships, before dismissing:-

> *"9. ...Therefore, before dismissing an employee for reasons of this kind (that is to say a breakdown in the working relationship) one would expect the matter to be properly, sensibly and practically investigated to see whether an improvement could not be effected. Very little indeed was done in that direction... It may be that nothing could have been done, but until you try you will never know, and no real efforts were made."*

33. Harvey confirms that the steps to be taken by the employer in seeking to improve the situation in a breakdown in trust and confidence situation (at 1940):-

> *"By analogy with Turner v Vestric Ltd [1981] IRLR 23, [1980] ICR 528, EAT (see para [1937] ff above), every step short of dismissal should first be investigated in order to seek to effect an improvement in the relationship when there has been a breakdown in trust and confidence. That will include considering suitable alternatives, if any."*

34. *Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11 (25 April 2012, unreported)* breakdown of trust in the employee held unfair on the facts:-

> *"40. Context being everything, subject to the wording of the statute, in our view there is no force here in the argument addressed to us by Mr O'Dair that would refuse any entitlement of the Tribunal to consider the background as part of the circumstances. Indeed, it might be thought that the citations from the* ***McAdie*** *case would permit it in most cases, though not plainly in that case itself. We are not saying that in every case in which there is a dismissal for some other substantial reason, where that reason is a breakdown of trust and confidence, that a Tribunal* ***must*** *have regard to how that situation came about; to do so would be to repeat the error identified in* ***McAdie****. But what we are asked to do is to say that the*

Tribunal is not entitled in an appropriate case to take such matters into account, and that we simply decline to do."

35. The BOG did not dismiss the claimant for irreconcilable clashes of personality yet the witness statements of Rev McCullough (**Page 29 Para 16 Tab B**) shows that there was a further factor in play that the BOG considered as relevant - the conduct of the claimant in making what Rev McCullough referred to as "*unsubstantiated allegations about fellow staff members*". No steps were taken to implement mediation or seek to ascertain whether or not the relationships could continue – bearing in mind that there was a new head teacher by this time.

36. Summarising the unfairness:-

    a. Risk Assessment carried out based upon information provided to Marcella Leonard by the EA and Brian Jess to which the claimant was not privy.
    b. Basing the decision to dismiss upon the Risk Assessment in circumstances where the process was unfair – including what had been provided to Marcella Leonard – and where the findings were superseded by events including offers to engage with any raining offered;
    c. Refusing to address the issues of training, monitoring or mediation prior to making a decision as to the claimant's continued employment.
    d. Dismissing without proper consideration the representations from the claimant and made on her behalf regarding willingness to undergo training (**to Marcella Leonard, in representations dated 28 July 2016 (Para 9 & 10) Page 167 & 17 May 2017 (Paras 2.1 - 2.3) Page 201**).
    e. The respondent failed to take all proper, sensible and practical steps to see if the situation could be improved – indeed the BOG's own wording was that "*reintegration...may well not be practically possible...*" This attitude reveals the lack of rigour and conscientiousness of the school in dealing with the issue of the IAC recommendations and looking to get the claimant back into the school.
    f. The 2 BOG members who gave evidence were disappointed with the decision of the IAC and Mr Belshaw accepted that he disagreed with the decision. The attitude of the BOG in dealing with this was clearly influenced by their earlier involvement.

g. Mr Belshaw provided a note of his update to the BOG on 6 October 2016 (**Page 170e**) from the Representations Committee – the note clearly reveals the attitude of the BOG wherein it opens "*Governors will recall that BOG decision to dismiss Mrs Ward was replaced by the LRA to a one-year final warning* ***despite*** *the fact that the LRA found that the Governors decision that the "toilet incident" had occurred.*" The update goes on the refer to the Risk Assessment and its '*comprehensive conclusions and recommendation*' in spite of the fact that Mr Belshaw had not seen the Risk Assessment prior to these proceedings.

h. The BOG initially convened a Representations hearing but then changed tack and held an appeal with persons appointed from SELB. Mr Belshaw was involved in the Representations committee on 5 October 2016 – he initially did not recall his involvement in that process but uncovered a briefing that he had given to the BG on 6 October 2016. Mr Belshaw (and the other members of the BOG other than Rev McCullough, Rev White & Mr Gardiner) did not see the Risk Assessment and was part of a rubber stamping exercise in October 2016 and January 2017. There is no evidence of anxious or any scrutiny of the recommendation to dismiss the claimant.

i. The appeal process was convened following on from the decision to dismiss being finalised in January 2017. The appeal was populated by two members of staff form the EA which had been advising the BOG throughout the process. The outcome letter (**Page 219 – 223**) quotes large sections from the correspondence provided by the BOG to the claimant when dismissing her. The conclusion is that the appeal panel was satisfied that the BOG was entitled to make the recommendation that the claimant should be dismissed. The final paragraph (**Page 223**) states that "*It is the decision of the Appeal Panel, having carefully considered all of the information, that your appeal is not upheld*" – the appeal outcome letter makes no reference to training, mediation or monitoring (save where it quotes from the BOG). The appeal outcome letter reveals no actual consideration of the issues.

j. At no stage during the claimant's 3 year and 8 month suspension was consideration given to an alternative to suspension or ending the suspension. That demonstrates the lack of willing ness on the part of the school to return the claimant to work.

37. A comment was made regarding the extent of Ms Stewart's evidence however there can be no adverse inferences drawn from this as she provided a statement and was called to be cross-examined on it. In being subject to cross-examination the witness could have been examined on any matters relevant to or at issue in the case. *Lynch v MOD 1983 NI216* refers to instances where a party fails to call as a witness a person whom he might reasonably have been expected to call. See also *Prest v Petrodel Resources Limited & Ors [2013] EWCA Civ 1395 Para 44* as regards failing to call evidence and adverse inferences – as opposed to not calling corroborating evidence. The respondent in this case had the statement (and presence of) Rev John McKelvey White and did not call him. The respondent did not call evidence from Marian Ferguson (EA – Advisor to BOG), Brian Jess (Former Head Carrick PS), or, Jill Trotter (EA – 2nd Appeal Member). The respondents stated that John Mason, though providing a statement, was not called to give evidence due to ill-health.

38. As regards quantum:-

k. Given the claimant's age, reason for dismissal (initial and second) as well as the length of time on suspension – when her skills and knowledge would likely have reduced through lack of use – the claimant is very unlikely to return to her chosen career.

l. On the basis that the claimant should have been returned to work, and that if the BOG had have offered training or put together a proposal of the type recommended by the IAC there should be no reduction for contributory conduct in this case.

m. The claimant has applied for and been rejected from a number of educational posts and has moved into training for an alternative role.

n. Whether or not the claimant would have continued teaching past her 60th birthday the claim, in terms of quantum, is above the Statutory Cap. The panel is referred to the Pension Loss Report and Schedule of Loss (2 alternative scenarios) at **Pages 54 – 74 Tab A**.

o. Reductions, if any are to be made, are made after the gross award is calculated and before the Statutory Cap is applied - *DIGITAL EQUIPMENT CO LTD v. STEPHEN M CLEMENTS [1997] EWCA Civ 2899*.

CASE REFERENCE:

IN THE OFFICE OF THE INDUSTRIAL TRIBUNAL
AND THE FAIR EMPLOYMENT TRIBUNALS

BETWEEN:

EILEEN WARD

CLAIMANT

AND

BOARD OF GOVERNORS OF CARRICK P.S
EDUCATION AUTHORITY

RESPONDENTS

SUBMISSIONS ON BEHALF OF THE RESPONDENT
03.05.18

Facts & Background

[1] The Claimant was dismissed from her employment with the Respondents in 2014 for physical abuse of 2 special needs children. The Claimant was re-instated on appeal by the Independent Appeals Committee (IAC) who issued their determination in December 2014 (page 72-78).

[2] The IAC concluded that the decision by the Board of Governors that "toilet incident" had occurred and that one child was scraped and the other was shaken by the Claimant was reasonable.

[3] The IAC made a number of recommendations, the one in focus in these proceedings being,

"The Independent Appeal Committee recommends that the SELB assist the school to develop a reasonable plan for 'intensive monitoring' of the behaviour in class of Mrs Ward and provide support to the school on a training plan on behavioural modification and the appropriate level of

control of children with special needs both inside the classroom and other areas of the school"

[4] In order to implement the recommendations of the IAC the BoG instructed the Principal to take such steps to carry them out (page 79 section C).

[5] A risk assessment process was thereafter implemented for the purpose of identifying training needs and appropriate steps that would be required for re-integration.

[6] The Claimant did not accept that the BoG had a right to seek a risk assessment to re-integrate into school (see start of Claimant's cross-examination on 26.04.18).

[7] Mrs Stewart (Claimant's union rep) accepted that it was a reasonable step for the BoG to take by implementing the risk assessment process (see start of Mrs Stewart's cross examination on 27.04.18). Mrs Stewart agreed it was reasonable as how else would the BoG be able to identify training needs.

[8] The Claimant thereafter failed to engage in the process properly or at all.

[9] The Claimant was dismissed by reason of "Some other substantial reason".

The position held by the Claimant and the obligations of the Board of Governors

[10] The Claimant held the position of a teacher in one of the Special Needs Units in Carrick P.S. She was in a position of trust and was responsible for the care of up to 10 special needs children aged between 4 years - 8 years old.

[11] The Board of Governors are responsible for the safety of the children entrusted to the care of the school.

[11] The protection of the children must be paramount.

[12] For the statutory duties of a teacher see Schedule 3 Regulation 5 of the **Teachers' (Terms and Conditions of Employment) Regulations (Northern Ireland) 1987.** In particular Sch 3 (3) (2) (a) *"promoting the general progress and well-being of individual pupils and of any class or group of pupils assigned to him".*

Unfair Dismissal

[13] *Article 130(1) (b) of the Employment Rights (NI) Order 1996* specifies that the employer should be able to show a specified statutory reason for the dismissal or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. In the present case the Respondent asserts that the Claimant was dismissed for "some other substantial reason" specifically that in light of the findings and conclusions contained within the Risk Assessment Report compiled by Ms Leonard, together with the Claimant's contribution to the process and her responses to these matters, her reintegration into her teaching role as Carrick Primary School was not practically possible as there were no grounds for believing that a reasonable plan for intensive monitoring of her behaviour in class and a training plan on behavioural modification and the appropriate level of control of children with special educational needs (as recommended by the Independent Appeals Committee) could be effectively implemented.

"Some Other Substantial Reason" Dismissal

[14] There is an important residual category of dismissals that are capable of being fair notwithstanding that they do not fall into any of the specific

categories detailed in Article 130(1)(b). Under Article 130(1)(*b*) a dismissal may be for a fair reason if the employer can show that it is 'for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held'. These reasons do not have to be of the same type as those stipulated in Article 130(2) (*R S Components Ltd v Irwin [1974] 1 All ER 41, [1973] ICR 535*). Provided the reason is not whimsical or capricious (*Harper v National Coal Board [1980] IRLR 260*), it is capable of being substantial and, if, on the face of it, the reason *could* justify the dismissal then it will pass as a substantial reason (*Kent County Council v Gilham [1985] IRLR 18, CA*).

[15] The dismissal in *Harper v National Coal Board [1980] IRLR 260* (where the employer believed that the employee was a danger to other employees) was held to be fair because the employer had considered whether the claimant could be employed under conditions which would not bring him into close contact with other vulnerable employees but no such arrangement could practicably be made.

[16] The Claimant held a position of trust as a teacher and in going back into the classroom would be responsible for the care of the children with special needs. In light of the history to this case, which cannot be completely divorced from the current proceedings, it was necessary that the Respondents had the assurance that the physical abuse on children would not happen again.

[17] The risk assessment carried out by an independent expert reported as follows:

a. In Mrs Leonard's opinion the three children have more likely than not had a negative experience in the company of Mrs Ward (para 3.2)
b. Mrs Ward was dismissive and wanted to highlight points relating to the procedures of interviewing the children and/or their accounts (para 3.3)
c. Mrs Ward extensively minimized the impact on the children. She was dismissive of the children's ability to tell a coherent account and stated "sure one was brain damaged and his word was taken, sure police couldn't event interview him" (para 3.4)

d. Although denial of an incident of perceived harm is not an indicator of future risk the lack of insight and personal reflection to demonstrate empathy for how others have experienced one's behaviour is a risk factor (para 3.7)
e. Mrs Ward presented in interview as a person wronged by a school community. She had no insight into how her behaviour had caused 3 young children upset and distress sufficiently for them to tell their Principal about their teacher (para 3.8).
f. Mrs Ward was defensive and passively aggressive. Of concern was her inability to reflect on the impact on those impacted by the events as set out in para 3.11.
g. The lack of ability to recognise the impact on others of one's actions, especially when those are children with special needs, is of concern. This was further evidenced in Mrs Ward's response to the recommendation of what training does she believe she may require to assist an return to teaching which was " *I don't need training, I am the best qualified teacher in the school, I don't feel I need any more training*"[1]. When training in behaviour management, safeguarding, awareness of how to keep safe were suggested Mrs Ward could not recognise the need for any of these training themes (Para 3.12).
h. Mrs Ward presents with no insight into her behaviour, is passively aggressive in her manner when challenged and seeks to dismiss others by questioning their ability and capability. She demonstrated no acknowledgement of any fault on her side, no insight into how her behaviour and attitude towards the children and colleagues may need to be addressed as well as considering the impact on others (para 3.16).
i. Mrs Ward's lack of emotional awareness and empathy for the children and the staff affected by her behaviour is of concern. She is unable to demonstrate emotional awareness of the impact on children, and specifically those whom she knows and taught (para 3.18).
j. Throughout the assessment Mrs Ward was unable to demonstrate insight and victim awareness (para 4.2)
k. Mrs Leonard had concern regarding Mrs Ward's overarching need to be vindicated, need to receive apologies from specific personnel which blocks her from being able to recognise how this will affect the child victims of her behaviour (para 4.3).
l. Mrs Ward's dismissive attitude of impact and her need to be vindicated would emotionally be detrimental to the children (para 4.4).
m. Training is only effective if Mrs Ward fully engages and acknowledges she

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he Claimant re asserted this statement in her cross-examination where she licated this was a "**statement of fact**".

requires the training. At this stage she did not recognise she requires any training in behaviour management, child protection, managing children and understanding the impact of her behaviour on others (para 4.7).

n. Without acknowledging the need for training to improve her insight into her behaviour, there is a possibility of repeat of similar physical inappropriate manhandling of children (Para 4.8)

o. Of more significant concern to Mrs Leonard was the lack of understanding of the emotional impact on the children and therefore returning without recognizing this and being open to training on this is of concern (para 4.8).

p. It is the constant dismissive attitude towards the children and her colleagues, which is the most significant aspect, which requires addressing (para 4.9).

[18] It is obvious from the concerns of the expert and the findings as detailed in her report that there were key issues regarding Mrs Ward's proposed re-integration into the school.

[19] The position of Mrs Ward as outlined above remained unchanged throughout the 2 meetings that she was invited to and attended (if only for part of the time) with the BoG sub-committee on 20th May 2016 and 28th June 2016.

[20] In relation to the 20th May 2016 the Claimant provided a written statement (pages 136-143) to the BoG outlining her position. She then refused to engage in any further discussion and the meeting was closed.

[21] The submissions document handed into the Governors focuses solely on the Claimant, her criticisms of the risk assessment and the impact of events on her. Tellingly is the following statement,

"It is in those circumstances and against that background that I fee that I am coming here today with a view to trying to convince you that I have done nothing wrong". (para 34)

[22] The Claimant and her union rep attend the next meeting with the sub-committee, who had been delegated to deal with this matter, on 28th June

2016. In advance of this meeting a number of documents had been requested by Mrs Stewart on behalf of the Claimant. These documents were not relevant to the issues to be considered e.g. it is unclear how the fee arrangements of Mrs Leonard were relevant to the issue of re-integration. In any event Mrs Stewart did not make a complaint regarding this in her evidence to the tribunal.

[23] The meeting opened on 28th June 2016 but the Claimant withdrew from the meeting and refused to engage any further for reasons relating to the provisions of the documents (referred to in the preceding paragraph).

[24] Prior to her withdrawal her assertion that she did not require training was made to the BoG (see bottom of page 159). When challenged about this and para 4.7 of the risk assessment Mrs Ward's response was *"what manhandling [of] children?"*

[25] The considerations of the Sub-committee are set out in brief bullet points (page 160-161), which show that the behaviours displayed to Mrs Leonard, which caused her such concern, were also being displayed in the meetings with them. In light of this there was no prospect that the claimant could be successfully re-integrated into her position as special needs teacher and a proposal to the full BoG was to be made that she be dismissed from her post.

[26] A letter outlining the considerations of the sub-committee was sent to the Claimant dated 25 July 2016 (page 162-163) and in particular she was informed that having,

"taken account of the decision of the Independent Appeal Committee, the findings and conclusions contained within the Risk assessment report, your responses to these matters and your refusal to engage in a meaningful manner in any discussions on a way forward, has come to

the view that your effective reintegration into your teaching role at Carrick Primary School is not practically possible".

[27] The letter thereafter informed the Claimant of the proposal and invited her in accordance with Schedule 2 paragraph 5(6) of the Education (NI) Order 1998 to make written and/or oral submissions to a further sub-committee of the BoG.

[28] A document was submitted to the BoG on 15th August 2016, which the Claimant indicated had been written by a lawyer, and were not her words. The Claimant via her representative, at tribunal put a great deal of emphasis on the fact that at paragraph 9 of those submissions (page 167) it is asserted that:

"in relation to the issue of training Mrs Ward was not offered any training. Had she been offered training she would have fully engaged with such training".

[29] Respectfully these are in fact "empty" words of very little value in light of what the Claimant herself, in her own words, said to Mrs Leonard, the sub-committee of the BoG dealing with this matter and in the course of her evidence to the tribunal.

[30] Furthermore at its height it is a simple statement that had the Claimant in the past been offered training she would have engaged. This document discloses no offer that going forward she would take the necessary steps to re-integrate into the school. Nothing in this document changes the attitude and behaviour displayed consistently by the Claimant in the course of this process.

[31] Indeed if the tribunal considers the rest of the content of that document once again the BoG are faced with a sustained and constant criticism of the risk assessment and its implementation.

[32] The Claimant was offered the right to make oral representations to a further sub-committee of the BoG on 5th October 2016 (page 170). She declined to attend.

[33] The BoG held a full meeting on 3rd January 2017 172-172c wherein it was determined that the Claimant's employment should be terminated on the grounds of "SOSR" in light of the position she held and the failure to engage in the re-integration process. Dismissal was considered to be the correct option as the alternative options were to bring the Claimant back into the classroom, which could not be done due to her failure to engage in the re-integration process.

[34] The Claimant was informed of the decision of the BoG by a letter dated 23 January 2017 (pages 173-176), which deals with the Claimant's August submissions and sets out the basis for the determination of dismissal.

[35] The Claimant is offered a right to appeal to a panel established by the Education Authority. The BoG had all been involved in the process and it was considered reasonable and fair to the Claimant to have an appeal process conducted by the EA rather than board members (see also page 182).

[36] The appeal outcome is at page 219-223. The only complaint the Claimant makes about the appeal is that it was conducted by *"colleagues of persons directly and substantively involved in the engagement of Marcella Leonard and in advising the Board of Governors during the process"*(para 55 of the Claimant's witness statement) and that the LRA panel who heard the original appeal should have heard the second appeal.

[37] There is no complaint about the conduct of the appeal meeting or the findings.

[38] The complaint about the make up of the EA appeal panel has no more substance to it that the fact they worked in the EA. By the Claimant's rationale then no EA employee could ever sit on a panel whether it be grievance or disciplinary. The argument presented does not stand up to scrutiny.

[39] In terms of whether it should have been the LRA or the EA who convened the appeal panel this is dealt with further in these submissions. However in general terms it is not accepted that the TNC 2007/5 procedure (pages 1-11 of Section C) was the applicable procedure, said procedure dealing with issues of misconduct.

Fairness of the dismissal

[40] In relation to the question as to whether the dismissal was unfair, if an employer establishes a potentially fair reason for dismissal, it is then for the Tribunal to determine whether or not the dismissal of the employee for that reason was fair and on this issue it is a neutral burden of proof (See para 22 of *Ssekisonge v Barts Health NHS Trust YKEAT/0133/16/LA*)

[41] According to *Art 130 (4) of the 1996 Order* the question as to whether a dismissal is unfair 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 the question shall be determined in accordance with equity and the substantial merits of the case.

[42] Whether or not the employer has acted reasonably is not a question of law but a question of fact, and Article 130(4) affords tribunals a wide discretion in this regard. In judging the reasonableness of the employer's conduct tribunals must not substitute their own decision for that of the employer, and in many cases, there is a band of reasonable responses[2] in

[2] **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**

which one employer might reasonably take the view that dismissal is justified whereas another employee might reasonably take the opposite view, and both cannot be challenged as unfair. It is only where the dismissal falls outside of the band of reasonable responses that the dismissal can be challenged and adjudged unfair.

[43] The Respondents submit that in the context of the facts of this case and the position, which the Claimant held, the decision to dismiss was within the band of reasonable responses.

The Procedure for dismissal and procedural fairness

[44] Procedural fairness is governed by Article 130A of the 1996 Order, which provides as follows: -

"Article 130A - (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) one of the procedures set out in Part I of Schedule 1 to the Employment (Northern Ireland) Order 2003 (dismissal and disciplinary procedures) applies in relation to the dismissal,

(b) the procedure has not been completed, and

(c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.

(2) Subject to paragraph (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Article 130(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.

(3) For the purposes of this Article, any question as to the application of a procedure set out in Part I of Schedule 1 to the Employment (Northern

Ireland) Order 2003, completion of such a procedure or failure to comply with the requirements of such a procedure shall be determined by reference to regulations under Article 17 of that Order."

[45] The statutory disciplinary and dismissal procedures are set out in Schedule 1 to the Employment (Northern Ireland) Order 2003. The procedure establishes a 3-step procedure to be followed.

[46] The first step is when the employer sets out in writing the employee's alleged misconduct or characteristics, which have led the employer to consider dismissal or disciplinary action against the employee. This must be sent to the employee with an invitation to attend a meeting to discuss the matter. It has become known as the "Step 1 letter".

[47] Step 2 of the procedure comprises a meeting, which must take place before any disciplinary action is taken, except in the case of a suspension. The employee must take all reasonable steps to attend the meeting. He or she must have been informed in advance of the basis for the meeting and must have an opportunity to consider his response to any information being given against him at the meeting. The employee must be advised of the employer's decision and notified of a right to appeal.

[48]Step 3 consists of the appeal. Under the appeal, the employee must notify the employer of his wish to appeal and the employer must then invite him to a further meeting. The employee must take all reasonable steps to attend the meeting. It is stipulated in the procedure that the appeal meeting need not take place before the dismissal or disciplinary action takes effect. After the appeal meeting, the employer must inform the employee of his final decision.

[49] The Tribunal can see from the timeline provided and the evidence given that the Respondent complied with the "3 step" procedure. In particular:

a. Step 1- 3rd June 2016 letter
b. Step 2- 28th June 2016 meeting
c. Step 3- 23rd January 2017 dismissal letter and offer of appeal. 17th May 2017 is appeal hearing.

[50] It is submitted that it is clear that there is no breach of the statutory dismissal procedure.

[51] As this was not a dismissal for "misconduct" the TNC 2007/5 procedure is not applicable. Only if that procedure is applicable are the steps envisaged in that procedure to be carried out i.e. the appeal to the IAC.

[52] The TNC procedure provides at para 1.1 under the heading **"purpose and principles"** that the procedure was concerned with supporting and maintaining high standards of "conduct and discipline". This case was concerned about the inability to implement a re-integration plan. The Claimant never faced charges for breaching the disciplinary rules (Appendix 1 to the procedure - pages 21 -23 section C).

Schedule 2 to the Education (Northern Ireland) Order 1998

[53] In addition to the statutory procedure the Respondents also complied with their obligations under the 1998 Order. In particular Sch 2 paragraph 5 (5), (6) (7) & (8) which provides as follows:

5 *(5) In relation to any such person, the reference in sub-paragraph (4) to his contractual notice period is a reference to the period of notice that would have been given under the contract of employment in question for termination of that contract if such notice had been given on the date on which the notification under sub-paragraph (1) was given in relation to him.*

(6) The Board of Governors of such a school shall make arrangements for affording to any person in respect of whom it proposes to make any

determination under sub-paragraph (1) an opportunity of making representations with respect to the action it proposes to take, including (if he so wishes) oral representations to such person or persons as the Board of Governors may appoint for the purpose, and shall have regard to any representation made by him.

(7) The Board of Governors of such a school shall also make arrangements for affording to any person in respect of whom it has made such a determination an opportunity of appealing against it before it notifies the employing authority of the determination.

(8) The relevant officer of the employing authority shall be entitled to attend, for the purpose of giving advice, all proceedings of the Board of Governors relating to any determination under sub-paragraph (1) and the Board of Governors shall consider any advice given by a person entitled to attend such proceedings under this sub-paragraph before making any such determination.

[54] As has been set out at length in the course of these submissions the BoG, having been advised by the EA (in accordance with 5(8)) have complied with each step of the aforementioned procedure.

Summary of liability

[55] The Respondents maintain the clear evidence was that the Claimant was dismissed for "SOSR". The dismissal was procedurally and substantively fair. The 3 step statutory procedure was complied with, as were the obligations under Schedule 2 of 1998 Order.

[56] The dismissal of the Claimant was within the "band of reasonable responses" in light of the matters as set out in the course of these submissions.

[57] The Respondents respectfully invite the Tribunal to dismiss the Claimant's claim.

[58] Whilst the Respondents deny that the Claimant was unfairly dismissed, if the tribunal do find for in favour of her then there are a number of matters that the Respondents submit should be taken into account. The Claimant seeks compensation only.

[59] If the tribunal find that the Respondent has not carried out the statutory procedures correctly then the Respondent respectfully submits that there should be a Polkey reduction of 100% of any award as the Claimant would have been dismissed in any event had the procedures been followed.

[60] If the tribunal find that the Respondent has not carried out its contractual procedures relating to the disciplinary process then the Respondent respectfully relies upon **Art 130(A) (2) of 1996** Order which states:

> ***" (2) Subject to paragraph (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Article 130(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure."***

[61] The Respondent relies upon the above provision and respectfully submits that as a result any award should be reduced by 100% as the Claimant would've been dismissed in any event had the procedures been complied with.

[62] According to Harvey Division DI Unfair Dismissal [2509] where the conduct of the employee before the dismissal was such that it would be just

and equitable to do so, any basic award may be reduced (**s 156(2) 1996 Order**). The Respondent relies upon the conduct of the Claimant in this regard.

[63] Art 157(6) 1996 Order provides that if the tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount as it considers just and equitable. Furthermore as the Court of Appeal emphasised in **Parker Foundry Ltd v Slack [1992] IRLR 11**, in deciding whether to reduce compensation it is only the employee's conduct which can be taken into account; the conduct of the employer, and the treatment of other employees, is irrelevant. Therefore the Respondent relies upon this to support the argument that any compensatory award should be reduced.

[64] This reduction is argued to be a 100% reduction for contributory conduct and is in accordance with the principles as set out by the House of Lords in **W Devis & Sons Ltd v Atkins [1977] 2 All ER 321** in particular Viscount Dilhome, who delivered the major speech, commented:

> *'[Section 123] requires the tribunal to consider whether a dismissal was "to any extent" caused by the action of the employee. It does not preclude the tribunal from coming to the conclusion that the dismissal was wholly caused by his conduct and, in the light of that conclusion, thinking it just and equitable to reduce the compensation it otherwise would have awarded to a nominal or nil amount ... I do not see that there is any inconsistency in finding that there was in the terms of the Act unfair dismissal, and in awarding no compensation'.*

[65] The Respondent also alleges that the Claimant has failed to mitigate her loss and any loss she has suffered flows from her own act or failure to mitigate. Art 157 (4) 1996 Order states that

"In ascertaining the loss referred to in paragraph (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Northern Ireland".

[66] The employee must act as a reasonable person would if he or she had no hope of seeking compensation from his or her previous employer. The employee must take all reasonable steps to mitigate the loss to him or her consequent upon the respondent's wrong and cannot recover damages for any such loss that he or she could have avoided but has failed through unreasonable action or inaction to avoid.

[67] The clear evidence from the Claimant was that she has not applied for any jobs since an application made on 10 November 2017. This is a failure to mitigate her loss.

[68] The Claimant has produced a pension loss report from IWC Actuarial Ltd (pages 58 - 70). The Claimant was referred to in the course of her cross examination to page 303 in the bundle which is a document from her pension provider which indicates a drawdown date of 25/12/19 i.e. her 60th Birthday. The Claimant confirmed this was the date she would expect to drawdown her pension. At its height the impact on the Claimant's pension appears to be from 2 June 2017 her dismissal to 25 December 2019 (her 60th birthday).

[69] There does not appear to be any consideration given in the report as to the impact on the Claimant obtaining new employment in the future. It appears an assumption is made that the Claimant will not work again.

Conclusion

[70] The Respondents submit the Claimant has been fairly dismissed for "SOSR" and invite the Tribunal to dismiss her claim.

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