EMPLOYMENT TRIBUNALS

Claimant: Ms L Dean

Respondent: Education Partnership Trust

HELD AT: Manchester **ON:** 14, 15, 16 November 2017
8 and 9 January 2018
19 January 2018
(in Chambers)

BEFORE: Employment Judge Ross

REPRESENTATION:

Claimant: Mr P Billington (Friend)
Respondent: Mr T Wood (Solicitor)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed for a procedural reason, pursuant to section 95 and section 98(4) of the Employment Rights Act 1996.

2. By reason of the principle in **Polkey v A E Dayton Services Limited 1988 ICR 142**, the Tribunal finds it inevitable the claimant would have been fairly dismissed in any event on the same date as her dismissal occurred and accordingly the Tribunal makes a nil award for compensation.

REASONS

1. The claimant was employed by the respondent as a Teaching Assistant from January 2002 until she was dismissed for gross misconduct on 27 June 2016. The claimant attended a disciplinary hearing on 7 June 2016. During the course of that meeting the claimant confirmed she was not medically fit to continue. That hearing was adjourned and reconvened on 16 June 2016. The claimant was dismissed on the grounds of gross misconduct by a letter dated 27 June 2016.

2. The allegations which the respondent found proven against the claimant were:

(1) Displayed threatening and intimidating behaviour towards colleagues in some instances in the presence of pupils, in particular –

(a) an incident on 30 April 2015 involving Tracy Robertson where the claimant demonstrated threatening language and behaviour;

(b) an incident in the staffroom where the claimant's comments and behaviour caused offence and distress to a number of colleagues;

(c) that the claimant behaved in an intimidating manner to a teacher during a lesson on Monday 14 September 2015, questioning and undermining the teacher in front of pupils;

(d) that the claimant entered the classroom and made derogatory comments regarding her line manager in front of pupils and colleagues resulting in colleagues feeling intimidated and uncomfortable.

3. The dismissing officer, Mr Callaghan, found that this conduct amounted to gross misconduct and considered dismissal was the appropriate sanction. (He found a further allegation was not substantiated.)

4. The claimant appealed. An appeal hearing was arranged initially for 14 October 2016. The claimant's trade union representative, Mr Atkinson, was unable to attend and it was rescheduled for 24 October 2016. Another trade union representative, Mr Paul Crewe, attended. The claimant failed to attend. The claimant confirmed her non- attendance by way of a hand delivered letter dated 20 October 2016 but delivered on 24 October 2016 at the time the hearing was due to commence. The hearing proceeded in the absence of the claimant. The claimant's representative, in the absence of the claimant, withdrew.

5. The hearing officer, Mrs Roscoe, gave the claimant the opportunity to put forward written representations. The claimant did not provide any written representations.

6. The appeal officer found the same four allegations relied upon by the dismissing officer as proven. She downgraded the finding of gross misconduct in relation to the Tracy Robertson allegation to serious misconduct. She upheld the sanction of dismissal. The claimant brought a claim to this Tribunal.

7. The claimant has a history of illness namely stress and depression. The claimant's representative indicated the claimant was not well enough to proceed on the third day of the Tribunal hearing in November 2017. The Tribunal considered other ways of proceeding, for example to continue without the claimant given that it was the respondent's witnesses who were being questioned by her representative, but it was agreed that was not appropriate as the claimant had been giving very detailed instructions to her representative during cross examination. Accordingly, the case was adjourned part-heard to resume on 8 and 9 January 201.

8. Taking into account the nature of the claimant's illness the Tribunal granted the claimant regular breaks in the course of the hearing.

9. At the outset of the hearing on Tuesday 14 November the Tribunal dealt with an application to amend the claim to include a claim for public interest disclosure "whistle-blowing" which was considered and rejected; an application for specific discovery of documents relating to the attendance record of Tracy Robertson, September 2013 to July 2015, which was rejected once the claimant's representative informed the Tribunal that these documents were not before the dismissing officer/the appeal officer. There was also an application for documents which the claimant wanted to be included in the bundle to which there was no objection and the clerk was asked to copy those documents (around 50 pages).

10. There was also an issue of an application by the claimant for further witness orders for Ms Val Murray and Mr Clegg which the Tribunal rejected as not being relevant to the issues. There was an application by the claimant for the Tribunal to view a DVD of CCTV footage. The application was rejected because the footage was not before the dismissing officer or appeal officer. The rest of Tuesday, once all the interlocutory applications had been dealt with, was spent by the Judge reading witness statements and documents. There were four bundles of documents comprising over 1,000 pages in this case. The Tribunal started hearing witness evidence on Wednesday 15 November

11. For the respondent I heard from the investigating officer, Mr D Clarke, School Business Manager; the dismissing officer, Mr D Callaghan, Chair of Education Partnership Trust and governor of Pleckgate High School; and from the appeal officer, Mrs S Roscoe, Chief Executive of Education Partnership Trust and governor of Pleckgate High School.

12. For the claimant the Tribunal was provided with a witness statement for the claimant herself, and statements from Ms A Waddington, colleague;Ms D Wilkins, Unison Branch Secretary; Ms J Taylor, Science Technician; Mr P Crewe, Unison Assistant Branch Secretary. Mr Crewe and Ms Waddington did not attend the Tribunal and accordingly limited weight was attached to their statements.

13. The claimant obtained a witness order for the attendance of a witness, Ms D Wood. Ms Wood attended the Tribunal hearing in November. The claimant had not obtained a witness statement for Ms Wood. There was no dispute that the respondent had refused to allow Ms Wood to attend the disciplinary hearing as a note taker. In these circumstances the claimant was given time to obtain a statement from Ms Wood although given that the respondent accepted they had refused to allow Ms D Wood to attend the disciplinary hearing as a note taker, the Tribunal indicated it may be that any evidence from Ms Wood was unlikely to assist and the procedural failure (if any) by the respondent was a matter for submission. The claimant's representative informed the Tribunal shortly before it adjourned part-heard on Wednesday 15 November that the claimant would not be calling Ms Wood. Accordingly a new summons was not issued for Ms Wood.

14. Between the initial hearing and the resumed hearing in January 2018 the claimant's representative wrote to the Tribunal raising a number of issues, including a further issue in relation to Ms Wood and her attendance. There was still no statement available from Ms Wood. The issue was raised with the claimant's

representative at the outset of the hearing on 8 January 2018. The claimant's representative indicated that it was unlikely an application for a further witness order for Ms Wood was being pursued.

15. On 9 January 2018, the claimant's representative stated he was not pursuing the application for a further order for Ms Wood

Issues

16. The issues for the Tribunal were defined at a case management hearing before Employment Judge Howard on 26 April 2017. The issues were:

(1) Whether the respondent could establish a potentially fair reason falling within section 98(2) Employment Rights Act 1996. The respondent relied on conduct. The claimant alleged that this was not a potentially fair reason considering other factors, such as the history between the parties played a part in the decision to dismiss her.

(2) Whether the dismissal was fair or unfair within the meaning of section 98(4).

17. In answering the second question the Tribunal must have regard to the decision in **British Home Stores v Burchell [1980] ICR 303**: did the respondent have a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's conduct? In answering these questions the Tribunal must not substitute its own view for that of the employer. The question is whether a reasonable employer of this size and undertaking could have dismissed the claimant. The Tribunal has been warned not to substitute its own view for that of the employer in relation to the investigation as well as the decision to dismissal (see **Sainsbury's Supermarket v Hitt 2002 EWCA Civ 1588**).

18. The Tribunal must ask itself whether the dismissal was procedurally fair and whether dismissal was within the band of reasonable responses of a reasonable employer of this size and undertaking.

19. Finally, if the claimant succeeds the principle raised of **Polkey v A E Dayton Services Limited** has to be considered. In other words, whether the claimant would have been dismissed in any event. For the respondent it was alleged that if the claimant had not been dismissed for conduct she would have been dismissed at the same time for "some other substantial reason", which is also a potentially fair reason for dismissal.

20. There were also potential issues in relation to failure to follow the ACAS Code of Conduct and contributory fault.

Applying the law to the facts

21. I turn to the first issue: whether the respondent could establish a potentially fair reason falling within section 98(2) of the Employment Rights Act 1996. I am satisfied the respondent has discharged this burden.

22. I rely on the evidence of Mr Callaghan dismissing officer whom I found to be a clear, cogent and conscientious witness. He confirmed he had before him at the time

he made the decision to dismiss the investigating officer's report with the appendices (see page 668-871) and the claimant's statement of case and appendices at pages 923-979).

23. In this documentation Mr Callaghan relied on a statement from Tracy Robertson, a staff member, who stated the claimant had come up very close to her to inform her she needed "to be careful". She stated that she found the claimant's manner "threatening and her comments disturbing". The complaint was made the same day it occurred (see page 721). In an interview on 8 May 2015 Ms Robertson reiterated what had occurred (see page 722-723). Her account was supported by a witness, Lesley McCreedy, who stated the claimant was "very, very close to Tracy. It was out of order. She backed her against a wall. Tracy looked shocked" (see page 768). Mr Callaghan also had a resignation letter from Tracy Robertson dated 12 July 2015 (page 744). It stated that Ms Robertson, a speech and language specialist (TA3) was resigning "due to the conduct of Louise Dean" (page 744). In an exit questionnaire Ms Robertson attached a comment stating, "I felt disappointed the grievance I raised against Louise Dean was not resolved quickly, especially as her behaviour towards me was the main reason for my seeking employment elsewhere" (page 752).

24. In relation to allegation 2, the incident in the staffroom, Mr Callaghan had a signed statement from Debbie Odudu (see page 727) complaining about the claimant's "angry and threatening behaviour towards me and her other colleagues". Mr Callaghan also had a signed statement from Sue Cousins also complaining about the claimant's conduct at break time in the staffroom (see page 728).

25. In relation to allegation 3 Mr Callaghan had a complaint from a new teacher, Emma Edwards, that the claimant had undermined her in front of a class (see page 775).

26. In relation to the fourth allegation Mr Callaghan had a complaint from Sarah Waring dated 20 May that the previous day, 19 May, the claimant discussed what had happened between her and her manager in a highly inappropriate way in a room full of children.

27. These versions of events were disputed by the claimant and in relation to allegation 2 Mr Callaghan had statements from other staff present who indicated that they did not find the claimant's comments upsetting.

28. Mr Callaghan relied on the school's disciplinary policy (103-110) and the dignity at work policy (see pages 132-139). The claimant's conduct, particularly towards Tracy Robertson, on the basis of Ms Robertson's and Ms McCreedy's evidence before Mr Callaghan was clearly a potential breach of the dignity and work policy and a potential matter of conduct.

29. I therefore turn to the second issue: was the dismissal fair or unfair within the meaning of section 98(4)? I remind myself I must not substitute my own view.

30. I turn to consider whether the decision was fair or unfair within the meaning of s98(4) ERA 1996. I reminded myself of the principles set out in **British Home Stores v Burchell**. Did the respondent have a genuine belief based on reasonable grounds following a reasonable investigation of the conduct? Or was the real reason

for dismissal the concerns the claimant had raised with the respondent over a long period of time going back to 2011. There was no dispute the claimant had raised a number of concerns and grievances.

31. I find the respondent had a genuine belief based on reasonable grounds, following a reasonable investigation of the claimant's conduct.

32. Mr Callaghan at the dismissal stage had a complaint from Tracy Robertson supported by a witness, Lesley McCreedy, that the claimant had demonstrated threatening language and behaviour towards her. On the basis of her resignation letter and the document attached to her exit interview Ms Robertson gave that behaviour as the reason for leaving. She left within months of the incident.

33. The claimant did not agree with Ms Robertson's and Ms McCreedy's version of events. She referred to it as a "false statement" See page 755. At the disciplinary hearing when asked whether she believed Tracy Robertson's statement to be true she stated, "I do not believe she would say something so provably untrue". When Mr Callaghan asked "why do you think it is provably untrue?" the claimant responded, "It is untrue. It is for you as investigating officer to find out why". When Mr Callaghan asked at page 819, "So you are saying you didn't back her against a wall?" she replied, "really, David?"

34. I find that Mr Callaghan had a genuine belief based on reasonable grounds for his belief that the claimant had behaved in a threatening and intimidating way towards Tracy Robertson. I find he relied on the statements of Tracy Robertson and the witness Lesley McCreedy and the reason given by Ms Robertson in her resignation letter. He preferred their evidence to that of the claimant.

35. I turn to allegation 2. It was alleged there was an incident in the staffroom where the claimant's comments and behaviour caused offence and distress to a number of colleagues. I find that in relation to this allegation Mr Callaghan relied on the signed statements of Debbie Odudu (p727) and Sue Cousins (p728) that Louise Dean had entered the classroom stating loudly, "Why are there so many staff already in here before me? I left my lesson when the bell rang and ran down here". Ms Odudu complained about the angry and threatening nature of the behaviour towards her and other colleagues. Ms Cousins said the behaviour made her feel "upset and stressed out".

36. Mr Callaghan further relied on an interview with Ms Odudu on 5 June 2015 (see pages 733-735). The record is signed by Ms Odudu. Ms Cousins also reiterated her version of events in a signed record when interviewed, which Mr Callaghan relied upon (pages 736-737).

37. The claimant said at the disciplinary hearing "I think someone else is writing these statements" (see page 821). When asked by Mr Callaghan who did she think was doing this and why, she said "that would be for you to ascertain. I have no idea. Who did these two people raise their concerns with?" The claimant disputed that she pointed at people.

38. The claimant supplied a statement from Ms Gilbert who was also present at the staffroom incident (see page 950). It confirmed, "I did notice she [the claimant] was waggling her finger but did not take much notice or was offended. None of us knew

what she meant by doing it. A couple of TAs did take offence but I stayed out of the conversation with them. Louise did not say anything rude or unpleasant to any of us".

39. Mr Callaghan preferred the evidence of Ms Odudu and Ms Cousins. He noted that although Ms Gilbert was not upset by the incident her evidence seemed to corroborated the evidence of Ms Odudu and Ms Cousins that the claimant was pointing her finger .(P726 and 727)

40. I turn to allegation 3 that the claimant behaved in an intimidating manner towards a teacher during a lesson on Monday 14 September 2015, questioning and undermining her in front of pupils. The issue raised by the teacher ,Ms Edwards is at page 775 and the original email which contained the complaint is at page 601. There is no dispute that the email complaint was sent the same day as the situation arose. Paragraph 1, "I've had a bit of an issue with (her) this morning…".

41. The complaint was that following instruction by Ms Edwards to her class, in the presence of the claimant, to put the date on the left of the paper, the claimant, who was the teaching assistant in the classroom, started pointing at pupils' books telling the children they were presenting their work wrongly and asking them why they were doing it like that, despite the teacher's clear instruction to the class. Ms Edwards said that she had told the children to do this.

42. When Ms Edwards set the children to work and discussed the matter with the claimant, the claimant argued with Ms Edwards, stating "no, it's on the right because you're going to confuse them for other classes and they're going to do it wrong every time". Ms Edwards was concerned that in front of the children the claimant questioned her a second time after she had explained this and was concerned that she may not have the claimant's full support in class in future particularly with the nature of the pupils. (It was not disputed that the behaviour of some children in this class could be challenging.)

43. The claimant disputed this version of events (see page 841):

> "I do not accept or agree with the version of events which is also not as described to me on 14 September 2015 and appears to have been written or embellished by someone who was not present at the time."

She goes on to state:

> "I did not question Ms Edwards nor undermine her. It is an integral part of my role as a TA to provide feedback to the teacher."

44. Mr Callaghan preferred Ms Edwards' account. He did not accept the claimant's version of events that she was providing "feedback to the teacher".

45. The final allegation which Mr Callaghan found proven was that, "LD entered a classroom and made derogatory comments regarding her line manager in front of pupils and colleagues, resulting in colleagues feeling intimidated and uncomfortable". Mr Callaghan relied on the statement of S Waring at page 729. The claimant disputed Ms Waring's version of events. She stated:

> "I do not accept or agree with the statement which also appears to have been written or embellished by a person not present at the time."

She goes on to state:

> "I believe my behaviour was appropriate and understandable considering the manner with which I was spoken to by Mrs Conlon."

46. The claimant disputes that there was a "room full of children" but appears to accept that five children were present: "Her perception that five children constitutes a room full of children further demonstrates this…"

47. I find Mr Callaghan preferred Ms Waring's version of events to the claimant's version.

48. Accordingly, I find that Mr Callaghan had a genuine belief based on reasonable grounds of the claimant's conduct.

49. I turn to the investigation. It is not for me to substitute my own view. Mr Clarke carried out a detailed investigation. His report is at pages 668-696. There are 60 appendices attached to his report. The claimant had an opportunity to comment on the allegations against her at an investigatory interview on 5 June 2015 (see pages 730-732) which was resumed on 15 June 2015. The claimant had an opportunity to put her side of the story at a disciplinary investigation meeting on 9 November 2015 (pages 803-811) and at a further meeting on 23 November 2015 (pages 635-643). The claimant then became unwell and was absent from work for four weeks from 27 November 2015.

50. Mr Clarke wrote to the claimant on 28 January 2016 putting questions to the claimant in writing (see pages 653-655). The claimant replied seeking further time due to the absence of her trade union representative (see page 840). The respondent permitted the deadline to be extended. The respondent received replies from the claimant on 22 February (see pages 841-844).

51. The claimant had a further opportunity to provide her version of events at a disciplinary hearing which commenced on 7 June 2016. The claimant was not well enough to continue and it was reconvened on 16 June 2016.

52. I am satisfied that the claimant had an opportunity to put her version of events to the respondent. The claimant had an opportunity to provide information and witness statements to the respondent, which she did in her statement of case.

53. The claimant originally asked for 93 witnesses to attend the disciplinary hearing to provide witness evidence (pages 876-879). The respondent is only obliged to conduct such investigation as is reasonable. I am satisfied it was perfectly reasonable for the respondent to indicate that such an extensive number of witnesses was not appropriate.

54. I am satisfied that having regard to the size and resources of the respondent, which is an Education Trust, that the respondent conducted a thorough investigation.

55. I turn to the next issue, which is the band of reasonable responses. Once again it is not for me to substitute my own view.

56. Mr Callaghan had found that the claimant was responsible for one allegation of gross misconduct, namely her threatening behaviour towards Tracy Robertson. In

addition he found that her behaviour towards Ms Cousins and Ms Odudu amounted to serious misconduct, as did the behaviour towards the teacher, Ms Edwards. He also found her behaviour in front of Mrs Waring and the pupils in May 2015 to be a well-founded allegation of serious misconduct.

57. In accordance with the school's disciplinary policy the respondent was entitled to dismiss the claimant for gross misconduct.

58. I find that Mr Callaghan was a careful and conscientious witness. I find he confronted his task as dismissing officer in a careful and thorough fashion. I find the fact that he did not uphold one of the allegations against the claimant (issues around insubordination such as punctuality and poor attendance set out at allegation 2(a) of the disciplinary invitation letter) is consistent with a finding that he approached this task with a fair and open mind.

59. I am persuaded by the evidence of Mr Callaghan that in a school environment it is essential for there to be good relationships for pupils to thrive. I accept his evidence of the importance of staff being role models for pupils. I accept his evidence that he took into account the Tracy Robertson incident in particular. I find he was concerned about the fact that the claimant had threatened an employee and challenged a teacher twice within a short period of time on one occasion and had behaved unacceptably towards other colleagues. Although the claimant had no disciplinary record, when considering other penalties Mr Callaghan was mindful of the poor relationships between the claimant and a number of her colleagues which was demonstrated by the allegations brought against her.

60. He also took into account that some of the incidents had occurred in front of the school's pupils, which he considered highly inappropriate.

61. I am satisfied the respondent has shown that in these circumstances given the nature of the respondent and its size and undertaking, dismissal for the conduct Mr Callaghan had found proven was individually in relation to the Tracy Robertson incident and cumulatively that incident together with the other incidents amounted to conduct for which dismissal was within the band of reasonable responses of a reasonable employer.

62. The claimant raised other procedural concerns. Firstly, she expressed concern about delay. There was no dispute that there was delay during the investigation and during the disciplinary procedure itself. I am not satisfied that any delay was sufficient to make the decision procedurally unfair. Some of the delay was due to the unavailability of the claimant's trade union representative or the claimant being insufficiently well to continue.

63. The claimant considered that the minutes of meetings produced by the respondent were inaccurate. The claimant wanted to have her own note taker, Ms D Wood, at the disciplinary hearing. The respondent refused to permit a second note taker.

64. The claimant was represented throughout her disciplinary process with the respondent by her trade union representative. She therefore had someone with her. There was also a note taker from HR. I am not satisfied that a reasonable employer was required to allow a second note taker. Accordingly I find a reasonable employer

of this size and undertaking in these circumstances was entitled to refuse an additional note taker for the claimant.

65. Finally I turn to consider the claimant's suggestion that the complaints raised by the claimant were the real reason for dismissal. I rely on the evidence of Mr Callaghan to find he considered the allegations of misconduct in isolation. I find he did not have any detailed knowledge of the former grievances and complaints raised by the claimant before his dealings with the claimant in 2015. I find the claimant's past complaints and grievances were not a factor in his decision to dismiss her.

66. I turn to the decision to dismiss at the appeal stage. At this point, the claimant's appeal proceeded in her absence. On the face of it, this is unusual. However, I am satisfied that on the particular circumstances of this case it does not amount to a procedural irregularity rendering the dismissal unfair. The respondent had liaised with the claimant's trade union representative about the date for the appeal hearing. I accept the evidence of Mrs Roscoe that the claimant was invited on 4 October 2016 to attend an appeal hearing on 14 October 2016 (see page 1008).

67. I find Mrs Roscoe to be a thoughtful and conscientious witness.

68. I accept her evidence to find that it had not been possible for the respondent to convene an appeal panel hearing within the time limit provided by the school's disciplinary policy as the claimant's letter of appeal was submitted just before the school closed for the summer holidays. I find, based on Mrs Roscoe's evidence that the earliest opportunity for this to take place was in the autumn term. I find the respondent was attempting to make arrangements from early September 2016.(P1126)

69. I rely on Mrs Roscoe's evidence to find that the claimant's representative from the trade union, David Atkinson, was unable to attend the hearing on 14 October and he informed the respondent of this on 7 October (see page 1013). I find the hearing was rescheduled for 24 October after Mr Atkinson's availability was discussed and provisional dates provided. I find that Mr Atkinson then advised he was no longer available on 24 October (page 1011). In the meanwhile the respondent's HR representative, Nicola McGonagle, received an email from Mr Atkinson stating that Mr Paul Crewe had agreed to represent the claimant (see pages 1009-1010 of the bundle). Owing to that information the respondent reasonably assumed that Mr Crewe and the claimant had liaised to arrange his attendance.

70. A further letter of invitation was sent to the claimant on 17 October 2016 (see page 1018). The claimant failed to attend the rescheduled meeting. Instead a hand delivered letter was received on the day of the hearing (page 1019) which stated that the claimant would not be attending.

71. I rely on the evidence of Mrs Roscoe to find that Paul Crewe was in attendance at the appeal hearing and that he confirmed he was present to represent the claimant. I accept her evidence that he stated he had been provided with the necessary documentation from Ms McGonagle which was given to him on 18 October in readiness for the hearing and in preparation for his meeting with the claimant later that week. (p1026-7)

72. In the absence of the claimant I find Mr Crewe withdrew from the appeal hearing as he did not have instructions to represent the claimant in her absence.

73. In the very particular circumstances of these facts I find that a reasonable employer of this size and undertaking could proceed with the disciplinary appeal hearing, as the respondent did.

74. I find that Mrs Roscoe sought to ensure that the claimant was not disadvantaged because she sent her a letter on 24 October (see pages 1026-1027) requesting further clarification around the grounds of appeal as well as written submissions. The claimant did not reply.

75. Accordingly I am satisfied there was no procedural irregularity either in the delay in holding the appeal or in the appeal proceeding in the absence of the claimant. In particular in her letter where the claimant explained she was unable to attend the claimant she did not advance any reasons of ill health which prevented her attendance. She was also given an opportunity to participate in writing which she chose not to take up.

76. I turn to consider whether the appeal officer had a genuine belief based on reasonable grounds following a reasonable investigation. Mrs Roscoe confirmed that the appeal amounted to a re-hearing. I am satisfied that she had all the documentation before her which the dismissing officer had. In addition she had the claimant's letter of appeal, the disciplinary outcome letter and the notes of the disciplinary hearing. I find that Mrs Roscoe approached the appeal in a fair and conscientious fashion.

77. I find evidence of this is the fact that although she upheld each of the allegations which Mr Callaghan had found to be well-founded, she downgraded the incident with Tracy Robertson from gross misconduct to serious misconduct.

78. I find that when she made her decision she had no detailed knowledge of the grievances and complaints raised by the claimant in the past and these matters were not a factor in her decision to uphold the dismissal

79. I remind myself when considering whether the dismissal was fair or unfair within the meaning of section 98(4) at the appeal stage I must have regard to the principle of **British Home Stores v Burchell.** I find Mrs Roscoe relied on the same information as Mr Callaghan and preferred the evidence of the respondent's witnesses to the evidence of the claimant. I am therefore satisfied that Mrs Roscoe had a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's conduct.

80. For the sake of completeness I turn to an issue which the claimant raised at Tribunal with Mrs Roscoe. The claimant found it particularly sinister that there had been an amendment to the minutes of the investigatory meeting conducted on 23 November 2015. The version of the minutes at page 823 states that Nicola McGonagle from HR states, "Louise, I'm concerned about the manner in which you are speaking to me. Please can you reflect on your tone? Every policy states that you can handle cases in an informal way and is an option to progress and resolve matters".

81. A slightly different version of these minutes is found at page 641 which states "Louise please can you be careful with how you speak to me. Every policy states that you can handle cases in an informal way"

82. This difference was put to the appeal officer, Mrs Roscoe at Tribunal. Mrs Roscoe explained that she was not at the investigatory meeting and found it unclear from the two sets of minutes why any significance should be attached to the difference in wording .The Tribunal finds there is no suggestion that either the dismissing officer or the appeal officer attached any significance to that particular entry or the different way it was worded.

83. In re-examination Mrs Roscoe was taken by her representative to the section where Nicola McGonagle told the claimant to "be careful", and she was asked to consider the claimant's suggestion these were the same words the claimant was alleged to have used ie "be more careful" to Tracy Robertson and that the rewording of the minutes was sinister behaviour by the respondent.

84. In so far as it is relevant, the Tribunal entirely accepts the evidence of Mrs Roscoe that the factual scenario is completely different. Nicola McGonagle, a member of HR, was explaining to the claimant to be careful about the tone the claimant used to speak to her, an HR professional, during the course of the disciplinary procedure. There was no suggestion that Ms McGonagle's tone was inappropriate or that she had backed the claimant up against a wall as Ms McCreedy said the claimant had done to Ms Robertson.

85. The Tribunal must consider whether the respondent's investigation was reasonable within the meaning of **Sainsbury's Supermarket v Hitt**. I find that although the claimant failed to attend the appeal hearing Mrs Roscoe reasonably investigated by considering the wealth of information before her in the investigation report, the claimant's statement of case the disciplinary hearing minutes and the letter of appeal .She also sought to investigate further by seeking written submissions from the claimant.

86. I must consider then consider whether dismissal was within the band of reasonable responses of a reasonable employer at the appeal stage and whether in all the circumstances the dismissal was procedurally fair.

87. The respondent has a disciplinary policy (pages 103-110). The principle of this policy (see page 104) is that:

> "Under this policy and procedure no employee will be dismissed for a first breach of discipline except in the case of gross misconduct when the penalty can be dismissal without notice."

88. When dealing with the claimant's appeal Mrs Roscoe downgraded the incident with Tracy Robertson from gross misconduct to serious misconduct. She said she did not think the allegation, when looked at in isolation, was extreme enough to constitute gross misconduct. In reaching this decision she looked at the disciplinary policy, including the examples of gross misconduct. Given that she found the claimant's behaviour amounted to serious misconduct rather than gross misconduct she arranged for the claimant to be paid her notice pay in line with her contract, following the appeal.

89. The respondent's representative sought to argue at Tribunal that because there were a number of different allegations (four in total) of serious misconduct which were upheld against the claimant at appeal stage, then the clause in the disciplinary policy in relation to "no dismissal for a first breach of discipline" did not apply because there was more than one breach of discipline.

90. I am not satisfied that a reasonable employer would read the policy in that way. It was agreed that the claimant had a clean disciplinary record. Therefore the conduct being considered at the appeal amounted to a "first offence". The claimant had an earlier management instruction on file in relation to her behaviour towards her manager but there was no disciplinary warning in place on her file at the relevant time. Her disciplinary record was unblemished.

91. The respondent is a large organisation with formal procedures. Given Ms Roscoe found the claimant responsible for serious misconduct rather than gross misconduct and given that the respondent's disciplinary policy expressly states that, "no employee will be dismissed for a first breach of discipline except in the case of gross misconduct when the penalty can be dismissal without notice", I find the dismissal at the appeal stage was procedurally unfair. I find a reasonable employer of this size and undertaking having found the claimant was responsible for 4 counts of serious misconduct rather than gross misconduct would not have dismissed the individual where the respondent held a policy which specifically stated that dismissal was not an option for a first offence, other then gross misconduct.

92. Accordingly I am satisfied for this reason only the dismissal was procedurally unfair.

93. Having found the claimant was unfairly dismissed I turn to the next issue, which is the principle of **Polkey v A E Dayton Services Limited**. I remind myself of the guidance of **Software 2000 Limited v Andrews and others [2007] ICR**, and in particular that if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted the Tribunal must have regard to all relevant evidence, including any evidence from the employee.

94. There may be circumstances where the nature of the evidence for this purpose is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgment for the Tribunal. However, the Tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation even if there are limits to the extent to which it can confidently predict what might have been, and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not reason for refusing to have regard to the evidence.

95. Having reminded myself of that guidance I turn to consider the evidence. I rely on the evidence of Mrs Roscoe. In her dismissing letter she explained that she had not gone on to consider whether or not the claimant could have been fairly dismissed for some other substantial reason because she had found her to have been responsible for serious misconduct.

96. However, in her evidence to the Tribunal Mrs Roscoe was very clear. Both in her witness statement and in answer to cross examination she stated that it was inevitable that the claimant would have been dismissed for some other substantial reason if she had not dismissed her for conduct. She explained the relationships between the claimant and her colleagues as illustrated in how she had behaved towards Tracy Robertson, Debbie Odudu, Emma Edwards and Sarah Waring made it inevitable that she should be dismissed. Mrs Roscoe expressly stated:

> "Had I not upheld the finding of misconduct I would have still dismissed the claimant for some other substantial reason, namely the untenable nature of the working relationship which was apparent given her behaviour towards colleagues."

97. In answering questions from the Employment Judge Mrs Roscoe explained that in reaching that finding she had taken into account the number of allegations made against the claimant by staff. She had particular regard to the fact that some of the incidents were witnessed by pupils. She had in her mind the responsibility the school had both to staff and pupils in terms of their safety and wellbeing and the fact that staff were role models for pupils.

98. I also find for the purposes of this section, namely consideration under Polkey principles whether the respondent could have dismissed for some other substantial reason namely the breakdown of trust and confidence between the claimant and her employer ,it was entirely clear that the trust and confidence between the claimant and some of her colleagues had broken down. I rely on the evidence that Ms Edwards was a young teacher new to the school with whom the claimant had not worked before. It is self evident that to query twice the ability of the teacher to give a direction to pupils in a Year 7 class, which is a class full of some of the youngest pupils in the school, aged 11 and 12 in their first year of secondary school close to the beginning of their time at Pleckgate High School was behaviour by the claimant likely to undermine trust and confidence.

99. I rely on the statements of Ms Robertson and Ms McCreedy .I find it was inevitable the respondent would consider the evidence that the claimant had confronted a colleague, Ms Robertson, in a corridor where pupils were present, so that that individual felt "threatened" and the evidence a witness which stated Ms Robertson was "backed up against a wall" to be behaviour destructive of trust and confidence.

100. The claimant herself said the relationships between the claimant and some other staff members were poor particularly in relation to her manager Mrs Conlon.

101. Given that the respondent had evidence that other teaching assistants who remained in employment were distressed by the behaviour of the claimant and that a new teacher felt undermined by her, I am satisfied that this information together with the information of the claimant herself suggests that the relationships between the claimant and others at the school had broken down.

102. The claimant was not an impressive witness. She struggled to answer direct questions. During the course of her evidence the claimant said the manager, Mrs Conlon, was at the root of her dismissal. She stated, "People around her have been affected by embellishments and reports of falsehoods". The claimant's attention was

drawn to page 720 where her own witness, Ms Gilbert, said the claimant had an obsession with Mrs Conlon.

103. Furthermore, the claimant displayed a lack of insight into her own behaviour. For example in relation to the complaint by the teacher, Ms Edwards, she referred to the way she had spoken to Ms Edwards by saying it was her job as a TA to provide "feedback" to the teacher.

104. Accordingly I am satisfied that the unpleasant nature of the incident with Tracy Robertson in the corridor, the way the claimant undermined a new teacher, the way the claimant spoke to her colleagues as illustrated by the behaviour in the staffroom meant the relationships between the claimant and same of her colleagues had broken down. I also rely on the evidence the claimant gave at Tribunal in relation to her poor relationship with her line manager, Mrs Conlon.

105. For all these reasons it is inevitable the claimant would have been dismissed by the respondent for some other substantial reason. The respondent's disciplinary policy cites "serious breach of trust and confidence" as an example of gross misconduct.P109. I accept therefore Mrs Roscoe would have fairly dismissed for this reason. The time of the dismissal would have been the same because the respondent would have relied on the same information which was before them at the appeal stage.

106. Accordingly, having found it was inevitable the claimant would have been dismissed fairly for "some other substantial reason", the award for compensation, both the basic award and compensatory award, must be nil.

107. There is no need for me to go on to determine the remaining issues. These are whether the respondent followed the ACAS Code of Practice and contributory fault. They are no longer relevant given I have found the claimant's dismissal for "SOSR" was inevitable.

108. However for the sake of completeness I find there was no breach of the ACAS Code of Practice. The claimant did not identify any such breach. The respondent conducted a detailed investigation. The claimant had opportunities to give her version of events at the investigation stage, the disciplinary stage and the appeal stage. There was no breach of the Code in the decision of the respondent to proceed with the appeal when the claimant chose not to attend.

109. I turn to contributory fault. I considered whether there was culpable or blameworthy conduct pursuant to section 123(6) of the Employment Rights Act 1996.

110. The claimant was an experienced teaching assistant working in a school. Her job was to assist pupils and the classroom teacher. However I find that the claimant behaved in a way wholly inconsistent with that role.

111. I find the claimant was responsible for an incident with Ms Robertson whereby Ms Robertson felt threatened and where a witness said the claimant had backed Ms Robertson up against a wall. I find this action amounts to culpable or blameworthy conduct. I find the claimant twice questioned the authority of a new teacher in a classroom of year 7 pupils. I find this amounts to culpable or blameworthy conduct. I find the claimant criticised her line manager inappropriately in front of pupils. I find this is culpable or blameworthy conduct. These actions together caused or

contributed to the claimant's dismissal because they are the reason why she was ultimately dismissed. I find it is just and equitable to reduce any compensatory award by 100% because I find she was entirely to blame for these actions.

112. I turn to consider a reduction to the basic award under section 122(2) ERA 1996. I find it just and equitable to reduce the basic award by 100% by reason of the claimant's conduct. I rely on my reasoning above.

Employment Judge Ross

Date 30 January 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
8 February 2018

FOR THE TRIBUNAL OFFICE