EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs D Evans **v** **Cuckoo Hall Academies Trust**

Heard at: Watford **On**: 28 November to 1 December 2016

Before: Employment Judge Henry

Appearances

For the Claimant: Ms K Duff, Counsel
For the Respondent: Mr M McNally, Solicitor

JUDGMENT

1. The claimant has not committed an act of gross misconduct.

2. The claimant was wrongfully dismissed when her employment was summarily terminated.

3. The claimant was unfairly dismissed when her employment was terminated for reasons of conduct.

4. The question of remedy is reserved to be determined at a hearing on remedy.

REASONS

1. The claimant by a claim form presented to the tribunal on 11 December 2015, presents complaints for unfair dismissal and wrongful dismissal when her employment was summarily terminated for reasons of conduct on 15 July 2015.

2. The claimant commenced employment with the respondent on 5 January 2009. The effective date of termination was 15 July 2015; the claimant then having been continuously employed for six complete years.

The issues

3. The issues for the tribunal's determination were agreed between the parties and clarified at hearing as follows:

   3.1 What was the principal reason for the dismissal? The respondent relies on misconduct, which is a potentially fair reason for the purpose of s.98(2)(b) of the Employment Rights Act 1996.

   3.2 Did the respondent's dismissing officer and appeal officer, genuinely believe that the claimant was guilty of the alleged misconduct?

   3.3 If so, did the respondent's dismissing officer and appeal officer have reasonable grounds upon which to sustain their belief that the claimant was guilty of the alleged misconduct?

   3.4 At the stage that the belief was formed:

      3.4.1 Had the respondent carried out as much investigation as was reasonable in the circumstances?

      3.4.2 Had the respondent adequately considered what the claimant had to say during the disciplinary and appeal stages?

   3.5 Did the respondent comply with the ACAS Code of Practice?

   3.6 Did the decision to dismiss fall within the range of reasonable responses and did the respondent consider the claimant's mitigating factors adequately?

   3.7 In the circumstances, was the dismissal fair or unfair bearing in mind the requirements of s.98(4) of the Employment Rights Act 1996.

   3.8 If the dismissal was unfair, would the claimant have still been dismissed in any event, had a fair procedure been followed? If yes, what was the percentage prospect of the claimant having been dismissed in any event had a fair procedure been followed (Polkey)?

   3.9 Did the claimant contribute to her dismissal? If so, to what extent? (s.122(2) and s.123(6) Employment Rights Act 1996.

   3.10 If the claimant has been unfairly dismissed what compensation should she be awarded.

   Wrongful dismissal

   3.11 On the facts, did the claimant commit an act of gross misconduct entitling the respondent to dismiss summarily without notice?

4. The tribunal heard evidence from the claimant and from Mrs Mary Elcock – ex-head teacher of Heron Hall Secondary Academy, and Mr Graham Davis – ex-company secretary, on her behalf, and from the following witnesses on behalf of the respondent:

   Ms Emma Breckenridge – head teacher Enfield Heights and Kingfisher Hall Academy
   Mr Marino Charalambous – chair of the board of trustees.

5. The tribunal had before it bundles of documents, exhibits R1 and C1. The witness' evidence in chief was received by written statements upon which they were then cross-examined. From the documents seen and the evidence heard, the tribunal finds the following material facts.

Facts

6. The respondent is an educational multi academy trust consisting of five schools, being: Cuckoo Hall Academy, Woodpecker Academy, Kingfisher Academy, Heron Hall Academy and Enfield Heights Academy. Heron Hall is a secondary free school, opened in September 2013. The other schools are primary schools.

7. The constitution of the trust consists of a board of trustees under the direction of a chair of trustees. Below the board of trustees is the executive head teacher, whose role it is to look after all of the schools in the trust. Below the executive head, are head teachers of each of the schools, holding responsibility for the day to day running of their schools, accountable to the executive head teacher and the board of trustees.

8. With regards the structure, the respondent had a central team, which held responsibility for information technology, finance, site management, administration and human resources across the trust, providing support services to all schools.

9. The claimant commenced employment with the respondent on 5 January 2009, at Cuckoo Hall, which was then converted into an academy in September 2010. The claimant has been promoted from the position of information and communications technology technical network manager to the position of head of information technology, responsible for providing IT services to all academies within the trust operating within the central group of services. The claimant held this position from September 2013 until the termination of her employment.

10. As head of information technology, it was the claimant's responsibility to provide IT services to all of the academies within the trust, managing a team of three technical staff, consisting of; two junior technicians and one part-time senior technician. It was the claimant's role to oversee the implementation of new technologies and in strengthening the IT infrastructure, updating the asset register to include licensing, warranties

and hardware restructured for the schools, and planning to meet future requirements. She was also responsible for the procurement of hardware, software and external services, providing routine audits and health checks of the overall infrastructure, and supervising the management of the network on a day-to-day basis.

11. The claimant was also engaged in training parents and staff on e-safety, managing server software including anti-virus and associated back-up routines, liaising with third party suppliers, assisting in maintenance and in the provision of first tier support for cashless catering hardware and software, the school's library system, and CCTV access across the schools to include door access control.

12. It is not in dispute that, the claimant had been actively involved in information technology provision for the trust as it grew, taking on new academies, which was demanding. It is also not in dispute that, the claimant, prior to the matter for which she was disciplined and the subject of this claim, had an unblemished disciplinary record.

13. I pause here to record that, from the evidence before the tribunal, it is apparent that there was, at the material time, some form of power struggle amongst the board of trustees, creating factions. The issues giving rise to the struggles or otherwise the extent to which those issues permeated the organisation has not been made known to the tribunal, however, it is evident that the issues arising amongst the board of trustees had overflowed into the wider organisation, for which there were certain understandings among staff, unofficially, although nonetheless apparent from the documents before the tribunal, which no doubt has had an effect on this case, but of which, I cannot say further, as the tribunal has not been presented with the particulars relevant thereto and as such, whilst noting such a state of affairs to be operative, and running in the background at the material time, I have not been able to take such factors into consideration, but do record the environment in acknowledgment that it may have been a material factor.

14. For the purposes of the complaint before the tribunal, the material facts begin in or about November 2014, the exact chronology is not clear, however I pick up the proceedings from 22 November 2014, when Mr Davis, the company secretary for the trust, in seeking to access his email account remotely, working from home, on finding that he was unable to do so, contacted the claimant raising the issue, whereon Mr Davis states, "The claimant advised me that Mr Sowter had demanded access to my email and as a result of that my password had been changed." It is the claimant's evidence that, on Mr Davis identifying that he could not gain access to his email account, she had asked him whether Mr Sowter had contacted him regarding his emails, because Mr Sowter had said that he would, which on Mr Davis stating that he had not been contacted by Mr Sowter, the claimant explained that Mr Sowter had asked her to look for an email in Mr Davis' email box, and that she had had to reset his password in order to open his account, and that this was the reason why he could not then gain access,

advising that it had been Mr Sowter's intention to contact him to make him aware thereof.

15. With regards to the claimant accessing email accounts, she held administrator rights, which gave her access to email accounts circumventing passwords, but in doing so the account would be reset, necessitating her generating a new password for the account. The new password would then be given to the account holder for them to gain access and then once access had been obtained, they could then change the password to one of their choosing and confidential to them. Without the password to an email account, or otherwise exercise of administrator rights, access to an email account within the trust academies could not be had.

16. With reference Mr Sowter, it is pertinent here to note that he was a member of the board of trustees and the husband of the executive head teacher.

17. With respect Mr Sowter seeking access to Mr Davis' email account, it is the claimant's evidence that this had been the first occasion on which Mr Sowter had asked her for access to any email account, which on Mr Sowter being a member of the board of trustees and her being advised that the request for access had come from his wife, the executive head teacher, she had complied with his request. This evidence has not been challenged by the respondent.

18. With respect the reason for accessing Mr Davis' email account, which is equally not challenged, it was to search for an email referencing the resignation from the board of trustees of Mr Charalambous. It is equally not in dispute that Mr Charalambous had submitted his resignation at the material time. With respect the claimant accessing Mr Davis' email on the instructions of Mr Sowter, the respondent has not at the material time identified this to have been in any way improper by the claimant.

19. On the claimant opening Mr Davis' email account on her computer screen, for which Mr Sowter looked over her shoulder at the screen, on Mr Sowter unable to see what he was looking for, he then left the claimant's office and as above referred, had advised that he would inform Mr Davis of the access having been had to his email account, on the claimant advising that as a result of her having accessed his account he would not then have access to his emails.

20. With regards Mr Sowter informing Mr Davis of access having been had to his email account, Mr Sowter left a note on Mr Davis' desk advising of the fact. However, it is noted that the note was not signed off in Mr Sowter's name but in the name of the IT department. Mr Davis was not then aware of this communication having come from Mr Sowter.

21. With respect Mr Davis' conversation with the claimant, being advised of access having been had to his email account and of his email password being changed, Mr Davis on 22 November at 13:53**,** emailed Ms Caroline Prosser, of the respondent's solicitors, Hill Dickinson, stating:

> "I have learnt that access has been obtained to my email account and my emails have been read without my permission by others within Cuckoo Hall Academies Trust. Can you or a colleague please advise me of my legal rights?"

22. At approximately 05:10 pm, Ms Prosser responded advising:

> "We cannot advise you personally if there is a possibility of a conflict. This all depends on who you believe is reading your emails, and whether they have "hacked" into your account or they have open access. If it is an employee then it is potentially a disciplinary matter and we can investigate.
>
> With work emails, it depends on what the expectation of privacy is. For example, with most work emails, things marked "personal" have an expectation of privacy, but not necessarily other emails…
>
> If you could let me know the circumstances then I can arrange for you to be advised by us, or if there is a conflict direct you to another firm…"

23. With respect Mr Davis seeking the advice above referred, it is Mr Davis' evidence that in the early part of 2014, he had received a number of bullying emails from Mr Sowter and that having complained about Mr Sowter, he had had discussions with the then chair of the board of trustees, Ms Andry Efthymiou, of his considering resigning, and for which there appears to have been some antipathy between him and Mr Sowter, for which Mr Davis states:

> "I was very angry that Mr Sowter, who is not an employee of the respondent, was looking into my emails without my knowledge. I couldn't understand why he was looking into them and I wanted to know what my rights were.
>
> With this in mind, I emailed Caroline Prosser…"

24. It is further noted that, it is Mr Davis' evidence that he had at no time used the word "hacking," as this had not been something that he had meant, in that, he had clearly stated that someone had been accessing his emails without his authority or otherwise notifying him of that fact. Mr Davis her notes that the word "hacking" was first mentioned by Ms Prosser as is evident by her email above referred.

25. I pause at this juncture, as it is noted in Mr Davis' statement to the tribunal that, he states in respect of his conversation with the claimant on 22 November that, "The claimant advised me that Mr Sowter had demanded access to my emails and as a result of that my password had been changed", and of which statement he was challenged by the respondent that the expression, "Mr Sowter had demanded access," had been the exact words used by the claimant, which is material, as it is the respondent's contention that the claimant had expressed herself in such manner to evoke a particular response in Mr Davis.

26. Exactly why the claimant would seek to evoke an aggressive reaction from Mr Davis is not clear, however, it is intimated that she was party to a

particular fraction within the organisation, as has been acknowledged above. However, how it is alleged that the claimant belonged to any fraction has not been stated and indeed, from the evidence that the tribunal has heard, the actions of the claimant at the material times, have put her in both camps and for which there is no explanation. It is equally pertinent here to note that, for the claimant to have had allegiance to any fraction, she would have to have been aware of the issues and particular circumstance of the trust board and various allegiances, of which there is no evidence that the claimant had any such knowledge.

27. Despite this, it is Mr Davis' evidence that his reference to the term "demand access," was nothing more than his being told of Mr Sowter having sought access, which taking into account the antipathy that existed between him and Mr Sowter, it is understandable that the expression used is more indicative of the relationship between the two rather than express words used by the claimant; the claimant here adamant that she had not used the word "demanded" but merely gave an account that she had been requested by Mr Sowter to access Mr Davis' account.

28. On 24 November, on the claimant further being contacted by Mr Sowter for access to Mr Davis' email account, at approximately 01:00 am that morning, she texted Mr Davis, stating:

> "Graham, Just to let u know about 10 min ago (midnight) Phill asked me the passw for your account, have told him is welcome. I would say that u called me as u could not check your emails, that's how u found the passw changed, u logged in with passw welcome and I don't know if u have changed it since then! If this message is confusing, call me first thing tom morn, Diana"

29. I pause here to address a number of factors which, whilst the acts did not involve action of the claimant, it is nevertheless material as it forms the basis upon which disciplinary action was taken against the claimant.

30. Following Mr Davis' receipt of the claimant's text on the morning of 24 November, later that day, he contacted Ms Prosser of Hill Dickinson Solicitors, seeking further assistance, it being Mr Davis' evidence that he had realised that he was unlikely to get assistance from her and decided to seek his own independent legal advice. It is the respondent's case and which is material to the respondent's contention for disciplinary action being taken against the claimant, that, when Mr Davis had contacted Ms Prosser he had been in a somewhat agitated state, stating that his emails had been "hacked," but that when questioned as to who he believed had hacked his emails he did not provide a reply for which the tribunal was taken to a statement of Ms Prosser. In cross-examination of Mr Davis before the tribunal, Mr Davis was adamant that no such discussion took place. The tribunal notes that at the material time no enquiries were made of Mr Davis in respect of any of these events or otherwise his state of distress on learning of Mr Sowter's approaches to his email account.

31. On or about the 24 November 2014, with respect matters arising between trustee board members, a meeting took place between Mr Davis, company

secretary, board members; Ann Zimkin and Mary Elcock, and the chair of trustees, Andry Efthymiou, together with local authority officials, the result of which was that the executive head teacher, Mrs Sowter, her husband Phillip Sowter and the head teacher of Cuckoo Hall Academy, Sharon Ahmet, were suspended by the chair of trustees on 27 November 2014

32. It is Mr Davis' evidence that, following the meeting, despite his challenging whether it was constitutionally appropriate, he was directed by the chair of trustees, Ms Efthymiou, to suspend the above referred individuals for which he duly drafted letters of suspension and on which Ms Efthymiou proceeded to suspend those individuals.

33. There is no evidence that the claimant was party to any of these discussions or otherwise aware of the issues under consideration, and had had no part in the suspensions. It is however, clear from the case advanced by the respondent that they believed that the claimant was in some way a party to this course of action, but, as stated, no evidence to support this belief has been presented to the tribunal, this despite their being asked directly on point.

34. With regards the suspensions, which is here noted for completeness, it was determined by the board of trustees under an interim chair, on Ms Efthymiou being voted out, that the suspensions were unlawful and allegations unsubstantiated. The particular allegations being made against the individuals have not been made known to the tribunal.

35. Again, there is no question of the claimant having been involved in any of these matters.

36. For completeness, it is also here noted that, on 8 December 2014, the education funding agency began an investigation into the trust in respect of anonymous allegations having been made on 28 November, pertaining to matters of; governance, safeguarding, bullying, recruitment, HR processes and IT policy and security, for which a report was produced in February 2015, a copy of which is at R1 page 128-148. This report found that there had been a number of material breaches in relation to; the master funding agreement, the carrying out of DBS checks, compliance with the academy's financial handbook, failures to carry out suitability checks on staff prior to (or as soon as practicable after) appointment, having an accurate single central register, and meeting the statutory requirements on fire safety, as well as material breaches in relation to the management of conflicts of interest by the trust, particularly in relation to the recruitment of family members.

37. The tribunal also here notes for completeness that, the respondent commissioned a report from solicitors, Hill Dickinson, in relation to grievances brought by the individuals suspended, being Mrs Sowter, Mr Sowter and Sharon Ahmet; the grievances having originated in letters of complaint dated 4 and 12 December 2014 and 7 January 2015. The report of Hill Dickinson into the grievances are at R1 page 294-368. However, of relevance to the tribunal, is its finding regarding the suspensions of the

abovementioned officers and board members, to the extent that it gives an account of the circumstance leading to these suspensions and a potential role played by the claimant, the report finding on ICT and security at paragraph 34-90, and its findings at paragraph 91-94, which identifies the claimant as being a source for access having been had to email accounts, of which I will address in due course.

38. The tribunal was also taken to an extract of a report from Russell Cooke, requested by the board of governors to investigate and report on allegations as made against Mr Sowter, which has been presented in a redacted form, from which the tribunal has been unable to glean any material evidence, in itself, which is here noted for completeness, however it is noted by this report that, of the information stated to have been received by Mr Davis on 22 November 2014, it states:

> "He had spoken to Diana Evans, the trust's head of IT, who had told him that Mr Sowter had asked for the password to his email account. She had told Mr Sowter that he would need to email or text Mr Davis to say that he had done this, which he had not done. Ms Evans had changed Mr Davis' password. Mr Davis had then received a text message from Ms Evans at 00:58 on 24 November notifying him that Mr Sowter had asked her again for the password to his email account at midnight that night…"

The tribunal here notes there is no reference to any demand being made**.**

39. Turning back to the material facts as pertinent to the claimant's claim, following the suspension of Mr Sowter, Mrs Sowter and Ms Ahmet, on 8 January 2015, the claimant was called to attend a meeting of the board of governors.

40. The board meeting was being held for Mr Sowter to answer to the allegations that had been made against him, which allegations the tribunal is not aware, albeit an aspect appears to have been his accessing the email account of Mr Davis, and in respect of which the claimant was called to give her account of events.

41. On the claimant being invited to attend the board meeting, she was told that there was nothing for her to prepare and that the board just wanted to clarify a few questions with her. On the claimant being reluctant to attend the meeting, a board member, Ms Zimkin, acting as a go-between, in the presence of HR, informed the claimant that she had either to appear before the board or face disciplinary action. Whilst it is accepted by the respondent that Ms Zimkin had indeed informed the claimant, in these terms, as to her attendance, it is nevertheless advanced that it had not been an instruction from the board. That as may be, the tribunal accepts the claimant's evidence that as a consequence she felt compelled to attend and felt pressured in the meeting, where she was aggressively questioned by Mr Sowter, albeit it is challenged by the respondent as whether it was aggressive questioning by Mr Sowter although they do acknowledge that Mr Sowter was robust and

challenging of the claimant. The claimant's account of the incident written shortly after the meeting on 8 January, is at R1 page 417-419, from which this account is noted:

> "The experience was very intimidating and intense and an interrogation and I felt like it was unfair to discuss the allegation in front of PS without giving me prior notice and to allow him to defend himself against me.
>
> There was also a feeling of being in minority and overwhelmed by 4 people asking me questions in a fire line manner (MC, PS, AO, DG).
>
> I understand the EFA report was available to the chair and the members of the board and PS, and they are discussing my statement following the allegations made to PS.
>
> I feel was unfair [sic] to comment on a statement I have not seen in the final form and I should have prior knowledge of the facts printed in that report, to check the validity of it. The interview with Mark Gibson, from EFA, was made over the mobile phone with limited reception and while I was on compassionate leave. I would have preferred to see the statement, check the accuracy and sign it.
>
> As today's [sic] meeting it was a no minutes, off the record conversation, I feel that no actions could be taken or any statements I made considered valid."

42. The tribunal has not seen minutes of the meeting in full, having been presented with a redacted version consisting of 12 lines, giving account of Mr Sowter not having access to Mr Davis' account himself, that he did not open any emails and that the claimant, having changed Mr Davis' password, had asked Mr Sowter to inform Mr Davis accordingly, and Mr Sowter giving account that he had left a note to that effect on Mr Davis' desk and that whilst the claimant stated that Mr Sowter could have used the password to access Mr Davis' account she had no evidence to support such a contention.

43. Following this meeting, Mr Sowter was reinstated to the board of trustees.

44. I pause here and return to events of the 27 November 2014. Following the above referred suspensions of Mrs Sowter, Mr Sowter and Ms Ahmet, the claimant was instructed by her manager, Mr Hesketh, to disconnect their email accounts, fobs and door access. The claimant hereon sought formal instructions. It is the claimant's claim that she wanted it documented, in that her usual chain of command, being Mrs Sowter, as executive head was being superseded by the chair of trustees, Ms Efthymiou. **T**he was accordingly furnished with written instructions from Mr Hesketh confirming his oral instructions from Mss Efthymiou, and a note from the chair of governors, which provided:

> "I am the chair of CHAT and I give permission to Dianna to cancel Patricia Sowter, Phil Sowter and Sharon Ahmet fobs, access control and email accounts. Signed Chair of CHAT…"

45. The claimant duly disabled the email account fobs and door access controls.

46. By correspondence that night, 27 November, Ms Efthymiou sent an email to all staff stating:

> "Dear Staff
>
> I regret to inform you that I have today suspended Patricia Sowter (executive head teacher), Phil Sowter (CHAT director) and Sharon Ahmet (head of Cuckoo Hall) following allegations of gross misconduct. These allegations will be investigated. I will let you know soon of the interim arrangements for the management of all the academies in the CHAT group."

47. Subsequent hereto, the claimant was approached by Ms Efthymiou and asked to be given access to Mrs Sowter's disabled email account. The claimant accessed Mrs Sowter's inbox during which Ms Efthymiou asked the claimant to conduct a search of the inbox for her, Ms Efthymiou's, name.

48. On the claimant conducting the search, when the results came up, Ms Efthymiou went through a couple of emails before printing one out, which she then took with her on leaving the office. The claimant was not aware of the content of the email.

49. Save for the correspondence above referred, from Mrs Efthymiou, the claimant had received no information regarding the allegations against the three named individuals or otherwise the basis of their suspensions or ensuing investigations.

50. In respect of the email taken by Ms Efthymiou, by email sent to the board of trustees under the subject "Disgusted" an attachment was furnished being a photo.

51. I pause here, as the tribunal heard a significant amount of evidence as to exactly what the attachment was, whether it was a photo of the computer screen or a photo of a document which was then uploaded as a jpeg image and attached to the email. I do not say further on this point otherwise than to note the tribunal received significant argument thereon, for which there was no direct evidence, the material fact being that Ms Efthymiou was in possession of the correspondence purportedly gained by the claimant giving Ms Efthymiou access to Mrs Sowter's email account after the account had been disabled.

52. As above stated, the claimant was not aware of the content of the document and the tribunal has been presented with no direct evidence of how the particular document came into the possession of Ms Efthymiou. The implication however, being that this was the document obtained by Ms Efthymiou, when the claimant gave her access to Mrs Sowter's email account.

53. The document is dated 19 November 2014, following Ms Sowter's suspension between her and Caroline Prosser of Hill Dickinson LLP, the respondent's HR advisers.

54. The correspondence provides:

> "Subject: Andry and Anne…
>
> And finally…
>
> I also had a chat with David about these two. With Andry she can agree to resign on the understanding that she is re-elected on conclusion of the disciplinary (this is something I can chat you through).
>
> And Anne, David said it will be in the constitutional documents (which you called Stone King about), but that you can have a conversation with her inviting her to step down with the implication that if she does not then it will go to a vote at the next GP meeting.
>
> David offered that he could put together a bible of all your constitutional documents free of charge so that when you have issues like this, we can access the documents and advise quickly."

55. I pause here, to put in context this email, as its contents, whilst not of relevance to the issues for the tribunal's determination, offers background to circumstance which have influenced the case against the claimant, in that, there were domestic issues arising between Ms Efthymiou, her husband and Mrs Sowter, and of disciplinary action being taken against Ms Efthymiou's husband who had been suspended on allegations of gross misconduct, for which Ms Efthymiou was being challenged as having a conflict of interest and for which it was being proposed that she stand down as chair. With respect the domestic strife between Mr Efthymiou and Ms Efthymiou, it was alleged that the claimant was furnishing Mr Efthymiou with confidential emails. There is no evidence of the claimant furnishing Mr Efthymiou with such emails, which on her having been questioned thereof by Mrs Sowter, the claimant had vehemently denied such action; the allegation being made by Ms Efthymiou that the claimant was passing the emails to her husband.

56. Following the Russell Cooke investigation above referred, a board meeting was held on 13 January 2015, where the results of the investigation were put to Ms Sowter and Ms Ahmet, following which the board concluded that the suspensions were unlawful and the allegations unsubstantiated. Ms Sowter and Ms Ahmet were reinstated thereon.

57. On 29 January 2015, the claimant was written to by Mr Hesketh in respect of the grievance, raised by Mrs Sowter and Ms Ahmet, being advised:

> "The board received a grievance from Patricia Sowter and Sharon Ahmet in December which by law it must investigate. You have been named as part of that grievance and therefore it is important that you are spoken to so you can give your version of events. I am therefore emailing to request your attendance at a grievance meeting… on Thursday 5 February 2015…
>
> The purpose of the meeting is to consider your response to matters which relate to your involvement in the lead up to the suspensions. You have already given your account to Anthony Sakrouge and the EFA therefore you are well aware of the issues.

> It will be conducted by Caroline Prosser who is assisting the board by carrying out the interviews…"

58. The claimant confirmed her attendance asking:

> "Are you able to ask Ms Prosser on my behalf to forward me a copy of the relevant part to me of the grievance letter prior to the meeting, as per "you have been named as part of that grievance and therefore it is important that you are spoken to so you can give your version of events".
>
> I am not aware of what the grievance is for, therefore I don't know what are the allegations I will be asked to defend?"

59. The grievance meeting was subsequently postponed, the claimant being advised in respect of her request for particulars of the grievance, that Ms Prosser would "provide some background to the grievance but will not be providing sections or parts from the grievance letter itself".

60. On 3 February 2015, Mr Hesketh requested the claimant give email access to the then chair of trustees, Mr Marino Charalambous, the instructions stating:

> "Can you please arrange for the following password access for Marino Charalambous, chair of the CHAT board.
>
> - Immediate access to G Davis email with a new password sent to Marino by you directly Diana, with the option for Marino to change the password;
>
> - In addition Marino would also like to have access to the ex chair's CHAT email account as we have suspended this when she was removed so everything up until that date should be intact. Can you again send Marino everything he needs to set up and view these email accounts."

61. The claimant duly gave access to Mr Charalambous furnishing the relevant passwords.

62. In respect of further being called to a grievance meeting, the claimant, in an effort to determine the nature of the meeting and what she would be asked questions about, sought a copy of her statement that she had provided to the EFA, which she had not seen, for her reference. The claimant was advised that she should not be asked questions on the evidence she had given to the EFA.

63. On the claimant confirming her attendance for the rearranged meeting with Ms Prosser, Mr Hesketh advised:

> "This is a grievance sent by Sharon and Patricia against CHAT, various areas have been identified and people mentioned. Caroline Prosser will be asking you questions in respect of the IT systems. There are concerns about the security of emails and as the head of IT you are best placed to respond."

64. The claimant duly attended the meeting with Ms Prosser of Hill Dickinson on 10 February 2015, as part of her investigations into the grievance, notes of which are at R1 page 172-174.

65. The interview with the claimant addressed security of the IT system and how access could be had. The claimant explained that, away from the person whose account it was, no other access could be had unless the individual concerned was part of a group who had access, it being made clear that access was permission based. The interview then addressed access to Mrs Sowter's and Ms Ahmet's email account, for which the following exchange is noted:

> "CP When PS and SA were suspended what happened with their emails? Were their emails shut off?
>
> DE I don't do anything without a written request. I have the request in writing from the chair of governors Andry Efthymiou (AE) which I asked for signed and on headed paper which I have a copy of (provided)
>
> Further to that I still didn't action the request and went back to my line manager (MHES) and until I got confirmation in an email from him I didn't do anything (confirmation email from MHES provided)
>
> CP So, once the emails were discontinued what happened to emails when the accounts were blocked?
>
> DE Access was disabled.
>
> CP Who then had access to the disabled account?
>
> DE No-one.
>
> CP When PS and SA were suspended, legally privileged emails that I sent to them were made public, they were out there, who had access to the account?
>
> DE At some point AE authorised that we had to look for a certain email.
>
> CP What email was that?
>
> DE It was an email sent referring to AE personally.
>
> CP Was there anything else about the email? What did it say?...
>
> CP Who was the email to?
>
> DE Asked if she was able to disclose that information.
>
> [CP clarified that C was doing this investigation on behalf of the board and asking these questions on their behalf. The board need to be assured that emails are safe.]
>
> DE Replied the emails are safe.
>
> DE The email was from PS to you, CP.

CP What was on it?

DE I can't remember.

CP Was AE with you when she asked you to find that?

DE Yes, she was in the room.

CP Was it a screen grab of that email?

DE I don't recall if it was a screen grab or a printed email. There were lots of events happening at that time and lots of information going back and forwards. All that happened was very unknown territory and I was trying to stick to requests.

CP I am trying to clarify the chair of governor's request; trying to establish how things were provided and how we can stop it happening again. There are things in the public domain now that shouldn't be. There is a concern that legally privileged material that belongs to board, and is not something ever to be shared, has gone and is out in the public domain.

DE I don't know what happened with this information.

CP What made AE think there was an email in my emails? How would she know what was in PS's and my emails?

DE I don't know, I can only comply with what was asked of me.

CP Apart from this one email did you ever give access to PS's emails to AE?

DE No, she just took the paper.

CP Have you ever given access to PS's emails to anyone else?

DE No.

CP … "

66. The interview then addressed the issue of the claimant being asked about passing emails to Mr Efthymiou and whether there had been any concerns about the system or emails getting out, for which the claimant identified there was no way for that to be done. The meeting then addressed issues as to Mr Davis finding out about Mr Sowter accessing his emails and of Mr Davis having contacted Ms Prosser being in a "flap", stating that his emails had been "hacked", Ms Prosser stating:

"… I told him I acted for the board but advised him to get his own legal advice. I asked GD if he had spoken to anyone about this but he wasn't keen to follow this procedure.

DE I told him that it wasn't hacking, it wasn't mischievous, it was straight to the point and I described the facts.

CP This is just something that happens, someone looks at my emails, why would he be in such a flap? Talking about hacking?

DE Some people take it to the extreme if they don't understand how it works?"

67. The meeting then addressed issues as to the computer server going down around the Christmas period and access had, to emails at that time.

68. It is the claimant's evidence, which is not challenged, that following this meeting she was unsettled and began questioning herself and the policies she had been following, and that it seemed unclear as to who she was to take instructions from, and from which time she began asking for every request about IT devices to be in writing.

69. There does not then appear to have been any issues until 15 April 2015, when Hill Dickinson raised concern with the board, following discussions with management in respect of the security of the IT system, of emails being blocked and emails being leaked. Exactly what the particular concerns were has not been presented to the tribunal. As a consequence of these concerns, a request was made of the board of trustees to release the minutes from the grievance investigation meeting held with the claimant on 10 February, despite the investigation then still ongoing. A note of the boards meeting of 15 April 2015, provides:

> "DG suggested an [sic] forensic audit of IT by external auditors. Suggested that Buzzacotts are commissioned to do this. DG immediate future in relation to IT services… are for the board to deliberate on."

70. On 16 April 2015, on Mr Charalambous seeking to gain access to Mr Davis' and Ms Efthymiou's email accounts for which he had previously been given access, as above stated on 3 February 2015, he raised issue with the claimant as to his not then having access, stating:

> "I have tried to access these two email accounts and I am not able to log into these emails. I need to find some information for the EFA. Can you tell me why I can't access these accounts especially since I set new passwords.
>
> This is an urgent matter and it is causing me some concern."

71. I raise this here for completeness, as the respondent has placed emphasis hereon, on Mr Charalambous not receiving a reply from the claimant. The relevance thereof however, is not apparent.

72. With reference this point in time, it is further the claimant's evidence that, she repeatedly sought guidance from her manager, Mr Hesketh, which was not forthcoming until 21 April 2015, when Mr Hesketh agreed to meet with her, it being the claimant's further evidence that, on her having sought guidance from Mr Hesketh he had responded that "It was everyone for themselves". It is further her case, and which evidence is not challenged by the respondent, that IT expenditure was stopped and that unfriendly emails were being received by staff and a lot of pressure was being put on the IT department, and that there were conflicting requests from senior management.

73. At the meeting arranged with Mr Hesketh for 21 April, Mr Hesketh attended accompanied with an HR officer, whereon the claimant was informed that she was suspended with immediate effect and handed a letter of suspension, the letter providing:

> "I am writing to confirm that as of the date of this letter, you have been suspended from work until further notice pending investigation into an allegation of gross misconduct. The allegations are:
>
> 1. That you gave access to Andry, the ex-chair of CHAT to Patricia's account at the time of the suspensions when the request on 27 November was to disable them.
>
> 2. That you lied about doing this in the meeting dated 10 February 2015.
>
> 3. That you told Graham Davies [sic] that Phil Sowter requested his password and led him to believe his email account had been hacked.
>
> 4. That you leaked confidential information contained about the constitution of the new board and contained in emails.
>
> 5. That you leaked confidential emails to Debra Crouch in respect of her dismissal in November 2014.
>
> 6. That you have been engaged in blocking emails from external lawyers to HR in the month of April which has resulted in instructions not being received.
>
> We reserve the right to change or add to these allegations as appropriate in the light of our investigation."

74. The claimant was thereon advised, inter alia, that the suspension did not imply guilt in misconduct, that she should not attend the workplace unless authorised to do so by Mr Hesketh, and that were she required to attend a disciplinary hearing she would be notified thereof, whereon she would have the opportunity to state her case at a hearing in accordance with the respondent's disciplinary procedures. The claimant was further advised to inform the respondent of any witnesses or information that she felt was relevant to the matters under investigation.

75. The claimant was subsequently written to, being advised that an independent forensic IT examination was being commissioned into allegations 1, 4, 5 and 6, as furnished by the correspondence of 21 April.

76. With regards this further investigation, due to cost considerations and the potential evidence to be obtained, the forensic investigation was not pursued.

77. On 12 May 2015, a report from the investigation into Mrs Sowter and Ms Ahmet's grievance and Mr Sowter's complaint (R1 page 294-368), was provided to the chair of trustees, Mr Charalambous, the report concluding that Ms Efthymiou, Bernie Jordan, Mary Elcock, Anne Zimkin and Graham Davis, board trustees, were all involved in the unlawful and ultra vires

suspension of Mr Sowter, Mrs Sowter and Ms Ahmet. The report also found that Ms Efthymiou had a conflict of interest in respect of her interfering in her former husband's disciplinary process, and of Ms Elcock being guilty of safeguarding offences and fraud in falsifying information on the SCR record. No allegations were put to Ms Elcock and Ms Elcock has denied such wrongdoing before this tribunal.

78. With regards the material facts relevant for the tribunal's determination, the report addressed issue as to ICT and security at paragraphs 79-94, which after setting out the factual account relevant to Mr Sowter accessing Mr Davis' emails, Ms Efthymiou having access to Mrs Sowter's email account and suspicions of the claimant having given email access to Mr Efthymiou, the report at paragraph 91-94 found the following:

> "Our finding is that as emails from CP to PS were accessed, it must be the case that DE provided access to at least AE. DE failed to offer any explanation about how AE knew the email "Disgusted" existed, despite confirming that the accounts were disabled and that no-one had access to them. This of real concern and there is the very real possibility therefore that DE was allowing access to emails or sending on emails that belonged to someone else.
>
> This concern is further illustrated by the correspondence from DC which suggests that she had read legally privileged emails between CP and PS regarding her own dismissal.
>
> When AE informed PS and SA that DE was passing emails to NE during his disciplinary process, and before the suspensions, AE was on good terms with PS and SA, indeed "warning" them about NE being given these emails by DE. This, together with the reaction of DE at the time, means it is possible if not likely that DE was passing emails to NE.
>
> It is also our finding that DE lied about what she had told GD regarding the allegation of "hacking". The evidence given by DE to the board and to CP with regard to what she told GD is not supported by the text she sent to GD (document 24). The fact that GD was convinced he had been hacked and his confirmation to CP that he didn't want to talk to the person involved suggests that both DE and GD were motivated by the desire to "bring down" PHS (*Phil Sowter*)."

79. On 20 May 2015, Mr Hesketh informed the claimant that he had been appointed as the investigating manager and for which a report would be furnished once complete.

80. On 4 June 2015, Mr Hesketh advised of delays in finalising the investigation report, which was subsequently furnished on 9 June 2015, which is at R1, page 161-163. The report provided that, on the evidence consisting of; text message from Diana Evans to Graham Davis dated 24 November 2014, email from Martin Hesketh to DE dated 27 November 2014, handwritten note from AE (undated), email from AE to the CHAT board with attachments dated 3 December 2014, file note of PS dated 7 December 2014, redacted minutes of meeting with the board on 8 January 2015, minutes of meeting with Caroline Prosser dated 10 February 2015, report from forensics dated 11 May 2015 and on the response given by DE in the meeting of 10

February 2015, it was recommended that the matter progress to formal disciplinary proceedings, on grounds that:

> "1. DE gave access to Andry, the ex chair of CHAT to Patricia's account at the time of the suspension when the request on 27 November was to disable them.
>
> 1. That DE lied about doing this in the meeting dated 10 February 2015.
>
> 2. That DE told Graham Davies [sic] that Phil Sowter requested his password and led GD to believe his email account had been hacked."

81. The report further found that, "Having considered the forensic report and the cost compared to the likelihood of obtaining further evidence the allegations as to:

> "DE has leaked confidential information contained about the constitution of the new board which was contained in emails
>
> That DE linked confidential emails to Debra Crouch in respect of her dismissal in November 2014
>
> That DE was blocking emails from external lawyers to HR in the month of April which has resulted in instructions not being received were dismissed."

82. By correspondence of 15 June 2015, the claimant was invited to a disciplinary meeting for 24 June, to consider the allegations above referred, being furnished with a copy of a contract of employment, copy of the disciplinary policy, copy of the investigation report and documents referred to in the investigation report.

83. The claimant was advised of her right to be accompanied and that she would be afforded the opportunity to respond fully to the allegations, and that any representation she made would be considered before a decision taken, being further advised that should she not be able to provide a satisfactory explanation for her conduct she may be summarily dismissed.

84. The claimant duly attended the hearing accompanied by her union representative, Cherry Locke. The disciplinary hearing was chaired by Ms Breckenridge, head teacher of Enfield Height and Kingfisher Academy, advised by Clare Edwards of Hill Dickinson Solicitors, as HR adviser, notes of the hearing being taken by Ms Ledgister, personal assistant. Notes of the disciplinary hearing are at R1 page 193-199 and as amended at R1 page 200-243.

85. On the claimant furnishing the hearing with a statement of case and further documentation, the hearing was adjourned for the panel to consider the further evidence for which further enquiries were made of Mr Sowter and Ms Prosser. The claimant was not presented with the product of these further enquiries before Ms Breckenridge made her decision.

86. It was the finding of Ms Breckenridge, in respect of allegation 1, that on the claimant accepting that she had given access to Ms Efthymiou, to Mrs

Sowter's emails, and that she had previously received a written request to disable the email accounts, and that the request to access Ms Sowter's email had been an oral request by Ms Efthymiou, she determined that her task was to consider whether she believed the claimant's version of events and whether it was reasonable for her to follow Ms Efthymiou's instruction, given the nature of the request and the circumstances known at the time. Ms Breckenridge concluded that, on Ms Efthymiou asking for a search of emails containing her name, as sent between Ms Sowter and Ms Prosser, this indicated that either Ms Efthymiou knew of the existence of the email, which meant she had been given access by the claimant previously, or that the claimant had allowed Ms Efthymiou full access to Ms Sowter's emails when the accounts were supposed to have been disabled, and in considering whether it was appropriate to allow Ms Efthymiou access to anything she requested of the claimant, given that she was the chair of governors, further concluded that, on Ms Efthymiou asking for an email about her personally was an act where she was not acting as the chair of CHAT but in her own interest, and that the claimant should have been there aware of, as the written instructions had been to disable the account and as the head of IT in charge of IT security, the claimant should have questioned why the request was being made and if it was appropriate, which on further reference being had to issues between Ms Efthymiou and her former husband, it should have been apparent to the claimant that Ms Efthymiou had a conflict of interest and accordingly, she should have been very suspicious of a request from Ms Efthymiou to search through Ms Sowter's emails.

87. It was further Ms Breckenridge's reasoning that, having considered the "Disgusted" email as sent by Ms Efthymiou, on the claimant stating that Ms Efthymiou had printed out an email and that the email as sent by Ms Efthymiou was either a screen shot or a photo of a computer screen shot, and not a printed out email, this had been inconsistent with the claimant's evidence of an email being printed out, Ms Breckenridge upholding the allegation against the claimant.

88. With regards the second allegation, on the product of the claimant's account at the grievance investigation meeting of 10 February 2015, as to the claimant stating she had only given Ms Efthymiou access to Ms Sowter's account only once, and that in the hearing the claimant had stated that she did the search and that emails came up in the search and that Ms Efthymiou clicked on the email and printed it out, but that in her statement of case she stated that Ms Efthymiou searched for emails using key words herself, Ms Breckenridge held that there were too many inconsistencies in the claimant's evidence, such that her evidence was not credible, challenging the claimant's evidence as to her doing only that which she had been asked to do, Ms Breckenridge stating that, "I felt that if she had been a wholly innocent party and believed she was doing the right thing then she would have been clear in her responses. Also I was very aware that Diana knew that Patricia Sowter had been suspended by Andry and therefore should have been on the alert to what Andry's motives were when she asked for access to Patricia's emails or to search for a specific email", opining that the claimant should have sought authority of her manager, Mr Hesketh, and that

the claimant's evidence that the written authority to suspend the account having come from Ms Efthymiou was sufficient instruction for her to act on Ms Efthymiou's further instructions, Ms Breckenridge did not believe that the claimant genuinely believed that. Ms Breckenridge held that she believed that the claimant had lied about providing access to Ms Efthymiou and that, as opposed to being an innocent party, doing as she was told, she had assisted Ms Efthymiou in locating a "legally privileged email between Patricia and Caroline Prosser" and was deliberately so done by the claimant without obtaining the necessary permission.

89. With reference allegation 3, on the claimant's statement of case stating that she had provided the password to Mr Sowter, and at the disciplinary hearing had stated that she had told Mr Davis that his password had been changed because she had not been told by Mr Sowter that his access was to be kept confidential, and that at the board meeting on 8 January 2015, the claimant had stated that Mr Sowter did not access the account himself or otherwise open any emails, and that she had changed the password, in considering the claimant's text to Mr Davis on 24 November 2014, and that by the text she had stated that "Phil asked for the password to Graham's account" in circumstances where Mr Sowter did not access the account himself, being the version of events told to Ms Prosser on 10 February 2015, Ms Breckenridge concluded that the claimant's evidence had changed through the process and made her evidence unreliable, and further, that Mr Davis' evidence was unreliable as he had been involved in the suspensions of Mrs Sowter, Mr Sowter and Ms Ahmet in contravention of the scheme of delegation as to the suspension of executive head teachers by the board. Ms Breckenridge further took issue with Mr Davis having only furnished one text record of correspondence between himself and the claimant, on the premise that there were further texts. The tribunal finds as a matter of fact that there was only the one text correspondence between Mr Davis and the claimant as was furnished. Ms Breckenridge concluded that she could see no reason why Mr Davis would think his email account had been "hacked" based on the facts, determining that she believed the claimant deliberately led Mr Davis to believe that his account had been "hacked", which then led to Mr Sowter's unlawful suspension, finding that, although the claimant had not been directly involved in the suspensions, she was "reckless in the information she provided and should have reasonably foreseen that telling Graham that his emails had been unlawfully accessed would lead to repercussions against Phil Sowter". Ms Breckenridge upheld the allegation against the claimant.

90. In giving consideration to sanction, Ms Breckenridge determined that action short of dismissal was not appropriate, in that, the claimant was in a very senior position at the respondent and was responsible for IT security, and that having the responsibility to protect the integrity of the IT system her actions were inconsistent therewith, holding that she had, "at best recklessly and at worst intentionally compromised" the integrity of the IT system, which had had a negative effect and that the seriousness of the misconduct outweighed any mitigation for a lesser sanction.

91. The claimant was informed of the decision to summarily terminate her employment by correspondence of 15 July 2015, a copy of which is at R1 page 244, for reasons of gross misconduct.

92. On the claimant being afforded the right of appeal, by correspondence of 28 July 2015, the claimant presented an appeal, inter alia, that:

    92.1 The alleged misconduct did not occur;
    92.2 The findings of the disciplinary panel on the evidence presented was perverse;
    92.3 The minutes taken in the meeting were inaccurate
    92.4 The decision was unreasonable and that it did not fully take into consideration the evidence presented during the investigation hearing;
    92.5 That crucial evidence that had been presented had been disregarded; and
    92.6 Unsubstantiated distortions to allegations had been made, in particular with regards the credibility of Mr Davis.

    The claimant's grounds of appeal are at R1 page 261-266.

93. The claimant was duly invited to an appeal hearing to be chaired by the chair of governors, Mr Charalambous, accompanied by Clare Edwards, HR adviser to CHAT, and Ms Legister as note taker, to which, by correspondence of 7 September 2015, the claimant raised objection to Mr Charalambous hearing the appeal, as having been involved in the disciplinary process on his being the chair of the board meeting on 8 January 2015, the outcome of which was part of the disciplinary process, and of Ms Edwards having been involved in the disciplinary hearing on 24 June 2015. Mr Charalambous advised that he had not been involved in the investigation or the original disciplinary, stating his impartiality and of the integrity of Ms Edwards, who had not been a decision maker at the disciplinary hearing. The hearing duly proceeded chaired by Mr Charalambous. Notes of the disciplinary hearing are at R1 page 283-288.

94. With regards Mr Charalambous' approach to the hearing the tribunal notes this account in respect of the case that was presented by the claimant, that:

    "The witnesses she had supplied in support of her appeal were three people who were involved in the unlawful and ultra vires suspensions of Patricia, Phil and Sharon, and in the case of Mary Elcock involved in fraud. Further, it made me consider that Diana was a part of that group of people especially as the allegations for which she was appealing against were linked to the suspensions."

95. It was Mr Charalambous' determination not to uphold the claimant's appeal, on grounds that the claimant, as IT manager, held a high degree of responsibility for security of the IT systems which was seriously compromised, and that she had not considered the risks that she was putting CHAT under by her actions, and whose judgment had caused CHAT

to suffer huge damage and financial costs, for which trust in the claimant had been lost. Mr Charalambous concluding:

> "You acknowledge that your actions justify a disciplinary sanction by way of written warning. The severity of the consequences resulting from your actions, which, given the evidence in the circumstance was reasonably foreseeable, and the lack of judgment used by you, means that a sanction less than dismissal is not appropriate."

96. The claimant was notified of the appeal outcome by letter dated 1 October 2015, a copy of which is at R1 page 289-293.

The law

97. In an unfair dismissal claim the burden is initially on the employer to identify a potentially fair reason for dismissal so as to satisfy section 98 (1) and (2) of the employment rights act 1996

98. It then falls to be determined whether or not the dismissal was fair. The determination 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 the reason as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case. S98 (4) of the employment rights act 1996

99. The tribunal must consider whether the employer's conduct fell within the range of reasonable responses of the reasonable employer in all the circumstances of the case, without substituting its own decision as to what was the right course to adopt for that of the employer (Iceland frozen foods v Jones 1982 IRLR 439 EAT per Browne-Wilkinson J). The burden is neutral at this stage; the tribunal must make its decision based upon the claimants and the respondent's assertions with neither having the burden of proving reasonableness

100. The tribunal has to decide whether the employer who discharged the employee on the grounds of the conduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that conduct at that time. This involves three elements: I) the employer must establish the fact of that belief; II) it must be shown that the employer had reasonable grounds upon which to sustain that belief; and III) the employer at the stage at which it formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case (**British Home Stores Ltd V Birchell 1970 IRLR 379)**

101. The employer does not have to prove beyond a reasonable doubt that the employee was guilty of the misconduct, but merely that they (the employer) acted reasonably in treating the misconduct as sufficient for dismissing the employee in the circumstances known to them at the time. It is not necessary that the tribunal itself would have shared the same view in those

circumstances. Furthermore it does not matter if the employer's view, if reasonable at the time, is subsequently found to have been mistaken.

102. The tribunal must remind itself that the Birchell test does not mean that an employer who fails in one or more of the three limbs is without more, guilty of unfair dismissal: (boys and girls welfare Society V McDonald 1997 ICR EAT)

103. Where there are admissions the scope for the investigation is limited. see RSPB V Croucher 1984 ICR 604 EAT

104. Any procedural defect must always be sufficiently serious to render the dismissal unfair see Fuller v Lloyds bank plc 1991 IRLR336. The tribunal is mindful that the ACAS code is only a guide and is not a mandate to; failure to comply with every detail does not render a dismissal unfair. In considering compliance with the ACAS code the employer's size and resources are to be taken into account.

105. Where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (section 122 (2) employment rights act 1996)

106. Where the tribunal finds a dismissal was to any extent caused or contributed to by any action of the complainant that was foolish, perverse or unreasonable, it shall reduce the amount of the compensatory award by such proportion as it considers just inequitable giving regard to the act of finding (section 123 (6) of the employment rights act 1996. See Nelson V BBC (No2) 1980 ICR 110)

107. The tribunal has also had reference to His Honour Judge Hand QC in, Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/003203/209/LA as to the tribunal's duty in considering gross misconduct, who at paragraph 109, provides:

> *"109.….It is not clear to us what the breach of trust policy actually was. … Assuming that is a breach of trust policy, it still remains to be asked – how serious a breach is that? Is it so serious that it amounts to gross misconduct? In our judgment that is not a question always confined simply to the reasonableness of the employer's belief. We think two things need to be distinguished. Firstly the conduct alleged must be capable of amounting to gross misconduct. Secondly the employer must have a reasonable belief that the employee has committed such misconduct. In many cases the first will not arise. For example many misconduct cases involve the theft of goods or money. That gives rise so far as to the character of misconduct is concerned. Stealing is gross misconduct. What is usually an issue in such cases is the reasonableness of the belief that the employee has committed the theft.*

110. In this case it is the other way round. There is no dispute as to the commission of the acts alleged to constitute misconduct. What is at issue is the character of the act. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In our judgment the question as to what is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness in the sanction of unfair dismissal on the context of breach of contract. What then is the direction as to law that the employer should give itself and the employment tribunal apply when considering the employer's decision making?

111. Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee; see ***Wilson v Racher*** *[1974] ICR 428 CA per Edmund Davis LJ at page 432 (citing Harman LJ in* ***Pepper v Webb*** *[1969] 1WLR 514 at 517)*:

> *"Now what would justify an instant dismissal? – something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract"*

and at paragraph 433 where he cites Russell LJ in **Pepper** (page 518) that the conduct "must be taken as conduct repudiatory of the contract justifying summary dismissal" in the disobedience case of **Laws v London Chronicles (Indicator Newspapers Ltd) Ltd** [1959] 1WLR 698 at page 710 Evershed MR said:

> *" The disobedience must at least have the quality that it is wilful: It does (in other words) connote a deliberate flouting of the essential contractual conditions."*

So the conduct must be a deliberate and wilful contradiction of the contractual terms.

112. Alternatively it must amount to very considerable negligence, historically summarised as gross negligence. A relatively modern example of "gross negligence", as considered in relation to gross misconduct is to be ***found*** ***Dietman v LB Brent*** *[1987] ICR 737 at page 759.*

113. Consequently we think that the employment tribunal was quite right to direct itself … that "gross misconduct" involves either deliberate wrong doing or gross negligence. Having given a correct self direction in terms of law, therefore it fell to the employment tribunal to consider both the character of the conduct and whether it was reasonable for the trust to regard the conduct as having the character of misconduct on the facts."

Submissions

108. The parties presented oral submissions, which submissions have been duly considered.

Conclusions

109. On the claimant presenting a complaint for unfair dismissal and wrongful dismissal in circumstances where the termination of the claimant's employment were for acts of gross misconduct, without seeking to undermine s.98 of the Employment Rights Act, I have approached this case from a consideration of the character of the acts going to gross misconduct and how they then feature for the purposes of s.98, as it illuminates the investigation and genuineness of the belief in the claimant's misconduct held by the respondent.

110. The tribunal is satisfied that the reason for dismissal is conduct and can found a fair dismissal pursuant to s.98(1) and (2) of the Employment Rights Act 1996.

111. On a analysis of the allegations against the claimant, distilled to their bare facts, stripped of the power play and factions of the board of trustees, they can be stated as follows:

112. Of the allegation concerning Mr Davis, it is that between 22 and 24 November 2015, the claimant gave access to Mr Sowter of Mr Davis' email account by:

    112.1 Allowing Mr Sowter to view Mr Davis' email account whilst the claimant effected a search, Mr Sowter looking over her shoulder; and

    112.2 Providing Mr Sowter with email passwords to access the account;

    112.3 Informing Mr Davis of his account password being changed on access being afforded to Mr Sowter and subsequently of Mr Sowter asking for the password.

113. There is no issue arising as to Mr Sowter having access to Mr Davis' email account generally or of the manner in which the access was afforded, namely by Mr Sowter orally requesting access. There is equally no issue raised on the claimant furnishing Mr Sowter with the password to Mr Davis' account. There is equally no suggestion that on Mr Davis' email account having been accessed under administration rights for which the password would necessarily be changed, and of which Mr Davis being informed of the changed password, was inappropriate. It is equally not in issue that what was relayed to Mr Davis was factually correct. The issue of concern here arising, is the manner in which the information was received by Mr Davis, for which the respondent maintains that the claimant would have foreseen the implication, being that she had encouraged it by her actions, which implication only arises on the basis of the fractured nature of the board of trustees, and of which the claimant would have to have been aware, and as suggested by the respondent, a party to the groupings so as to effect an attack against Mr Sowter.

114. I deal with this matter briefly, in that, there is no evidence to support such a contention of the claimant being a member of any faction of the board of trustees. Accordingly, on the claimant having done that, which is not challenged as being untoward or otherwise inappropriate by giving Mr Sowter access to Mr Davis' email account or, otherwise, informing Mr Davis of access having been had and of the change to his password, there is here exhibited no wrongdoing by the claimant to warrant investigation, the events being interpreted based on the groupings of the trustee board members.

115. Of the second allegation against the claimant, of her lying in respect of access being granted to Ms Efthymiou, chair of the board of trustees to Mrs Sowter's email account, on it being explained to the tribunal that the lie arises on the discourse between the claimant and Ms Prosser on 10 February 2015 as set out at paragraph 65 above, it is evident that the claimant is there responding to questions as to persons having access to the email accounts once access was disabled. The response of the claimant as to "no-one" is in respect of that general question as to general access to a disabled account, such that when the claimant was subsequently asked:

> "Apart from this one email did you ever give access to PS's emails to AE?"
>
> DE No, she just took the paper."

being questioned specifically as to Mrs Sowter's emails, which Ms Breckenridge stated to the tribunal was the consequential lie having previously stated that no-one had access to disabled email accounts and that the claimant had to be prompted to give the further account as to Ms Efthymiou's access to the account, was clearly not the case, and was a distortion of the account of the claimant given at that meeting which was readily apparent from the notes of the meeting, there being no further evidence relevant to this allegation.

116. Of the final allegation, that of giving access to Ms Efthymiou of Ms Sowter's email account, for which it is alleged the document retrieved by Ms Efthymiou was then put into the public domain by Ms Efthymiou. There is no dispute that Ms Efthymiou was afforded access to Ms Sowter's email account, which has never been denied by the claimant, the claimant's case being that she had merely done that which she had previously been doing without challenge, having taken instructions from Mrs Sowter as the executive head teacher and of Mr Sowter on his informing her that he was acting on Mrs Sowter's authority to request access to email accounts, namely Mr Davis. The respondent does not challenge access to email accounts on instruction from Ms Sowter, be it oral or in writing, on the premise that Ms Sowter was the executive head teacher and the most senior officer of the academy trusts, albeit not the claimant's line manager, and draws a distinction between Ms Sowter and Ms Efthymiou on Ms Efthymiou being the chair of the board of trustees without "executive" authority to which the respondent attaches motive of Ms Efthymiou in seeking access, which distinguishes it from any other instance where a chair

of the board of trustees may seek information, as is evident on Mr Charalambous seeking access to email accounts in April 2015.

117. The issues here raised, going to misconduct, take effect on two levels, first, whether the claimant had legitimate instruction to access Ms Sowter's email account on her being suspended, and secondly, whether the claimant should have been astute to the motives of Mrs Efthymiou for her request, so as to give cause for her to question any perceived authority.

118. With reference the first question, the operative facts were that Ms Efthymiou was recorded as being the individual who had suspended Mrs Sowter, the executive head teacher and the most senior official of the trust. It is pertinent here to note that the suspension was not identified as a board decision but that of Ms Efthymiou. The disabling of Mrs Sowter's email account was then on the instructions of Ms Efthymiou, the instructions originally coming through the claimant's line manager which was then substantiated by written authority from Mrs Efthymiou, it being apparent that the control of the accounts and the circumstances relating to Mrs Sowter, were being directed by Ms Efthymiou. In these circumstances, when that individual who to all intents and purposes has control of the situation, approaches the claimant and personally directs the claimant to afford her access, I am unable to envisage a circumstance where an individual officer would then deny such access, and indeed, were the claimant to have denied access, on the evidence of the course of events preceding, it would be reasonable to conclude that Ms Efthymiou would give instructions to the claimant's line manager, who then would have given the instructions to the claimant, and to think that any alternative situation would have existed at that point in time would be perverse, particularly in circumstances where it is not challenged that Ms Efthymiou had been dictating the course of events within the trust academies.

119. With regard the second question, on Ms Efthymiou having suspended Mrs Sowter and informed staff of the suspensions of Mrs Sowter, Mr Sowter and Ms Ahmet, and that the allegations would be investigated and that she, Mrs Efthymiou, would "let you know soon of the interim arrangements for the management of all the academies in the CHAT group" it was evidence that Ms Efthymiou was then in charge. Accordingly, on Ms Efthymiou then seeking information as to Mrs Sowter and seeking to interrogate her email account, the mere fact that the search was to be referenced by correspondence relating to her, without the claimant knowing of the basis for the suspensions or the nature of any investigations to ensue, which there is no suggestion made that the claimant was to have been privy to such information, I can find no basis upon which the claimant could reasonably have challenged Ms Efthymiou's request. Indeed, the situation is analogous to that of Mr Charalambous requesting access to email accounts in April 2015, albeit the respondent maintains that that request was appropriate because of Mr Charalambous' motive. Whilst Mr Charalambous' motives are not questioned as being anything otherwise than appropriate, as far as the request being made of the claimant is concerned, the claimant would have been none the wiser of Mr Charalambous' motives to that of Ms

Efthymiou's; Mr Charalambous being granted total access to the required, email accounts for which Mr Charalambous then had carte blanche to search for any document he desired, for good or ill motives.

120. The character of the act and on which misconduct is premised is the subsequent actions of Ms Efthymiou in putting the document (purported correspondence the product of the claimant giving her access to Ms Sowter's email, which has not been established to be the particular document obtained by Ms Efthymiou) in the public domain, the relevance of which, to be found in the different factions of the trust board membership and the claimant's imputed involvement therewith.

121. In addressing the question of security arising from Ms Efthymiou's access to Mrs Sowter's email account, it is pertinent to note that there was no protocol as to access, reliance being had on the claimant's judgment in any circumstance and in respect of which, issue was raised as to the claimant's competence in not having put in place a procedure. Whilst this has been raised, I do not make a determination thereon as it was not an allegation of which the claimant was called on to answer or relevant to her dismissal.

122. Were I wrong as above stated in respect of the claimant affording Ms Efthymiou access to Ms Sowter's email account, in the circumstances above referred, any failings of the claimant would have been a failure to refer the request to her line manager, which in circumstances where the claimant has at no time sought to deny that which she has done, I have considered whether such failure could amount to an act of gross misconduct being an act of gross negligence or wilful and deliberate contradiction of the contractual terms. I answer this in the negative. The claimant's actions fall palpably short of such conduct.

123. For the reasons above stated I find that the claimant has not committed an act of gross misconduct, be it by the singular acts or by the composite of her actions.

124. Giving regard to s.98(4) of the Employment Rights Act 1996, I find that the respondent has not established the facts of their belief, which had the investigation been premised on the factual matrix as existed, clear of the issues being played out at the trustee board level, no reasonable employer could have concluded that there were grounds to support the allegations against the claimant. I find that the investigation was flawed having been conducted against the prejudicial circumstance of the factions within the trustee board. For the reasons above stated, I find that the claimant has not committed an act of gross misconduct and that the summary dismissal of the claimant was unfair and further amounted to a wrongful dismissal.

125. The question of remedy is reserved to be determined at a hearing on remedy. Should however, the parties resolve the question of remedy between themselves prior to the date for the remedy hearing, they are to inform the tribunal without delay, whereon the date will be vacated.

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Employment Judge Henry

Date: ……20.02.17……..

Sent to the parties on: .....

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For the Tribunal Office