



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Miller
Respondent: The Rastrick High School Academy Trust
Heard at: Leeds **On:** 14 and 15 March 2017
Before: Employment Judge Little

Representation

Claimant: Mr P Wilson, Counsel (Direct Access)
Respondent: Mr S Mallett, Counsel (instructed by Howarths)

JUDGMENT

My Judgment is that the Claimant was fairly dismissed and accordingly the complaint of unfair dismissal fails.

REASONS

1. These reasons are given at the request of the Claimant – the request being made at the hearing.

2. The complaint

Mrs Miller's claim comprised a sole complaint – unfair dismissal.

3. The issues

It was agreed at the beginning of the hearing that the following were the relevant issues:-

3.1. Could the Respondent show a potentially fair reason to dismiss?

The Respondent sought to show the reason of conduct.

3.2. If so, was that reason actually fair having regard to the test in section 98(4) of the Employment Rights Act 1996?

In particular:

- ◆ Did the Respondent have a genuine belief in the Claimant's guilt?

- ◆ Was there a reasonable investigation and should the Respondent have interviewed all four staff who accompanied the Claimant on the Seville trip?
 - ◆ At the point when the decision to dismiss was made did the Respondent have reasonable grounds to sustain it's belief in the Claimant's guilt?
 - ◆ Had the Respondent "built a case against the Claimant" and did the head teacher have a "desired outcome" of dismissal?
 - ◆ Had the Claimant's dismissal been influenced by the costs incurred through missed flights from Spain?
 - ◆ Had the Claimant's dismissal been premeditated and was that evidenced by the Respondent seeking a replacement for the Claimant prior to the disciplinary hearing?
 - ◆ Should the Respondent have approached the matter as one of capability rather than conduct?
 - ◆ Had there been inconsistent treatment because the four members of staff accompanying the Claimant on the Seville trip had not been disciplined?
 - ◆ Had the Respondent dismissed information given by the Claimant during the disciplinary process as irrelevant and/or had that "disappeared" from notes of various meetings?
 - ◆ In the presentation of the case against the Claimant had there been "filtering of information and false representations". That was in relation to the notes taken.
 - ◆ The destruction of handwritten notes taken during disciplinary meetings.
 - ◆ The delay in the Claimant's appeal against dismissal being heard.
 - ◆ The significance of a comment in the appeal outcome decision that things might have been done differently.
 - ◆ That the sanction of dismissal was disproportionate and was a decision out with the band of reasonable decisions.
- 3.3. If the Claimant's dismissal was procedurally unfair would a fair procedure have made any difference and if so what?
- 3.4. If the Claimant was unfairly dismissed had she contributed to that dismissal and if so to what extent?

4. The evidence

The Claimant has given evidence but called no other witnesses. The Respondent's evidence was given by Ms R Bailey, assistant head teacher (investigating officer); Mr S Evans, head teacher (dismissing officer) and Mr D Brundell, chair of governors (appeal officer).

5. Documents

I have had before me an agreed bundle of documents which runs to 337 pages.

6. The facts

- 6.1. The Claimant is an experienced teacher of modern foreign languages. She began her employment at the Respondent's school on 3 September 2013 and at that stage she was appointed as second in the department for modern foreign languages. However subsequently the Claimant was promoted to be director of modern foreign languages and that is the position she held at the material time.
- 6.2. In May 2015 the Claimant led a school trip to Seville. The trip comprised 37 students who were at Key stage 3 and 4 and so aged 14 or thereabouts. The Claimant was the visit leader and she was accompanied by four members of staff. There were two teachers from her department Ms G Pavanetti and Mr J O'Callaghan. The other two staff were Julie Wilson who was a learning support assistant and Mr Ben Wilson who was a cover supervisor. The Claimant had misread or misunderstood the departure time for the return flights to the UK and those flights were therefore missed. I was told that the cost of replacement flights and additional accommodation was some £11,500. The Claimant received a written warning for this (which I have not seen). The warning was administered by Mr Evans the head teacher. By the material time that warning had expired. I find that the Respondent was unaware of any other potential disciplinary matters arising out of that trip until July of 2016 – as to which see below.
- 6.3. On 18 June 2016 the Claimant was informed that there was to be a formal lesson observation for a class she taught which would take place on 22 June. Lesson observations were a regular feature and this one would be part of the Claimant's performance management assessment. It's outcome would therefore potentially have a bearing on her pay and how that might be reviewed in the future.
- 6.4. On 20 June 2016 the Claimant sent an email to Ms Bailey. A copy ("embedded" in another document) is at page 111 in the bundle. It reads:
- "Hi Rachel,*
- Is there any chance I can be observed with a different class? The ITT student (Initial Teaching Training contract) has had this class for several weeks now and this is my first lesson back teaching them.*
- She had really struggled with her behaviour management and now I need to get them back on track.*
- Speak soon".*
- The ITT student in question was a Ms Z Maskin.
- 6.5. I have not seen any email or other documented reply to the Claimant's enquiry. The Claimant's evidence was that she heard nothing from Ms Bailey. Ms Bailey's evidence was that she verbally informed the Claimant that her request was declined. In any event nothing very much turns upon that point and the lesson observation proceeded as planned.
- 6.6. It is perhaps inaccurate to say that it went entirely as planned for the following reason. Within the class was a male pupil who we have

referred to during this hearing as 'student A' or 'A'. He was a native Spanish speaker and so unsurprisingly his language skills, at least verbal, were considerably better than those of his peers. He had been entered for the GCSE in Spanish early and it was anticipated that he would complete that course within a year. At the material time A's cousin, a female student who we have referred to as 'student C' or 'C' was a visitor to the school. Staff, including the Claimant had been informed about the cousin's visit in an email dated 15 June 2016 from Fiona Morris who was the Year 8 achievement leader. A copy of that email is at page 77 in the bundle. The email included the following:

"Please do not plan anything special for her, all I ask is that you make room for her near A and give her some paper to work on ... you do not have to mark it (her work) or differentiate it in any way ... there should be no extra work on your part!!"

- 6.7. On the morning of the lesson observation the Claimant decided that students A and C should be removed from her lesson. She approached a junior colleague to see if she could take the two students but found that that colleague was teaching a French lesson. She then went to another colleague, Jessica Bellas, who was a newly qualified teacher and asked her if she would take the two students. Miss Bellas did so. When interviewed about this matter subsequently during the course of the disciplinary process Miss Bellas reported that at the time the Claimant had "mentioned something along the lines of Matt Williams (deputy head and the Claimant's line manager) may question her about challenge". Miss Bellas went on to report that although A had brought his textbook with him he told her during the course of the lesson that he did not have any work because he had finished the textbook (page 92).
- 6.8. The lesson observation was in fact carried out by Mr Dean Watson an assistant head teacher. The Claimant did not inform him that two students had been removed from the lesson which he was about to observe. A (but not C) was shown on the seating plan for the lesson (page 86). Mr Dawson was given a copy of the Claimant's lesson plan at the beginning of the observation and a copy of that appears on page 84 to 85. Whilst referring to there being nine high achievement pupils (HAPs) in the class no specific reference was made to A or any "differentiated" work that had been prepared for him. At the end of the lesson observation (for which the Claimant was marked highly) Mr Watson did note that there were some empty seats. However the Claimant still did not inform him that A and C had been removed from the lesson.
- 6.9. After the lesson observation another of the Claimant's colleagues, Ms Pavanetti did approach Mr Watson and informed him what had happened. Mr Watson passed on that information to Mr Steve Evans the head teacher.
- 6.10. On the following day, 23 June, Mr Evans asked to see the Claimant at the beginning of the school day. The Claimant's handwritten note of this meeting – probably made after the meeting itself – is at page 90. Mr Evans began the meeting by informing the Claimant that this was not going to be a "nice chat". Mr Evans informed the Claimant that it had been brought to his attention that two students had been removed from the observation lesson on the grounds that they were potentially

disruptive students. The Claimant was informed that she was being suspended and that a disciplinary process would commence.

- 6.11. On the same day Mr Evans wrote a suspension letter and a copy is at pages 88 to 89 in the bundle. The letter confirmed that the suspension was whilst there was an investigation “into the manner in which you dealt with two potentially disruptive students”. The letter went on to state:

“This alleged action would constitute irreparable damage to our working relationship and the trust between us”.

- 6.12. The Claimant was then invited to attend an investigatory meeting which was conducted by Ms Bailey. That took place on 30 June 2016. Ms Bailey was accompanied by Colin Meredith who was the school business manager. It was Mr Meredith who took the notes which appear at page 110 to 113. The Claimant subsequently did not agree all that was in those notes and her annotations to those notes appear in the version of the notes at 114 to 117. During the course of that meeting a statement was taken from the Claimant and that appears at pages 106 to 109. Towards the beginning of the meeting Ms Bailey explained that the reference to “disruptive students” in the suspension letter was not necessarily referring to behaviour but to the additional planning and work that was required due to having the students or at least A present in the observed lesson. The Claimant had contended and indeed it was common ground that both A and C were well behaved and not disruptive in that sense. The Claimant’s explanation for removing A and C was that it had been to reduce disruption to A’s learning. The Claimant accepted that she had made the decision to move A and C on the morning of the lesson observation and she felt that A could be trusted to carry on his individual learning with Miss Bellas. The Claimant denied that A’s presence would have been disruptive to her or the other students. She reminded Ms Bailey of the instruction given by Miss Morris that no special arrangements needed to be made for C. The Claimant contended that A had adequate resources provided to him so that he could make progress during the lesson he spent with Miss Bellas’ class.

- 6.13. During the course of her investigation, Ms Bailey interviewed Miss Bellas on 24 June (pages 92 to 94). In addition to the comment referred to above, Miss Bellas went on to explain that she felt a bit annoyed that the two students had been left with her and that she felt that she was put in a position where she could not say no. She went on to say:

“On reflection I feel that my senior subject leader took advantage of her position and as a classroom teacher you are responsible for every student and this should not of (sic) happened. I feel Diannah asked me as she felt it would have a negative impact on the lesson observation due to the level of challenge”.

- 6.14. Ms Bailey also interviewed Gabriela Pavanetti (pages 96 to 98). She had been told by Miss Bellas what had happened and she explained that it had annoyed her and made her angry:

“because this incident is a really bad example and in my opinion a head of department should not even think about doing something like this”.

She thought that the Claimant might have found it too difficult to differentiate her lesson since the range of ability was so wide”

- 6.15. Mr Watson was also interviewed – on 27 June 2016 (see pages 99 to 101).
- 6.16. Ms Bailey then prepared her investigation report. It is dated 3 July 2016 and a copy appears at pages 120 to 121. Ms Bailey accepted that the reason for the removal of the two students differed between the Claimant’s statement and that of Miss Bellas and she noted that the Claimant had assumed that A had work to complete in the GCSE textbook. The Claimant had not followed up with either student A or Miss Bellas during the remainder of the day as to how the lesson had gone.
- 6.17. On 1 July 2016 Sally Mason (PA to the head teacher) sent an email to the Claimant. A copy is on page 118. It was an invitation to attend a disciplinary hearing scheduled for 11 July.
- 6.18. On 7 July 2016 Ms Pavanetti approached Ms Bailey. What she reported on this occasion is documented in the statement which Ms Bailey took from her – therefore a second statement. A copy is on pages 130 to 132. Ms Pavanetti explained that there had been an incident during the 2015 Seville visit which she now felt was additional information to the investigation. She reported to Ms Bailey that on Sunday 3 May 2015 the Claimant had organised a trip to a village outside Seville. That had involved the students and the five staff travelling by train to what in the note is described as an unknown town. On arrival at the town’s railway station Ms Pavanetti described the students (37 in number) having been put into 11 separate cars driven by adults who Ms Pavanetti described as being unknown to the Claimant and driven to the village. Ms Pavanetti said that this trip had been arranged at short notice at the instigation of the Claimant. Ms Pavanetti’s evidence was that it had not been referred to until breakfast on that morning. The Claimant had a friend and former colleague who lived in the village and Ms Pavanetti was informed that the intention was to see a flamenco show put on by local children and to have lunch. Ms Pavanetti’s evidence as given to Ms Bailey was that she had simply been told that the visit was going to take place. She said that she had been shocked when the students got into cars with people who were unknown to her and that it was really worrying. She acknowledged that the Claimant had probably thought that this was an authentic experience of the real Spain but Ms Pavanetti believed that she should have planned it properly. The trip had not therefore been on the itinerary. It is common ground that despite her subsequent expression of concern, Ms Pavanetti had not said anything about this at the time or immediately afterwards and indeed the Respondent was unaware of these events until Ms Pavanetti reported them in July 2016. It has been suggested that the subsequent significant problem with the missed return flights may have led to that state of affairs.

- 6.19. Ms Bailey also interviewed Mr O’Callaghan the other teaching member of staff on that trip. A copy of his statement is at pages 133 to 135. He confirmed that no brief had been given although he recollected that he had known prior to the Sunday morning. He had had no knowledge as to the arrangements for transport from the town to the village until they were actually on the train. At the time Mr O’Callaghan felt unsure as to putting the students in cars unsupervised. Again he did not report the matter at the time.
- 6.20. Ms Bailey went on to interview three students who had been on the trip. They confirmed that they had been transported in what they described as a stranger’s car. One had had no accompanying adult; another had an accompanying teacher (these statements are at pages 137 to 141). The car journey had been approximately 20 minutes.
- 6.21. The Claimant was invited to a further investigation meeting to discuss the Seville matter and so the disciplinary hearing which would have taken place on 11 July was cancelled. The second investigation, meeting again conducted by Ms Bailey, took place on 8 July 2016 and the notes begin at page 142. Again subsequently the Claimant would not agree those notes and her annotated version starts at page 144A. A further statement was taken from the Claimant during the course of that meeting and a copy of that is at pages 145 to 148. Whilst it was the Seville issue that had prompted the further investigation the Claimant was also questioned at that meeting about her supervision and support of the ITT student Ms Maskin. It seems that one of the prompts for that had been the comments the Claimant had made in her 20 June request to Ms Bailey (page 111) which had lead the Respondent to fear that the Claimant had not given enough help to Ms Maskin in relation to behaviour management of that class. In the event, although this theme was added as a disciplinary matter it was not upheld by Mr Evans at the disciplinary hearing. The Claimant had not been put on notice that the main topic for this meeting were issues about the transport of the children to the village in Spain. Initially, for that reason, the Claimant was reluctant to answer questions but she relented and gave what information she could. She accepted that this visit had not been on the original itinerary and she had asked accompanying staff if they were ok about it and they said they were. When asked whether the staff members had been briefed about safeguards when students would be travelling in cars without a member of staff the Claimant could not recall who had travelled with whom. However she explained that the drivers of the car were family members of the Claimant’s Spanish friend or otherwise people known to the friend. When asked whether she, the Claimant, knew the drivers personally she accepted that she did not (see page 143) – although during the course of this hearing the Claimant said that having stayed with her friend in the village previously she had at least met most of the 11 drivers. She did not think that she had simply “dropped” the trip on the other members of staff. She said that she was a very experienced trip leader and that she had organised four exchange trips that year. At this point Ms Bailey pointed out to the Claimant that the Seville trip was not an exchange trip.
- 6.22. As was explained to me at the hearing different responsibilities and rules apply as between exchange trips and trips organised by the

school itself. In the former case the parent of the visiting child agrees that the parents of the receiving child will be responsible and so in loco parentis. Because of this on an exchange trip it would not be necessary for the school to carry out any formal checks as to the character of the receiving parents or the safety of the accommodation or transport that might be used during the exchange visit. However, the Respondent says that if the trip was a school arranged trip then it would be the school or more particularly the members of staff who accompanied the trip who would stand in the position of loco parentis. For that reason it was necessary for the parents of the students to be aware of what was going to be done during the course of the trip or at least the significant events and the arrangements, in order that informed consent could be given.

- 6.23. During this interview the Claimant was also asked some further questions about the lesson observation matter.
- 6.24. Ms Bailey then prepared a further investigation report. That document dated 11 July 2016 is at pages 155 to 157 in the bundle. In relation to the lesson observation matter Ms Bailey's view was that the Claimant had failed to meet various of the Teacher's Standards as required by the Department for Education (see page 281). Those were setting high expectations which inspire, motivate and challenge pupils; demonstrate good subject and curriculum knowledge; adapt teaching to respond to the strengths and needs of all pupils and make accurate and productive use of assessment. The report also covered the concerns about the supervision of Ms Maskin. The Seville issue was dealt with under the heading of failure to adhere to safe working practices paragraphs 7.19 and 7.20. That is a document issued by the Respondent. Its full title is Guidance on Safe Working Practices and it is in the bundle at pages 314 to 322. The paragraphs which Ms Bailey was relying on are at page 320 under the heading of transporting students. The guidance indicated that in certain situations staff or volunteers might agree to transport students but a designated member of staff would be appointed to plan and provide oversight of all transporting arrangements and respond to any difficulties that might arise. The guidance also includes the following:

"Wherever possible and practicable it is advisable that transport is undertaken other than in private vehicles, with at least one adult additional to the driver acting as an escort".

There was also a requirement to ensure that the vehicle being used met all legal requirements and were properly insured. Adults should be alone with the child for the minimum time possible. The route of the journey should be reported. Paragraph 7.20 is headed Educational Visits and After School Activities and indicates that there should always be another adult present for those events unless otherwise agreed with senior staff and that a risk assessment had to be undertaken.

In her report Ms Bailey concluded that the Claimant had failed to provide accompanying staff with any detailed information regarding the itinerary and so they had not been fully briefed. There had been a lack of planning and preparation and there had been no record on "Evolve" (Evolve is a national online system for the preparation and planning of educational trips). There had been no risk assessment of the journey

on the train or in respect of students travelling in what were described as stranger's cars for about 20 minutes. Ms Bailey believed that the drivers of those cars were unknown to the Claimant, the children and the other staff. It had not been established whether the cars were roadworthy nor had the character and safety of the drivers. Ms Bailey said that she had asked other members of the staff on that trip whether they had felt those arrangements were unusual and they said to her that they had but that had been eclipsed later in the trip when they missed the flight home.

- 6.25. On 14 July 2016 Mr Evans wrote to the Claimant inviting her to a disciplinary hearing. A copy of that letter is at page 164 to 165 in the bundle. The allegations were those referred to above. The Claimant was informed that the purpose of the hearing was to consider those allegations as gross misconduct. The disciplinary hearing was scheduled for 18 July 2016. In the event however it took place on 19 July.
- 6.26. The disciplinary hearing minutes are at pages 188 to 200. On this occasion the notes were taken by a Fiona Black-Jones who had been supplied to the Respondent by Hayes for this purpose. Again the Claimant would find those minutes to be allegedly inaccurate and so there is a version at pages 201 to 213 with the Claimant's annotations. The hearing was before Mr Evans the head teacher. The Claimant was accompanied by Mr Mark Stephenson, a union representative. During the course of the hearing evidence was received from Jessica Dawson a language teacher. That was about an allegation that the Claimant had allegedly told her that it would be fine to "just make up" some marks. This was a matter which in due course was not upheld by Mr Evans. The other witnesses were Ms Pavanetti, Miss Bellas and Mr Williams. In addition as Mr Evans himself had had discussions with the Claimant at the suspension meeting he is listed as a witness although he did not actually give evidence in the formal sense during the course of the disciplinary hearing.
- 6.27. The Claimant was given the opportunity to cross-examine the witnesses. She asked Ms Pavanetti why she had not raised this aspect of the Seville trip until so late. Ms Pavanetti replied that it had been overtaken by the flights issue. There is then questioning, the answers to which could, on one interpretation, suggest that the Respondent had approached Ms Pavanetti which had resulted in disclosure of the Seville matter but alternatively could be interpreted as Ms Pavanetti saying that having disclosed that matter voluntarily herself she was then asked questions about it during the course of the further investigation. Although I have not heard from Ms Pavanetti, from the documents that I have seen the latter explanation seems more likely.
- 6.28. The Claimant was then asked questions by Mr Evans. She agreed that the work given to student A had not been stimulating or met the required standards. Mr Evans pointed out that A's book had not been marked since April. The Claimant was asked why, as a native speaker, differentiated work had not been set and the Claimant responded that nothing further had been in place than the text book work. As to the move of student A Mr Evans suggested to the Claimant that a reasonable person might think that this would have had a positive

impact on the Claimant's lesson planning and delivery of the lesson. Apparently answering a slightly different question the Claimant said that the students A and C had not misbehaved during the lesson. She thought that the observer might have been distracted because A was a native speaker. The Claimant agreed that her decision to move A had not fully considered the impact that would have on others but the decision had not been conscious and a negative impact was not taken into consideration. The Claimant said that there was no way that she would have carried out those actions if she had realised the consequences. She had not been deliberately manipulative. When asked whether she had met her job description and the core purpose of teaching the Claimant responded that she was "not modelling what my behaviour could be. There is a question there".

- 6.29. Turning to the Seville issue Mr Evans asked whether a reasonable person could judge that a child sent in a private car would be a failure of judgment. The Claimant agreed but explained that her friend Delores had confirmed the names of the drivers to be used and that there were only two unfamiliar names on the list. They could not be described as unknown people because they were members of or known to her friend's family. The Claimant stressed that Delores was an ex colleague. The Claimant accepted that there had been no check as to the roadworthiness and insurance for the cars and no risk assessment as to the nature route or time of the journey with which the Claimant agreed. Her evidence to me was that she had made a "dynamic risk assessment". Mr Evans pointed out that male drivers had been driving female children and was the Claimant aware of the safer working practices around that. The Claimant replied that she wasn't. The Claimant confirmed that she was not aware of the legal requirements in Spain with regard to seatbelts or a child's height if travelling in the front seat. The Claimant agreed that no parental consent had been obtained. The Claimant went on to explain that the cars ran in convoy and so it was understood she said that if one vehicle stopped they all did. However she agreed there was nothing formal in place. Mr Evans then posed the question that if his daughter had been in the car with an unknown adult going to an unknown location and the child could not communicate with those in charge of their care would a reasonable person assume that there had been a lapse in professional judgment. The Claimant replied 'yes' but went on to say that drivers licence details could be gathered. She went on to draw the analogy with arrangements for exchange visits. However Mr Evans explained that such trips were run differently in terms of partner schools who were responsible for vetting adults involved. The Claimant said that she had placed her trust in her friend Delores. The meeting which had taken a little over two hours concluded on the basis that Mr Evans would take time to consider his decision and he would then telephone the Claimant to inform her of that decision and a letter would follow.
- 6.30. On 20 July 2016 Mr Evans duly telephoned the Claimant to inform her that his decision was that gross misconduct had been established and that the Claimant was therefore to be dismissed without notice. Mr Evans explained to me that he felt that it was better to communicate this directly albeit via a telephone call and then confirm the decision in writing.

- 6.31. That written confirmation was set out in Mr Evans' letter of 21 July 2016 a copy of which appears at pages 224 to 227. With regard to the removal of two students from the observed lesson Mr Evans stated that such action should only have been taken if it had been a case of poor behaviour by the students. He described what had happened on 22 June as having been done for "purely selfish purposes" and there was no mitigation for that. The Claimant had let down her colleagues and as director of modern foreign languages had fallen completely short of her obligations. He described the decision as being "unconsidered" and Mr Evans explained to me that he meant lacking in judgment. He described the evidence in respect of that allegation as "resounding".
- 6.32. Mr Evans had not upheld the allegation of not providing the student teacher with appropriate supervision. That was because there was insufficient evidence.
- 6.33. Turning to the Seville matter Mr Evans pointed out that the Claimant did not know who all the drivers were and had no professional experience of them. There was not a Rastrick High School adult in each vehicle and the Claimant had made "an incredulous decision" to travel in a car with her friend and all the Rastrick High School adults thereby leaving all the students unsupervised and in some instances leaving female students alone with a male driver. There had been no checks as to roadworthiness and insurance for the cars or of the route to be taken. No parental consent had been obtained. Mr Evans had taken into account what the Claimant had said about the trust she placed in her friend who knew all the drivers and that the cars had driven in convoy. However he did not consider that those justified the Claimant's actions. He noted:

"To put it bluntly, you placed the lives and welfare of 37 students in your care at risk and I am shocked that you fail to see this. Not only did you endanger the students in your care but you also placed the school's reputation and its ability to operate at risk too. If anything had happened to those students then there would have been cause to strike certain teachers off and there is a chance that the school may have been closed as a result. At the very least the reputational damage to the school would have been devastating".

Mr Evans said that that was completely unacceptable and that the Claimant's actions constituted gross professional misconduct.

Whilst saying that he had not taken it into account when considering the matters currently under consideration, he noted that on the same trip the Claimant had failed to ensure that the students caught their return flight home and that was due to her negligence and carelessness. In those circumstances his decision was to dismiss summarily.

- 6.34. The Claimant subsequently lodged an appeal against that decision and the grounds are set out in her letter of 26 July 2016 which is at pages 228 to 229. The appeal was to Mr Brundell from whom I have heard, the chair of governors. The Claimant said that she had serious concerns over note taking throughout the three disciplinary meetings. She complained about being suspended and her treatment had been worse than when she was disciplined for the missed flights in 2015. There had been no investigation of the other four colleagues who had

been on the Seville trip. She contended that Mr Evans had sought to undermine her efforts and contributions during the three years of her employment.

- 6.35. The appeal hearing took place on 15 September 2016 before Mr Brundell accompanied by Sally Mason, HR support. The Claimant was accompanied by a Steve Eggleton. The minutes of that hearing are at pages 239 to 249. Interspersed in those notes are observations or conclusions which Mr Brundell arrived at subsequently when considering the appeal. So it is that on page 243 there is a reference to an appeal point being partially upheld in the context of how the suspension had been handled. At page 247 a further point was partially upheld in that at some point it was acknowledged the Claimant had apologised. He also acknowledged that it had not been appropriate to describe the drivers as random people in the sense that they were not wholly unknown to the Claimant and were apparently known to her friend.
- 6.36. Despite upholding those limited points Mr Brundell's ultimate decision was that the appeal overall failed. He communicated that to the Claimant in his letter of 29 September 2016 a copy of which appears at pages 251 to 254 in the bundle.

7. The parties' submissions

7.1. The Claimant's submissions

Mr Wilson said that the case was really about the reasonable band and whether the decision was fair having regard to the level of training the Claimant received. I pointed out to Mr Wilson that alleged shortcomings in the Claimant's training had never been raised in the claim form or in the Claimant's extensive witness statement – although it was acknowledged that she had alluded to the issue when answering questions in cross-examination. Mr Wilson accepted that observation.

Only two of the other four staff on the Seville trip had been interviewed. As between the two who had been interviewed there was a dispute as to the length of notice they had been given of the village trip.

Mr Wilson indicated that the Claimant was no longer contending that there had been inconsistent treatment but it was relevant to take into account that if the Claimant's alleged failings had been as serious as the Respondent now contended it was odd that none of the four members of staff had raised the issue at the time or until significantly later in Ms Pavanetti's case.

Mr Wilson did not intend to say anything more about the filtering of information contention but reminded me of the evidence I had heard. He accepted that the key facts before the disciplinary officer had been largely agreed.

On the question as to whether the Claimant's dismissal had been pre-meditated this was something which an employer would never admit. The issue had to be approached by inference drawing. Mr Wilson suggested that initially the Respondent had made the false assumption that A had been removed because his behaviour was disruptive. I was also reminded that Mr Evans had accepted that at the beginning of the academic year he had criticised the Claimant because results had been

20% down and told her that she was under scrutiny and that there might later in the year be a conversation with her union present.

The first investigation report had trespassed into other areas. Mr Wilson contended that the Respondent had trawled for further evidence and that it was in those circumstances that the Seville matter had come to light some 14 or 15 months after the event. Although Mr Evans' evidence before me had been that the Claimant had been dishonest or deceitful in relation to the lesson observation dishonesty had not actually been mentioned in the invitation to the disciplinary hearing. Mr Wilson contended that the matter had really been treated as one of capability. He suggested that the Respondent's intention was to dismiss because of the missed flight issue and/or because of performance issues generally.

Returning to the lesson observation issue, transferring the two students had not obviously made matters easier for the Claimant. The level of discipline adopted was out of proportion to the conduct on 22 June. On the Seville matter Mr Wilson accepted that the Claimant now acknowledged that there was an element of risk but she had been judged unfairly. It was not simply a question of the children being driven off by a stranger. There was rational judgment exercised. There was a difference between a lapse of judgment and wilful disregard. The Claimant had not just been using the village trip as an opportunity to catch up with her friend.

7.2. Respondent's submissions

Mr Mallett reminded me that in terms of the fairness of the procedure, the Claimant now accepted that Ms Bailey's investigation and the appeal process were fair. In reality the alleged procedural failings boiled down to not asking questions of the other two staff on the Seville trip and the Claimant's concerns about the various notes taken by various note takers.

There had been no pre-meditation. Whilst the Claimant contended that the real reason for her dismissal might have been concerns about her performance generally, the Claimant had set out at some length in her witness statement how well she believed she was doing.

In relation to the lesson observation issue the Claimant had given a wholly inadequate explanation. Her actions had been in the hope that she would get a better assessment if A and C were not in the lesson. Whilst the word dishonesty may not have been used that was clearly the implication from the allegations made.

In relation to the Seville issue that came to light via Ms Pavanetti. It was clear that if the school had known about that aspect of the Seville trip before action would have been taken at the time. During the disciplinary process the Claimant had made various admissions regarding the safeguarding shortcomings of the Seville village trip. It was not appropriate to compare the situation to an exchange visit and the Claimant knew that. In respect of both the lesson observation and the Seville trip there had been gross misconduct. The Claimant was a role model and dismissal had been a response within the reasonable range.

8. My conclusions

- 8.1. Has the Respondent shown a potentially fair reason to dismiss? The potentially fair reasons are set out in the Employment Rights Act 1996 at section 98(1) and (2). Those reasons include one which is related to the conduct of the employee. That is the potentially fair reason which this employer seeks to show and I find that they have.
- 8.2. Was that reason actually fair? The starting point for this consideration will always be the Employment Rights Act 1996 section 98(4) which sets out the statutory test of fairness. In a case where the reason for dismissal is conduct the guidance given in the leading case of **British Home Stores v Burchell** applies. In short that means that the employer must have a genuine belief that the misconduct has occurred; it must carry out a reasonable investigation and by the time it makes the decision to dismiss it must have sufficient material before it to sustain that belief. The question of fairness is often considered on the approach of whether the particular employer's decision to dismiss can be said to come within a reasonable band of decisions (see **British Leyland v Swift**).

8.2.1. Was the real reason for dismissal capability?

Although I have found that the Respondent has shown the potentially fair reason of conduct, when considering actual fairness it is crucial to determine that the employer dismissed for the stated reason as opposed to the stated reason being a sham. On the evidence before me I am satisfied that the Respondent had in mind that the Claimant was an experienced teacher and indeed was head of the Department. Moreover she had considerable experience in leading not just exchange trips but also school trips abroad. I find that the Respondent approached the matter on the basis that the Claimant knew what she should have done in respect of both the lesson observation and the village trip but for reasons of her own chose to diverge from the required standards.

8.2.2. The investigation

The test here is again to apply the standard of reasonableness. Account must be taken of the size and resources of the employer and clearly this employer was sizeable and had concomitant resources. Usually the level of investigation will depend upon the extent of the disputed facts. It is significant in this case that there was no substantial dispute about the essential matters. It was agreed that the Claimant had removed A and C from the lesson. It was agreed that Mr Watson the observer had been unaware of this and would not have become aware of it had not a third party told him after the event. There was also little evidence that A had been given adequate or sufficient challenging/differentiating work to undertake. So too with the Spanish village trip. It was agreed that it had been a relatively spur of the moment decision which effectively had been imposed upon the other members of staff and the students without the parents or the school having any idea that it would occur. Whilst the drivers may not have been complete strangers to the Claimant she had to rely on the good faith and judgment of her friend. The friend had no connection to the Respondent

and was not under any sort of control. None of the obvious precautionary steps or enquiries had been undertaken before the cars ferried the students to and from the village.

Whilst it might have been better if Ms Bailey had interviewed all four of the staff who attended with the Claimant on the Seville trip, whatever they had said would not have had any crucial bearing upon the agreed facts. It must also be accepted that no clear finding was made as to whether the staff were given a day or so notice of the village trip or were only told at breakfast time. Again that was of no great moment to the matter determined by the Respondent.

8.2.3. Ms Pavanetti

It was Ms Pavanetti who both informed Mr Watson that A and C had not been in the lesson he observed and also, some days later disclosed the circumstances surrounding the Spanish village trip. However the Claimant has not suggested that there was any animus before that between her and Ms Pavanetti. Whilst it is curious that Ms Pavanetti did not mention the Seville matter when she was being interviewed initially about the lesson observation matter it is fair to say that what she did disclose about the Seville matter was not in dispute. Again the Claimant is not contending that Ms Pavanetti had some sort of vendetta against her. Whilst the Claimant is contending that the Respondent was trawling for evidence to use against her I am satisfied on the balance of probability that Ms Pavanetti volunteered the information. I should add that it does seem plausible that none of the four staff members would have raised the issue of the Seville trip on their return to the UK bearing in mind what appeared to be the rather traumatic circumstances surrounding the delayed return after flights had been missed.

8.2.4. Was the dismissal pre-meditated?

The missed flight issue was referred to briefly at the disciplinary hearing and in the dismissal letter. However it must be borne in mind that Mr Evans had made the decision with regard to the disciplinary process concerning the missed flights that the appropriate sanction was a written warning. Whilst I have not seen that warning or any documentation about the process that led to it I consider that a reasonable employer could well have at least considered dismissal as an appropriate sanction in that case. There had been inconvenience and a substantial and unnecessary cost incurred. There may of course have been mitigating circumstances and, fairly Mr Evans says that he was never contemplating dismissal for that offence. However the Claimant's case is premised on the theory that having not dismissed her for that matter Mr Evans then had regrets that he had not done so and so chose some 15 months later to use other matters as a sham to revisit the earlier offence. I consider that argument to be wholly implausible. Not the least in circumstances where I consider that the lesson observation and Seville village trip were grounds on which any reasonable

employer could have concluded that there was gross misconduct with a sanction of dismissal.

Whilst being cross-examined Mr Evans candidly accepted that he had reservations about the Claimant's performance particularly with regard to the exam results for 2015. He accepted that he had the conversation with the Claimant at the beginning of the 2016 school year. These frank admissions and what was said at the time lead to the conclusion that Mr Evans did not intend to shy away from a performance or capability procedure if he thought one was necessary and that diminishes the likelihood that he would have used such matters as an unexpressed reason for the Claimant's dismissal.

The Claimant has contended that the email of 15 July which Miss Bellas sent to a Carol Rackstraw (page 169) suggests that prior to the Claimant's dismissal arrangements were already being made for her to be replaced. Although I have not heard from Miss Bellas or for that matter Ms Rackstraw I am satisfied on the evidence that the Respondents have given me about this that whilst an additional teacher was being sought that was simply a classroom teacher for French up to Key stage 4 and Spanish up to Key stage 3. Clearly that was a very different role from the Claimant's as director or head of the entire department.

8.2.5. The alleged inaccuracies in the notes of the various disciplinary meetings

In her witness statement and claim form the Claimant has made sweeping allegations that information has been filtered and notes are inaccurate or original copies lost. However the Claimant has given only one specific example which is the accuracy of recording the 11 drivers as being random people from the village as opposed to being either relatives or acquaintances of her friend. The Claimant may also suggest that it was not recorded that she the Claimant had met nine of the 11 drivers on an earlier visit to the village. Even if that criticism is sustained it does very little to reduce the safeguarding failures which this Respondent believed had occurred. I do not consider that that goes to the fairness of the decision. It must also be borne in mind that the Claimant alleges that Mr Meredith inaccurately noted what was said at the first investigation meeting on 30 June 2016, that Sally Mason was guilty of the same carelessness or inaccuracy at the second investigation meeting on 8 July 2016 (possibly the Claimant also alleges because she was biased in favour of the head teacher who she was the personal assistant to) and that the external person brought in to minute the disciplinary hearing itself (Miss Black-Jones) also failed to take accurate notes. That three apparently experienced note takers each failed to take accurate notes of three separate meetings seems implausible. In the circumstances I am driven to accept the suggestion by Mr Mallett that the Claimant's annotations to those three sets of minutes or notes represent not corrections but rather what, on

reflection, the Claimant wishes she had said as opposed to what she actually did say at the time.

8.2.6. Inconsistent treatment

As noted, Mr Wilson counsel for the Claimant indicated in closing submissions that it was no longer being contended that the sanction for the Claimant was unfair because it was inconsistent with the treatment of the other four staff. I should add that although there was no formal discipline Mr Evans has explained that guidance and additional training was given to those other four staff members. Instead Mr Wilson now contends that the failure of the four members of staff to raise any issues at the time or in fact until a significant period after the event suggests that the Respondent's reaction when it did know was exaggerated. The statements from Ms Pavanetti and Mr O'Callaghan which were taken in July 2016 by the Respondent do however show that those two individuals were concerned even though they did not express that at the time. Again they cite the missed flights as overshadowing other concerns about that trip. That relatively inexperienced teachers in those circumstances did not react in the same way as Ms Bailey and Mr Evans does not support the view that the latter's response was an exaggeration. In any event I find that the Respondent was entitled to conclude that it was the Claimant who had the ultimate responsibility for that trip and that it would not have been particularly easy for two relatively junior members of staff to raise their concerns at the time. In fact that feeds into the Respondent's overall concern about the Claimant as a role model to the department.

8.2.7. Delayed appeal allegation

It seems that the Claimant is now not saying that the appeal process was unfair. In so far as there was a delay in the appeal being heard the Respondent has offered the reasonable explanation that initially the Claimant was not available and then the six week summer holiday intervened. As I have noted, in so far as aspects of the appeal were partially upheld that was merely in relation to the way in which the suspension was communicated and whether there was a failure to note that the Claimant had at some point given an apology. Whilst the Claimant complains about the unpleasantness of being suspended and then having to return to school for the disciplinary meetings, suspension under a disciplinary procedure is never going to be a pleasant experience but it seems that a reasonable employer was entitled to suspend so as to avoid the Claimant coming into contact with potential witnesses. It was put to the Claimant in cross-examination that she would not have needed to wear a visitors badge when she returned for various meetings had she put on her staff badge which she agreed she had with her on the material occasions.

8.2.8. Lack of training

As noted above this had never been part of the Claimant's case until she referred to it in replies under cross-examination. Of more significance is that it was not a matter raised by the Claimant at the time of the disciplinary process itself. Although at the time the Claimant did contend that the Spanish village trip should be assessed on the basis of the standards that would apply had it been an exchange visit she did not say then that that was because of her faulty understanding of the difference between those two trips. I find that a reasonable employer was entitled to judge the Claimant on the basis of her extensive teaching experience including experience of leading trips and by reason of the fact that she occupied the position of director of the department.

8.2.9. The reasonable band

Mr Wilson asserted that this was primarily what the case was about. The question is therefore whether the decision to dismiss was one which a reasonable comprehensive school could come to in the context of the relatively undisputed factual situation presented to it. The reasonable band approach presupposes that one reasonable employer might not reasonably dismiss but another would. If that is the case then the test is satisfied. Applying that test to the case before me I consider that the decision to dismiss came well within the reasonable band. Accordingly I find that the complaint is not made out and fails.

Employment Judge Little

Date 28th March 2017

Sent on: 28 March 2017