EMPLOYMENT TRIBUNALS

Claimant: **Mr Alistair McCarty**

Respondent: **Castle Donington College**

Heard at: **Nottingham**

On: **3, 4, 5 and 6 July 2017**

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

Representation

Claimant: **Ms Rosa Dickinson of Counsel**
Respondent: **Mr Alistair Hodge of Counsel**

JUDGMENT

The Judgment of the Tribunal is that:-

1. The Claimant was unfairly dismissed.

2. The Claimant is dismissed in breach of contract.

3. The Remedy Hearing shall take place on Friday 11 August 2017 at 10:00 am at the Nottingham Hearing Centre.

REASONS

1. By a claim form presented to the Tribunal on 30 March 2016 Mr Alistair McCarty brings complaints of unfair dismissal and breach of contract. Mr McCarty was employed by the Respondent as a Maths Teacher from 26 August 2008 to 13 November 2015, the latter date being the 'effective date of termination'.

2. The facts of the case are relatively straightforward and unless otherwise indicated are not in dispute.

3. The Respondent is an Academy in North Leicestershire providing education to children aged between 10 and 14. Mr McCarty was promoted to Head of Maths in 2012.

4. On 7 June 2013, allegations were made against the Claimant by a female pupil of alleged improper conduct by Mr McCarty. These were reported to the Local Authority Designated officer for Safeguarding ("LADO") and also referred to an Allegations Manager in accordance with the Respondent's Safeguarding Policy and the Department of Education statutory guidance. LADO subsequently carried out an investigation into the allegations which concluded on 23 August 2013. At the end of the investigation there was no disciplinary action taken against the Claimant.

5. Although parental complaints were subsequently received in relation to the Claimant's behaviour in March and April 2014, they were not in relation to safeguarding matters or similar to those issues that arose in June 2013. By then Mr Ward had left the College and his replacement was Mr Mark Mitchley who was appointed on 6 January 2014. Mr Mitchley, who gave evidence at this hearing, has also now left the Respondent College to take up a position at another College.

6. The events of this case centre upon allegations raised by 4 pupils on 9 March 2015. The day following the allegations the parents of the child about whom the concerns had been raised came to the College and met Mr Mitchley. Accompanying them was one of the pupils who alleged that the Claimant had held her shoulder and that on previous occasions Mr McCarty had touched her hair which she found uncomfortable. Following the meeting Mr Mitchley interviewed another pupil who had been present in the same lesson when the incident was said to have occurred and that pupil also alleged that the Claimant had previously touched her hair in a similar way. Following his initial enquiries Mr Mitchley referred the matter to the LADO officer, Mr Mark Goddard. Following the discussion he made the decision to suspend the Claimant.

7. Mr Mitchley appointed Mrs Johnson who had been the School's lead on Safeguarding to undertake the disciplinary investigation. However he then discovered that Mrs Johnson was working in the same department as the Claimant and decided that it would not be appropriate for her to undertake the investigation. He then appointed Mr David McKnight, a Governor, in her place. Following complaints by the Claimant's trade union representative as to the manner in which Mr McKnight was undertaking the investigation Mr McKnight was removed from the role.

8. Mr Mitchley then appointed Mrs Mary Robson, who does not work at the College at all but is employed by Leicestershire County Council as an HR Team Leader, to undertake the investigation. Mrs Robson began the investigation on 2 June 2015. There was an ongoing Police investigation. As a consequence the internal investigation was put on hold. On 25 August 2015 the Crown Prosecution Service confirmed that no criminal proceedings would be issued against the Claimant in respect of the allegations. Mrs Robson's investigation was ultimately concluded in October 2015. In her report Mrs Robson recommended that the allegations against the Claimant should proceed to a disciplinary hearing

9. The following passages appear in the investigation report of Mrs Robson:-

"He [the Claimant] has repeatedly been told not to touch pupils unnecessarily and has failed to follow the instruction.

Only female pupils have complained about his behaviour yet AM [the Claimant] states there is no sexual motivation for his actions.

The outcome of the Allegations Strategy meetings in 2013 was a conclusion of "unsubstantiated". There is a complication uncovered as part of the investigation insofar as the feedback from the 2013 Allegations Strategy communicated by Brian Ward, the Acting Head Teacher at the time. He provided AM with a letter stating that the allegation was "unfounded". This was inaccurate and the outcome was actually "unsubstantiated".

In both the investigatory meetings, AM has admitted to touching pupils but denied that the touching was inappropriate."

10. Mr McCarty was called to a disciplinary hearing to take place on 6 November 2015. The allegations against him were that:-

"1. On numerous occasions you demonstrated inappropriate behaviour when you have touched and/or sniffed pupils' hair.

2. On 9 March 2015, you have demonstrated inappropriate behaviour when you touched pupils' back and/or bottom.

3. By your actions above, either jointly or severally, you have either failed to follow management instructions/training regarding your behaviour towards pupils.

4. By your actions above, either jointly or severally, you have failed to act in accordance with Part 2 of Teacher's standards.

5. By your actions above, either jointly or severally, you have breached the implied term of mutual trust and confidence between an employer and employee.

11. The disciplinary hearing on 6 November was conducted by a panel chaired by Dr Robert Mitchell, a Governor. The Panel reconvened on 13 November 2015 when the matter was considered at length.

12. By a letter of 18 November 2015 the Panel set out the five allegations and their findings on each as follows:-

"1. On numerous occasions you have demonstrated inappropriate behaviour when you touched and/or sniffed pupils' hair.

Founded: The Panel concluded there was a demonstrated pattern of concerns going back to 2010, again in 2013 and 2014 and more recently the incident on 9 March 2015. In addition the employee admitted he had touched pupils' hair on more than one occasion and this was recognised as inappropriate behaviour by the pupils concerned. The Panel therefore concluded the employee's actions were a clear contravention of Section 15 of the Guidance for Safer Working Practice for Adults.

2. On March 2015 you have demonstrated inappropriate behaviour when you touched a pupil's back and/or bottom.

Unfounded: The Panel concluded that despite the various opinions of the credibility of child [ ] there were no other independent witnesses to the alleged incident. Therefore on the balance of probabilities this could not be corroborated either way.

3. By your actions above, either jointly or severally, you have failed to follow management instructions/training regarding your behaviour towards pupils.

Founded: As a result of the findings in allegation 1 above and in considering the number of management discussions and training attended the panel unanimously agreed there was a clear failure to follow management instruction. There was also evidence of not putting into practice learning gained from any Safeguarding training received. Therefore on the balance of probabilities the allegation was founded.

4. By your actions above, either jointly or severally, you have failed to act in accordance with Part 2 of Teacher Standards.

Founded: The Panel concluded that your actions were not in accordance with the expectations of a Teacher, in particular one with your experience and seniority. Your actions were contrary to Part 2 of the Teacher standards which refer to expected personal and professional conduct. There was a failure to treat pupils with dignity and observe proper boundaries and failure to have regard to the need to safeguard pupil's wellbeing, in accordance with statutory provisions. In addition, you did not demonstrate proper and professional regard to the ethos, policies and practices of the school in which you teach and you have not demonstrated an understanding of nor acted within the statutory frameworks. Therefore on the balance of probabilities the allegation is founded.

5. By your actions above, either jointly or severally, you have breached the implied term of mutual trust and confidence between an employer and employee. Given all the above the Panel concluded that this allegation was founded.

On the basis of the above outcomes it was unanimously agreed that the allegations 1, 3, 4 and 5 constitute gross misconduct. As a result of these findings the panel unanimously agreed that their decision on the appropriate sanction is that Mr McCarty is dismissed with immediate effect."

13. The Claimant appealed against the decision to dismiss. Following an appeal hearing held on 1 February 2016 and chaired by Mr P Norwell, the appeal was dismissed by a letter of 5 February 2016. Ms Catherine Henry, one of the Panel members to the appeal gave evidence at this hearing.

THE LAW

14. Sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA 1996") state:-

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

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

(2) A reason falls within this subsection if it:-

(b) relates to the conduct of the employee,

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

15. In applying section 98(4) ERA 1996, I have borne in mind the guidance in **HSBC Bank plc v Madden** [2000] ICR 1283 (originally set out in **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439) namely that:-

"(1) The starting point should always be the words of section [98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute it's decision as to what was the right course to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

(5) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair."

16. It is now well-established that the above so-called 'band of reasonable responses test' applies equally to an investigation as it does to the decision to dismiss – see **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23.

17. In **British Home Stores v Burchell** [1980] ICR 383, the Court of Appeal set out the criteria to be applied by tribunals in cases of dismissal by reason of misconduct. Firstly, the Tribunal should decide whether the employer held an honest and genuine belief that the employee was guilty of the misconduct in question. Secondly, it should decide whether the employer had reasonable grounds on which to sustain that belief. Thirdly, at the stage at which the employer formed its beliefs whether it had carried out as much as investigation of the matter as was reasonable in all of the circumstances. Although **Burchell** was decided before changes were made as to the burden of proof, the three-step process is still helpful in determining cases involving dismissal for misconduct.

18. In **A v B** [2003] IRLR 405, the Employment Appeals Tribunal (per Elias J as he then was) in its judgment, at paragraphs 60 and 61, said:-

" Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

19. In the Court of Appeal case of **Roldan v Salford Royal NHS Trust** [2010] EWCA Civ 522, Elias LJ (at paragraph 13) said**:-**

" ……it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite."

CONCLUSIONS

20. At the commencement of this hearing I made it clear that the purpose of this hearing was not to reconvene the disciplinary hearing itself. I was at pains to do so because the Respondent had intended to call Mr Simon Genders, a Safeguarding Development Officer with the Respondent and Mr Mark Goddard. I drew the attention of the parties the passage from **Orr v Milton Keynes** [2011] EWCA Civ 62 where Moore-Bick LJ (at paragraph 44) said:

"The approach taken in these cases to the determination of the fairness of the dismissal concentrates on the conduct and state of mind of the employer immediately before and at the time of the dismissal. In substance it requires one to ask whether, when he took the decision to dismiss the employee, the employer had taken all reasonable steps to inform himself of the facts, whether having done so he formed the view on reasonable grounds that the employee had

behaved in a way that justified his dismissal and, finally, whether his conclusion that the conduct justified dismissal was itself reasonable."

21. In coming to my decision therefore I have therefore been careful to focus on the views of the dismissing officer (or in this case that of the panel insofar as those views are known) and not to substitute my views for that of the employer. Instead I have considered whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer. In particular I have considered the three limbs of the **Burchell** test all of which are in issue in this case.

The investigation

22. There is no doubt that there were early delays in the investigation which could have been avoided. The appointment of Mrs Johnson was clearly inappropriate and whilst that was recognised early on it is surprising that she should ever been appointed in the first place. The appointment of Mr McKnight was also unfortunate though less foreseeable. All of those contributed to the overall delays in the process. The longer the delay the more difficult it is to restore an employee back to work if there is a genuine desire to do so.

23. The ultimate investigation report of Mrs Robson is very brief having regard to the length of time the investigation took, the amount of material that was before the investigating officer and the detailed witness evidence. Mr Hodge submits that different investigators will take different approaches to their role. Some may include a great deal of information within the body of their report with few or no appendices. Others may set out a relatively brief report with lots of appendices. In this case it was the latter. He submits that the investigation report needs to be read cross-referenced to the appendices. Whilst I accept that as a matter of principle it is a question of style, what is essential is the adequacy and reasonableness of the investigation. I am not satisfied that the investigation was adequate in all of the circumstances having regard to the guidance set out in **Roldan**.

24. I accept the submission of Ms Dickinson on behalf of the Claimant that the investigation did not form a reasonable basis for the belief that the Claimant was guilty of gross misconduct. I do so for the following reasons:-

24.1 Despite the length of time the investigation took it failed to deal with all of the allegations adequately, as they were framed. The investigation failed to set out specifically what the allegations of inappropriate touching were, failed to consider what the evidence was in respect of all of the allegations particularly the third allegation, introduced matters such as rumours at another College without providing any evidential basis and failed to consider that the Claimant might have been the target for malicious allegations by pupils following an unsubstantiated complaint in 2013.

24.2 The allegations refer to the Claimant "sniffing hair" which was apparently based on an e-mail from another College, Hind Leys, where it was suggested that pupils who had formerly attended Castle Donington College but had moved to Hind Leys were making comments in relation to the Claimant. What happened was that some pupils had seen Mr McCarty attend a meeting at Hind Leys (for some reason one of the meetings could not be held at Castle Donington College) and had allegedly said one of the members of staff "please don't employ him, he is strange – he used to stroke girls hair in lessons, sniff it and ask what

conditioner they had used". This potentially serious allegation was never investigated.

24.3 Mrs Robson's investigation failed to adequately enquire into the Claimant's suggestions that one of the pupils who had complained was upset with him following an exchange in the classroom and thus had a motive to fabricate allegations.

24.4 The investigation failed to consider the possibility of collusion between the complainants, particularly as some of the allegations were very historical.

24.5 Included as an attachment or appendix to the investigation was a "timeline". This was not an agreed document and contained potentially prejudicial information in the "notes" section between the Claimant and someone called KB. Within that was a reference to an alleged conversation between the Claimant and KB about inappropriate behaviour where the Claimant was apparently "advised not to touch children again". However the circumstances were not investigated and in itself the note was highly damaging without findings as to what had actually happened. There is no written record or evidence of such a conversation. It simply appears without explanation in the timeline. In that respect I am satisfied that the investigation failed to amount to an even-handed and balanced enquiry.

25. Whilst the honest belief of Dr Mitchell and his colleagues on the disciplinary panel has not been impugned, it is difficult to know precisely what their beliefs were. Leaving aside the fact that Dr Mitchell in his witness statement frequently refers to matters in the first person, and it is therefore not clear whether he is speaking for himself or representing the views of the panel as a whole, there are very serious gaps as to what Dr Mitchell and/or the disciplinary panel actually believed. There are no notes of their deliberations nor any note as to what was considered other than the dismissal letter itself. The absence of any notes during the deliberation is particularly puzzling given that there was a note-taker throughout the whole of the deliberations. Dr Mitchell was understandably unable to give detailed evidence as to the discussions of the panel given the passage of time and in the absence of any notes. Some of the findings in the dismissal letter are inconsistent with Dr Mitchell's witness statement. At times Dr Mitchell mirrors the language used by Mr Mitchley who frequently described the Claimant as a 'maverick'. At paragraph 23 of the witness statement Dr Mitchell says:-

"These were significant factors in the panel forming our overriding view that this was someone who would play the system to their advantage – a maverick."

26. It is not clear whether the panel was aware of the College's own disciplinary procedure or was advised as to follow that procedure. Instead, and according to his witness statement, Dr Mitchell announced at the start of the disciplinary hearing that whilst the process would be "relatively structured", he would take a "methodical approach to each allegation", whatever that meant. However there is no evidence, and no explanation, as to why the panel concluded that Allegation 5 (which is in very general terms) was "founded". Allegation 2 was deemed to be 'unfounded' when on the face of it that appeared to have the strongest factual evidence against the Claimant. It was held to be "unfounded" merely because there were no independent witnesses to the alleged incident. However there were no independent witnesses to *any* of the allegations nor was it likely that there would be in a case of alleged inappropriate touching.

27. Both the witness statement of Dr Mitchell and the dismissal letter give very little information as to the analysis of the considerable amount of material before the panel. There is no information as to how or why the panel came to the conclusion that the first allegation as to sniffing pupils' hair was well-founded. In evidence Dr Mitchell said that of the two elements of touching and sniffing hair, sniffing hair played "second fiddle" to touching. Neither the allegation nor the findings set out which pupils' hair the Claimant was alleged to have sniffed when he was alleged to have done so or how many times it occurred for it constitute 'numerous occasions'. Dr Mitchell accepted that the mere touching of hair did not breach safe working practices and procedures as touching all depended on the circumstances and not all touching was misconduct.

28. In relation to the first limb of **Burchell**, that is holding an honest and genuine belief in misconduct, it therefore remains unclear what the Respondent's beliefs. In relation to the allegations there was a lack of vital information to enable the Claimant to defend his position.

29. Moreover, in considering the allegations the dismissing panel went beyond the allegations as framed. Mrs Robson had specifically excluded any sexual motive on the part of the Claimant. At page 3 of her report she says:

"Whilst there is no evidence of a sexual motive in AM's touching……. he has repeatedly been told not to touch pupils unnecessarily and has failed to follow this instruction."

30. However the disciplinary panel appeared to have disregarded this finding and did go on to impute a sexual motive in relation to the first allegation. The only allegation where there could be any potential sexual motive was the second allegation but that was held to be 'unfounded' and could not therefore have been a valid reason for dismissal.

31. In the circumstances, in relation to the second limb of the **Burchell** test, I am satisfied that even if the panel did hold honest and genuine beliefs of misconduct, such views were not held reasonably.

32. There are a few other issues I consider it appropriate to deal with at this juncture as they were the subject of evidence and submissions.

33. Insofar as it is relevant, whilst I accept that Mr Mitchley appears to have been involved in the process to a significant degree, I do not find that he 'engineered' the dismissal as alleged.

34. The conduct of the appeal gives rise to a number of concerns. No reasons were given for the dismissal of the appeal other than to say that the decision of the disciplinary panel was "reasonable and appropriate". I make no criticism of Mrs Henry who was called to give evidence in relation to the appeal at this hearing. It is rather odd that the Chair of the appeal panel was not called to give evidence instead. Apparently he was not available for the hearing. No application for a postponement because of his unavailability was made by those representing the College. Mrs Henry had no input into the drafting of the appeal letter and has little recollection of the appeal hearing given the passage of time. She did not take her own notes but rightly expected that there would be minutes of the meeting as a note taker was present. Mrs Henry has not seen any notes of the appeal nor have they been included in the bundle. Mrs Henry's does recall that the appeal panel was advised that they had no power to consider the sanction and must uphold the original decision if they found even one of the allegations was well-founded. Such advice would be contrary to the School's internal disciplinary policies and procedures.

35. The appeal hearing took place some 14 months after the decision to dismiss was given. In those circumstances it is difficult to see how any employee could return to the workplace. The Claimant has, in real terms, been denied the chance of a fair appeal.

36. Mr Hodge raised the issue of a **Polkey** reduction (*Polkey v AE Dayton Services Ltd* [1987] IRLR 503) and a reduction for contributory conduct. I am satisfied that this dismissal was both procedurally and substantively unfair and that a **Polkey** reduction in this case is not appropriate.

37. As for contributory conduct, whilst such a submission is formally made it fails to identify what conduct caused or contributed to the dismissal. It is not therefore appropriate to make any reduction.

38. In relation to the complaint of breach of contract, the test for determining such complaints is different to that of unfair dismissal. The test was recently explained by Langstaff J in **British Heart Foundation v Roy** (UKEAT/0049/15), at paragraph 6, where he said:

"Where the focus in unfair dismissal is on the employer's reasons for that dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether in fact the misconduct actually happened, it is different when one turns to the question of either contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. There the question is, indeed, whether the misconduct actually occurred."

39. The Respondent has failed to establish on any evidence that the alleged misconduct actually occurred. Accordingly, the complaint of breach of contract must succeed.

40. The issue of remedy was adjourned.

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Employment Judge Ahmed

Date: 6 October 2017

REASONS SENT TO THE PARTIES ON

11 October 2017

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FOR THE TRIBUNAL OFFICE