Appeal No. UKEAT/0048/18/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11 June 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR J HARGREAVES — APPELLANT

GOVERNING BODY OF MANCHESTER GRAMMAR SCHOOL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS JENNIFER McCARTHY (Solicitor) Conway McColl Solicitors Ltd 40a Bramhall Lane South Bramhall Stockport SK7 1AH
For the Respondent	MR KASHIF ALI (of Counsel) Instructed by: Ellis Whittam Limited Woodhouse Church Lane Alford Chester CH3 6JD

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

Unfair dismissal – reasonableness of dismissal – section 98(4) ***Employment Rights Act 1996***

The Claimant was a teacher employed by the Respondent who had an unblemished career until it was alleged that he had acted inappropriately by grabbing a pupil (pupil A), pushing him against a wall and putting his fingers to the pupil's throat. The Respondent's findings in respect of this matter had ultimately led it to dismiss the Claimant. The ET found that dismissal had been fair. The Claimant appealed, arguing that given the career-changing impact of the allegation the Respondent's investigation was inadequate. In particular, he contended that the ET erred in its approach to the Respondent's failure to disclose (to him and to the disciplinary panel) specific evidence from potential witnesses (two other pupils and one member of the administrative staff), who had each said they had seen nothing. It was the Claimant's case that, given the location of the incident and the conduct alleged, evidence that these witnesses had seen nothing untoward was itself highly relevant and it was irrelevant that he had not himself raised the point during the internal process.

Held: *dismissing the appeal*

The ET had correctly directed itself as to the higher standard of investigation and process that might be expected given the potentially career-changing nature of the allegation against the Claimant. As for the specific points taken on appeal, there was nothing to suggest that the ET had misunderstood the location of the incident in question (relevant to the question whether particular witnesses might have been expected to have seen something untoward). The Respondent had, however, been concerned with a very particular interaction between the Claimant and pupil A and the ET was entitled to consider the reasonableness of its decisions in this context. Doing so, it had permissibly concluded that the Respondent had acted within the range of reasonable responses in taking no further action in respect of the evidence of witnesses who would not have had a direct view of the incident and who had said they had seen nothing. As for the fact that the Claimant had not himself taken the point during the internal process, whilst this was not an irrelevant consideration the ET did

not lose sight of the fact that it was the Respondent's obligation to ensure that there was a fair investigation.

HER HONOUR JUDGE EADY QC

1. The appeal in this matter questions the approach taken, and conclusion reached, by the Employment Tribunal ("ET") in addressing a claim of unfair dismissal, where the dismissal took place in circumstances where more than the mere loss of a particular employment was in issue.

2. This is the Full Hearing of the Claimant's appeal from a Reserved Judgment of the Manchester ET (Employment Judge Slater, sitting alone over three days in March 2017 with a further day in chambers), sent out on 30 March 2017. Representation below was as it has been on this appeal. By its Judgment, the ET concluded that the Claimant's claims of unfair dismissal and breach of contract, wrongful dismissal, were not well-founded. The Claimant appeals.

The Factual Background

3. The Claimant was employed by the Respondent as a Teacher of Art and Design from 1 September 2005 until 17 June 2016. Prior to the allegation that led to his dismissal, the Claimant had not been the subject of any formal disciplinary action. The allegation in issue related to an incident that took place on 3 March 2016. It was reported by a pupil ("pupil A") that the Claimant had grabbed him, shoved him against the wall and then pushed two forefingers against his throat. When reporting this matter to his form tutor, on 7 March 2016, pupil A had apparently presented as visibly upset.

4. Pupil A's allegation was initially investigated by the Respondent's Designated Safeguarding Lead, Mr Smith, who obtained advice from the Local Authority's Designated Officer ("the LADO"), Ms O'Hagan. Following Ms O'Hagan's advice, as well as speaking to pupil A, Mr Smith also interviewed pupil B who had witnessed the incident and who gave an

account that largely corroborated that of pupil A. He also spoke to the Respondent's Proctor, Dr Burch, who had been approached by the Claimant after the incident. Dr Burch explained that the Claimant had seemed very agitated and had told him that pupil A had made a rugby tackle on another boy. Dr Burch had spoken to pupil A, who had been subdued and upset and who admitted pushing and shoving in the corridor, seeming almost too relived when he was not disciplined. Mr Smith also spoke with pupil A's parents who knew about the incident and were concerned about the impact on their son.

5. Pupil B had named other boys who may also have seen the incident (pupils OB, EB and GK). Mr Smith spoke to pupil OB on 8 March, but he had no recollection of anything unusual. He decided not to speak with pupils EB and GK as he was concerned about the risk of speculation and gossip. Meanwhile, Ms O'Hagan had passed on information about the incident to the Police Public Protection Investigation Unit where it was being handled by a DS McKee.

6. On 10 March 2016, pupil A's mother contacted Mr Smith to tell him that some other pupils had been taunting her son about the incident and named pupils C and D as being involved. Mr Smith interviewed both pupils separately. Pupil C said that the Claimant had, "*tapped Pupil A on the shoulder after Pupil A was pushing. Pupil A then moved back to middle school office. Mr [Hargreaves] then placed [his] finger around top of tie, tapped several times*." Pupil D related how he had seen various pupils, including pupil A, pushing each other and then came back to see pupil A sitting on a chair outside the office holding his neck with the Claimant standing next to him.

7. After Mr Smith had spoken with DS McKee, who was making arrangements to meet with the Claimant, the Respondent carried out a risk assessment to consider suspending the Claimant.

This assessment was not shown to the Claimant or the dismissing officers, but whilst he took issue with the content of the assessment, the Claimant did not suggest the suspension was inappropriate. He was informed of the allegation against him and of his suspension on 11 March. He was also told that the Respondent had been instructed by the Police that it could not progress an internal investigation until such time as the Police advised.

8. DS McKee interviewed the Claimant and recorded his account, which was to the effect that he had seen pupil A rugby tackling another boy and so had got hold of him by his rucksack. He denied grabbing pupil A or holding him with his fingers at his throat and believed the accounts to the contrary, given by other pupils as well as pupil A were malicious lies.

9. There was a meeting between Ms O'Hagan (the LADO) and Mr Smith, the Respondent's HR Manager (Ms Vaughan) and its High Master, Canon Dr Boulton, on 7 April 2016. This was also attended by DS McKee and a person from Children's Services. DS McKee summarised the account given by the Claimant and asked Mr Smith to speak to two members of the office staff, Ms Ivory and Ms Balamoody, named by the Claimant as potential witnesses to the incident. Those attending from the Respondent were asked if there had been any previous concerns regarding the Claimant and Mr Smith had said that the Claimant could be rude and insensitive, but Dr Boulton confirmed that there was nothing of concern on file. Dr Boulton also commented that it was hard to understand the Claimant saying the allegations were malicious as he had not taught pupil A.

10. Dr Smith followed up the request made by DS McKee and spoke to the office staff mentioned, but Ms Balamoody had not been in the area at the relevant time and Ms Ivory could only say that she had not seen anything unusual. As she had mentioned pupil OK as being

present, pupil OK was also spoken to, but had apparently seen untoward involving the Claimant. Subsequently, DS McKee advised the Respondent that the matter would not be progressed further by the Police as pupil A's parents did not want that, so it was for the Respondent to address and determine whether any further action should be taken.

11. The Claimant was invited to an investigation meeting. The ET accepted the Claimant's account that the letter inviting him to the meeting did not include the disciplinary procedure or provide him with any of the statements taken by Mr Smith. His understanding of the case against him thus only came from the letter itself and from what he had been told by the Police. At the investigation meeting the Claimant again gave his account of checking pupil A's conduct towards another by holding the handle of his rucksack. He said he had been very calm during the incident and denied pushing pupil A or putting his fingers on his throat. Subsequent to the meeting with the Claimant, investigation meetings were held by Mr Smith with pupil A's form tutor, with Dr Burch and pupil A's parents. Pupil A was also interviewed again, as were pupils B, C and D.

12. Pupil D had mentioned that possibility that pupils E and JS had witnessed the incident. Pupil E was spoken to but had not seen anything and a decision was taken not to speak to pupil JS as it was felt that it was unlikely he had seen anything and Mr Smith was reluctant to increase the possibility of further gossip and speculation.

13. The investigation report, dated 17 March 2016, identified there were two polarised views of the incident, "*either there has been a malicious allegation of physical abuse, levelled against JH, or he had acted in a way that could be viewed as serious professional misconduct.*" Progression to the disciplinary stage was recommended. The report attached notes of the

interviews with pupils A, B, C, D and E and with A's form tutor, Dr Burch, the Claimant and with the parents of A.

14. The Claimant was invited to a disciplinary hearing to face three allegations: (1) of unwanted and unreasonable physical conduct against pupil A, (2) of breach of his duties as a teacher and of the Respondent's Code of Conduct and (3) of breach of trust and confidence. The hearing took place between 7 and 10 June before the Respondent's High Master, Dr Boulton, and Academic Deputy Head, Dr Neil Smith. The Claimant attended with his Trade Union representative. He had asked that Dr Burch be called as a witness but did not seek any other witness to be called or that further questions were raised with any potential witnesses. Although he told the ET that he had been unwell at the time, nothing had been said to that effect at the disciplinary hearing and the Claimant accepted he had all the statements and every opportunity to ask for further evidence to be obtained.

15. Arising from points made by the Claimant at the hearing relating to pupils B and C, further investigation was carried out, but this did not corroborate the Claimant's suggestion that there had been collusion and dishonesty on the part of the boys and nothing else was discovered that would cast doubt on the pupils' credibility. A point was also followed up relating to Dr Burch's evidence, but again that did not support the Claimant's case. It was concluded, on the balance of probabilities, that the allegations against the Claimant were proven and that he should be summarily dismissed. The Respondent's reasoned position reached in this regard was explained in a letter to the Claimant on 17 June 2016.

16. The Claimant appealed against the decision. Whilst he conceded that there was no explanation for what he said were malicious claims on the part of the boys, he felt it was important

to realise the devastating effect personally, financially, and professionally that this had had and he stated his, "*hard-won career was potentially now in ruins*."

17. As the Respondent was bound to do, it had also referred the Claimant's case to the National College of Teaching and Leadership ("NCTL") and to the Disclosure and Barring Service ("DBS"). The NCTL notified the Respondent by letter of 13 September 2016 that it considered matters had been dealt with appropriately at local level and any further action would be disproportionate. For its part, the DBS concluded that it was not appropriate to include the Claimant on the barred list.

18. The Claimant's appeal was heard by two of the Respondent's Governors on 29 June 2016. Again, the Claimant attended with his Trade Union representative and had the opportunity to raise any points he wished. After the hearing, further investigation was undertaken into specific points the Claimant had raised, but this did not disclose anything that supported his account. The Governors also spoke to Mr Smith about how he had selected the boys he had interviewed as part of his investigation. Ultimately, however, it was concluded that the Claimant was guilty of the alleged conduct and dismissal was the appropriate sanction. That decision was communicated to the Claimant by letter of 6 July 2016.

The Relevant Legal Principles

19. The focus of the present appeal relates to the ET's findings in respect of the Claimant's unfair dismissal claim, brought under section 98 of the **Employment Rights Act 1996** ("the ERA"). The Claimant was dismissed for a reason relating to his conduct and the ET was concerned with the question whether that dismissal was fair for the purposes of section 98(4) **ERA**. Section 98(4) provides as follows:

> **"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."**

20. The ET appropriately reminded itself of the guideline authority of **British Home Stores Ltd v Burchell** [1978] IRLR 379 and, when considering the fairness of the investigation and process in this case, specifically had regard to the guidance provided in the cases of **A v B** [2003] IRLR 405 EAT, **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721 and **Crawford and Another v Suffolk Mental Health Partnership Trust** [2012] IRLR 402.

21. In **A v B** the EAT gave guidance as to the approach to be adopted in cases such as the present, where serious allegations are made that might have career changing consequences:

> **"60. 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.**
>
> **61. This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances, anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances."**

22. **A v B** involved allegations made against a residential Social Worker by a vulnerable child. The ET had found the Claimant's dismissal was fair but the EAT disagreed, concluding that the Respondent's investigation had fallen short of the "*even-handed, careful enquiry that is required*." More specifically, in considering the disclosure of evidence to the employee in that case, the EAT observed as follows:

> **"81. … certain members of staff, who may have given relevant evidence were not interviewed at all … it is relevant to note that it is not said that they could not have had anything relevant to say, merely that by the time they might have been interviewed they would not be likely to remember anything, even if it was relevant.**
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> **82. Mr Pepperall (counsel for the Respondent) submitted that it is unlikely that they would have had anything material to add. He may well be right, but it seems to us that is not something one can assume …**
>
> **83. Perhaps of greater significance is the fact that the statements which were taken, and may have been of some assistance to the Applicant, were not provided to him … there was some material in those statements which might have assisted the Appellant, had they been made available to him.**
>
> **84. If an employer reasonably forms a view that certain evidence is immaterial and cannot assist the employee, then of course a failure to disclose that material will not necessarily render a dismissal unfair. Ultimately, fairness is a broad concept and must be considered in the round.**
>
> **85. In this case the Tribunal took the view that the Appellant was not materially prejudice. We do not think they were entitled to reach that view in the light of admitted failure by the Respondent to make evidence available. They appear to have concluded that, even if the relevant evidence had been provided, it would not have affected the result.**
>
> **86. If that is what they intended to say, then, in any event, they fell into error. It is no answer for an employer to say that even if the investigation had been reasonable it would have made no difference to the Decision …"**

23. The approach adopted by the EAT in **A v B** was approved by the Court of Appeal in **Salford Royal NHS Foundation Trust v Roldan** and in **Crawford and Another v Suffolk Mental Health Partnership Trust**. In the latter case it is was stressed that it is for an employer to ensure that a fair procedure is adopted.

The ET's Decision and Reasoning

24. Considering first the Claimant's unfair dismissal complaint; the ET noted there was no dispute that conduct was the reason for the dismissal. The ET rejected the suggestion that the investigation had been biased against the Claimant. It concluded that the decisions made – specifically, as to who to interview and who not to interview - had fallen within the band of reasonable responses. It also found that it was within the reasonable range to decide not to inform the Claimant and the disciplinary panel about interviews with those who had seen nothing; it did not follow that, because those individuals had seen nothing, nothing had happened.

25. The ET was also satisfied that proper questions had been put to the witnesses and noted that during the disciplinary hearing the Claimant and his representative had been given the opportunity to ask for further questions to be put, but had not asked for this to be done. It did not accept the investigation had brushed over inconsistencies in the witnesses' accounts; the disciplinary panel had reasonably taken a view as to the significance of any inconsistencies. Although the ET accepted there had been a failure to provide the Claimant with witness statements prior to the investigation interview, this arose from an inadvertent error and gave rise to no prejudice: the Claimant had understood the allegation against him and was able to provide his version of events; he was, in any event, provided with the statements in good time for the disciplinary hearing. Overall, the ET was satisfied a reasonable investigation had been carried out and a reasonable process followed by the Respondent; it had approached the process with an open mind and had properly taken account of the relevant evidence.

26. As for the decision reached at the disciplinary hearing the ET was satisfied this was founded upon permissible conclusions reached on the evidence. Whilst Dr Boulton had attended an early meeting with the LADO, that was by virtue of his position, and the evidence made clear he had approached his decision-making at the disciplinary hearing with an open mind. The decision did not evidence bias in favour of pupil A as against the Claimant. At both the disciplinary hearing and the appeal stage, points raised by the Claimant were followed up. His previous good record had not been questioned and account was taken of the fact that false allegations could be made just as sometimes individuals in trusted positions might behave in a manner contrary to their position of trust. The decision-takers had also allowed for the fact that collusion could be inadvertent, even if not malicious. A reasonable conclusion had been reached on the evidence. To the extent the dismissal and appeal outcome letters did not reference every point taken by the Claimant, the ET did not consider this was because these had not been taken

into account; it was apparent these matters had been in the minds of the decision-takers but did not impact upon the conclusions reached. The ET further accepted that the Respondent had a reasonable belief such that it was entitled to dismiss the Claimant.

27. Turning to the wrongful dismissal claim, the ET had itself to determine whether - on the balance of probabilities - the Claimant was guilty of gross misconduct. The evidence available was largely the same as that before the dismissal and appeal officers; the ET had also heard from the Claimant and considered his account tested under cross-examination. On that basis, as carefully set out in its reasoning, the ET concluded it was more likely than not that the Claimant had engaged in unwarranted and unreasonable physical conduct on 3 March 2016, by pushing pupil A against a wall and pushing his fingers against pupil A's throat; that was gross misconduct and the Respondent was not in breach of contract in dismissing the Claimant without notice.

The Appeal and the Claimant's Submissions

28. The Claimant's appeal was permitted to proceed after a hearing under Rule 3(10) of the **EAT Rules 1993**; HHJ Shanks having been persuaded that there was "*an arguable appeal based on* ***A v B***" and that the ET had arguably "*erred in dealing with the points about potential witness (OB, OK and Melissa Ivory) who were not followed up or drawn to the [Claimant's] attention by the Respondents.*"

29. In his submissions for today's hearing, the Claimant has stressed that if the allegations made by pupil A were true it would be highly likely that someone in the vicinity at the time would have noticed something untoward, whereas that would not be the case if the Claimant's account was true. The ET thus erred in respect of the significance of the evidence of Ms Ivory and pupils OB and OK; that they saw nothing untoward was corroboration of his account. More

than that, there were a large number of people present at the relevant time and the evidence supported the description of the incident as loud and aggressive; on the Claimant's case, his interaction with pupil A was relatively innocuous; that was very different to the characterisation of the event by pupil A. It was, however, to be noted that no one else had raised any issue about the incident until it was raised by pupil A. In the circumstances, witnesses who were present, and who might reasonably have been expected to have seen something untoward but who had not done so, were significant; specifically, Ms Ivory and pupils OB and OK.

30. Looking further at the potential relevance of the testimony from those witnesses, to the effect they had seen nothing, the Claimant objects that the ET erred by misunderstanding the evidence as to the whereabouts of the three individuals. There was a lot of evidence to suggest that at least part of the incident took place in the area of Ms Ivory's desk, such that it would be remarkable if she had seen nothing. Specifically, the statements of pupils A, B, C and D and of Dr Burch placed the incident, or its immediate aftermath, in the area near Ms Ivory's desk. Similarly, references made to pupils OB and OK in the evidence also suggested they must have been in the relevant area at the time of the incident. Given that the evidence placed those witnesses at the heart of the incident, it was perverse for the ET to consider they could not provide relevant evidence (indeed, it seemed possible the ET had confused the evidence relating to Ms Ivory with that relating to Ms Balamoody): had the ET properly appreciated where these witnesses were located during the incident, it could not have reached the conclusion it did (that is, that it was within the band of reasonable responses not to inform the Claimant and the disciplinary panel about the interviews with these witnesses).

31. The Claimant further contends that the ET failed to apply the relevant case law, in particular the guidance provided at paragraphs 60 to 61 and 80 to 83 in **A v B**. Although the ET

referenced the relevant authorities, it failed to heed the EAT's warning that it should not assume that the evidence of witnesses would add nothing, or that the statements would not be of assistance to the Claimant. Specifically, the ET had failed to apply that requirement in circumstances in which the Respondent had (i) not followed up on the witness evidence of Ms Ivory and pupils OB and OK, which could have supported the Claimant's case, and (ii) had not forwarded details of any of this evidence to the Claimant or disciplinary panel. To the extent that the ET was putting the onus on the Claimant (see paragraph 111 of its reasoning), that was a failure to apply the principles laid down in **Crawford and Another v Suffolk Mental Health Partnership Trust**. The force of the potential evidence of these witnesses was lost by reason of the failure to draw their statements to the attention of the disciplinary panel; it was potentially very relevant that these individuals - who might have been expected to have witnessed something untoward - had not done so.

The Respondent's Case

32. The Respondent prefaced its submissions by emphasising the context in which the incident had taken place; it had been common ground that there had been a very large number of pupils trying to move through the relevant area at the time and a lot of pushing and shoving had taken place. On the Claimant's account, he had intervened to pull pupil A back, taking hold of the top handle of his rucksack and pulling him back three times. It was that very specific interaction between the Claimant and pupil A, with which the ET was concerned. On any case, it had lasted only a matter of seconds and the Claimant had ultimately accepted - in cross-examination before the ET - that it was likely that there were only a very small number of witnesses to the incident in issue. Also relevant was the fact that - on either account - for those who had seen the incident, it would have been memorable. On the Claimant's account, he had pulled pupil A out by his rucksack handle (and had taken three attempts to do so) before taking

him towards the corridor leading the office. On neither the Claimant nor pupil A's account did the specific interaction take place near Ms Ivory's desk; that was where pupil A was left to await Dr Burch and the statements from the other pupils were consistent with that.

33. The ET had been entitled to look at the evidence as a whole. It was not that the witnesses in question were not spoken to; they were. Moreover, the ET had made very specific findings regarding Ms Ivory's evidence such that it should not be thought that it had confused her with Ms Balamoody. Each of these witnesses had said that they had seen no physical interaction between the Claimant and the pupil. On the Claimant's own account, they had obviously missed something of what had taken place. Moreover, the significance of potential witnesses - Ms Ivory and pupils OB and OK - was addressed by the ET; it had not failed to deal with the point but had described how the three were interviewed and permissibly concluded that it had not been outside the range of reasonable responses not to re-interview those who had seen nothing. As for the relevance of their evidence, it was not necessarily supportive of the Claimant's case that these witnesses had seen nothing; the evidence was of a noisy and crowded corridor and the Claimant had accepted there had been a scuffle. There was nothing to suggest that passing information to the Claimant or the disciplinary panel - in terms of what these three individuals said they had not seen - would have made any difference.

34. Moreover, it was apparent that the Claimant himself was aware of the presence of each of the potential witnesses in question: he had identified Ms Ivory as being present and pupils OB and OK were referred to in the other statements provided to him (see the ET at paragraph 111). It had been open to the Claimant to call any witnesses he chose at the disciplinary hearing and - allowing that it was for the Respondent to ensure it followed a fair process - it was not irrelevant

to the assessment of reasonableness for the ET to have had regard to the points made, or not made, by the Claimant and his Trade Union representative.

Discussion and Conclusions

35. What happened on 3 March 2016 had a devastating effect on the Claimant; his was the kind of case identified in **A v B** and **Salford Royal NHS Foundation Trust v Roldan** and in **Crawford and Another v Suffolk Mental Health Partnership Trust**, where the consequence of an allegation against the employee can go far beyond the loss of the particular employment. That is not to say that, in such cases, an employer has to adopt the kind of safeguards present in criminal trials; the test remains that of the band of reasonable responses of the reasonable employer, but the far-reaching consequence for such an employee is a relevant circumstance to which an ET should have regard when assessing the reasonableness of the investigation and process undertaken before the employer reached its decision. In the present case, the ET expressly reminded itself of the relevant guidance and the case law in this regard; considered in general terms, I do not think it lost sight of this point when determining the question of fairness in the Claimant's case.

36. The Claimant does not, however, put his appeal on the basis that the ET wholly lost sight of the approach it was required to undertake. His criticisms are more specific; in particular, he complains that the ET failed to adopt the requisite approach when considering the Respondent's failure to provide him, and then the disciplinary panel, with the evidence obtained from Ms Ivory and from pupils OB and OK. Ms Ivory was a member of the office staff named by the Claimant as a potential witness; pupil OB had been referenced as potentially part of the scuffle involving pupil A; pupil OK was the Senior Prefect present, who was seeking to marshal and calm down the other students. The Claimant contends that if the evidence of these individuals was added to

the picture - notwithstanding they had said they had seen nothing - it had the potential to create a different image: here were three further witnesses, present in the location of the incident, who had seen nothing untoward when, on pupil A's account, something quite remarkable had taken place. That, the Claimant says, was potentially significant and it was (1) perverse of the ET not to see the possible relevance (it being possible that the ET had confused Ms Ivory's evidence with that of Ms Balamoody or misunderstood where the incident had been located); (2) a failure by the ET to apply the guidance in **A v B** not to see this as a material omission in the investigation; and (3) an error of law by the ET, in that it had tested the question of reasonableness by reference to what the Claimant had failed to do, rather than to recognise - per **Crawford v Suffolk** - that the obligation to ensure a fair process lay on the Respondent.

37. To the extent the Claimant's case is put as a perversity challenge, he acknowledges he must meet the high test laid down in cases such as **Yeboah v Crofton** [2002] IRLR 634 CA. His appeal fails to do so. The ET did not confuse the statement given by Ms Ivory with that given by the other office employee, Ms Balamoody; reading the Judgment as a whole, it is apparent that the ET was clear as to what Ms Ivory had told Mr Smith and there is nothing to suggest it lost sight of this at any stage. More particularly, however, I do not consider that the ET was unaware of the evidence as to where the incident was said to have taken place, or as to the context in which it occurred. The sketch plan and photographs, to which I have been taken in argument today, were all before the ET. The various statements from different pupils - which referred to pupils OB and OK being present and which talked in terms of matters taking place near Ms Ivory's desk - were also before the ET and were plainly explored in some detail in evidence. There is nothing in the ET's reasoning that suggests it misunderstood the evidence in this regard.

38. The fact is that the incident in issue took place in a matter of moments. On both the Claimant's case and that of pupil A, there was a very crowded, noisy situation with a great deal going on - witnesses had spoken of over 100 pupils pushing and shoving their way through the area in question. In the midst of this, it was common ground that the Claimant entered the fray and pulled pupil A out. The Claimant says that, on his account, the interaction was innocuous. That, however, is not the case. The incident as described by the Claimant may not have had the same connotation as pupil A's account, but had it been seen - as described by the Claimant - by others present, it was not unremarkable. Yet, no one else saw the incident in the way described by the Claimant. On the other hand, a number of witnesses did see an interaction that corroborated the account given by pupil A. Some of those witnesses placed the aftermath of the incident near Ms Ivory's desk. It seems, however, that only pupil C suggested that the actual incident took place in that area.

39. The focus of the Respondent's investigation had been on the conflicting accounts given by the Claimant and by pupil A of a very specific physical interaction between them. The question for the ET was whether, in those circumstances, the Respondent had reached a decision outside the range of reasonable responses in deciding not to take (and then provide to the Claimant and the disciplinary panel) statements from Ms Ivory and pupils OB and OK, who had all said that they had seen nothing of the specific incident in issue. The decision whether to take the investigation further in respect of these particular witnesses had entailed a judgement call for Mr Smith, just as he had had to make a judgement call in respect of other potential witnesses - other pupils who might have been present and who may, or have may not, have seen something of the incident or the interactions around that incident. That decision had to be tested against the particularly stringent standards applicable in cases such as this. Having reminded itself of that test, the ET concluded the Respondent was entitled to consider that, given the particular point in

issue, the evidence of these witnesses went nowhere. Given the actual point of dispute between the Claimant and Pupil A, I am unable to say the ET did other than reach a permissible conclusion that the Respondent's decision in this respect fell within the band of reasonable responses.

40. Having rejected the Claimant's perversity challenge, I turn to the question whether the ET, nevertheless, erred in failing to take into account either the broader picture this evidence might have provided for the disciplinary panel (or for the Claimant to use before that panel). In considering this question the ET was, again, bound to apply the band of reasonable responses test, albeit holding the Respondent to the appropriately higher standard laid down in cases such as **Salford Royal NHS Foundation Trust v Roldan**. In purporting to apply that test, the ET noted that the Claimant was himself aware of the potential presence of these witnesses: he had named Ms Ivory as a possible witness but had not suggested she be called to the disciplinary hearing, or that any questions be taken up with her; he had also seen pupils OB and OK named in the statements taken from others, but again did not suggest that further investigation be undertaken in respect of their potential evidence.

41. As the Claimant observes, taken in isolation, any failings on his part would not provide a complete answer for the ET: it was still for the Respondent to ensure a fair process. That said, I do not consider that it was irrelevant for the ET to have regard to what the Claimant and his Trade Union representative had seen as the requirement for a reasonable investigation – that helped in setting the parameters in this case. This was not a case in which the Claimant was simply unaware of the evidence in question; he could have asked for the evidence to be pursued but chose not to do so; it was not an error of law for the ET to take this into account as part of the overall picture.

42. As for the obligation on the Respondent, it was required to ensure a fair process. In this regard, I can allow that this meant the Respondent was obliged to ensure that the disciplinary panel was not provided with a potentially incomplete or misleading picture. Even accepting the Claimant's argument in this regard, however, the fact remains that the three witnesses in question were simply unable to assist. In broad terms, they had been present at the time of the incident but had seen nothing. Ms Ivory had been situated in a different place to where the actual interaction between pupil A and the Claimant - on either of their accounts – had occurred and she could remember nothing untoward in terms of the aftermath of the incident (which would have been nearer to where she was working). As for pupils OB and OK, at most it seems they had been engaged in other aspects of the overall incident; there was nothing to suggest that they would have seen the specific interaction between pupil A and the Claimant. In the circumstances, the ET was entitled to find that there was nothing to suggest to the Respondent that it would be relevant to include statements from these individuals before the disciplinary panel. Not simply because the ET took the view that it would have made no difference, but because it was satisfied that the Respondent had reasonably formed the view that the evidence in question was immaterial and could not assist either the Claimant or the disciplinary panel.

43. This was not a case where the Respondent failed to pursue certain lines of enquiry; the three witnesses in question were all interviewed by Mr Smith and the Respondent's trained Designated Safeguarding Officer. Nor was it a case in which the Respondent had failed to turn its mind to the possible relevance of the evidence in question; on the contrary, it is apparent that care was taken by Mr Smith to reflect on the potential relevance of the accounts given by these witnesses, but (the ET found) reasonably concluded that it was not material.

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44. The particular focus of this appeal has been on a very specific part of the evidence that was available to the Respondent and before the ET. Of course, both the Respondent and the ET had to consider far more than the material that has been presented to me on this appeal. The fact that the potential evidence of these particular witnesses was, however, still the subject of specific consideration – again, by both the Respondent and the ET - demonstrates the careful regard that was had to this material and to the evidence relevant to the charge against the Claimant more generally. Having considered each way the Claimant has put his case at this stage, I am satisfied that the ET reached a conclusion that was entirely open to it in this case and I am therefore bound to dismiss the appeal.

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