Case Number: 3325526/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr O Dervis	v	(1) Haringey London Borough Council (2) The Governing Body of Tiverton Primary School

Heard at: Watford **On**: 20 and 21 August 2020

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: Ms Angela Delbourgo, of counsel
For the respondent: Mr Ben James, of counsel

RESERVED JUDGMENT

The claimant's claim of unfair dismissal does not succeed: he was not dismissed unfairly.

REASONS

The claim and the parties

1 In these proceedings, the claimant claims that he was dismissed unfairly, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA 1996"). The claimant was dismissed by the first respondent (which is a unitary local authority) from his post of Site Manager for Tiverton Primary School ("the school"), which is a community school within the meaning of the School Standards and Framework Act 1998, maintained by the first respondent within the meaning of that Act. At the time of the claimant's dismissal, the school had a delegated budget.

2 The claim was originally made against the first respondent only. However, after I had drawn the parties' attention to the Education (Modification of Enactments

Relating to Employment) (England) Order 2003, SI 2003/1964 ("the 2003 Order") and section 35 of the Education Act 2002, Ms Delbourgo applied on behalf of the claimant to add the governing body of the school as a respondent. Mr James was unable to point to any material disadvantage that would be caused to the respondent by my adding the governing body as a party, and, given that factor and that the 2003 Order required the claim to have been made against the governing body of the school, I granted the application.

The issues

3 The first respondent's claimed reason for dismissing the claimant was his conduct. The claimant asserted that it might have been redundancy, on the basis that the school at which the claimant worked had since his dismissal been merged with another one, with the merger taking effect in September 2020. It was the respondent's case that the claimant's dismissal was for his conduct.

4 The issues in the claim of unfair dismissal were accordingly these.

4.1 What was the reason, or principal reason, for the claimant's dismissal? Was it (as the respondent claimed) the claimant's conduct?

4.2 Did the persons responsible for deciding that the claimant should be dismissed genuinely believe that the claimant had committed that misconduct?

4.3 Did the respondent conduct a reasonable investigation into the alleged misconduct of the claimant before deciding that he should be dismissed for that conduct, i.e. was it (see *J Sainsbury plc v Hitt* [2003] ICR 111) one which it was within the range of reasonable responses of a reasonable employer to carry out, or was it outside that range?

4.4 Were there reasonable grounds for the belief of whoever decided that the claimant should be dismissed that the claimant had committed the misconduct for which he was in fact dismissed?

4.5 Was the claimant's dismissal within the range of reasonable responses of a reasonable employer?

5 I heard oral evidence from the claimant on his own behalf and, on behalf of the respondent, from (1) Ms Resham Mirza, the Head Teacher of the school, (2) Mr Alex Dickson, a member of the second respondent, who chaired the disciplinary panel of three members of the second respondent that decided that the claimant should be dismissed, (3) Mr Mike Hakata, another member of the second respondent, who chaired the panel of three members of the second respondent which heard the claimant's appeal against his dismissal, and (4) Ms Dankay Wurie, who is a Human Resources Advisor employed by the first respondent.

6 I was referred to relevant pages in a bundle of documents containing 194 pages other than the pleadings and relevant orders.

7 Having seen and heard the witnesses give evidence and having read the documents to which I was referred, I made the following findings of fact.

The facts

The claimant's duties

8 The claimant was employed by the first respondent to work at the school from 10 January 2005 until his dismissal, which occurred on 20 June 2019. As Site Manager of the school, he had a job description of which there was a copy at pages B127-B130. That description was of a sort that was applied by the first respondent to all school site managers in the respondent's area. It started with the following passage in typed words:

> "**Main duties and responsibilities**
>
> **At Scale 3**
>
> 1. To maintain and keep under review the security of premises, ensuring proper and regular patrols are undertaken and that alarms are properly maintained, used, reset as necessary and tested.
>
> 2. To act as one of the main keyholders of the site, registered as such with the police and to ensure that access to keys and the site is given only to authorised persons.
>
> 3. To ensure that all windows, doors and gates are opened and closed at appropriate times as specified by the Headteacher/Head of centre.
>
> 4. As keyholder, to be responsible for attending the site/premises in emergencies, taking appropriate action in the case of break-in, theft or fire, including boarding up broken windows, repairing or changing door or window locks and resetting alarms."

9 There were handwritten words added to the above typed words, which the claimant had asked to be added by his line manager at the school, Ms Ying Vuong and which she had added. At the end of paragraph 1 of the description, this had been added:

> "Fire + intruder alarm, every 6 months as well as weekly check. Fire test once a term, to email Headteacher regarding Autumn 2."

10 At the end of paragraph 3, this was added:

"Timetable and Rota".

11 At the end of paragraph 4, this was added:

"Abel alarm liaise with OD [i.e. the claimant]".

The events which led to the claimant's dismissal

12 The claimant was the first named keyholder for the school, so that the first port of call for the alarm company, which was Abel Alarm Company Limited ("Abel"), in the event of the alarm going off at the school was the claimant. The second named person was the claimant's assistant, Ms Doret Brown. The third named person was Ms Mirza, as the head teacher of the school.

13 If the claimant attended the school's premises at any time to respond to an alarm, then he was paid overtime. He lived approximately 15 minutes' drive from the school's site when there was little traffic.

14 The claimant was due to start a period of holiday on Monday 25 March 2019. On Friday 22 March 2019, he emailed Abel in the following terms:

"I would like to update Key Holders list for Tiverton Primary School.
I'm AL from 25 April to 29 April.
Monday to Friday (5 days)
From 23 April Saturday 2pm till
Friday 7pm April 29
First-Doret Brown
Second
Resham Mirza".

15 In fact, that information was wrong, as the claimant had got the month wrong.

16 The claimant worked on Saturday 23 March 2019, but regarded himself as being on holiday as from 2pm on that day. At 1.35am on Sunday 24 March 2019, the claimant was called by Abel. He did not answer immediately, but did so when they called again, at 1.37am. The caller from Abel informed the claimant that the intruder alarm at the school had been triggered. The claimant's first response was to say that he was on holiday, but when he was asked by the caller whether the caller should call the second named contact, namely Ms Brown, the claimant said that the caller should not do that, as he had now been woken up. The claimant then decided that the alarm might be a false alarm and asked the caller to monitor the alarm. The caller did not say that he/she would, but merely said "okay".

17 The claimant then did not attend the school to see whether or not the alarm was a false one in that there was in fact no intruder. Nor did he contact either Ms Brown or Ms Mirza to tell them that he was not intending to attend the premises as he was now as far as he was concerned on holiday.

18 The claimant did, however, go to the school's premises later on that day, at about 9:30am, and he found that there had indeed been a break-in, with much damage caused by the burglar(s).

19 The claimant then called Ms Mirza, who attended promptly. She was present for much of that day (Sunday 24 March 2019), during which time among other things that happened, the police attended.

20 The claimant was then absent from work for the next week, as planned, on annual leave. During that week, Ms Mirza started an investigation into the situation, and during that week she sent the claimant an email inviting him to a meeting on his return to work to discuss the situation and his involvement in it. The meeting took place on 23 April 2019. The claimant was accompanied at it by his trade union representative, Mr Paul Renny. There were notes of the meeting at pages B123-B124. The claimant on several occasions during the meeting said that he had made a "mistake" and apologised several times for it. There was this note at the top of page B124:

> "There was discussion in regards to the protocol of attending site if there was a suspicious break in.
>
> RM [i.e. Ms Mirza] explained that the key holder needs to drive away from site and call the police if a break in is suspected."

21 Ms Mirza then prepared a report of her investigation. It was at pages B1-B4. Her conclusion was that the failure by the claimant to attend the school's premises when he was telephoned by Abel at 1.37am on 24 March 2019, or to let any other member of the staff (such as her, Ms Mirza) know by telephone that the alarm had been activated, was gross misconduct. She wrote this in her report, at page B4:

> "Site managers play a vital role in schools, being responsible for the maintenance and security of school buildings. It is part of their duty and written in OD's JD that he is responsible for the security of the school and for attending call out alarms (Appendix 26).
>
> On Sunday 24th March 2019, OD failed to attend the site when the intruder alarm was sounded, despite being informed by the security company Abel Alarm at approximately 1:37am. OD did not advise anyone else that the alarm had been activated, thereby ensuring that another staff member could have attended the site, nor did OD inform the police at that time.
> During the investigation meeting on 23rd April 2019, OD was not able to explain his failure to attend the site and in fact kept insisting that he was on annual leave and should not have been called out. This does not account for why OD did not take any interim action to address the emergency at hand.

OD's failure to prioritise and implement appropriate and immediate action with regard to this serious incident, during which the school premises sustained severe, internal damage to the building, resources as well as financial loss is a gross misconduct. Furthermore, OD's failure to attend the site left the school vulnerable as it remained unalarmed and therefore unprotected for several hours. This is a gross dereliction of duty and a breach of professional trust that cannot be repaired."

22 The report enclosed an email dated 29 March 2019 from Abel, in which Mr Tony Large had sent "two calls", i.e. recordings of two telephone calls that Abel had said it had received in relation to the school, implying that the claimant had spoken to Abel twice on 24 March 2019. That email was at age B119. Abel had also sent the school a print-out of a log of actions, including telephone calls, which had occurred on 23 and 24 March 2019. That log was at page B122. Next to a time of 01:37:58, there was this record:

"Outcome: Contact has taken responsibility for this alarm."

23 At page B114, there was a copy of an email from Abel to Ms Vuong dated 1 April 2019, in which this was said:

'Following on from the recorded telephone call with your key holder.

Our monitoring centre will not pick up a Power Failure signal – If the power fails your alarm system automatically goes into its own battery back-up. If the battery back up failed then we would receive a "Tamper" or a "Fault" signal.

We contacted your key holder to report an intruder alarm. Your key holder's response was that this was a power problem at site. Regardless of being advised about power issues, our operators responsibility passed to your key holder when passing the intruder alert call.'

24 The claimant's case was then put before a committee of the respondent chaired, as indicated above, by Mr Dixon. One of the members of the committee was a staff governor, i.e. a member of the school's staff who was appointed pursuant to the relevant statutory instrument concerning the constitution of the respondent. That is the (School Governance (Constitution) (England) Regulations 2012/1034, regulation 13 of which provides:

"(1) The governing body of every maintained school must be constituted in accordance with this regulation.

(2) The total membership of the governing body of a maintained school must be no fewer than seven governors.

(3) The governing body of a maintained school must include the following—

(a) at least two parent governors;

(b) the head teacher unless the head teacher resigns the office of governor in accordance with regulation 19;

(c) one staff governor; and

(d) one local authority governor.

(4) The governing body may in addition appoint such number of co-opted governors as they consider necessary provided that the requirements in regulation 14 are met in respect of governing bodies of foundation and voluntary schools.

(5) The total number of co-opted governors who are also eligible to be elected as staff governors under Schedule 2, when counted with the staff governor and the head teacher, must not exceed one third of the total membership of the governing body."

The disciplinary hearing which led to the claimant's dismissal

25 The committee held a disciplinary hearing on 18 June 2019. Ms Mirza presented her report and in effect proposed the claimant's dismissal. One part of her report (concerning an exchange between the claimant and Abel which occurred otherwise than on 24 March 2019) was withdrawn before the report was read by the committee. The claimant was represented by a trade union representative, Mr P Renny, of Unison.

26 During the hearing, the claimant said that he had had only one telephone conversation with Abel on 24 March 2019. After that happened, the committee started its deliberations and Ms Mirza listened to the recordings of the two telephone calls that had been sent as described in paragraph 22 above. The panel was that asked to return and "All" are recorded as having returned, immediately after which, as recorded on page B140, there was this paragraph in the notes of the hearing:

> "RM [i.e. Ms Mirza] – With regard to the phone calls from Abel Alarms on 24 March 2019, I have listened to the two audios. OD was correct, only one call was made to him on 24 March. The other audio recording was on 1 February 2019 and shows that OD did not attend the premises. Abel Alarms used the term Intruder Alarm on both occasions."

27 The following exchange was then set out, i.e. it followed immediately on from that paragraph:

> "Panel to OD - Can you tell us about 1 February 2019?

PR [i.e. Mr Renny] – That would be unfair, evidence has been put in the papers that was incorrect and now [sic] new evidence has been put forward.

BD [i.e. Ms Bernadette Daley, "HR Adviser to the Panel"] - The purpose of telling you was to clarify that one phone call was made on 24 March 2019 to OD.

OD – I want to answer, what time was the call made on 1 February 2019?

RM – 11.38pm.

OD – I can't recall.

Q – Have you received calls before from Abel Alarms when you have not attended?

OD – I have always attended, apart from on 24 March 2019 when the school was broken into.

Q – What was different this time?

OD – This was the first time.

PR – OD has said he made a bad judgement."

28 The committee then deliberated further and announced its decision in person. It was to dismiss the claimant summarily, as noted at page B141. On 20 June 2019 Mr Dixon sent the claimant the letter at pages B143-B144, the main part of which was in the following terms:

"As you are aware, the panel considered the following allegations:

- You failed to attend and secure the school site on 24th March 2019 when the intruder alarm was activated.
- This is despite the fact that Abel Alarm contacted you at 1:37am to inform you that there was an issue.
- You attended the school site at approximately 9:30am on 24th March 2019.

In reaching our decision, the panel have taken into account all the facts of the case and the information provided in mitigation by you and your trade union representative.

After reviewing all the information, the panel was satisfied that the allegation(s) are upheld and that they constitute gross misconduct on your part. The decision has been made that you should be dismissed from your

post of Site Manager at Tiverton Primary School. The dismissal will take effect from the date of this letter and is without notice.

The reasons are; that in failing to attend and secure the site, you risked and caused loss and damage to the school. This is a serious failing of your duties and responsibilities set out in section 4 of your Site Manager job description, which states that as key holder, you are responsible to attend the site in the event of an emergency and take appropriate action.

Further to this, you failed to contact either of the other key holders after being informed by Abel Alarm that the intruder alarm at the school had been activated. This meant there was no opportunity for another member of staff to secure the site. Instead, you chose to attend the site yourself at 9:30am on 24th March 2019 to assess the situation. This caused further delay, risk and damage to the school and was a serious breach of trust and confidence. Both actions were behaviour inappropriate and incompatible with your role and position."

29 During the hearing, the claimant was asked (as noted at the bottom of page B14):

> "Would you say it was your responsibility as Site Manager to come out in the event of the alarm going off?"

30 The claimant's answer to that question was simply (as recorded at the top of page B16): "Yes."

31 On page B17, Mr Renny was recorded to have said to the committee:

> "He [i.e. the claimant] is not denying he should have taken different action."

32 The claimant did not dispute the accuracy of those parts of the hearing record, although during the hearing before me, when I asked him if he accepted that it was accurate he said that he could not recall "it 100% being said".

33 I asked Mr Dixon whether he had accorded Ms Mirza's recommendation that the claimant be dismissed any particular weight, bearing it in mind that she was the head teacher of the school. He considered that question carefully, and said that he had not done so: the disciplinary panel had, he said, considered the matter independently and carefully, and its conclusion was its own entirely. I accepted that evidence.

34 The claimant appealed the decision to dismiss him summarily, on the grounds set out in the letter at pages B145-B146. The grounds included this one:

> "Abel Alarm: I have stated that I asked the company when they phoned me to phone back if any further sensors were tripped. The school has stated that only one phone call from an incident is expected. The operator stated to me

that he would phone back if any other alarms were tripped. As the robbery took place throughout the school other sensors must have been tripped. Abel Alarms did not follow up my request and if they had I would have attended the school."

The appeal

35 The appeal hearing was chaired by Mr Hakata, and took place on 24 July 2019. The claimant was again represented by a trade union representative, this time Ms A Holden of Unison. Rather than Mr Dixon, as the chair of the disciplinary panel, presenting the panel's conclusions (which was, it was asserted on behalf of the claimant, the norm), another member of the panel, Ms Law, did that. One of the members of the governing body was a co-opted governor, who was the current head teacher of another primary school in the area.

36 There were notes of the hearing in the bundle at pages B150-B160. One of the arguments advanced by Ms Holden (noted at page B152) was based on the fact that the claimant had not been suspended: that showed, it was reasoned, that "The school has failed to demonstrate a breakdown of trust", so that

> "The HT's decision [i.e. that of Ms Mirza] not to suspend OD [i.e. the claimant] shows that she failed to demonstrate that dismissal was justified."

37 In addition, Ms Holden asserted (at page B156) that Ms Mirza should have got "an independent investigator" to carry out the investigation which she, Ms Mirza, carried out.

38 I noted the following exchange in the notes of the hearing at pages B152-B153 (to which I have added emphasis by underlining) under the heading "Questions from Panel":

> "Q. The alarm company were asked to monitor, is that their role.
>
> A Holden – That would be a question for the HT.
>
> OD – Not sure.
>
> Q. We would like clarification as to what the alarm company are contracted to do.
>
> OD – Each classroom has a sensor.
>
> A Holden – That morning OD asked for, but did not get, a call back. There have been numerous call outs before due to power cuts.
>
> Q. Emails refer to Abel Alarms saying that their responsibility ends with the call.

A Holden – this was not made clear to OD.

Q. How frequent are false alarms.

OD – You would have to find out from Abel Alarms. During the last year over six or seven, maybe more.

OD – There are three cable lines into the school, one of them is always a problem.

Q. You have attended the school in the middle of the night for false alarms.

OD – Yes, many times.

Q. There is a difference in what they tell you.

OD – Yes, a difference.

Q. They say in their email "Intruder" comes up; would they normally say which flag.

A Holden – That was one of our questions. The emails between the HT and Abel Alarms requesting information, they said it would require an engineer to come into the school and that would incur a charge. This never happened.

Q. The incident before, you asked Abel Alarms to call you if the alarm went off again.

OD – Yes, on 1 February during the day, the alarm was re-set in between."

39 On page B154, the claimant is noted to have said twice:

"I made an error of judgement."

40 Ms Holden is noted to have said on the same page (B154):

"In hindsight, OD should have attended the school site, but he asked Abel Alarms to monitor."

41 On page B157, there was this exchange about the claimant's job description and the handwritten additions which I have set out in paragraphs 8-11 above:

"A Holden – Appendix 26, the JD, there are a number of handwritten comments. How were they consulted on.

RM – They were not changes, they are explanations, the SBM [i.e. the School Business Manager, Ms Vuong] did OD's appraisal and he requested this.

OD - Yes, I received it.

RM – They were not changes, she wrote down what you asked re what you were doing.

OD - I had no issue at the time."

42 In summarising the case, Ms Holden is noted to have said this (page B159):

"He is extremely sorry. He couldn't have prevented a break in, he may have been injured if he'd attended."

43 The outcome of the appeal was to uphold the decision to dismiss the claimant but to change the sanction to dismissal on notice rather than without notice. That was recorded in the notes at page B160 and formally stated in the outcome letter at pages B193-B194. Of most relevance (although the whole of the letter was relevant in that it showed that the appeal panel had considered the claimant's arguments against his dismissal carefully) was this bullet point at the bottom of page B193:

"It is accepted that the Abel Alarms call operator did not say that they would not call, however this does not change the fact that your JD states that you are responsible for attending the site in emergencies including alarm call outs."

44 The next and final bullet point in the letter (before the appeal panels' conclusion was stated) was at the top of page B194 and was in these terms:

"The requirement to attend the site during emergencies, including alarms, means that you should have attended the school site following the call on the 24th March 2019 regardless of your opinion at the time that the alarm was likely to be caused by a power cut. This meant that the burglary continued uninterrupted and was not discovered until the next morning."

45 The panel's overall conclusion was stated on the same page and was this:

"After reviewing all the information, the appeal panel was satisfied that the decision of the disciplinary panel is correct and should be upheld. However, in acknowledgement of the mitigating circumstances you mentioned during the appeal hearing; namely your long service, the appeal panel has changed the sanction imposed by the original panel from summary dismissal to dismissal with contractual notice. You will not be required to work your notice period."

46 In his oral evidence at the hearing on 22 August 2020, the claimant accepted that if there was a power cut, then the normal consequence as far as the alarm system was concerned was that a back-up battery started to operate and kept the alarm system working and that if it did not do so then the alarm would be triggered, but that the system would show (and Abel would log) that there was a fault, not an intruder alarm. However, on that day he said (apparently for the first time, i.e. he did not say this to the respondent before being dismissed) that that had happened on 1 and 18 December 2018 and 1 February 2019.

47 When giving oral evidence, Mr Hakata said that he and his fellow panel members had concluded that it was implicit in the claimant's job description that he was required to attend the school's premises in the event of being informed by Abel of the intruder alarm being triggered there. He said that that was an emergency within the meaning of the tasks in that job description set out in paragraph 8 above.

48 Ms Mirza said in oral evidence that the merger of the school with another primary school had led to no reduction in the number of employees required to do work of the sort that the claimant did. I accepted that evidence.

The claimant's submissions

49 Written submissions were advanced by Ms Delbourgo in a skeleton argument on behalf of the claimant. I do not refer to them all here, although I took them all into account and respond to them so far as necessary below. The submissions included these:

49.1 "Our primary submission is that this is not a case of gross misconduct. There was no misconduct at all really only a simple error of judgment."

49.2 After referring to the definition of gross misconduct in the ACAS guidance on the matter, Ms Delbourgo wrote that "there does need to be a breach of contract which it is submitted there is not here".

49.3 "The Claimant's job description did not in terms require him to attend whenever the alarm goes off only to attend in the case of actual emergencies: B-127. The Claimant's job description was the subject of collective bargaining: B-154. The head teacher and/or the Claimant's line manager were not entitled to extend the Claimant's duties without going through the collective bargaining process. The Claimant had to exercise judgment in deciding whether it was a real emergency and on 24/3/19 he made an error of judgment in that he thought it was a false alarm whereas in fact there had been a serious break in."

49.4 "The Claimant had sent out an out-of-office message to Abel Alarms which contained an obvious error as to the date. That message seems not to have been queried by Abel Alarms and they appear to have ignored it - see B-125."

A discussion

50 As I said to Ms Delbourgo during the hearing, an employer may classify a dismissal as being for gross misconduct when, as a matter of the law of contract, that is wrong, but still dismiss fairly: what will matter will be whether or not the dismissal was within the range of reasonable responses of a reasonable employer. I note here that that is recognised in the following discussion in paragraph DI[1553.01] of *Harvey on Industrial Relations and Employment Law ("Harvey")*:

> "This principle of the separation of the common law and statute gives rise to a further caveat here. It is customary to equate dismissal for a first offence with summary dismissal for gross misconduct. This will normally be the case, but in law the statutory action for unfair dismissal operates on its own terms, and thus it is possible for there to be a fair dismissal for a first offence falling short of 'gross misconduct' at common law. This is illustrated by the case of *Quintiles Commercial UK Ltd v Barongo* UKEAT/0255/17 (16 March 2018, unreported). The claimant was disciplined for two actions (not undertaking necessary training and missing a compulsory session) which the employer considered to be gross misconduct. Although on that basis it could have gone for summary dismissal, it instead dismissed on notice. On his appeal, it was decided that these actions fell short of gross misconduct; they were recategorised as 'serious misconduct' under the firm's procedures but the decision to dismiss was upheld. When he brought proceedings, the ET held that this had to be unfair dismissal because a first offence which fell short of gross misconduct had to result in warnings; to proceed to dismissal in such circumstances was in law unfair. The EAT allowed the employer's appeal, denying any such rule of law. The ET had been wrong to draw a bright line between summary dismissal and anything less in a statutory action for unfair dismissal. Neither the ERA 1996 s 98 nor the ACAS Code of Practice makes such a distinction. Quite simply, a dismissal for a first offence (without warnings) may or may not be unfair, depending on a consideration of all the facts and the application of the range of reasonable responses test, as required by s 98(4). It may of course be in practice that such a dismissal for less than gross misconduct may be more difficult for an employer to defend, but that is a question of fact, not law."

51 Also, as noted in paragraph DI[1567] of *Harvey*:

> "In general if there is gross misconduct the employer will not wish to retain the employee in employment at all. However, as the Scottish EAT recognised in *Hamilton v Argyll and Clyde Health Board* [1993] IRLR 99, it is not intrinsically inconsistent with a finding of gross misconduct for the employer to be willing to consider the employee for other suitable employment."

52 That is in accordance with my own understanding, which is that an employer may, but is of course not obliged to, retain an employee who has in the view of the employer committed gross misconduct, so that if only for that reason, the reverse proposition that was relied on here, namely that if the respondent had not suspended the claimant then it could not rationally dismiss the claimant for gross misconduct, did not bear scrutiny. In fact, that proposition in my view did not bear scrutiny in any event, and would fly in the face of the case law concerning the need to avoid suspending an employee simply because the employee is accused of conduct which, if it happened, was gross misconduct. The case law concerning suspensions and the need to avoid a knee-jerk reaction to an allegation of misconduct by suspending the employee, includes the decision of the Court of Appeal in *Crawford v Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402.

53 During the hearing of 20 and 21 August 2020, I discussed with Ms Delbourgo the impact in the law of unfair dismissal of the classification by an employer of an employee's conduct as "gross misconduct" and then dismissing the employee for it . As I said then, I could see no such impact: in my view the only relevant tests are those which I have set out in paragraph 4 above. I note here that there is the following passage in paragraph DI[1352.02] of *Harvey* onwards:

> "Although it is conventional to refer to this whole area of unfair dismissal law as dismissal 'for misconduct', in fact the legislation refers to dismissal for a reason that 'relates to the conduct of the employee'. Normally, the two will be synonymous, but the decision in *J P Morgan Securities plc v Ktorza* UKEAT/0311/16 (11 May 2017, unreported) shows that ultimately it is the statutory wording that must be applied; in particular, when establishing 'the reason', there is no legal requirement on the employer to show that the employee's conduct was 'culpable'. The claimant was found guilty by the employer of a trading practice called 'short-filling' and dismissed. This was contrary to its rules, but there was dispute over whether the claimant was or was not aware of this. On his claim for unfair dismissal, the tribunal held for him on the basis that in order to constitute misconduct the employer had to show that the employee had been 'culpable' (using the criminal law analogy of deliberate action, not merely negligent or reckless). As this had not been shown to the tribunal's satisfaction here, the employer had not discharged its burden to show the reason for dismissal (under the ERA 1996 s 98(1), (2)) and so the dismissal was unfair. Allowing the employer's appeal, the EAT held that there is no legal requirement of culpability at this stage; nor is there any requirement to show that the employee was subjectively aware that his or her conduct would meet with the employer's disapproval. The judgment cites that in *Royal Bank of Scotland v Donaghay* UKEATS/0049/10 (11 November 2011, unreported) where the EAT disapproved a similar tribunal misdirection that s 98 required the employer to show that the employee's conduct was 'in some sense reprehensible' (note: this was the EAT judgment in what became *CJD v Royal Bank of Scotland* [2013] CSIH 86, [2014] IRLR 25 (see para [1352.01] above) where the argument was slightly different). In the instant case, the

judge pointed out that how culpable or otherwise the employee's conduct was may become relevant at the next stage of deciding under s 98(4) whether the decision to dismiss was reasonable in all the circumstances, but not when determining the reason in the first place.

Two points are suggested:

(1) although the judgment does not cite the standard definition of conduct in *Thomson v Alloa Motor Co Ltd* [1983] IRLR 403, EAT, as 'actings of such a nature whether done in the course of employment or outwith it that reflect in some way on the employer-employee relationship' (see para [1352.01] above), it seems entirely consistent with it;

(2) two matters of semantics arise from the case: (a) as stated above, the correct term technically is 'conduct', not 'misconduct'; and (b) it is generally better in this area to avoid terminology taken from criminal law.

[1352.03]

Accepting that it is the statutory term 'conduct' that should be considered and that culpability is not per se a legal requirement, there is one further question of principle that may need to be resolved at some point. This arose incidentally in the decision of the Supreme Court in *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16, [2018] IRLR 558, [2018] ICR 705. The case concerned the fairness of the dismissal of a head teacher because of her association with a man convicted of child pornography offences (see para [1481.03] below). The decision of the court (upholding the tribunal's finding of fair dismissal) is relatively brief and concerned only with the particular facts before it. However, in her short concurring judgment, Lady Hale indicated obiter that the case might have raised the question whether 'conduct' in s 98(2)(b) requires as a matter of law a breach of the contract of employment itself. However, as the point had not been raised and argued in the appeal, she gave no further indication of any opinion on it, stating only that 'it is not difficult to think of arguments either way'."

54 That discussion is interesting and illuminating, but served as far as I was concerned to confirm my initial view, as stated by me in the preceding paragraph above.

My conclusions

The issues stated in paragraph 4 above

55 I came to the following conclusions on the issues stated in paragraph 4 above, taking them in the order in which they are set out there (and setting out the issue before stating my conclusion on the issue):

55.1 What was the reason, or principal reason, for the claimant's dismissal? Was it (as the respondent claimed) the claimant's conduct? Yes. It was not redundancy, it was the claimant's conduct in the form of not going to the school's premises in the middle of the night on 24 March 2019 or alternatively alerting another keyholder who was able and willing to attend (such as Ms Mirza) to the need to do so. In addition, it was in my view not an answer to say that the claimant exercised a judgment, which was that he did not need to attend the school's premises when he was called out in the early hours of 24 March 2019 and that as a result his conduct was not the reason for his dismissal. His failure to attend the school on being informed by Abel that there was an active intruder alarm, or to call e.g. Ms Mirza, was, in my view, conduct within the meaning of section 98(2)(b) of the ERA 1996.

55.2 Did the persons responsible for deciding that the claimant should be dismissed genuinely believe that the claimant had committed that misconduct? Undoubtedly, yes, both Mr Dixon and Mr Hakata and their fellow committee members genuinely believed that the claimant had admitted that conduct. That was of course in the circumstances an inescapable conclusion.

55.3 Did the respondent conduct a reasonable investigation into the alleged misconduct of the claimant before deciding that he should be dismissed for that conduct, i.e. was it (see *J Sainsbury plc v Hitt* [2003] ICR 111) one which it was within the range of reasonable responses of a reasonable employer to carry out, or was it outside that range? In my view the quality of the investigation was of relatively little relevance, given that the claimant plainly did commit the conduct for which he was dismissed. There was in any event nothing wrong as far as the law of unfair dismissal was concerned with having Ms Mirza carrying out the investigation into the circumstances surrounding the claimant's failure to attend the school's premises when he was called out at 1.37am on 24 March 2019. The fact that she formed a strong view on the matter and then pressed it to a conclusion in the disciplinary hearing chaired by Mr Dixon was, however, capable of affecting the fairness of the claimant's dismissal, but that was another matter. In fact, as I say in paragraph 33 above, I accepted Mr Dixon's evidence that he and his fellow committee members considered the situation independently and carefully. Mr Hakata's evidence to which I refer in paragraph 47 above was given after careful thought, and the fact that the appeal panel changed the disciplinary sanction showed that it too had approached the matter independently.

55.4 Were there reasonable grounds for the belief of whoever decided that the claimant should be dismissed that the claimant had committed the misconduct for which he was in fact dismissed? Inescapably, yes, there were reasonable grounds for concluding that the claimant committed the

misconduct for which he was dismissed. Not only did he admit the conduct, but it was objectively verifiable and verified.

55.5 Was the claimant's dismissal within the range of reasonable responses of a reasonable employer? This question was, as I said to Mr James during the hearing, the main issue in this case. However, I was unable to see how I could lawfully come to the conclusion that the claimant's dismissal was outside the range of reasonable responses of a reasonable employer. That was for reasons to which I now turn.

Was the sanction of dismissal outside the range of reasonable responses of a reasonable employer?

56 The main plank of the claimant's arguments to the disciplinary committee, the appeal committee and me, was that he had asked Abel to monitor the alarm and let him know if it was triggered again, after 1.37am on 24 March 2019. However, in order to be able to say to me that that was a sufficient response by him, he had to be able to put before me evidence which he had put before the second respondent, or (possibly, i.e. at best from his point of view) which was generally available and of which it should have taken account, that once an intruder alarm is triggered, an intruder could trigger a sensor which, if triggered, will again trigger the alarm.

57 There was no such evidence before me. In addition, as far as I could see, i.e. the evidence before me showed that, once the alarm at the school was triggered, it had to be reset before it could again be triggered. That was consistent with the final part of the notes set out in paragraph 38 above. In addition, in the notes set out in paragraph 27 above, the claimant is recorded to have said that he had on all previous occasions of the intruder alarm going off and him being notified by Abel that it had done so, gone to the school's premises. That implied that the claimant's own understanding was that he had to go the school's premises to reset the alarm if it was going to operate again.

58 In addition, the claimant accepted in the passage set out in paragraph 27 above, and elsewhere, that he had made an error of judgment. Further, I could see no reason to doubt the accuracy of the parts of the record of the disciplinary hearing to which I have referred in paragraphs 29-31 above. They had not been challenged by the claimant at any time, and they seemed highly likely to me to be accurate. Furthermore, the claimant's own representatives at both the disciplinary hearing and the appeal hearing recognised that the claimant had been at fault.

59 In those circumstances, unless there was some factor which might undermine the conclusion that the claimant's dismissal was within the range of reasonable responses of a reasonable employer, I could not see how that conclusion could be avoided here. I could see no such factor. That is for the following reasons.

60 The fact that the disciplinary panel had as one of its members a member of the school's staff was to my mind incapable of making the claimant's dismissal either procedurally or otherwise unfair in the circumstance that neither the respondent's disciplinary procedure nor the statutory instrument to which I refer in paragraph 24 above precluded that. I was not aware of, and did not have drawn to my attention, any other statutory provision which precluded a staff governor from taking part in a decision to dismiss a member of the staff of a maintained school. One might even infer from the absence of such a prohibition that Parliament had expressly envisaged a staff governor taking part in a decision to dismiss a member of the staff of a maintained school, but that was neither necessary here nor was it in my view a safe inference to draw. It was sufficient in my view to say that the absence of a prohibition in either the respondent's disciplinary procedure or legislation on a staff governor being a member of a committee which decides whether another member of the staff should be dismissed, meant that it would at least normally not be outside the range of reasonable responses of a reasonable employer for a committee including such a member to decide that the claimant should be dismissed. There was here nothing to take the situation outside that norm.

61 Equally, and for the same reasons (but with even more force, bearing in mind that it was not clear why a co-opted governor's inclusion in a disciplinary or appeal panel might affect the fairness of a dismissal), there could be no reasonable objection to the inclusion in the appeal panel here of a co-opted governor.

62 Even if the claimant was guilty of an error of judgment only, in my view that was capable of being classified as gross misconduct, so that it fell within the definition of "conduct" in section 98(2)(b) of the ERA 1996. However, if that were wrong, then the reason for the claimant's dismissal was inevitably "capability" within the meaning of section 98(2)(a) of the ERA 1996, and therefore also capable of being fair. The classification of the cause of the claimant's dismissal here was in my view therefore not material.

63 Reliance by the claimant on the fact that he had told Abel that he was on holiday was plainly insupportable, given that the email in which he informed Abel of his holiday stated (see paragraph 14 above) that he was on holiday in April and not March of 2019. In addition, the claimant had (see paragraphs 16 and 17 above) himself told Abel not to call any other keyholder, and he had not called any other keyholder. That was plainly culpable conduct which meant that the fact that he had told Abel that he was on holiday was irrelevant to the fairness of his dismissal in the circumstances.

64 For the avoidance of doubt, I agreed with Mr Hakata's and his fellow panel-members' assessment that the claimant's job description implicitly (if not, I add, explicitly) required him to attend the school's premises when he was called at night by Abel, telling him that the intruder alarm had been triggered. That was not least because it was impossible to know whether or not the intruder alarm had been triggered because there was an intruder on the premises without someone on behalf of the school going to those premises in person. If the claimant was not

going to attend, then he had to alert someone else to do so. The fact (as it was suggested by Ms Delbourgo) that it was onerous for the claimant to be required to attend at any time unless he was on holiday and someone else was the designated first port of call in the event of the intruder alarm being triggered, was in my view irrelevant. The claimant had agreed to do that, and he was paid overtime at any time that he did so.

65 Also for the avoidance of doubt, the handwritten amendments to the claimant's job description to which I refer in paragraphs 8-11 above in my view added nothing material, but even if they had done so, the fact that the job description was originally agreed by collective bargaining between the first respondent and the claimant's trade union (and possibly other trade unions) could not mean that those handwritten amendments had no effect, not least because the claimant had (as recorded in paragraph 41 above) had no objection to them being made.

In conclusion

66 For all of the above reasons, the claimant's claim of unfair dismissal did not succeed.

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Employment Judge Hyams
Date: 25 August 2020

JUDGMENT SENT TO THE PARTIES ON

23 September 2020

N Gotecha
FOR THE TRIBUNAL OFFICE