



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr D Eade

v

City of London Corporation

Heard at: London Central
(via Cloud Video Platform)

On: 3, 4, 5, 6, 9 and 10 November 2020

Before: Employment Judge Joffe

Representation

For the Claimant: In person

For the Respondent: Ms I Omambala QC, counsel

RESERVED JUDGMENT

1. The claim for unfair dismissal under sections 94 and 98(4) Employment Rights Act 1996 is dismissed.
2. The claim for wrongful dismissal is dismissed on withdrawal by the claimant.

REASONS

Claims and issues

1. The claimant brought claims for unfair and wrongful dismissal. The issues were agreed at a preliminary hearing in front of Employment Judge Quill on 6 May 2020.
2. At the outset of the hearing, the claimant made it clear that he did not want to pursue the claim of wrongful dismissal. I explored with him whether he was sure he wished to take that course and he was. The remaining issues were accordingly:

Unfair dismissal

1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”)? The respondent asserts that it was a reason relating to the claimant’s conduct.
2. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called ‘band of reasonable responses’?

Remedy for unfair dismissal

3. If the claimant was unfairly dismissed and the remedy is compensation:
 - a) if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would [still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway]? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604;
 - b) would it be just and equitable to reduce the amount of the claimant’s basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
 - c) did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?
3. The hearing in front of me concerned the liability issues only.

Findings of fact

The hearing

4. I was provided with a bundle of over 1000 pages of documents. I heard from the claimant on his own behalf. For the respondent, I heard from Mr Alan Bird, head teacher of City of London School ('the school'), Dr Richard Brookes, senior deputy head of the school, Mr Andrew McBroom, deputy head - co-curricular and operations, Mrs Ena Harrop, former head of City of London School for Girls, and Mr Roland Martin, head of City of London Freeman's School.

Application under Rule 50 Employment Tribunals Rules of Procedure

5. The bundle included some, although imperfectly completed, redaction of the names of pupils at the school. Both parties agree that any references to children's names should be anonymised / redacted in the interests of preserving their privacy.
6. Giving full weight to the principle of open justice and the Convention right to freedom of expression, it seemed to me that it was necessary to undertake redaction and anonymise pupil names to protect the Article 8 rights of the relevant pupils.
7. Incidents involving particular pupils at the school formed a very small part of the evidence and the names were entirely unnecessary to an understanding of the evidence and the issues. The Article 8 rights of the pupils clearly outweighed any possible interest the public might have in their identities.

Application to recall Mr McBroom

8. On the fourth day of the hearing, after Mr McBroom had completed his evidence and been released, the claimant applied to have him recalled for further cross examination. He initially said that this was to pursue a further 'theory of case' and then said that he wanted to go into more detail in relation to the investigation report. He said that he was representing himself and had not appreciated the need to put detailed challenges to Mr McBroom. He also suggested that he found it difficult to put tough cross examination to a longstanding former colleague.
9. The respondent resisted the application. Ms Omambala said that the claimant had prepared his witness statement at a stage when he had had advice and representation but had raised no substantive challenge to the

investigative process. Mr McBroom would be put to further inconvenience if he was required to attend again.

10. Before deciding the issue, I asked the claimant whether he was willing to share with me the further script which he had prepared of questions to ask Mr McBroom and he agreed to do so. He had shared another script of questions he had prepared for Mr Bird earlier in the hearing.
11. I concluded that it was not appropriate to recall Mr McBroom. Whilst, in accordance with the overriding objective, it might on occasion be appropriate to allow a witness to be recalled where an unrepresented claimant had missed the opportunity to put crucial parts of his case because of a lack of legal understanding, that did not seem to me to be the case here. The further questions the claimant had set out in his script were largely long sections of commentary which essentially had the character of submissions rather than of questions. They appeared to be further thoughts that the claimant had had about the investigation process and further evidence of his own which he wanted me to consider rather than to be questions for Mr McBroom which were the product of an enhanced understanding by the claimant of the law. I concluded that it would be disproportionate to require the respondent to recall Mr McBroom since the questions the claimant proposed to ask were unlikely to produce evidence which would have any meaningful impact on the case and since there would be inconvenience to Mr McBroom and a risk that the hearing could not be completed in the time available. At the time I made this decision, I was hopeful that I would be able to deliver an oral judgment.
12. The parties were notably helpful, cooperative and civil to one another and the Tribunal during the course of the hearing, despite some emotive issues being raised for the claimant in particular, for which I record my gratitude.

Background

13. The respondent is, amongst other things, the proprietor of a number of schools including City of London School and it employs the staff of the school.
14. The City of London School is an independent fee-paying school; its pupils are 950 boys aged 10 – 18. It is a selective school with a strong academic reputation. Academic results in the form of performance by pupils in public examinations are important for the school's reputation and for attracting and retaining pupils. There are approximately 100 teaching staff.

15. The school has a senior management team ('SMT') consisting of eight members of staff. Heads of particular departments in the school are not members of the SMT but fall at middle management level in the school hierarchy.
16. The claimant is a qualified maths teacher who commenced employment at the school in 2003. In 2006 the claimant was promoted to head of the maths department; he had line management responsibility for 11 staff as of 2018 – 2019. Maths is the largest academic department in the school. The claimant's line manager at relevant times was the assistant head (academic), Ms Noeleen Murphy.
17. Part of the claimant's role as head of department was to monitor performance of teachers in the maths department and to monitor pupil outcomes; he also, in common with other staff, had responsibilities in relation to safeguarding.
18. Mr Alan Bird was appointed as head teacher from January 2018. Dr Richard Brookes, senior deputy head, was acting head in the autumn term of 2017. Mr Andrew McBroom was deputy head co-curricular and operations at relevant times and Coco Stevenson was the deputy head (pastoral) and also designated safeguarding lead.

Teachers' Standards

19. The Department for Education lays down national professional standards for teachers which include:
'Teachers make the education of their pupils their first concern, and are accountable for achieving the highest possible standards in work and conduct... A Teacher must
...Promote good progress and outcomes by pupils
Be accountable for pupils' attainment, progress and outcomes
Demonstrate knowledge and understanding of how pupils learn and how this impacts on teaching...
Take responsibility for improving teaching through appropriate professional development, responding to advice and feedback from colleagues...
Teachers uphold public trust in the profession and maintain high standard of ethics and behaviour, within and outside school, by:
 - Treating pupils with dignity, building relationships rooted in mutual respect, and at all times observing proper boundaries appropriate to a teacher's professional position
 - Having regard for the need to safeguard pupils' well-being, in accordance with statutory provisions

...

Teachers must have proper and professional regard for the ethos, policies and practices of the school in which they teach, and maintain high standards in their own attendance and punctuality, Teacher must have an understanding of, and always act within, the statutory frameworks which set out their profession duties and responsibilities. ‘

Procedures

Capability procedure

20. The respondent has a capability procedure for teachers which has informal and formal stages.
21. The informal procedure provides for a meeting with an employee and a manager at which the employee is to be advised on the ways in which performance is not meeting standards and the steps which need to be taken to improve. It provides for an action plan to be agreed with input from the employee, setting out the areas of concerns, the standards / objectives to be met and any agreed training and guidance. At the end of the review period, normally one to three months, there will be a review meeting. If performance has improved sufficiently, that will be confirmed in writing and no further action taken, otherwise the shortcomings will be discussed and, if the manager concludes there is a not a justifiable reason for the lack of improvement to an acceptable standard or that the shortcomings are likely to continue, then action under the formal procedure will be taken.

Disciplinary procedure

22. The respondent also has a detailed disciplinary procedure for teachers which provides, in common with most such procedures, examples of conduct which may be considered gross misconduct and which could lead to dismissal for a first offence. These include:
 - a serious act of insubordination;
 - a breach or omission relating to safeguarding of a pupil, client or young or vulnerable person;
 - a serious breach of confidentiality;
 - offences or actions within or outside the City Corporation employment which by their nature...[are]..

Considered to be a wilful breach of the trust and confidence that is implicit between the employer, teacher and work colleagues.

23. The procedure provides for the possibility of precautionary suspension before or during a disciplinary investigation 'if it is considered necessary or expedient to enable investigations to be made, or if it is considered inappropriate for the teacher to continue at work during the investigation.' Suspension is decided upon by the head or deputy head in consultation with the director of human resources.
24. There is also a disciplinary appeals procedure and a detailed code of conduct for teachers.

Code of Conduct

25. The respondent's code of conduct includes the following relevant provisions:

'Employees are expected to conduct themselves in a way that, in the reasonably held belief of the City Corporation, is not likely to fundamentally undermine the required relationship of trust and confidence between themselves and the organisation.'

'Employees must not conduct themselves in a way that brings the Corporation, Employees, Members, Service Users and Partners into disrepute or causes reputational damage.'

Social media policy

26. The respondent's social media policy includes the following provisions:

'This policy applies to the use of social media in both professional (ie in the course of your duties and on behalf of the City Corporation) and personal capacities (ie. your own personal accounts)... In accordance with the Code of Conduct, employees are expected to conduct themselves in a way that, in the reasonably held belief of the City Corporation, is not likely to fundamentally undermine the required relationship of trust and confidence between themselves and the organisation. Employees are individually responsible for any content they publish on social media sites... Serious breaches of the guiding principles, for example incidents of bullying individuals/colleagues or social media activity causing (or with the potential to cause) serious damage to the City Corporation may constitute gross misconduct and may lead to action under the disciplinary procedure up to and including dismissal. '

Relevant events

27. In May 2018, there were concerns about the claimant's handling of a parental complaint; he did not follow a direct management instruction in handling the complaint and did not allow a member of pastoral staff to accompany the pupil to a meeting with the claimant. This was said not to conform with the school's safeguarding policy and led to Dr Brookes concluding that the claimant should attend training in safeguarding and handling pupil and parental complaints. The claimant accepted that he had not followed Mr Bird's instruction in the particular case but considered that he was justified in doing so because he felt he was dealing effectively with a run of the mill complaint by a boy about a detention.
28. On 16 May 2018, the claimant sent an email to Mr Bird about the incident in which he said in some 'educational notes': 'Educating young boys is a difficult thing to do. Since there is no instruction manual for such a process we make it up as we go along. If we choose to scrutinise [pupil name]'s perceptions and emotions we will never find clarity...Given the difficulties involved in educating children we need to depend upon notions of trust, confidence, faith and intuition; notions which crumble when exposed to evidence gathering, reasoned discussion and close examination...'
29. Mr Bird responded on 17 May 2018 by email. He said, amongst other things, that the claimant's 'educational notes' 'did not address the fact that there are clear, regulatory requirements (encapsulated within our school policies, and put at the heart of much staff training) which outline how we – as teachers and staff working with children – must be accountable for decisions that we make every day, to ensure that pupils are safeguarded...for this reason it is not possible for us to 'depend' upon notions of trust, confidence, faith and intuition, even if those notions are hugely important in much of what we do.' He pointed out that 'evidence gathering, reasoned discussion and close examination' were at the heart of the procedures the school was required to have in place. He said he would be pleased to discuss the matter face-to-face at an already planned meeting.
30. The claimant received additional training on level three safeguarding. He described that training in an email as 'indoctrination'.
31. The claimant's relationship with the school's policies and procedures continued to be an issue. In a letter of 2 July 2018 to Mr Bird, Dr Brookes, Ms Murphy and Ms Stevenson which concerned the parental complaint amongst other matters, he suggested he was being treated as a scapegoat and that if he was accused of not following policy, then 'given the size of the maths department, I contend that the fault lies with how our policies are

composed and imposed rather than with me.’ He made a plea for greater collegiality.

32. In the academic years 2016/2017 and 2017/2018 the school’s A level maths results were below expectations and represented poor added value and predicted grades did not match grades actually achieved by pupils.
33. In June / July 2018, the school commissioned a report on parental perceptions of the school from Mungo Dunnett Associates (‘the MDA report’). There was significant negative feedback on the maths department which was described as the ‘most poorly regarded maths department we have encountered’.
34. Mr Bird and Dr Brookes met with the claimant on 31 August 2018 to discuss the MDA report and the concerns about A level results.
35. There was a discussion about how to address the issue, which Mr Bird said was that the maths department was ‘not doing enough or not doing the right things, to support the progress and outcomes of many of our boys in Maths.’
36. The claimant raised external factors which contributed to the dip in grades, in particular curriculum change and that large numbers of pupils were taking maths at A level. Mr Bird’s evidence was that the claimant rejected the idea that teaching methods could have contributed to the results and was reluctant for there to be scrutiny of teacher practice or pupil progress. His view was that he should be trusted as a subject expert. He did not accept that Dr Brookes and Mr Bird were equipped to offer advice as they were not maths specialists.
37. Agreed actions from the meeting included Dr Brookes sourcing support from an appropriately qualified external source to provide a fresh perspective on the maths department. The claimant was asked to reflect on the discussion with members of the department. At the end of the notes of the meeting which were sent to the claimant, Mr Bird said that he would prefer the necessary further discussion take place face to face and not via email and said that he would set up a meeting for that purpose early the following week. Mr Bird strongly advised the claimant not to share the MDA report with the maths department as he feared the effect on staff morale.
38. On 3 September 2018, there was a staff meeting of the maths department; Dr Brookes attended. The claimant shared the findings of the MDA report; Dr Brookes did not intervene to stop him doing so. Dr Brookes informed Mr

Bird that this had caused distress to some members of the maths department. Dr Brookes said that claimant had led attendees of the meeting to believe that the school's maths department was the worst maths department MDA had surveyed which was not what the MDA report had said. The claimant had questioned the approach of the report and its conclusions and characterised them as those of a 'gossipy parent'.

39. Three members of the maths department approached SMT members about the MDA report. Mr Broadhurst spoke to Dr Brookes and wanted to better understand the report and its findings. He expressed concern about communication between the maths department and the SMT and wanted this to improve. He suggested that the claimant was hampering communication. Mrs Nirmla Bigden also spoke with Dr Brookes about the MDA report which she felt had not been well explained to the department.
40. 10 September 2018, the claimant emailed Mr Bird a written response to the 31 August discussion, entitled 'A report on CLS Mathematics Education'. The report said it had been shared with maths department and that it offered a deeper analysis of maths education at the school and a critique of the MDA report and the educational data analysis which Mr Bird had discussed with the claimant. The claimant questioned in the report the practice of offering additional support to students predicted lower grades. The report expressed some doubt about the efficacy of conducting lesson observations. It said that any value-added analysis of results at this point was too unreliable to be meaningful, given the curriculum reform. The methodology followed in preparing the MDA report was criticised.
41. At this point a meeting as envisaged had been set up for 12 September.
42. Mr Bird decided that there should be a capability procedure overseen by Dr Brookes. In evidence Mr Bird said that he decided to invoke the capability procedure because the claimant had not responded to less structured approaches and had been resistant to changing his practice. He considered that the claimant's report reflected longstanding views which were contributory to the poor academic results and parental perceptions and that there was a need for a more structured process. He was influenced in that view by a previous paper the claimant had prepared in the autumn of 2017. In evidence he said that he appointed Dr Brookes because the claimant had been unhappy with his line manager, Ms Murphy, over the handling of his last appraisal but that the claimant had not had any difficulties with Dr Brookes.
43. On 14 September 2018, Mr Bird met with the claimant to discuss the 2 July 2018 'scapegoat' letter. In his follow up letter he reiterated that staff did have to comply with policies and procedures 'much of which is governed by

legislation and regulation, and all of which has the interests of the boys at heart.’

44. On 19 September 2018, Dr Brookes and Mr Bird had a meeting with the claimant as a follow up to the 31 August meeting. The claimant was told that Keith Latham, former head of maths at City of London School for Girls (‘CLSG’), had agreed to provide external support and a fresh perspective on the maths department.
45. Mr Bird explained his concerns about the claimant’s paper on maths education, in particular that there seemed to be a lack of willingness to engage with school strategy on scrutiny of teaching practice and pupil progress and suggested that the claimant saw his role as shielding the maths department from senior management. He explained that Dr Brookes would be providing structured support to the claimant through the informal capability process.
46. On 21 September 2018, Mr Latham attended the school to observe teaching, meet with maths department members and offer suggestions. He then met with Mr Bird and Dr Brookes. Mr Latham reported some positive impressions of the maths department but questioned how he could be useful since he had had a very challenging meeting with the claimant who had questioned his motives and whom he felt was not able to engage constructively with the issues. The claimant said that it was unclear what Mr Latham’s role was intended to be or what he was there to do and that the department was confused.
47. Dr Brookes wrote to the claimant on 25 September 2019 setting out the areas of concern which were:
 - ‘- Subject Leadership: your undermining (albeit, as you stated, unintentional) of school-wide approaches, in particular with regard to monitoring and promoting pupil progress, through giving your department the freedom to ignore school leadership;
 - Departmental Management: the effectiveness of your resolution of concerns raised about the maths department and insufficient scrutiny of teaching practice;
 - Implementation of school-wide strategies: a lack of willingness to engage with school-wide strategies, and your perceived defensiveness, which present as the sense that you see your role as ‘shielding’ your department from senior management;
 - Trust: a lack of trust in relationships with school leadership.’
48. On 26 and 27 September 2019, Dr Brookes met with the claimant to prepare a development plan. The plan set out in tabular form: issues,

objectives, targets, support offered and how performance would be monitored. The claimant had significant input into the draft plan. The claimant was to be provided with informal mentoring support from Adam Zivanic, the assistant head (teaching and learning), who would also attend the maths department meetings.

49. Dr Brookes emailed the claimant a record of the meetings on 29 September 2019 together with a final version of the development plan. He referred to the Teachers' Standards Part One (Teaching).
50. Between 3 October and 7 November 2018, there were weekly monitoring meetings between Dr Brookes and the claimant. Dr Brookes' evidence was that he continued to be concerned by what the claimant said in these meetings. The claimant continued to focus on matters external to the maths department to explain the poor outcomes of pupils who were underperforming. There was no evidence that the claimant had analysed the 2017 and 2018 A level results to identify any trends or patterns or to consider the contribution of teaching approaches to the results. There was no evidence the claimant undertook department-wide scrutiny of teaching practice such as by lesson observations. In the meetings, the claimant suggested that Dr Brookes was out to get him and had an issue with him personally. He said that the capability process was unfair.
51. The claimant sent to Dr Brookes and others a document described as 'Minutes from Maths Dept Meeting Thursday 1st November' which included the passage: 'I am the only teacher in the department with the experience of teaching all the topics. Hence the department struggle to understand why Richard has decided to put me through a Capability Procedure at this time since they believe that I am extremely capable.' Dr Brookes felt that this suggested that the claimant had inappropriately shared with the department that his performance was subject to the capability procedure.
52. Prior to a scheduled monitoring meeting on 14 November 2018, the claimant asked for further monitoring meetings to be put on hold. He told the Tribunal that this was so he could concentrate on supporting a particular teacher. Dr Brookes said that the claimant had said he would like the meetings to stop because he did not feel they were helping. Dr Brookes explained to the claimant that the capability process would continue and that his report to Mr Bird would be on the basis of the evidence collected to date.
53. On 28 November 2018, Dr Brookes wrote inviting the claimant to a meeting to review the informal capability process. He sent a copy of the notes of the monitoring meetings.
54. On 29 November 2019 the claimant wrote to Dr Brookes and Mr Bird:

'Many thanks for the 23 pages of notes and 800+ [words] of notes all about me (!), along with the indication that review/monitoring/capability (which one is it?) process against me may be coming to an end. This has taken up a lot of time for you and me, and we must consider if it is time well spent. As it happens I have taken the initiative of writing my own capability report (only 2 pages and 1300 words) on Dr Brookes but I have not attached it since such a report may not fit within the school development strategic plan and has not been checked by Human Resources (am I showing too much initiative?). I am a bit busy with report writing at the moment but I am sure we can squeeze in a meeting at some point.'

55. On 10 December 2018, Dr Brookes held a final review meeting under the capability process. The claimant continued to decline to accept that the standard of teaching might have played a role in the A level results in 2017 and 2018. He had not conducted work scrutiny or a programme of lesson observations and had not implemented a consistent programme of targeted support for pupils. He declined to provide evidence of progress towards targets and Dr Brookes said that he considered his tone to be obstructive. He continued to say that the capability procedure had been inappropriate and that the maths department was angry about it and that it had caused the department distress.
56. Dr Brookes recommended to Mr Bird that the formal part of the capability procedure should be commenced. Mr Bird agreed with the recommendation; he felt that the claimant had not engaged with the capability process, was not accepting that the downward trend in A level results required investigation, rejected the notion that teaching methods needed to be looked into and was arguing that the school should simply trust him as head of department
57. On 13 December 2018, the claimant was told that the formal capability procedure was being invoked in an email from Dr Brookes. The claimant was critical that this email was sent shortly before the school broke up for the Christmas holiday period.
58. Mr Bird said in evidence that he was concerned about the tenor of emails the claimant sent during this period. These included:
 - Email of 24 September 2019 sent to members of the maths department and the SMT setting out positive comments received prefaced by the remark: 'Given that so many members of the school leadership team have been telling us how we need to improve in recent times, as if we didn't know how to teach maths already, I thought the comments were worth sharing on email.'
 - What were said to be 'maths minutes' sent to Mr Brookes, Mr Zivanic and Ms Murphy on 15 November 2019 which included this point:

'DRE [the claimant]: RMB [Dr Brookes] has offered to DRE that the capability process he was undergoing be halted and DRE has accepted the offer of the process being halted. The Procedure has caused a great deal of consternation and incomprehension in the department. There was a sense of relief that this measure had been withdrawn so that department could get on with focussing on maths education';

- Further 'maths minutes' sent on 29 November 2019:
'Deputy Head: Teaching and innovation. Discussion of innovation: maths department felt that we were most innovative when we had the freedom to cooperate and try our own ideas, but in recent times we have found ourselves following instructions keeping up with ideas dreamt up in SMT meetings. DRE added that the last HODS presentation by AZ [Mr Zivanic] appeared to stifle innovation since lessons were to be judged against inspection criteria and teachers were expected to ask questions in a specific way. General amusement over whether or not DRE should apply given management measures carried out against him in the last few years. Contributions to previous maths department meetings from RMB, AZ and the consultant had not been well received. AZ's T&L emails had not been well received and were deleted by all.'

59. On 17 December 2018: the claimant raised a grievance against Dr Brookes in which he alleged Dr Brookes had bullied and harassed him. He said that Dr Brookes had been intimidating and hostile and over critical.
60. On 17 January 2019, Mr Bird met with the claimant to discuss his grievance. Mr Bird confirmed to the claimant that the capability process would be suspended pending the outcome of the grievance.
61. On 28 January 2019, Mr Bird sent the claimant his grievance outcome; he rejected the grievance and informed the claimant of his right to appeal. He said that he had asked Mr Zivanic to take over line management of the claimant and support the claimant in meeting the objectives of the capability process. He offered to extend the informal stage of the process if the claimant agreed.
62. On 31 January 2019, the claimant wrote to Mr Bird withdrawing his grievance and said he wanted to proceed with the capability process as planned. Understandably Mr Bird understood the claimant had not accepted the offer of an extension to the informal stage of the process.
63. Mr Bird felt some concern about the claimant's ongoing communications which included:
 - An email to Dr Brookes and Mr Zivanic on 2 February 2019, headed 'DRE Capability'. In that email the claimant said that he could not have made

accurate A level predictions, essentially because of curriculum reform. He said that given his own experience in the department and that of many of the other maths teachers 'I know how they teach and how they teach does not change from year to year. Given this level of trust there is less need to monitor and gather evidence. However there is no path within the Capability Procedure to explore the fact of life that trust inevitably replaces scrutiny.' He suggested that negative parental opinion resulted from teenage boys with a relative lack of mathematical ability blaming their maths teacher for that fact. He said 'lesson observations, increased monitoring, support clinic ... have all been tried in the past and have not stood the test of time.' 'In sharing my knowledge of the past I could quite easily be judged to be undermining SMT. Unfortunately, there is no path within the Capability Procedure to explore the nature of working relationships between a young less experienced SMT and an older more experienced Head of Department.'

64. On 6 February 2019, a meeting was held between the claimant, Mr Zivanic and Mr Bird to discuss the way forward, including avenues of support available to the claimant and what measures were needed to ensure that the claimant had the opportunity to put forward the required evidence.
65. Mr Bird said it was not possible to proceed with the meeting as intended as the claimant was aggressive and disruptive, Mr Bird said the claimant was not willing to engage in a constructive discussion and continued to dispute the use of the capability process. Mr Bird said in evidence that the claimant shouted at him for at least thirty minutes; a temporary PA who heard the shouting raised it as a concern with Mr Bird's usual PA.
66. The claimant denied shouting and said he was impatient and frustrated.
67. Mr Zivanic's note of the meeting recorded: 'Throughout the meeting DRE's approach was aggressive and kept repeated [sic] that he is allowed to take an aggressive stance as he is being placed under a capability procedure.'
68. Mr Bird emailed the claimant later that day. He said that he had hoped that they could have used the meeting to agree a constructive way forward and a continuation of the informal process. He said that they had not been able to reach that point and that he had found the claimant's approach to be unconstructive and at times unprofessional. He once again encouraged the claimant to consider whether the informal capability procedure could usefully be extended.
69. The claimant replied that day. He said: 'I encourage all the teachers in my maths department to test my thinking with verve, precision and lack of deference, in order to create a professional learning community in which all our policies and procedures are based on the utmost clarity and rigour. I am aware that such communication styles may not be valued elsewhere.' He said

that he had hoped in the meeting to hear a convincing justification for the capability procedure but this had not been forthcoming and therefore 'I am not in a position to make decisions as to further steps.'

70. Mr Bird said in evidence that for him this meeting tipped the matter into being a disciplinary issue. He took advice from Director of HR Chrissy Morgan.
71. There was also in this period an issue between the claimant and the safeguarding lead, Ms Stevenson, which Ms Stevenson raised with Mr Bird. Ms Stevenson was seeking to agree special arrangements for a pupil to sit a maths challenge. The claimant disagreed with the approach and wanted to speak to the boy and his mother. Eventually Ms Stevenson had to share safeguarding concerns about the pupil in order to prevent the claimant from pursuing the approach he wished to pursue.
72. Mr Bird decided a disciplinary investigation should be conducted. He considered that the claimant was failing to have regard to policies and practices of school, was undermining efforts to achieve improvement and was refusing to accept that scrutiny was appropriate. He considered that the claimant's behaviour was in breach of the Teachers' Standards and the respondent's Code of Conduct.
73. Mr Bird described the claimant as becoming unmanageable, and posing a risk to the effective and smooth running of the school.
74. In evidence, Mr Bird summarised his concerns:
 - a) The claimant refused to accept that the downward trend in A level results required scrutiny;
 - b) The claimant refused to accept that teaching methods may have been a factor that resulted in the decline in results achieved;
 - c) The claimant refused to accept that management's concern about the results was legitimate;
 - d) The claimant refused to cooperate with the informal capability process;
 - e) The claimant continually refused to accept that he should be subject to staff management procedures;
 - f) There was a deterioration in the claimant's conduct when interacting with the SMT and colleagues;
 - g) There was an ongoing concern over the claimant's respect for policies over parental complaints and student welfare.
75. Mr Bird decided to impose a precautionary suspension on the claimant. He said that, because of the nature of the claimant's communications with staff and his apparent refusal to accept management's right to use procedures,

he decided that the investigation could not be conducted if the claimant was present in school.

76. On 14 February 2019, a suspension meeting with the claimant was held by Charles Griffiths, school bursar and HR Manager Sheetal Gill. The meeting was held during the course of the school day. Mr Bird said that the timing was because there was no expectation that staff would be present in the school outside of the school day. The claimant was escorted from the school.

77. Prior to the suspension meeting, the claimant had emailed more 'maths department minutes' to Mr Bird, Dr Brookes, Ms Murphy and Mr Zivanic. These included a section entitled 'Follow-on thoughts':

'When carrying out lesson observations DRE had in the back of his mind the balance between teaching as a profession and teaching as a vocation (DRE had been accused of being unprofessional on two occasions recently). Teaching as a profession elevates teacher competence based upon policies, procedures and scholarly research; whereas teaching as a vocation elevates knowledge of the curriculum coupled with practical wisdom based upon teaching experience. Question: does a predominantly young and voluntary-childless Common room necessarily celebrate teaching as a profession above teaching as a vocation? ...DRE to consider exploring these questions via an MPhil if he manages to hold on to his teaching position for any period of time.'

78. Mr Bird sent the claimant a letter confirming his suspension and the disciplinary investigation. This set out areas of concern which were expressed in a fairly broad thematic way in relation to the Teachers' Standards: 1) failure to demonstrate high standards of personal and professional conduct in demonstrating 'inappropriate behaviours and communication with colleagues and sharing of sensitive and confidential information with colleagues'; 2) failure to have proper and professional regard to the ethos, policies and practice of the school in undermining school improvements and refusing to engage with policies and practices designed to support and develop professional practice; 3) failure to follow processes in relation to proper handling of parental complaints and pupil welfare; 4) inappropriate and obstructive behaviour that compromised the ability of the school to promote good progress and pupil outcomes, in particular failing to establish priorities of the maths department and to take reasonable steps to ensure excellent teaching and learning; 5) failing to follow reasonable management instructions of the head and others.

79. The claimant was told that he would receive full particulars of these concerns during the investigation process.

80. The claimant was told in the letter that he should not contact without permission members of staff, governors, pupils and parents. He was told

that failure to comply with the terms of suspension might be regarded as gross misconduct.

81. Initially Ms Stevenson was appointed as investigating officer. The claimant was invited to put forward relevant documents and witnesses.
82. On 26 February 2019, the claimant emailed the deputy head of maths, Mr Broadhurst, early in the morning about work matters. He had emailed Mr Bird some 40 minutes earlier asking for permission to do so but did not wait for a response before writing to Mr Broadhurst
83. On 27 February 2019, the claimant emailed Mr Bird saying that many ex pupils had been in touch with him about his situation. He said that the suspension letter had not mentioned ex pupils so he was not sure how he should act. He asked for clarification. Mr Bird responded on 28 February 2019 to say that the matter was confidential and it was in everyone's interests including the claimant's that confidentiality should be maintained.
84. The following day, 1 March 2019, Dr Brookes was approached by two staff members who had encountered pupils looking at a screenshot of Facebook messages sent by the claimant to some former pupils. The messages encouraged former pupils to contact the chair of governors and commented that the claimant had been suspended because of maths results, parental feedback and his relationship with the head.
85. On 2 March 2019, the claimant wrote to Mr Bird, the City solicitor and his own solicitor. He said that he had received a Facebook message from a former pupil suggesting that the ex pupil had heard that the claimant had been suspended for using sexist language. He suggested that malicious rumours had originated from the school leadership 'in a desperate attempt to defend their untenable position'. He said that in order to defend his reputation he had responded to the former pupil and other former pupils to send the message which had been seen on pupils' phones, which encouraged former pupils to write to the chair of governors to contest his suspension. He said that: 'The only way forward for both the school and me to regain our dignity, and rebuild our reputations, is for the Head to welcome me back into school on Monday 4th March so that we can show a public demonstration of reconciliation.'
86. The chair of governors was approached by a number of former pupils of the school expressing concern about the situation.
87. Mr Bird said in evidence that he considered that the claimant had disclosed confidential information about parental feedback, the downturn in results

and his own suspension. The information provided and the manner in which it was provided damaged the school's reputation.

88. There was then a campaign by past pupils resulting in a letter in support of the claimant signed by 126 ex pupils.
89. The claimant said in evidence that he had contacted alumni privately to address his feelings of fear and loneliness.
90. In evidence, Mr Bird said that he had reviewed the suspension during its currency. He had not communicated the facts or results of his reviews to the claimant. He said that by the time he reviewed the suspension, he had become aware of the claimant's communications with alumni and was aware that events had been placed in the public domain. He felt that this had created a climate where it would not be possible for the claimant to return whilst the investigation was ongoing.
91. The claimant objected to Ms Stevenson as investigating officer and Mr Bird agreed to replace Ms Stevenson with Andrew McBroom, deputy head co-curricular and operations, as Mr McBroom had not previously been directly involved in management of the claimant. The claimant wrote to Mr McBroom on 7 March 2019 saying that he saw Mr McBroom's appointment as a 'glimmer of hope'. He felt he could trust Mr McBroom and speak honestly to him. He said that he was really glad that Mr McBroom had accepted the task.

Investigation

92. Mr McBroom explained in evidence that the first week after the claimant's suspension was half term which caused some delay in the investigation and that he was appointed after half term.
93. At some point Mr Bird explained to Mr McBroom what the factual allegations were about and provided him with a file of documentary evidence.
94. On 7 March 2019 Mr McBroom interviewed Mr Bird and Dr Brookes.
95. On 11 March 2019 Mr McBroom invited the claimant to a disciplinary investigation meeting which took place on 18 March 2019; the meeting lasted all day. The claimant described this as an 'interrogation' and complained about the length of the interview. Mr McBroom went through the factual allegations which underlay the heads of complaint. The claimant was accompanied by a workplace colleague, Mr Bracken.

96. Amongst other things, the claimant said that he had involved the maths department in his capability process because the concerns raised were about the whole maths department.
97. The claimant also made some written submissions which he sent to Mr McBroom. They included a representation about why he had contacted former pupils. He said that his morale was low so he had contacted friends, many of whom were ex pupils. They had asked what they could do to help and together they came up with the idea that they could write to the chair of governors to preserve the claimant's reputation.
98. In total Mr McBroom interviewed 11 witnesses, including six members of the maths department and notes were made of these interviews. He looked at documents produced by the claimant and by Mr Bird. He produced a detailed report which appended the documents and interview notes produced in the course of his investigation. He concluded that there was a case to answer in relation to the various concerns. I note that the language he has used in his report is to say that various concerns were 'upheld' although the role of an investigating officer is to consider whether there is a case to answer or, put another way, sufficient evidence to justify a disciplinary hearing.
99. I summarise some of the main points that are set out in Mr McBroom's detailed report. The setting out of the concerns on a thematic basis means that some of the same incidents and evidence were looked at by Mr McBroom in relation to different allegations.

a) Allegation 1:

He considered that the sharing of the MDA report and the manner in which it was shared showed a lack of professional judgment and a lack of awareness of the consequences of the claimant's actions..

In relation to the concern about the claimant sharing the capability procedure with members of the maths department, Mr McBroom found that the evidence was contradictory. The claimant had certainly led Mr Bird and Dr Brookes to believe that he had discussed the matter with the maths department and the claimant had said so in his interview with Mr McBroom. Interviews with members of the maths department suggested these teachers were largely unaware of the process. Mr McBroom took the view that the claimant was suggesting to the SMT that the maths department were distressed by the process as a device to challenge the use of the procedure. He considered that various of the claimant's communication were unprofessional and undermining of the SMT. These included his emails of 24 and 29 September 2018.

He also found some of the claimant's correspondence with the SMT unprofessional, including the email of 29 November 2018 and the email of 14 February 2019. He found the claimant's behaviour in the 6 February 2019 meeting unprofessional, insubordinate and undermining of trust and confidence. He reviewed various explanations given by the claimant for some of his communications:

- That it was important for him to offer feedback on school strategies and policies
- He lacked appropriate channels to discuss school strategy with the SMT
- That the tone of some of his email communications had been produced by the confusion and stress of the capability procedure, similarly behaviour in meetings
- That he had not received support and guidance about his communications.

Mr McBroom considered that the claimant had many opportunities in common with other heads of department to feed back on school strategies and practices. There had been discussion about appropriate communication in the past and as part of the monitoring meetings with Dr Brookes. It was apparent from interviews with members of the maths department that various teachers had tried to encourage him to communicate more diplomatically. His interview with the claimant and the documents produced showed no meaningful acceptance by the claimant that his conduct in email or in meetings had been unprofessional.

In relation to minutes of department meetings, interviews with teachers in the maths department showed that these had not been shared with the maths department. Some members of the maths department disagreed with the contents of the minutes. Mr McBroom considered that the minutes were used to offer indirect and direct criticism of the SMT.

b) Allegations 2 and 4:

Mr McBroom considered that the evidence showed that Mr Bird had a duty to take action on the quantitative and qualitative information he had about the maths department (the fall in A level results, issues with predictions and value added data and the MDA report) and that the claimant had acted in sustained and open resistance to the school's strategies and actions agreed at the 31 August 2018 meeting. Mr McBroom pointed to evidence from the monitoring meetings which showed that the claimant had expressed an unwillingness to analyse department results for trends and patterns, that the department had not done work scrutiny, set up a programme of lessons observations or a programme of regular individualised support mechanisms. He referred to a variety of communications from the claimant which indicated his resistance to lesson observations, monitoring data and targeted intervention. The claimant repeated these views in the course of the investigation.

Mr McBroom considered the claimant's contention that he was legitimately and appropriately scrutinising policy as part of his role as head of department but concluded that the claimant's approach went beyond such scrutiny and amounted to sustained resistance

He considered that the claimant had behaved obstructively during the capability procedure and in relation to the external consultant, Mr Latham. This was a clear example of the claimant's failure to have proper regard for the school's policies and practice.

c) Allegation 3

Mr McBroom said that the evidence showed that in relation to the parental complaint in May 2018, the claimant had ignored a direct management instruction, did not seek to investigate in a balanced fashion and did not tell a boy he was entitled to be accompanied in a meeting with him. The concerns which flowed from this incident were that the claimant continued to assert that the level three safeguarding training was not required and was 'indoctrination' and inappropriate and the claimant's email of 16 May 2018 disputed the need for evidence gathering, reasoned discussion and close examination which Mr McBroom considered to be at the heart of a complaints policy.

d) Allegation 5

Mr McBroom found there was evidence to support this concern about failure to follow management instructions in respect of:

- The disclosure of content from the MDA report to the maths department, against Mr Bird's advice
- Communications designed to challenge management decisions and strategies
- Unprofessional conduct in meetings
- Failure to implement strategies to address concerns in the maths department
- Unwillingness to engage in the capability process
- Ignoring management instructions in relation the parent complain in May 2018
- An occasion in January 2017 when Ms Stephenson felt forced to divulge sensitive safeguarding information to the claimant when he was declined to follow a management instruction to about special arrangements for a pupil to sit a maths challenge.

Mr McBroom considered the claimant's contention that he was only offering appropriate and constructive scrutiny and would follow management instructions when given but did not consider that that was borne out by the evidence he had considered.

e) Allegation 6

This allegation was added after the claimant's suspension and was an allegation that the claimant had breached the terms of his suspensions Mr McBroom considered that the evidence showed that the claimant had failed to abide by the terms of his suspension:

- By contacting the deputy head of maths without permission from Mr Bird; although he sought permission, he only allowed forty minutes for a response before making contact with Mr Broadhurst
- The claimant released confidential information about his suspension, in particular to alumni via social media this led to a lobbying campaign, reputational damage to the school, operational challenges and upset to the maths department.

The claimant said that he was contacting Mr Broadhurst out of concern for the effective operation of the maths department. The claimant said that he had not posted publicly on social media, that he had sought moral support from friends and they had asked what they could do to help. 'He said that in defending in his own reputation, he was preserving the school's reputation.

Mr McBroom considered that the claimant's explanations did not excuse the breaches.

100. Mr McBroom concluded that there was 'substantial evidence' to justify the concerns raised. He identified a deep-seated resistance on the claimant's part to being managed and a pattern of behaviour, particularly in relation to his relationship with the SMT, which had cumulatively become more unprofessional. He considered that the claimant had failed to understand that the role of a middle manager is ultimately to accept school strategies and to seek to motivate his department in implementing them. He considered that the evidence showed that the SMT had sought to engage with the claimant and support him.
101. Mr McBroom's overall conclusion was that the first five allegations together amounted to gross misconduct and that the failures to comply with the terms of the suspension separately constituted gross misconduct. He concluded that there was a case to answer and recommended that there be a full disciplinary hearing. I note again that the language used by Mr McBroom is not always consistent with his role being that of investigating officer rather than decision maker, in particular the 'upholding' of concerns.
102. Mr Bird concluded that it was appropriate to convene a disciplinary hearing but that he was not the correct person to act as hearing officer. The respondent's Town Clerk therefore appointed Mrs Ena Harrop, then head teacher of CLSG, which is under separate management from the school. Mrs Harrop had no knowledge of the day-to-day running of the school. Mrs Harrop had worked with Mr Bird on occasion as well as the heads of other schools run by the respondent.
103. Mrs Harrop received a bundle of documents which included the school's disciplinary, capability and social media policies, the National Teachers' Standards, Parts 1 and 2, the investigation report and appendices, the claimant's statements and comments and the claimant's submission to the disciplinary investigation.

104. On 7 May 2019, Mr Bird sent a letter to the claimant inviting him to a disciplinary hearing. The letter enclosed the investigation report, explained that Mrs Harrop would be conducting the hearing and informed the claimant of his right to be accompanied. The letter set out the charges being pursued and explained that Mr Bird, Dr Brookes, Ms Stevenson and Ms Murphy would be called as witnesses. The claimant was informed he had a right to call his own witnesses and supply documents. He was told that dismissal was a possible outcome of the hearing.
105. On 21 – 22 May 2019, a disciplinary hearing was held by Mrs Harrop. The claimant was accompanied by his colleague, Ms Bigden. Mr McBroom presented the management case. The claimant denied all of the allegations.
106. Mr Bird, Dr Brookes, Ms Stevenson and Ms Murphy were called to give evidence and the claimant questioned the witnesses and Mr McBroom.
107. The claimant made submissions on his own behalf.
108. During the course of the hearing, the claimant acknowledged that he ‘had been a nightmare’ and said that he would adapt to the culture. He said that he accepted that a number of his emails and some of his commentary had not been acceptable. He suggested that his behaviour at the 6 February 2019 meeting had been caused by his fear of dismissal. He expressed regret to Dr Brookes for making his life difficult. He said to Ms Murphy, after she gave an account of her difficulties in managing the claimant, that he had been ‘wearing’ and that she had been patient. He apologised to her.
109. In his submissions to the disciplinary hearing, the claimant said that he accepted that he had exhausted senior managers, apologised for any offence he had caused and said that he was willing to address concerns. He described his behaviour in recent times as ‘anxious’ because he feared losing his job.
110. The claimant then went on to defend his actions in relation to a variety of the factual complaints. For example, he still felt that the capability process had been inappropriate but said that his response to it did not amount to gross misconduct. In response to questions from Mr McBroom, he said that the remarks included in the maths minutes were appropriate. It appeared that what he was apologising for was the volume of his commentary on school policies and practices. He did not accept that his handling of the May 2018 parental complaint had been inappropriate. He did not agree that he had broken the terms of his suspension or that there was anything wrong in his contact with alumni.

111. In evidence , Mrs Harrop said that although there were moments of contrition by the claimant in the hearing, at other points the claimant made clear that his behaviour would not change; she felt that overall he demonstrated an inability to reflect and accept responsibility.
112. In his closing submissions, the claimant pointed out that the charges were not based on any complaints from pupils, parents or fellow teachers. He said the disciplinary had arisen from his 'incessant emails'. He pointed to a number of mitigating factors:
- The fact that his wife had had back surgery during the relevant period and been immobile for two and a half terms so that he had effectively been a single parent;
 - The fact that he had Meniere's disease. He said that Mr Bird had demonstrated no sympathy for him;
 - The fact that he had nonetheless maintained near perfect punctuality and attendance.
113. The claimant said that he had a wife and son to provide for and that disciplinary action would destroy his career and damage his family life. The suspension had been a shock which caused reputational damage and emotional trauma.
114. The claimant suggested a role change to maths teacher might be a suitable outcome since his problems had been with the SMT. He referred to himself as having autistic traits and suggested that he would be happy to undertake communication skills training and seek a diagnosis. The claimant had said in his evidence that people had said he might be on the autism spectrum. He said that he and members of the maths department had taken the 'Baron-Cohen' autism test and he had scored 36 out of 40, which was the highest score on the maths team. The claimant said that that might explain his difficulties in understanding other people's feelings and his difficulties in communicating with management. He said that he did not have similar difficulties with friends, family and maths department colleagues.
115. The material produced by the claimant include a number of testimonials from past and present teachers at the school and alumni, expressing admiration for the claimant's teaching abilities and a negative view of the action taken by the school in relation to the claimant.
116. Mrs Harrop spent time over the following two weeks considering her conclusions.
117. She found:
- a) The first allegation to be substantiated in relation in particular to:
 - The sharing of the MDA report;

- Emails containing open criticism of the SMT to a circulation list beyond the SMT;
- Unprofessional communication with the SMT and Mr Latham at meetings held during the capability procedure

She concluded that there was a breach of Teachers' Standards and the code of conduct and that the actions undermined trust and confidence.

- b) The second allegation (which was previously allegations two and four) partially substantiated. She considered that there was evidence of actual and rhetorical resistance to what she described as 'the implementation of mainstream and widely accepted education strategy to secure the best outcomes for pupils' but that the evidence did not show that that resistance translated into a constant failure to follow policy in terms of data analysis or lesson observations; the claimant was inconsistent in producing data required by managers. She found that he failed to show a willingness to engage in reflective analysis of teaching and learning and failed to engage effectively with the capability procedure. She concluded there was ample evidence that the claimant's line managers had brought to his attention the inappropriateness of some of his communications and the need to support agreed policies. She considered that there had been a breach of Teachers' Standards which contributed to an undermining of trust and confidence.
- c) The third allegation substantiated. She accepted management evidence that the claimant had failed to investigate a parental complaint in a balanced way and chosen not to listen to the child in question. He had ignored a direct management instruction not to contact the parents concerned. At the hearing the claimant continued to assert that sending him on a safeguarding course was unreasonable and that the school's approach to safeguarding was overly bureaucratic and overreactive. He continued to maintain that a system based on intuition and experience was better than one based on evidence and investigation. She said that the claimant declined to answer questions about whether he would behave differently with hindsight. She felt there was a lack of willingness to reflect on his past actions. She referred to evidence given by Ms Stevenson of other occasions when the claimant had failed to share information in accordance with the school's safeguarding policy and the fact that the claimant had prepared and delivered training to the maths department in September 2018 about how to handle parental complaints despite a direct instruction from Mr Bird not to do so. She considered that this training showed the claimant was driven by a desire to protect his staff rather than place pupils' welfare at the centre of complaints handling. She considered that there had been a breach of Teachers' Standards which contributed to an undermining of trust and confidence.

- d) The fourth allegation (previously allegation five) substantiated; she considered there were a number of occasions when the claimant had failed to follow reasonable management instructions, as set out in the investigation report and evidence as well as examples of aggressive and unprofessional behaviour. She considered that these behaviours had contributed to undermining the relationship of trust and confidence.
 - e) The fifth allegation (previously allegation six) substantiated. The claimant had contacted the deputy head of maths without waiting for permission. He had provided confidential information to alumni and failed to consider the distinct possibility that by doing so, the information would reach current pupils, parents and staff. He failed to consider that instigating a campaign to reinstate him could have an operational and reputational effect on the school. She considered these actions to be a breach of the code of conduct and the social media policy and contributory to undermining the relationship of trust and confidence.
118. Mrs Harrop considered the matters which the claimant had put forward in mitigation. She considered the suggestion that what the claimant said were autistic tendencies might be responsible for the issues. She took into account the fact that the problems had only arisen over the past three years and the fact that the claimant had not raised a potential diagnosis with the school or sought a medical diagnosis or any support. She considered the fact that the difficulties arose only in relation to management and she concluded that the allegations against the claimant did not arise exclusively from an inability by the claimant to understand the effects of his communications but from his unwillingness to follow policy and procedure and management instructions.
119. Mrs Harrop concluded that the claimant's actions had cumulatively destroyed trust and confidence and that the appropriate sanction was dismissal for gross misconduct.
120. On 3 June 2019, Mrs Harrop wrote to the claimant with the outcome and her detailed findings and notified him of his right to appeal.
121. Although the claimant had been summarily dismissed, Mr Bird decided that he should be paid twelve weeks' notice pay to enable him to avoid financial hardship whilst looking for a replacement post for the autumn term.
122. On 6 June 2019, the claimant wrote to the respondent appealing his dismissal. His grounds included the fact that he had a spotless disciplinary record and had not been subject to any parental or pupil complaints, the assertion that the capability procedure had been inappropriate as there was no evidence of poor work performance and the assertion that the

disciplinary procedure had been invoked because he had questioned Mr Bird's authority.

123. On 25 June 2019 an appeal hearing was held in front of a panel made up of the chair of the school board of governors, James Thompson, another governor, Alex Barr, and Roland Martin, the head of City of London Freeman's School. Mrs Harrop attended to present the management case. The claimant attended but chose not to be accompanied. Mrs Harrop had submitted a written response to the appeal document. The appeal panel were provided with the documents available at the disciplinary hearing and the dismissal letter. The appeal panel reviewed the dismissal decision rather than rehearing the disciplinary case.
124. The claimant said at the outset of the appeal hearing that he was seeking reinstatement as head of maths rather than as a maths teacher. Amongst other submissions, the claimant said that the allegations against him were 'manufactured' and that Mr Bird had not acted with integrity. He pointed out the lack of complaints from parents, pupils and fellow teachers. He said that his communications with the SMT had always been professional. He said that the instigation of the capability procedure was inappropriate management by a 'young first time head'.
125. In the course of the hearing there was a discussion of an incident which Ms Stevenson had given evidence about in relation to concerns about the claimant not sharing safeguarding information. This was an incident where a pupil had bruises and there was a report from the parents to the school about bullying. The claimant had phoned the parent but had not spoken to Ms Stevenson as safeguarding lead. Mrs Harrop had said that this example had caused her concern. The claimant said that he had questioned the pupil and been satisfied with the explanation for the bruising. He considered he had acted appropriately.
126. The appeal panel concluded that the cumulative effect of the claimant's actions was to destroy the relationship of trust and confidence and that dismissal was warranted. It considered procedural issues raised by the claimant but was satisfied that the procedure had been fair. The panel was particularly concerned about what it saw as the claimant's failure to recognise the inappropriateness of his contacts with alumni to raise support. The panel was also particularly concerned by the claimant's continued assertion that it was appropriate for him to act on trust and instinct in relation to safeguarding matters such as that described in the previous paragraph. The panel rejected the claimant's assertion that evidence had been manufactured.
127. The panel concluded that there had been an irretrievable breakdown of the relationship of trust and confidence between the claimant and the

respondent and that reinstatement or redeployment to another role would not be appropriate. The claimant was sent the appeal outcome rejecting his appeal on 2 July 2019.

Submissions

128. I heard oral submissions from both sides and have carefully considered those submissions in reaching my conclusions, although I refer to them below only so far as is necessary to explain my conclusions. The claimant told me from the outset of the hearing that his primary contention was that there had been a predetermined plan by Mr Bird and Dr Brookes to dismiss him. We discussed whether he had a reason to put forward as to why the respondent wanted to engineer his dismissal and the claimant suggested at different points some possibilities such as a difference in educational philosophy or the use of the claimant as a scapegoat to release tensions within the school. I explained to him that it was not necessary for him to put forward an alternative 'theory of case' and that it was for the respondent to establish a potentially fair reason for dismissal, as I was concerned at one point during the hearing that he may have felt that he was obliged to prove an alternative reason in order to succeed in his claim. I was satisfied that he understood the legal tests for unfair dismissal, which we discussed on several occasions during the hearing.

Law

Unfair Dismissal

Reason for dismissal

129. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and 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.'

Reasonableness

130. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '...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 that question shall be determined in accordance with equity and the substantial merits of the case.' (Section 98(4) of the ERA).

131. When considering reasonableness, a tribunal cannot substitute its own view. Instead it is required to consider whether the decisions and actions of the employer were within the band of reasonable responses which a reasonable employer might have adopted. The test applies to the procedure followed by the employer and to the decision to dismiss.
132. Tribunals must always consider the reasonableness of the dismissal in accordance with s 98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT as to matters that should be considered in a conduct dismissal:
- (1) did the respondent genuinely believe the claimant was guilty of the alleged misconduct?
 - (2) did the respondent hold that belief on reasonable grounds?
 - (3) did the respondent carry out a proper and adequate investigation?
133. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondent (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).
134. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.
135. What type of behaviour amounts to gross misconduct, justifying dismissal without previous warnings having been given, will depend on the facts of the individual case; it must be conduct which fundamentally undermines the employment contract: Wilson v Racher [1974] ICR 428, CA. The conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence: Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698, CA.
136. The Court of Appeal has emphasised that loss of trust and confidence is not a label which employers should stick on any situation where the employer feels let down by the employee or put forward as a valid reason for dismissal whenever a conduct reason is not available or appropriate: Leach v Office of Communications 2012 ICR 1269, CA.
137. Serious allegations of misconduct, where disputed, should be the subject of the most careful investigation; the investigator should focus as much on

evidence which might exculpate as evidence which inculpates the employee: A v B [2003] IRLR 405, EAT.

138. The attitude of an employee to the conduct may be a mitigating or aggravating feature when the employer is determining sanction: Paul v East Surrey District Health Authority [1995] IRLR 305.
139. Suspension should not be a kneejerk response to an allegation of misconduct: Crawford and anor v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402, CA.

Conclusions

140. I preface my conclusions by saying that it is no part of the role of the Tribunal to adjudicate on appropriate educational strategies or indeed philosophies. It is for schools, acting within the framework of regulation and guidance which governs and supports them, to devise and implement appropriate strategies and procedures. The area of oversight of Employment Tribunals is limited to scrutinising the treatment of employees by employers and determining whether that treatment is in accordance with the various statutes and statutory instruments which regulate the rights and responsibilities of employers and employees.
141. It is also no part of the role of the Tribunal to adjudicate on the claimant's qualities as a teacher generally or his commitment to the education of his pupils. It is right to say that there is significant evidence in the bundle that the claimant was held in very high regard as a teacher by some of his colleagues and pupils and evidence that he is and was a dedicated teacher with a passion for his subject.

Witnesses and credibility

142. There was nothing to suggest that any of the witnesses I heard from were being anything other than honest and straight forward in their evidence.
143. There were very limited areas of factual dispute. Where these occurred, I tended to accept the respondent's evidence. For example, I accepted the respondent's evidence that the claimant was shouting at the meeting on 6 February 2019, which evidence was supported to some degree by the contemporaneous documents and also by Mr Bird's account of the reaction of the temporary PA. This did not seem to me to be a story that Mr Bird would have concocted. More broadly, I formed the impression that the claimant was

apt to misremember or interpret differently evidence which did not sit well with his sense of himself as a professional person.

Issue: What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”)?

144. I concluded that there was no evidence that the respondent had some underlying motive for dismissing the claimant, as suggested by the claimant, and that its reason for dismissing the claimant was the collection of behaviours which the respondent identified as misconduct and with which the claimant was charged in the disciplinary proceedings.
145. It was very difficult to see what alternative motive the respondent might have for suspending and then dismissing a member of staff who performed a very important function effectively midway through an academic year, and the claimant’s developing and differing ‘theories of case’ in my view highlighted the fact that there really was no tangible evidence that the respondent had some other reason for dismissal.
146. The fairly significant efforts made by Mr Bird to avoid a formal disciplinary route reinforced that conclusion. Some of the claimant’s correspondence well before February 2019 was strikingly disrespectful to members of the SMT but did not lead to formal disciplinary action. Right up to the 6 February 2019 meeting, Mr Bird was seeking to continue with an informal capability process rather than rushing to judgment.

Issue: If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called ‘band of reasonable responses’?

Did the respondent carry out such investigation as was reasonable?

147. The claimant suggested that Mr McBroom could not be an impartial investigator because Mr Bird was Mr McBroom’s line manager and he had commissioned the investigation. I did not find that this had any effect on fairness. Mr McBroom’s role was to investigate not to adjudicate on the charges. Mr Bird was the most senior person within the school hierarchy so inevitably the charges would have to be investigated by a member of staff subordinate to him. It was within the range of reasonable responses for the school not to appoint an outside investigator. Although some of the language in the investigation report suggested that Mr McBroom was making findings as opposed to determining whether there was a case to answer, there was no evidence that this improperly influenced Mrs Harrop.
148. The claimant suggested that Mr McBroom’s action in interviewing Mr Bird first showed his lack of impartiality. Mr McBroom said that he had to interview Mr

Bird and Dr Brookes to fully understand the concerns but the order of the witnesses had not affected his findings. Given the thematic and unparticularised nature of the allegations as set out in the suspension letter, I concluded that there was really no other way for Mr McBroom to proceed. He had to understand the factual detail in order to investigate and indeed to set out to the claimant exactly what the charges were.

149. The claimant suggested to Mr McBroom that his lack of impartiality was evidenced by the fact that he put to the claimant what the claimant described as leading questions. I found that these were occasions over the course of the interview when Mr McBroom put the allegations to the claimant in terms and that it was fair and appropriate for Mr McBroom to do in order to give the claimant an opportunity to rebut the allegations.
150. The claimant submitted that the investigation failed to look for exculpatory evidence as well as evidence of guilt. Mr McBroom interviewed a range of members of the maths department including teachers who had expressed support for the claimant. Evidence from those individuals was considered as part of the investigation report and the notes of those interviews formed part of the appendices. I found that Mr McBroom had not improperly limited his investigation to a search for evidence of guilt but had sought a wide range of evidence, some of which was supportive of the claimant.
151. I concluded that Mr McBroom's investigation was well within the band of reasonable responses. The range of the investigation in terms of the number of witnesses seen and the documentation considered was extensive. The investigation report itself represented a detailed, comprehensive, thoughtful and nuanced analysis of a large body of evidence.
152. I carefully considered the fact that the charges as initially drafted were broad and thematic and lacking in particulars. I was satisfied, however, that the claimant would have fully understood the case he had to meet by the time the charges were fully articulated in the investigation report. The charges themselves were complex because they were about a number of concerns which rested on what was to some extent a common pool of facts and evidence.

Reasonable grounds for belief that the claimant was guilty of misconduct

153. Mrs Harrop, like Mr McBroom conducted a detailed and subtle analysis of the large body of evidence and reached rational and evidenced conclusions about the nature of the claimant's conduct and its impact on the relationship of trust and confidence between the claimant and the school. She had reasonable grounds to conclude that the claimant had been guilty of gross misconduct.
154. The claimant challenged the idea that the matters he was accused of could amount to gross misconduct. I considered that Mrs Harrop had reasonable grounds to conclude that the accumulation of behaviours and communications by the claimant amounted to deliberate conduct by the claimant which had the

effect of destroying the relationship of trust and confidence. Gross misconduct is not limited to obvious acts such as fighting or theft but can over a series of behaviours which collectively destroy the relationship of trust and confidence.

Genuine belief in misconduct

155. Just as there was no evidence that there was an alternative reason for dismissal, there was no evidence that Mrs Harrop's belief that the claimant was guilty of gross misconduct was anything other than genuine or that the beliefs of other actors in the disciplinary process such as Mr McBroom and Mr Bird were anything other than genuine.

Did the respondent follow a reasonable procedure in other respects?

The disciplinary hearing

156. I concluded that the disciplinary hearing was within the band of reasonable disciplinary hearings. The claimant had the opportunity to question management witnesses and to present his own case. He had the opportunity to call witnesses had he chosen to do so.

Appeal

157. The claimant did not point to anything specific about the appeal process which was unfair and I concluded that it was a fair review of Mrs Harrop's decision.

Role of the capability procedure

158. The capability procedure was the occasion for the development or exacerbation of conduct concerns which led to the dismissal but the claimant was not dismissed through the mechanism of the capability procedure.
159. The claimant submitted that the capability procedure had been improper and unlawful because the matters raised, he said, did not fall within the definition of capability in the ERA. If that were true it might have had some impact on the fairness of the dismissal in that it might, depending on the facts of the particular case, not be reasonable to dismiss for misconduct which arose from an improper procedure.
160. However, I was satisfied that a reasonable employer could properly take the view that the issues which arose should be dealt with under the respondent's capability procedure. The matters which were the subject of the capability process were matters relevant to the claimant's performance in his role as head of department and his communication skills. Had the respondent taken the view in autumn of 2018 that the claimant's perceived failings were wilful, it might instead have started a disciplinary process. It seemed to me that treating the matters as capability issues at this point was intended as a lighter touch process and showed a willingness to give the claimant the benefit of the doubt.

Suspension

161. The claimant was critical of the fact that he was not forewarned that he was going to be suspended and said that the manner of the suspension removed his dignity. It was not clear to me from the evidence that it was reasonably necessary for the respondent to have suspended the claimant midway through a school day; however the manner of the suspension did not affect the disciplinary procedure as a whole or the fairness of the decision to dismiss. An inappropriately handled or kneejerk suspension may be a breach by an employer of the implied term of trust and confidence and give rise to or contribute to a constructive dismissal but that was not the case before the Tribunal.

Delay

162. The claimant criticised the length of the process. He said the capability process was commenced in September 2018 and he was dismissed some nine months later.
163. It is a mischaracterisation of what was happening to describe that gap in time as delay. One process (the capability procedure) was commenced and pursued within appropriate timescales. That process led to the disciplinary procedure, which was itself progressed without material delay.

Was it reasonable to dismiss in the circumstances?

164. I concluded that the decision to dismiss the claimant was within the range of reasonable responses. The claimant's behaviour, as found by Mrs Harrop, had destroyed trust and confidence and his performance at the disciplinary hearing demonstrated that that behaviour was not likely to change materially. A significant consideration for an employer considering a conduct charge is whether the employer can have confidence that the conduct will not be repeated. The claimant gave Mrs Harrop and subsequently the appeal panel no such confidence. He continued to believe and assert that he had behaved correctly, as he continued to do at the Tribunal hearing. Unfortunately, it appears that he failed ultimately to accept that there comes a point in a hierarchical organisation where an individual employee, having put forward his own views on educational approaches, is obliged to accept and implement the policies and procedures of the organisation. An employee in middle management will have to ensure that those who report to him also work within those policies and procedures. Weighing the claimant's entrenched attitude against the mitigating features, including his long and dedicated service, a reasonable employer could properly conclude that dismissal was the appropriate sanction.
165. For all of the above reasons, the claimant's claim is dismissed.

Employment Judge Joffe
18th Nov 2020
London Central Region

Sent to the parties on:
18/11/2020

For the Tribunals Office