Case Number: 2303314/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
(BY CLOUD VIDEO PLATFORM - CVP)

BEFORE: **EMPLOYMENT JUDGE NASH**

BETWEEN:

Claimant **MR P WRIGHT**

AND

Respondents **ROYAL BOROUGH OF GREENWICH**

ON: **22 September 2020**

APPEARANCES:

For the Claimant: **Mr N Davies, Counsel**

For the Respondents: **Ms N Murphy, Counsel**

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

1. The Claimant was unfairly dismissed.

2. It is just and equitable to reduce the Basic Award by 100% under section 122(2) Employment Rights Act 1996.

3. It is just and equitable to reduce the Compensatory Award by 100% under section 123(6) Employment Rights Act 1996.

REASONS

1. Following an ACAS Early Conciliation period from 9 May to 8 June 2019, the claimant presented his claim form on 19 August 2019. The response was presented on 28 November 2019.

2. The matter was originally listed before the Tribunal on 23 March 2020. However, as a result of the Covid lockdown and Presidential Guidance, that hearing was converted into a one-hour preliminary hearing. The matter was then listed for a two-day hearing to consider both liability and remedy. The parties advised me that they thought that this listing would prove short and, in the event, this was correct as the two days only proved sufficient to hear evidence and submissions on liability.

3. The Tribunal had sight of an agreed bundle to 559 pages together with four short video recordings. The need to ensure that all participants had full and effective access to all documents caused a number of unfortunate delays at the hearing. There was a significant delay in getting the bundle to the Tribunal as it had not been provided in an accessible format. It took some further time to ensure that all participants could view the video recordings, by means of sharing the video screen. Further, inconsistent numbering of the bundle also caused delay. However, the parties agreed that they had full access to all documents, and videos, on which they intended to rely.

4. At the hearing, the Tribunal heard from the Claimant as his only witness. From the Respondent, it heard from Mr S Harris, the investigating officer, Miss C Farrant, the dismissing officer and from Ms C Ladbrook who heard the appeal.

The Claims

5. It was agreed that the only claim proceeding was unfair dismissal.

The Issues

6. With the parties it was agreed that the issues were as follows:-

   (i) What was the reason for the Claimant's dismissal? The Respondent contended that the Claimant was dismissed for gross misconduct as set out in the grounds of resistance.

   (ii) Was the reason for dismissal a potentially fair reason falling within Section 98(2) of the Employment Rights Act 1996? The Respondent relied on conduct.

   (iii) If the dismissal was for a potentially fair reason, did the Respondent act reasonably in treating that as a sufficient reason to dismiss the

Claimant, specifically:-

a. Did the Respondent have a genuine belief in the Claimant's guilt, were there reasonable grounds on which to base that belief and had the Respondent carried out as much investigation as was reasonable in the circumstances?

b. If so, was the dismissal within the range of reasonable responses available to the employer?

(iv) Is there a chance that the Claimant would have been dismissed anyway for a fair reason and if so, what was the percentage chance of that and should compensation be reduced by the same (called a "Polkey deduction")?

(v) Did the Claimant contribute to his dismissal and if so, to what extent did he so contribute in percentage terms and should the basic and/or compensatory awards be reduced by the same?

7. The issues relating to remedy were set aside for any remedy hearing

The Facts

8. The Tribunal found the following facts.

9. The Claimant has been employed since 10 October 1988 at King's Oak School ("the school") as a caretaker or premises manager. Due to his employment, he was entitled to tied accommodation at the school's premises. The school is a secondary school for boys with social, emotional or mental health difficulties. The admissions are managed by the Special Educational Needs Department within the local authority and most of the students require additional learning and behavioural support.

10. Prior to the events material to the dismissal, the Claimant had an unblemished record.

11. The Claimant's evidence was that discipline and behaviour in school had worsened in the time leading up to the incident in December 2018. The Claimant stated that a number of pupils carried knives, and some had been charged with very serious criminal offences. The Respondent did not lead evidence on this, and the Tribunal accepted that it was not unreasonable for the Respondent to only call those involved in investigation and disciplinary, none of whom worked at the school. The Tribunal concluded that in such a school there would be some considerable difficulties with pupil behaviour, making for a sometimes very challenging working environment.

12. The Claimant's evidence was that he was given only one day training on how to manage and react to problems with pupils. He had attending the morning session on de-escalation. However, he missed the physical part of the training because he was called back into school that afternoon.

13. The Respondent did not call any evidence to contradict this. The Tribunal had sight of a certificate saying the Claimant had attended for the whole day. Mr Harris's evidence was that in his opinion this strongly indicated the Claimant had attended all day.

14. The Tribunal accepted the Claimant's evidence on training for the following reasons. The Claimant would naturally have the best recollection of what had happened at training. The later disciplinary hearing (although not the appeal) accepted that he only attended half the training. Further, even a whole day is not a lot of training to provide to a staff member whose role would bring him into frequent contract with pupils. This does not suggest that that the respondent treated training of staff whose roles were not around working directly with pupils as a priority and this is consistent with the certificate being signed off incorrectly.

The Incident of 20 December 2018

15. The basic facts of the incident on 20 December 2018 - which led to the Claimant's dismissal - were not in dispute. A pupil, who was accompanied by a teaching assistant, had approached a dinner lady in a hallway asking for a sandwich. The dinner lady refused. He became upset and kicked an external door. The claimant approached and a confrontation developed between the pupil and the claimant. This ended in a physical altercation with other staff members intervening to separate the pupil and the claimant.

16. In addition to statements from those present at the incident, the Tribunal had sight of four good quality CCTV videos of the incident. However, although there was some noise on the videos, it was not possible to make out what anyone was saying.

17. The videos showed the same incident from two different angles. The video showed the pupil approaching a dinner lady in a hallway. He then kicked an external door. Two female members of staff were present at the time. One was Ms Steward a teacher, and the other was Ms Halford a Teaching Assistant, whose job it was to accompany the pupil, due to concerns over his behaviour. There were also other pupils present.

18. Whilst the Teaching Assistant appeared to be speaking to the pupil (seemingly about his behaviour), the Claimant came out of his office to inspect the door. The Claimant appeared to remonstrate with the pupil. The claimant appeared angry. The pupil attempted to walk away, and he and the Claimant barged into each other. It was unclear if this was

deliberately or by accident. The Claimant then grabbed the pupil around his neck or shoulder (it was unclear which because of the pupil's clothes).

19. The pupil then started to attack the Claimant. The two teaching staff intervened to try to stop the pupil attacking the Claimant. The pupil tried to fight off the two women to get to the Claimant. It appeared that the pupil had lost control and needed to be subdued. The Claimant used his flat hand to keep the pupil at arm's length. The Claimant took time to take off his glasses whilst holding the pupil at arm's length. After a short time, the teaching staff managed to take the pupil away. bringing the incident to an end.

Investigation

20. The Executive Head, Mr Michaels, (the head of more than one school including the Claimant's school) contacted the Respondent's Human Resources Department. He told HR that, an employee (the Claimant) had assaulted a pupil.

21. According to the Human Resources records, the Respondent reported the incident to the Local Authority and then decided to investigate. All witnesses agreed that there was firstly a safe-guarding investigation by the Local Authority and only once that was completed could and did the Respondent investigate the Claimant's conduct as his employer. This was consistent with the HR case plan and email correspondence before the Tribunal.

22. In respect of this HR case plan (at page 277), no witness had taken part in creating this or could give the Tribunal evidence as to how and when it was completed. Nevertheless, no witness disagreed that the document was what it appeared to be - a contemporaneous chronology of HR action on the Claimant's case on different days, which was added to as time went on.

23. The Claimant was suspended on allegations of a physical assault on a pupil, inappropriate language to a student, placing staff at risk and failing to report an incident.

24. Mr Harris, an Executive Head Teacher of a number of Respondent primary schools, was tasked with the investigation. Mr Harris gave unchallenged evidence that he had no previous connection to the school or the Claimant. Mr Harris firstly watched the four video recordings of the CCTV of the incident. According to his statement, which he confirmed this in evidence to the Tribunal, he concluded from the video evidence that the Claimant had been aggressive. Mr Harris also had sight of written statements completed just after the incident from the pupil (known as "H"), from the Claimant and from the two members of staff who witnessed the incident, Ms Stewart, a teacher and Ms Halford, a teaching assistant.

25. Due to delays caused by the Local Authority safe-guarding process, the Claimant was not interviewed by Mr Harris until 4 February 2019. The Claimant's account to Mr Harris was that he was - essentially - defending himself on 20 December.

26. Mr Harris went on to interview Ms Stewart and Ms Halford. Ms Halford gave a clear account of the interactions of the parties before the Claimant and the pupil made physical contact. She said that the Claimant had challenged the pupil about damaging the door. The pupil denied that he had broken the door and swore. The Claimant told the pupil not to swear. The pupil swore again and said 'he could talk all he liked' to the Claimant. The physical confrontation then occurred.

27. Mr Harris also interviewed Ms Smith, Head of School, who had not witnessed the incident. She said that the Claimant would have known that he should not have intervened in such an incident with a pupil.

28. Mr Harris decided not to interview the pupil. He rejected the Claimant's union request to interview the pupil. He did this because he had sight of a hand-written statement by the pupil but, in the event, he decided not to take this pupil statement into account.

29. At the request of the Claimant and his union, he further interviewed Ms Canfield, a family liaison worker and Ms Andrews, the dinner lady who had refused the pupil a sandwich.

30. According to the contemporaneous HR plan, after collating these statements, Mr Harris spoke to the HR Case Manager on 26 February 2019. The notes are as follows:-

    "Minutes received from the Investigating Officer but notes from the two main eye-witnesses were not strong enough defending the employee. HR suggested to the Investigating Officer to go back and re-interview the two main witnesses before producing his final report."

31. The thrust of the evidence from these two eyewitnesses was that the Claimant was protecting female staff from the pupil - who had very serious behavioural issues. However, the Claimant should have walked away from the incident.

32. At the end of his investigation, Mr Harris recommended that all allegations (save the failure to report) should proceed to a disciplinary hearing.

Disciplinary Hearing

33. The Respondent wrote to the Claimant on 25 March 2019 inviting him to a disciplinary hearing and enclosed the investigation report dated 11 March 2019 and the disciplinary procedure. The Claimant was provided with the witness statements.

34. The disciplinary charges against the claimant arising out of the incident were as follows:

    a. He had physically assaulted the pupil.
    b. He had sworn.
    c. He had put other staff at risk by his behaviour.

35. The disciplinary panel was chaired by Ms Catherine Farrant, a governor of a community senior school. She gave unchallenged evidence that she had no previous involvement with the Claimant. She informed the Claimant when inviting him to the disciplinary hearing that the allegations potentially amounted to gross misconduct.

36. After re-scheduling, the disciplinary hearing took place on 23 April 2019. Ms Farrant was assisted at the hearing and in her decision by Mr Gavin Williamson and Ms Emma Warren, governors of a different school. Minutes were taken by a minute-taker.

37. Mr Harris presented the investigation report. The HR Advisor was in attendance. The Claimant was represented by his union rep. The disciplinary hearing heard from the following witnesses - Ms Steward, Ms Halford, the Claimant, Ms Andrews, Ms Perkins (who had previously worked at the school and did not witness the incident) Ms Smith, and Mr Lyoubi (a colleague who gave evidence as to the Claimant's training record). Ms Andrews at one point told the panel that witnesses were worried about giving evidence, but the panel did not follow this up.

38. Ms Stewart's evidence was that she said, 'do not push or assault me' to the pupil. Ms Halford said that the pupil said, 'he could f-ing well speak to the Claimant how he liked', although she did not see the fight start. Ms Stewart's evidence was that the fight was not intentional. Ms Halford said it was not a fight but that the Claimant had been defending female members of staff. Nevertheless, this was not entirely clear from the CCTV footage which appeared much more consistent with the Claimant having told off the pupil for damaging school property and then getting into a minor physical confrontation with the pupil and, finally, grabbing the pupil.

39. After the hearing was adjourned, the panel deliberated for a further three hours. The Tribunal accepted the unchallenged evidence of Ms Farrant that the disciplinary meeting and panel deliberation were unusually lengthy. The Tribunal accepted her evidence that the panel had viewed the CCTV many times and found it the crucial piece of evidence leading to their decision. The Tribunal found Ms Farrant a straight-forward and reliable witness, who appeared to take time to consider her conclusions carefully. The Tribunal accepted her evidence that she and the panel had 'agonised' about the decision as this was consistent with the amount of time taken.

40. The panel members upheld the first allegation that the Claimant had physically assaulted the pupil. They did not uphold the second allegation that the Claimant had sworn. The panel upheld the third allegation that the Claimant had put other staff at risk because they found him responsible for the physical confrontation in which the other two members of staff were required to intervene. Having upheld the allegation, they considered that the appropriate sanction would be gross misconduct.

41. Ms Farrant wrote to the Claimant on 26 April 2019 to inform him of the outcome and inform him that he was dismissed summarily. She informed him that he would be required to leave his home. She advised him of his right to appeal.

The Appeal

42. The Claimant appealed. Ms Carol Ladbroke was appointed to hear the appeal. She was Chair of an organisation called the Imperial Foundation which was responsible for the Claimant's school and another school (the exact make-up of this organisation was unclear)

43. Ms Ladbroke wrote to the Claimant inviting him to the re-scheduled appeal hearing on 27 June 2019. She provided him with the minutes from the disciplinary hearing. The appeal was primarily to look at whether the procedure was followed correctly and to consider the appropriateness of the sanction.

44. The appeal hearing took place on 19 July 2019 and Ms Ladbroke was assisted by Mr Dick Quibell and Mr Thomas Wood, two governors of other schools. Ms Farrant presented the management case, and the Claimant was represented by his union. The Claimant presented his case with his trade union representative. Both the panel and the Claimant were given the opportunity to question Ms Farrant and Mr Harris.

45. The appeal panel upheld the decision to dismiss. They were satisfied that the investigation was full and thorough, and that the decision to dismiss was not unduly harsh.

The Applicable Law

46. The applicable law can be found at Section 98 of the Employment Rights Act 1996 as follows:-

(i) 98 General.

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

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

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

(v) (2) A reason falls within this subsection if it—

…

(vi) (b) relates to the conduct of the employee,

…

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

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

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

Submissions

47. Both parties provided written submissions and spoke briefly to them.

Applying the Law to the Facts

48. The Tribunal firstly considered the reason for dismissal.

49. At this stage, the burden of proof is on the employer. According to the Court of Appeal in **Abernethy v Mott Hay & Anderson 1974 [ICR 323]**, the burden on which the employer at this stage is not a burdensome one. The question is whether the employer dismissed the employee for some trivial or unworthy reason. The question is, on the face of it, whether the reason could justify the dismissal. The question for this Tribunal, therefore, was whether misconduct was the genuine reason for dismissal.

50. The Claimant's case was that the real reason for dismissal was not the stated reason, misconduct. The real reason was that the Executive Head had in effect engineered the dismissal using the incident as a pretext. He pointed out that the Head had instigated the investigation and immediately concluded that the Claimant had assaulted the pupil.

51. Accordingly, the Tribunal directed itself in line with the Supreme Court Authority in **Royal Mail Group Limited v Jhuti 2020 [IRLR 129]** as follows**.** If a person in a hierarchy above the employee has made up their mind that the employee should be dismissed for a reason but hid it behind an invented reason (which was the reason used to dismiss by a separate decision maker), the Court should consider the genuine reason for the dismissal.

52. One difficulty for the Claimant was that his account of the reasons for the dismissal was somewhat confused. There were a number of references to different matters, including issues with asbestos, a wish to avoid paying

the Claimant an expensive redundancy payment, a general vendetta against the Claimant and a plan to re-develop the Claimant's home to accommodate a sixth form college.

53. The Tribunal did not view this multiplicity of reasons as necessarily fatal to the Claimant's case. The Tribunal accepted that an employee may legitimately not know the reason why an employer has become displeased with him and engineers his departure. In that situation the employee may only have a number of suspicions.

54. However, there was no evidence going to any of the Claimant's allegations; they were bare allegations. For instance, there was no evidence that a sixth form college was planned, and Respondent witnesses specifically denied this. In contrast, the employer relied on considerable evidence to indicate that misconduct was the genuine reason for dismissal. They had CCTV recording of the Claimant becoming involved in a physical altercation with a pupil. This was not a situation where the Claimant had been caught up in an incident or had been attacked himself. The Claimant himself started with interaction with the pupil. In such circumstances, in the view of the Tribunal, it would be surprising if an employer – particularly a school - did not investigate. It was consistent with the employer's view that the incident was potentially serious, that the Local Authority dealt with it as a possible safe-guarding matter.

55. In seeking to paint the investigation as biased, the Claimant placed emphasis on the record of HR telling Mr Harris (as referred to above) that the evidence was not strong enough against the Claimant and that he should look for more. The Tribunal heard no evidence from the writer of this record. Mr Harris's evidence was that this was not really an accurate record of the conversation. In light of the context - CCTV footage of what was, in effect, a fight between the Claimant and the pupil, and no good evidence of any alternative reason for the dismissal - the Tribunal did not find that this indicated that Mr Michaels, or anyone else in a position of authority in the Respondent had any other reason than misconduct, for the dismissal of the Claimant. The statement was in no way inconsistent with misconduct being the reason in the Respondent's mind for dismissal.

56. For the avoidance of doubt, the Tribunal found no indication or evidence of bad faith on the part of the dismissing and appeal officers.

57. Accordingly, the Tribunal found that the Respondent had discharged the burden upon it of showing that its reason for the dismissal was misconduct. This is a potentially fair reason and the Tribunal accordingly went on to consider reasonableness.

58. In a misconduct dismissal, the Tribunal must follow the approach set out in **British Home Stores v Burchell 1978 [IRLR 379]**, with the caveat that

the burden of proof is now neutral. The so-called **Burchell** test requires that an employer must have carried out a reasonable investigation which led to a genuine and reasonable belief in the employee's culpability.

59. The Court of Appeal reviewed the standard to be applied in determining what is a reasonable belief or investigation in **Turner v East Midlands Trains 2012 [EWCA CIV 1470]**. The Court confirmed that the "range of reasonable responses test" applies to the reasonableness of an investigation. The range of reasonable responses test means that, when considering the investigation adopted by the employer, the Tribunal must consider whether that investigation comes within a range of investigations available to a reasonable employer in the circumstances. To put it another way, a Tribunal may not substitute its view of what it considers a reasonable investigation for that of the employer. The same applies to the reasonableness or otherwise of the employer's belief.

60. When considering what level of investigation is appropriate in this context, the Respondent submitted that the line of authorities linking the seriousness of the consequences of dismissal to the standard of investigation were not relevant. These authorities include **A v B 2003 [IRLR 405]** and **Salford Royal NHS Foundation Trust v Roldan 2010 [ICR 1457] Court of Appeal**. However, the Tribunal did not agree with this submission for the following reasons.

61. In **Roldan,** the Court of Appeal stated that when the consequences of a dismissal are substantially severe, an employer may be expected to have a higher standard of investigation. On the facts in **Roldan,** the Claimant was a professional person who risked losing her career and right to live in the United Kingdom.

62. Here, the Claimant had lived in school accommodation for over thirty years; this had been his and his family's home for all that time. Loss of employment led to loss of this home. In the view of the Tribunal, the consequences of dismissal were therefore especially severe, and the Tribunal would expect a higher standard of investigation.

63. The Tribunal considered the investigation as follows.

64. The Claimant criticised the investigation on a number of grounds. Firstly, that the HR records showed that Mr Michaels informed HR that the Claimant was guilty of assault without having carried out an investigation. Nevertheless, the Tribunal saw that this same HR record referred to an up-coming investigation.

65. In addition, the Claimant again relied on the entry of 26 February 2019 where HR advised Mr Harris to collect more evidence. The contemporaneous HR record strongly indicated that either HR or Mr Harris decided that the witness statements were not strong enough 'against' the

Claimant and an attempt should be made to get more evidence, in effect, against him. It was stated that the two main eyewitnesses, 'are not strong enough, defending the employee'.

66. The only witness who had direct knowledge of this conversation was Mr Harris. His account was not consistent with the HR records. In his witness statement, he made no reference to this conversation and gave an entirely different account of why he had re-interviewed witnesses - that he wanted further information. When questioned, he said he remembered the HR conversation, but he did not remember this statement. The Tribunal took into account that this conversation took place over a year and a half before the hearing. In light of this, the Tribunal preferred the account in the contemporaneous document to a recollection of a long-ago conversation and accepted the written record as accurate.

67. The Claimant also relied on the failure to interview the pupil as rendering the investigation out of the reasonable range. However, the Tribunal did not agree for the following reasons. According to the documents, the pupil absconded from school following the incident making it at least challenging to interview him. Further, the agreed with Mr Harris that it was not appropriate to involve the pupil, particularly in light of the Respondent having full CCTV footage and several eye-witness accounts.

68. The Tribunal noted that whilst Mr Harris was reluctant to interview witnesses proposed by the Claimant (such as Ms Perkins), he nevertheless did so despite the fact that they were not eyewitnesses.

69. The Tribunal agreed with the Claimant that Mr Harris had not investigated to any significant extent the Claimant's training (or lack of it) on managing pupil behaviour and conflict. Mr Harris had, in effect, accepted the Head of Schools' comment that the Claimant should have known not to intervene. However, in the view of the Tribunal, Mr Harris was entitled to view the Head of School as an authoritative source. In addition, Mr Harris was entitled to bring his own professional knowledge to this point. In any event, the disciplinary panel accepted the Claimant's case on his lack of training.

70. The Tribunal considered whether on the **Roldan** standard of investigation, the investigation fell outside of a reasonable range. In the Tribunal's opinion, the problem with the investigation was the potential bias as shown in the HR action plan – that there was a need to find more evidence "against" the Claimant. In the view of the Tribunal this was quite different from, say, a statement that the witness statements were unclear and/or certain matters needed clarifying. The statement indicated that the investigation was proceeding in a neutral way. The investigation was not accepting the evidence as it was found; it was seeking further evidence to take the investigation in a particular direction. There was no good explanation as to this statement.

71. The circumstances were of a very long serving employee with an unblemished record, and where the consequences of dismissal were especially severe. In these circumstances, the Tribunal determined that a decision in an investigation to obtain further information against the employee where the existing information was considered insufficient, was sufficient to take the investigation outside of the reasonable range.

72. The Tribunal found that the Respondent's belief in the Claimant's culpability was genuine for the same reasons as set out above. Briefly, the Respondent had good quality objective evidence of the Claimant's conduct.

73. The Tribunal went on to consider the procedure more generally.

74. The Tribunal found that arguably it might have been better for the disciplinary hearing to have followed up on Ms Andrews' statement at the hearing that witnesses were worried about giving evidence. Nevertheless, Ms Andrews was by no means a critical witness and the Tribunal found it was not outside the range of reasonable responses for the panel, in the context of a lengthy and thorough hearing, not to follow this up.

75. Otherwise the dismissal procedure was unexceptional. The Claimant was provided with the evidence against him, all witnesses were called to the disciplinary hearing, the Claimant was represented at the hearing and given the chance to question the witnesses. The Claimant was put on notice that dismissal was a possible outcome. The dismissal hearing was thorough and lasted for several hours, and there were further hours of discussion by the panel. Further, the panel dismissed one of the allegations. Finally, the Claimant had the opportunity to appeal his dismissal.

76. As the investigation fell outside the range of investigations available to a reasonable employer in the circumstances, the dismissal is accordingly unfair.

77. The Tribunal then went on to consider whether, had the employer carried out a reasonable investigation, it would and could have dismissed the Claimant fairly in any event. This is often called the **Polkey** exercise.

78. The Tribunal directed itself in line with the guidance of the President of the EAT, as he then was, in **Software 2000 Limited v Andrews 2007 IRLR 568.** A Tribunal must accept that there will naturally be limits to the extent which it can confidently predict what might have been; a degree of uncertainty is inevitable feature of the **Polkey** exercise and is not a reason for refusing to have regard to the evidence. Nevertheless, there may be some cases where the nature of the evidence is such that it is impossible for the Tribunal to reconstruct what might have been.

79. The Tribunal, accordingly, sought to reconstruct what would have occurred had a reasonable investigation been carried out. The question was would the employer have reached a genuine and reasonable belief in the culpability of the Claimant. The Tribunal found that the answer to this question was, yes, for the following reasons.

80. The Tribunal constructed what might have happened - that Mr Harris did not re-interview any witnesses or, to put the Claimant's case at its highest, had produced a very different investigatory report. In those circumstances, the Tribunal found that it would have made no difference to the decision to dismiss. The Tribunal accepted the evidence of Ms Farrant that the determining feature at the disciplinary hearing was the CCTV evidence. The panel questioned the eyewitnesses carefully and they appeared to add some useful context. Nevertheless, the Tribunal accepted that the CCTV footage that was by its nature an objective record, it provided a clear record of the incident and it was entirely credible that this was the crucial factor in the panel's decision.

81. The Tribunal accepted the evidence that the panel watched the CCTV footage several times and that it was a difficult decision for them to make. The Tribunal also noted that the Claimant and his union representative admitted that the CCTV footage did, 'not look good'.

82. The Tribunal accordingly, went on to consider whether, based on a reasonable investigation leading to a genuine and reasonable belief in the Claimant's culpability, the sanction of dismissal would have fallen outside a range of sanctions available to a reasonable employer in the circumstances. This is another example of the "range of reasonable responses test." Again, a Tribunal may not substitute its view for that of the employer when it determines if the sanction of dismissal was too harsh.

83. The Tribunal accepted that this was an unfortunate case. This was a long-standing employee with an unblemished record who lost his job and his home. The Tribunal had sight of excellent character witnesses for the Claimant including a former Head Teacher which established that the incident was entirely out of character.

84. The Tribunal firstly considered the Claimant's submissions as to his lack of training. The Tribunal had concerns at the amount of training provided to the Claimant. Although it was not his job to work directly with pupils, his role inevitably brought him into contact with pupils. In the view of the Tribunal, it was not adequate that an employee in the Claimant's position had received only half a day's training in respect of how to work with and manage pupils, particularly in a setting where pupils were likely to have significant behavioural difficulties. This is something that the Respondent may wish to consider going forward.

85. Nevertheless, the Tribunal accepted that the Claimant was a very experienced member of staff whose role was expressly not to manage pupil behaviour. The pupil at the time of incident was in the presence of a teacher and a Teaching Assistant specifically tasked with managing the pupil's behaviour. The Claimant had not been brought or forced into the situation with the pupil; he, himself, chose to get involved. In these circumstances, any shortcomings in the Claimant's training did not take a decision to dismiss outside of the reasonable range.

86. The Tribunal also considered the Claimant's contention that he was justifiably scared of and/or provoked by the pupil.

87. It came out during the investigation that the pupil had just threatened the dinner lady prior to his interaction with the Claimant. She had refused him a sandwich and he told her, 'wait until you are alone'. However, at the investigatory meeting (page 165B) the Claimant said that he did not even know that the pupil had requested a sandwich which is when this exchange occurred, so he did not know about this possible threat at the material time.

88. The Tribunal considered whether there was any basis to the Claimant's allegations that behaviour in general at the school was not properly managed and therefore, in such an environment of impunity, he might be legitimately fearful of what pupils might do. The Respondent did not lead evidence of behaviour at the school and how much management would back up staff if pupils became violent. This was not the focus of the hearing and the Tribunal accepted that the Respondent reasonably wished to keep its evidence within proportionate limits.

89. The Claimant said that he had reason to fear the pupil because he had previously seen him attack his carer. Ms Smith, Head of School, said during the investigation that the pupil was not violent. The Respondent further admitted that the pupil used deeply misogynist language to female staff, although there was such evidence that he did so to men. From the limited evidence before the Tribunal, the Tribunal could not be confident of the accuracy of Ms Smith's account of the pupil. She said that 'violence was not his way'. However, the CCTV showed him as capable of considerable violence.

90. The Tribunal therefore concluded that the Claimant, on the balance of probabilities, knew that this pupil was potentially dangerous, although he may not have known to what extent. He did not specifically know that the pupil had just threatened a member of staff.

91. The Tribunal considered the Claimant's contention that after the pupil started swearing, the Claimant became frightened. The most reliable and objective evidence before the Tribunal was the CCTV footage. From this,

the Claimant did not look frightened, he looked angry, although the Tribunal accepted that those two emotions can be close to each other and overlap.

92. The Tribunal took into account that the Claimant may have been badly provoked by a pupil he believed was potentially violent. However, even so, in the view of the Tribunal it cannot be outside of the reasonable range to dismiss a member of staff who, however provoked by a pupil, then grabs them around the shoulders or neck. The CCTV footage did not show the Claimant defending himself at first. After the Claimant appears to remonstrate with the pupil over the damaged door, the Claimant barges the pupil, and the pupil barges the Claimant. It is unclear whether either of them did so deliberately. However, the Claimant was the first to make physical contact, by barging or bumping the pupil and, most crucially in the Tribunal's view, he grabbed the pupil. Then the pupil appeared to lose control and the Claimant, and the other staff sought to restrain him. The Tribunal could see nothing wrong with the Claimant and the other staff restraining the pupil. The Claimant used the flat of his hand. He did not seek to punch the pupil.

93. Considering whether the Claimant felt fearful or vulnerable, the Claimant's difficulty is that he voluntarily got involved in an incident when there was no need to do so. The Tribunal would have needed to hear very considerably more evidence to determine if pupils did enjoy a culture of impunity, as alleged. But even taking the Claimant at his highest on this point, the Claimant initiated the incident by firstly remonstrating with and then grabbing a pupil. The Claimant was a very experienced adult employee at a school of pupils with extremely challenging behaviour. It cannot be outside the range to dismiss an adult who grabs a pupil, particularly when he was not set upon or he was not defending himself or other members of staff.

94. The Claimant also argued that his dismissal was inconsistent with the treatment of other members of staff. The Tribunal directed itself in mind with the authority of **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352,** as reaffirmed in the EAT case of **MBNA Ltd v Mr M Jones: UKEAT/0120/15/MC**. Inconsistency in treatment will only make a dismissal unfair in two particular circumstances. Firstly, where the employer has led its workforce to believe that certain categories of conduct will not lead to dismissal, and, secondly, where decisions in other cases support the view that the principle reason for dismissal is not the real one.

95. The Tribunal considered the records of other incidents where there had been physical interaction between staff and pupils. The Tribunal could find no sign in these notes of any comparable incident. There was an incident where a police officer had got into an altercation with a pupil and the pupil had suffered a broken wrist. However, this could not be compared as

there was no evidence that the school was in a position to dismiss or discipline the police officer.

96. Accordingly, the argument as to inconsistency is not sufficient to take a decision to dismiss outside of the reasonable range.

97. Accordingly, the Tribunal found that the Respondent, had it carried out a fair investigation, could and would have dismissed the Claimant and that this decision would have come within a range of reasonable responses. Accordingly, the case must be subject to a 100% Polkey deduction.

98. The Tribunal finally considered what, to any extent, the Claimant had contributed to his own dismissal. The Tribunal did not consider a compensatory award as this was rendered otiose following the Polkey deduction.

99. The Tribunal considered to what, if any extent, the basic award should be reduced, because it would be just and equitable to do so because of the Claimant's conduct prior to the dismissal.

100. The Tribunal found that the Claimant's conduct prior to dismissal had led to his dismissal. The question was by what percentage it was just and equitable to reduce compensation because of this conduct. The Tribunal considered that the deduction could not be any less than 100%. However much the pupil had provoked the Claimant, it is just and equitable to reduce by 100% because, in a physical confrontation he himself had initiated, he grabbed a pupil.

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Employment Judge Nash
Date: 11 December 2020