EMPLOYMENT TRIBUNALS

Claimant: Mr S B Reader

Respondent: South Tyneside Council

HELD AT: Newcastle upon Tyne, (in part by video platform)

ON: 9-11 March 2020
11-14 January 2021

IN CHAMBERS: 15 January 2021
18 January 2021

BEFORE: Employment Judge Aspden (sitting alone)

REPRESENTATION:

Claimant: Mr R Stubbs, Counsel
Respondents: Mr H Menon, Counsel

JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant was dismissed in breach of contract.

REASONS

Claims and issues

1. The Claimant was employed as Head Teacher of a primary school. On 19 December 2018 he was dismissed with immediate effect. On 22 February 2019 he presented claims to the Tribunal of unfair dismissal and wrongful dismissal (breach of contract). In the meantime, the claimant appealed the decision to dismiss him. That appeal was successful and he was reinstated on 8 March 2019. On 26 March 2019, the Claimant was summarily dismissed for a second time. The claimant was given permission to amend his claim to add a complaint that the dismissal on 26 March 2019 was both unfair and in breach of contract. Having been reinstated on appeal, the claimant recognised that he could no longer contend that he had been dismissed in December 2018. Therefore, he withdrew his complaints that he had been unfairly and wrongfully dismissed at that time.

2. This final hearing began on 9 March 2020. It had been given a time estimate of four days, with the morning set aside for me to read witness statements and key documents. In the event, I did not begin hearing evidence until the afternoon of the second day because of the need to deal with matters arising under rule 50. Those issues led me to make a Restricted Reporting Order, after hearing submissions from the parties and a member of the press who was in attendance.

3. It was apparent by this stage that the final hearing would not be completed within the original four-day time estimate. Then, on the afternoon of the third day of the hearing, an issue arose in connection with the Covid19 pandemic that caused me to adjourn the hearing. At that time, Mr Stubbs and Mr Menon suggested that a further five days would be required to complete the hearing. The hearing was, therefore, relisted to continue on 8 to 12 June 2020 (inclusive). Regrettably, we were unable to continue the final hearing on those dates, again due to the Covid 19 pandemic. In accordance with the direction made by the President of Employment Tribunals in connection with the pandemic, the first day of the resumed hearing was converted to a case management hearing by telephone, with the resumed final hearing of the case postponed.

4. At that telephone case management hearing, Mr Stubbs and Mr Menon agreed that the remainder of the final hearing could be conducted remotely by video. They suggested, and I agreed, that an extra day should be added to the time estimate, allowing a further six days to hear the remaining evidence and submissions and to allow me time to deliberate, reach a decision and deliver my judgment.

5. The resumed hearing began on 11 January 2021. The hearing was conducted remotely on HMCTS's Cloud Video Platform.

6. With regard to the unfair dismissal claim, the issues for me to determine are as follows:

6.1. What was the reason (or the principal reason) for dismissal ie what were the facts known or beliefs held that caused the respondent to dismiss the claimant?

6.2. Was this a potentially fair reason for dismissal?

The respondent's case is that the reason (or the principal reason) for dismissal was either: a reason related to the claimant's conduct; or some other substantial reason of the kind such as to justify the dismissal of an employee holding the position which the claimant held. With regard to the latter, the specific reason relied on by the respondent was set out in the amended grounds of resistance as follows:

'6.3.2 So far as concerns SOSR, it was not desirable or practically possible for the respondent to maintain the claimant in its employment in the face of the findings against him made by the Appeal Committee and the Strategy Meeting because:

(a) the findings indicated that the claimant could pose a risk to children and that he lacked awareness of the consequences of his actions;

(b) the findings required a referral of the claimant to the Disclosure and Barring Service (DBS) and the Teaching Regulations Agency;

(c) in the circumstances, the reinstatement of the claimant in any teaching role was highly inappropriate and would result in a loss of confidence in the School and/or in the respondent as the local education authority; the respondent was fully justified in the circumstances in preventing such loss of confidence and/or reputational damage that would be caused to it and/or the School by the reinstatement of the claimant to the School or to any teaching position elsewhere with the respondent.

6.3.3 The referral to the DBS and Teaching Regulations Agency would take several months to resolve. The claimant's pay came out of the School budget and the continuation of his suspension for a further several months would be an unjustified and substantial burden on the School's budget and to the detriment of its pupils.

6.3. In all the circumstances (including the respondent's size and administrative resources), did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant?

7. It was agreed with the parties that if I found that there was an unfair dismissal I would make relevant findings as to the following matters and that, therefore, evidence

and submissions relevant to these issues should be led at the same time as evidence and submissions as to liability:

7.1. Is there is a chance that, had the respondent acted reasonably, the claimant would have been fairly dismissed in any event?

7.2. Did the respondent unreasonably fail to follow the Acas Code of Practice on Discipline and Grievances? If so, is it just and equitable to increase any compensatory award and, if so, by how much? There was no suggestion that the claimant had failed to follow the Code.

7.3. Did the Claimant cause or contribute to his dismissal? If so, to what extent should the compensatory award be reduced?

7.4. Was the conduct of the claimant before dismissal such that it would be just and equitable to reduce the amount of the basic award and, if so, to what extent?

8. With regard to 6.3 and 6.4 above, when this hearing began in March 2020 I directed the respondent to identify the blameworthy conduct it says the claimant committed. Mr Menon set out the alleged conduct in an email as follows:

8.1. *Incident 1 (Child 1): C grabbing Child 1 (6 y.o) by the arm and dragged [Child 1] out of the dinner hall while shouting at [Child 1]. C then marched Child 1 towards his office still holding [Child 1's] arm. C still shouting at Child 1 who was crying 'for being cheeky' and repeatedly asking Child 1 'Who do you think you are?'. C then pulled Child 1 into his office and continued to shout at [Child 1]. C later brought Child 1, who was sobbing, back into the dinner hall. C then shouted for teacher …. [Teacher] comforted Child 1 and asked [Child 1] to have [their] dinner whereupon C told Child 1 to leave [their] dinner and go and stand outside his office until he said otherwise. C admits losing his temper but denies grabbing child.*

8.2. *Incident 2 (Child 2): Early 2018 - C heard shouting at Child 2 in his office 'How dare you, who do you think you are? That is not acceptable in school'. Child 2 was in nursery class (3 y.o.) and was heard crying as C was shouting at [the child]. C states he would have raised his voice to get above the noise of the child crying.*

8.3. *Incident 3 (Child 3): C reported to have held autistic child in a 'headlock'. C denies headlock and says he was only properly restraining the child. R maintains C should not have laid his hands on Child 3, especially when he had no training on restraining children.*

8.4. *Incident 4 (Child 4): C reported to have dragged a child from under a desk, marking the Child's arm. C then reported to have said 'Are you OK? You are not hurt are you? Are we still friends?'*

9. At the beginning of the third day of the hearing Mr Menon said there is a further allegation of blameworthy conduct that the respondent relies on ie that the claimant was responsible for a failure to log or record safeguarding concerns regarding children.

10. I agreed with Mr Stubbs and Mr Menon that any other issues relevant to remedy would be addressed in evidence and submissions only after a decision had been made as to whether the dismissal was fair.

11. With regard to the claim of wrongful dismissal, Mr Menon explained at the outset of the hearing that the respondent no longer defends this claim. The respondent concedes that it breached the claimant's contract of employment by dismissing him in March 2019 without due notice. In making that concession, the respondent does not resile from its position that the claimant committed gross misconduct amounting to a repudiatory breach of contract. Rather, the respondent concedes that, by reinstating the claimant following his appeal against the first dismissal, the respondent affirmed the contract of employment and waived any right it had to terminate the contract without notice.

The Legal Framework

12. An employee has the right, under section 94 of the Employment Rights Act 1996, not to be unfairly dismissed (subject to certain qualifications and conditions set out in the Act).

Reason for dismissal

13. Section 98 of the Employment Rights Act 1996 provides:

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

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

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

14. The reference to the reason, in section 98(1)(a), is not a reference to the category within section 98(2) into which the reason might fall. It is a reference to the set of facts known to the employer, or beliefs held by the employer, which cause it to dismiss the employee: Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. As Cairns LJ said in Abernethy v Mott Hay and Anderson [1974] IRLR 213, [1974] ICR 323. Put another way, the 'reason' for a dismissal connotes the factor or factors

operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what 'motivates' them to do what they do: Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401, [2017] IRLR 748.

15. In Abernethy the Court of Appeal noted that: "If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason'.

16. Having identified the reason (or, if more than one, the principal reason) for the dismissal, it is then necessary to determine whether that reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. In this case the respondents contend that the reason for the claimant's dismissal was a reason relating to the conduct of the claimant, which is a potentially fair reason for dismissal within section 98(2)(b).

Fairness

17. If the respondent shows that it dismissed the claimant for a potentially fair reason the Tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason applying the test in section 98(4) of the Employment Rights Act 1996.

18. Section 98(4) of ERA 1996 provides that: '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

19. In assessing reasonableness, the Tribunal must not substitute its view for that of the employer: the test is an objective one and the Tribunal must not fall into the substitution mindset warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563. The objective approach requires the Tribunal to decide whether the employer's actions fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439). This 'range of reasonable responses' test applies just as much to the procedure by which the decision to dismiss is reached as it does to the decision itself (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).

20. Where an employer has a number of reasons which together form a composite reason for dismissal, the tribunal's task is to have regard to the whole of those reasons

in assessing fairness: Robinson v Combat Stress UKEAT/0310/14 (5 December 2014, unreported).

21. The Employment Appeal Tribunal (EAT) set out guidelines as to how the reasonableness test should be applied to cases of alleged misconduct in the case of British Home Stores Ltd v Burchell [1980] ICR 303. The EAT stated there that what the Tribunal should decide is whether the employer had reasonable grounds for believing the claimant had committed the misconduct alleged and had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

22. The concept of a reasonable investigation can encompass a number of aspects, including: making proper enquiries to determine the facts; informing the employee of the basis of the problem; giving the employee an opportunity to make representations on allegations made against them and put their case in response; and allowing a right of appeal.

23. In A v B [2003] IRLR 405 the EAT held that the relevant circumstances to be considered when determining whether the respondent acted reasonably include the gravity of the charges against the claimant and their potential effect upon the employee. That statement was approved by the Court of Appeal in the case of Salford Royal NHS Foundation Trust v Roldan, where it was said that 'it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, …, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite.' The Court of Appeal cited, with approval, the following extract from the judgment in A v B: 'A careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.'

24. The Tribunal must take into account relevant provisions of the In ACAS Code of Practice on Disciplinary and Grievance Procedures when assessing the reasonableness of a dismissal on the grounds of conduct (section 207(3) of the Trade Union and Labour Relations (Consolidation) Act 1992).

25. Even if procedural safeguards are not strictly observed, the dismissal may be fair. This will be the case where the specific procedural defect is not intrinsically unfair and the procedures overall are fair (Fuller v Lloyd's Bank [1991] IRLR 336, EAT).

26. Furthermore, defects in the initial disciplinary hearing may be remedied on appeal if, in all the circumstances, the later stages of a procedure are sufficient to cure any earlier unfairness (Taylor v OCS Group Ltd [2006] IRLR 613). The Court of Appeal noted that the Tribunal must 'determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair,

notwithstanding any deficiencies at the early stage.' In Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402 the Court of Appeal held that an appeal hearing could not be held to have corrected procedural failures notwithstanding that the employee's union representative conducting the appeal did not complain about the procedural defects. The Court of Appeal held 'It is for the employer to ensure that a fair procedure is adopted ... it cannot be enough for an employer to say that although a fair procedure was not adopted, the responsibility for failing to remedy it lies at the door of the employee for failing to alert him to the error.'

27. In applying section 98(4) the Tribunal must also ask itself whether dismissal was a fair sanction for the employer to apply in the circumstances ie one falling within the range of reasonable responses open to a reasonable employer. As noted above, it is not for the Tribunal to substitute its view for that of the employer.

28. Where the employer characterised the conduct of the employee as amounting to gross misconduct, it is important to ask (without falling into the substitution mindset) whether the employer acted reasonably in doing so. The concept of gross misconduct was considered in the case of Sandwell & West Birmingham Hospitals NHS Trust v Westwood, where the EAT held that to amount to gross misconduct the employee's conduct must either be a deliberate and wilful contradiction of contractual terms or be conduct amounting to a very considerable degree of negligence. The ACAS code notes that some acts are so serious in themselves that they may call for dismissal without notice for a first offence. However, even if the employer's characterization of the employee's conduct as gross misconduct was within the band of reasonable responses, it does not automatically follow that the decision to dismiss the claimant was within that band.

29. The Employment Appeal Tribunal has emphasised the importance of length of service and past conduct as being factors to take into account when considering whether the sanction imposed fell within the band of reasonable sanctions (Trusthouse Forte (Catering) Ltd v Adonis [1984] IRLR 382).

Remedy

30. If a claim of unfair dismissal is well founded, and where an order for reinstatement or re-engagement is not made, the claimant may be awarded compensation under section 112(4) of the Employment Rights Act 1996. Such compensation comprises a basic award and a compensatory award, calculated in accordance with sections 119 to 126 of the Act.

31. Where the Tribunal considers that any culpable or blameworthy conduct of the claimant prior to dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, it must reduce the amount accordingly (section 122(2) of the 1996 Act). In this regard the question is not whether the employer believed the claimant committed the conduct in question but whether the Tribunal so believes.

32. So far as the compensatory award is concerned, the 1996 Act provides that the amount of compensation shall be such amount as is just and equitable having regard to the loss arising out of the unfair dismissal.

33. In Polkey v AE Dayton Services Ltd [1987] ICR 142, the House of Lords said that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been fairly dismissed in any event had a fair procedure been followed. As the Employment Appeal Tribunal said in Software 2000 Ltd v Andrews [2007] IRLR 568 a degree of uncertainty is an inevitable feature of this exercise and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. Nevertheless, the EAT acknowledged that there will sometimes be cases in which the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

34. Separately, if it appears to the Tribunal that either the employer or the employee has unreasonably failed to comply with the ACAS Code referred to above, the tribunal may increase or decrease any compensatory award by up to 25% if it considers it just and equitable in all the circumstances to do so (section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992).

35. Furthermore, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any culpable or blameworthy action of the claimant, it must reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (section 123(6) of the 1996 Act). As with any reduction under section 122(2), the question is not whether the employer believed the claimant committed the act in question but whether the Tribunal so believes.

Evidence and findings of fact

36. The children involved in the events which led to the claimant's dismissal were referred to at the hearing as Child 1; 2; 3; and 4 and the alleged incidents involving them as Incidents 1; 2; 3 and 4. I have maintained those references in this judgment. The numbering of the incidents corresponds with the number by which the child involved is referred and does not reflect the chronology of the alleged events.

37. The claimant gave evidence in support of his own case. He also called Mrs Salkeld to give evidence. Mrs Salkeld was one of the three panel members who heard the claimant's appeal against his (December 2018) dismissal. She is an HR professional and a Parent Governor at a primary school (not the school at which the claimant was employed).

38. For the respondents I heard evidence from the following witnesses:

38.1. Mrs Scanlon, who has been employed by the Council since June 2017 as its Head of Learning and Early Help and who decided to dismiss the claimant in March 2018.

38.2. Mrs Bagley, who, at the time with which we are concerned, was the respondent's Local Authority Designated Safeguarding Officer ('LADO').

38.3. Mr Watson, who chaired the panel which took the original decision to dismiss the claimant in December 2018. Mr Watson has been a School Governor at the same school as Mrs Salkeld for around 22 years.

38.4. Mrs Garr, who, at the time of the events with which we are concerned, was one of two Assistant Heads at the school of which the claimant was Head.

38.5. Mrs Winter, who is the School Secretary, and was a member of the Governing Body, at the school of which the claimant was Head.

38.6. Mrs Finnegan, who was a teacher at the school of which the claimant was Head.

39. I was taken to a number of documents in a bundle prepared for the hearing by the respondent.

40. Important elements of this case were dependent on evidence based on people's recollection of events that happened, in some cases, many months or years before they gave their account, and certainly some years before this hearing. In assessing that evidence I bear in mind the guidance given in the case of Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 3560. In that case Mr Justice Leggatt observed that is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. In the Gestmin case, Mr Justice Leggatt described how memories are fluid and changeable: they are constantly re-written. Furthermore, external information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all. In addition, the process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties, including employees and family members. It was said in that case: 'Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.' In light of those matters, inferences drawn from the documentary evidence and known

or probable facts tend to be a more reliable guide to what happened than witnesses' recollections.

41. My primary findings of fact are set out below.

42. The claimant was employed by the respondent as Head of a primary school. At the time of his dismissal he had been a teacher for 31 years. He had never had any disciplinary action taken against him until the events with which we are concerned.

43. The respondent has a disciplinary policy which applied to the claimant. The expressed aim of the policy is 'to ensure the fair and consistent treatment of employees in all matters of discipline and dismissal…'. Under the heading 'Scope and Principles' the policy contains the following statements:

43.1. 'Except for issues deemed to be gross misconduct, an employee will not be dismissed for a first act of misconduct. The procedure identifies the stages that should be followed and gives time scales for employees to improve their conduct.'

43.2. 'Where child protection/vulnerable adult concerns and/or criminal offences are suspected, these procedures may take precedence and a disciplinary investigation may be delayed. However, where possible to do so an internal investigation will commence at the same time. If reasonable to dismiss the employment will be ended without waiting for the outcome of any criminal proceedings.'

43.3. 'Investigations should be complete within 28 working days. Where due to unforeseen circumstances this is not possible, the employee will be made aware of the delay.'

43.4. 'Following an allegation, before any decision is taken to hold a disciplinary hearing, a management interview/investigation must be conducted. At that interview, the employee must be given an opportunity to respond to the allegations and give explanations as appropriate. At the conclusion of the investigation the employee will be informed if they are required to attend a disciplinary hearing, or if no further action will be taken.'

43.5. 'The employee must be informed of the arrangements for the disciplinary hearing, i.e. time, date and venue, in writing at least 5 working days in advance of the hearing. The letter must also clearly state the allegation(s) to be considered. Statements and supporting documents prepared for the disciplinary hearing should be issued to the employee or the nominated representative prior to the hearing and no later than 2 working days before.'

43.6. ‘It is the School’s aim to conclude disciplinary proceedings as soon as possible.’

44. The policy sets out various possible sanctions. One of those is a final written warning, which is said to be appropriate for ‘more serious’ misconduct. The policy provides that a record of the warning should be retained for 12 months but that the duration of the warning can be extended to 18 or 24 months in exceptional circumstances, such as where the matter is of such a serious nature but the circumstances do not warrant dismissal. Dismissal is said to be appropriate ‘if the employee commits a very serious act of misconduct’, with summary dismissal for gross misconduct, which is said to be ‘misconduct so serious as to destroy the contractual relationship between the employee and employer.’

45. The policy states that employees have ‘the right of appeal against decisions taken at all stages of the procedure.’ It provides for appeals against dismissal to be heard by an appeal panel and states ‘The Appeals Panel will conduct a full re-hearing, without unreasonable delay. The decision reached is final.’

46. The respondent also had a safeguarding procedure. That procedure states that it should be applied ‘when there is such an allegation or concern that a person who works with children has

- Behaved in a way that has harmed a child or may have harmed a child;

- Possibly committed a criminal offence against or related to a child;

- Behaved towards a child or children in a way that indicates he or she may pose a risk of harm to children.’

47. In that context, the procedure document states ‘These behaviours should be considered within the context of the four categories of abuse (ie physical, sexual and emotional abuse and neglect).’ Those categories are abuse are described in a document that appeared at page 579 of the bundle. Emotional abuse is described as follows:

> *‘the persistent emotional maltreatment of a child such as to cause severe and adverse effects on the child’s emotional development. It may involve conveying to a child that they are worthless or unloved, inadequate, or valued only insofar as they meet the needs of another person. It may include not giving the child opportunities to express their views, deliberately silencing them or ‘making fun' of what they say or how they communicate. it may feature age or developmentally inappropriate expectations being imposed on children. These may include interactions that are beyond a child's developmental capability as well as overprotection and limitation of exploration and learning, or preventing the child from participating in normal social interaction. It may involve seeing or hearing the ill—treatment of another. It may involve serious bullying (including*

cyberbullying), causing children frequently to feel frightened or in danger, or the exploitation or corruption of children. Some level of emotional abuse is involved in all types of maltreatment of a child, although it may occur alone.'

48. The safeguarding procedure document contains a disciplinary process. That process provides, amongst other things that on receipt of the investigating officer's report the employer should decide within two working days of receipt of the investigating officers' report whether a disciplinary hearing is needed and if such a hearing is needed it should be held within 15 working days.

49. In November 2017, Mrs Garr had a conversation with a Mrs Quinn, who was one of the school's parent Governors and the vice-chair of the Governing Body. They discussed Mr Reader, sharing what Mrs Garr described as concerns they and other staff had about him. These issues were discussed again 1 December 2017. Two days later, Mrs Quinn emailed Mrs Fairbrother, the School's Improvement Officer, to arrange a meeting with her. The following day Mrs Garr spoke to Mrs Bagley, the LADO. At some point Mrs Fairbrother, contacted Mrs Bagley. There followed, on 18 December 2017, a meeting between Mrs Bagley, Mrs Fairbrother and Mrs Quinn to discuss the issues that had been raised. On 5 January 2018, Mrs Bagley spoke to Mrs Garr, who mentioned some of the things that Mrs Quinn had raised and provided some additional information.

50. That same day Mrs Bagley sent an email to Mrs Scanlon and Mrs Fairbrother. In that email Mrs Bagley said that Mrs Garr and Mrs Quinn had raised issues about the school which, she said, fell into two categories: management issues and some safeguarding concerns. She went on to summarise those issues in 18 bullet points.

51. In her email, Mrs Bagley said 'The staff are concerned about the emotional health of [the claimant], they advise he is more bad tempered and shouts more when he is stressed and he appears increasingly stressed currently' and that Mrs Garr and Mrs Quinn 'are concerned about his state of mind and that he is stressed and possibly not coping at the current time.' Mrs Bagley said in her email that she thought it 'would be worth a discussion about the way forward.' She observed that all of the information was 'anecdotal, although potentially concerning' and that there were some safeguarding issues raised which would fall under the remit of the LADO process.

52. Mrs Bagley convened a Strategy Meeting which took place on 17 January 2018. Shortly afterwards she told Mrs Scanlon that more information was needed to be able to determine whether the allegations about the claimant were true or not. After discussing the matter with Mrs Bagley, Mrs Fairbrother, Mr Fells, head of HR, and Mr Pearce, who was the Corporate Director for Children Adults & Families, Mrs Scanlon decided to suspend the claimant. She believed this was necessary so that a proper investigation into the concerns could be carried out, given that the email Mrs Bagley had sent her referred to staff being fearful of challenging the claimant in case there were repercussions.

53. Mrs Bagley told the chair of governors of the school of her decision to suspend the claimant. The chair then went to see the claimant on Friday 26 January 2 0 1 8, accompanied by Mr Morris of the Respondent's HR Department. She told the claimant he had been suspended from his position as Headteacher of the School on full pay until further notice. The claimant asked why he had been suspended but neither the Chair of Governors nor Mr Morris were able to tell him.

54. The claimant was given a letter confirming his suspension, which had been drafted by Mrs Scanlon. The letter said the purpose of the suspension was 'to remove you from work to allow an investigation into allegations regarding safeguarding concerns and your conduct, in accordance with the school's Disciplinary Procedure.' The letter did not contain any information about the allegations that were being investigated. The claimant was told he must not contact or speak to any work colleagues or governors without prior express permission. The claimant remained suspended until his appeal against his original dismissal was upheld (whereupon, as set out below, he was reinstated but then immediately suspended again).

55. At around the same time, Mrs Scanlon asked Ms Libbey to undertake an investigation into some of the concerns which had been raised. Ms Libbey was, at that time, employed by the Council in its commissioning service, as its Joint Market Management Quality Lead. The matters Mrs Libbey was to investigate were set out as follows:

1. Allegation that a child had been dragged by SR, in the summer term. No bullying or behaviour incidents recorded. Police are interested in this incident. (Deborah Proctor) concerned, not gone through safeguarding procedures. Inappropriate consequences 'children facing the wall'.

2. Allegations about complaints process-not clear what happened to these and how they have been resolved, complaints about the conduct of the head. Parents have complained about shouting and disciplining of children from SR and NN. Professional complaint about SW behaviour towards a child.

3. General management of staff-style and ability, sometimes poor and inconsistent, bullying of staff, shouting in front of staff and children, scared of being shouted at.

4. Homophobic comments toward a staff member.

5. Capability/management—have there been any failures to adequately support SEN students by not following processes, has there been a failure to follow procedure in respect of appraisal/pay progression.

6. Personal Use of School credit card/mismanagement of funds.

7. Have children been put at risk by a lack of procedures at the end of the school day?

56. A report prepared by Mr Libbey at the conclusion of her investigation shows that, during the investigation, additional concerns were identified and were 'added to the terms of reference.' These were described as follows:

- Additional allegations of poor or aggressive management of behaviour (Ie. shouting at children, handling children).

- Concerns about relationship with a colleague and the impact on the leadership of the school.

57. As part of her investigation, Ms Libbey interviewed the claimant and other staff members during February and March 2018. Mr Morris of HR was present in these meetings. I was referred to typed notes summarising what was said by the claimant and others in those meetings. There has been no suggestion that those notes do not accurately record what was said, or at least the gist of what was said, in those meetings. I make the following findings about that investigation:

58. On 23 February 2018 Mrs Libbey met with Mrs Quinn and Mrs Garr, both of whom had prepared written statements in advance.

59. On 5 March 2018 Mrs Libbey met with Ms Gilmour, the Chair of Governors at the School.

60. Mrs Libbey arranged to meet with the claimant on 28 February 2018 but the meeting had to be rescheduled to 7 March 2018. Ahead of that meeting Mrs Libbey had told the claimant she was undertaking an investigation 'into allegations that have been raised regarding safeguarding concerns and your conduct.' When she asked the claimant in the meeting if he was aware of the allegations he said he was not.

61. Subsequently Mrs Libbey met with Mrs Fairbrother, Mrs Finnegan, Mrs Winter, and some other members of staff from the school. Mrs Libbey then met again with Mr Reader on 27 March 2018.

62. Ms Libbey then prepared a report in which she set out her conclusions.

63. Regarding the first of the numbered allegations in the terms of reference, Mrs Libbey said in her report 'No further information was provided in respect of this incident from staff making allegations, however, we had 4 specific incidents identified during the course of the investigation which were put to SR.' She then went on to detail allegations about the claimant's behaviour towards four children on four occasions. In her report Mrs Libbey outlined the allegations as follows:

63.1. Child 1-allegation that SR had dragged this child to his office and shouted at [them] quite forcefully, leading to the child becoming very distressed, and staff interviewed who were witness to this felt that this was unnecessary.

63.2. Child 2-allegation that SR had shouted aggressively at a nursery age child, in his office with the door closed. The child has not returned to school since.

63.3. Child 3-allegation that SR held a child in a headlock.

63.4. Child 4-allegation that SR had dragged a child from under a desk, causing a mark to the child's arm.

64. These alleged incidents are those referred to throughout this hearing as Incidents 1 to 4 respectively.

65. With regard to Incident 1, Miss Libbey's report contained the following summary of her findings.

> *'This incident was witnessed by 2 members of staff that were interviewed. When put to SR, he corroborated some of this. From the statements provided, it is evident that SR had disciplined Child 1, stepping in when another member of staff was dealing with the child's behaviour. The manner in which he dealt with the child was not proportionate or mindful of the child's level of understanding or age. For example, SR shouted at the child 'Who do you think you are?', and the child responded 'I'm x, I'm x', clearly responding literally to the question according to both witnesses. The child, in KS1, was described as 'cheeky', and SR admits 'being angered'. SR stated that he lost his temper on this occasion. On balance, it is likely that SR lost his temper and shouted at child 1, removing [them] to his office physically by leading [them] by the hand. It is fair to conclude that in this case the management of the child's behaviour was driven by a loss of control, and that the way SR dealt with this was inappropriate and disproportionate to the situation. Further to this, SR did state that he thought Child 1 may have told [their] parent, and that the child was 'good at telling'. The investigator found this language unusual. SR did state that he had personal issues around this time. SR denied dragging the child. SR stated that he intervened as the teacher wasn't getting anywhere with the child.'*

66. Miss Libbey's report contained the following summary of her findings on incident 2.

> *'allegation that SR had shouted aggressively at a nursery age child, in his office with the door closed. The child has not returned to school since. Described by a member of staff, they could hear what sounded like a baby crying, and SR shouting quite loudly. SR stated that he had been involved in disciplining the child, but couldn't remember this incident. SR did describe how he would have managed the child in general terms. However, without an eye witness (the staff member could only hear the crying and shouting) and SR being unable to recall this incident, the investigation was unable to determine a clear account of what happened. However, SR did state that he would have raised his voice to get*

above the noise of the crying. SR explained that the child did not return to school as his mother did not consider he was ready for school due to his needs.'

67. It was incorrect of Mrs Libbey to say the claimant had said he could not recall this incident.

68. With regard to Incident 3, Miss Libbey's report contained the following summary of her findings.

'An incident was described by a member of staff, that the child was held in a headlock with the child's mother present at the incident. SR's view of this was that 'headlock' was an emotive description, and he had merely held the child to comfort [them] and keep [them] safe. However, on questioning SR further, it is clear that neither he, nor any of the other staff in the school have had any positive de-escalation training or positive handling training. Members of staff should not be handling children without the proper training.'

69. With regard to Incident 4, Miss Libbey's report contained the following summary of her findings.

'This was confused, as the investigator had used the wrong child's name when first interviewing SR. The name of the child was clarified and this was put to SR again in the clarification interview. The witness described SR talking to a child that he had brought into the hall. The witness stated that SR was saying 'Are you ok, you are not hurt are you? Are we still friends? Are we ok?' SR recalled this incident as being over a year to 18 months ago. SR stated that the child has a tendency to slide off [their] chair and under the desks. SR said that he remembers he may have caught and pulled the child up. SR remembers asking the child if [they were] ok, and if they were still friends, but not because he was worried that the child would 'go and tell.' Again the investigator thought this was a curious use of language. Without an eye witness to what happened immediately before, the investigation could not get a clear picture of what happened. No one saw a mark, and it is not clear if any complaint was made.'

70. That summary does not record what the witness to the alleged incident, Mrs Proctor, actually said. Instead it records what Mrs Garr claimed Mrs Proctor had said to her about the alleged incident. That account differed from what Mrs Proctor told Mrs Libbey.

71. Mrs Libbey summarised her findings on the above matters as follows

'…The investigation has therefore found that there have been incidents of managing behaviour that appear to have been disproportionate and/or inappropriate. There is no evidence that any child has come to any harm, however, SR's style of managing behaviour appears intimidating at times. This has been corroborated by some teaching staff across the school in their

> *interviews. …teaching staff have stated that SR's behaviour management approach isn't the way that they would do it, that it can be 'loud and abrupt', 'aggressive', 'very loud'.'*

72. Mrs Libbey added 'SR was asked to demonstrate his manner during his interview, and admitted his size could be intimidating, along with being 'gruff'. When he demonstrated how loud he could shout in the interview this was loud enough to make the investigator jump even though she was expecting it.'

73. Mrs Libbey said she concluded:

> *'SR's behaviour management style is based on old practice. Behaviour in the school is described as very good, and all comment on how lovely the children are, and that the policy in the school works well. However, the way that SR manages behaviour is viewed by some staff as old-fashioned. SR is more than likely unaware at how this comes across, and the impact that this could have on children and adults who are subjected to or witness this. SR is also unaware of how handling children could pose a risk to children, him or others. This is likely because training on positive de-escalation and positive handling strategies have not been taken up by the school. Of significant concern is SR's admission that he 'lost control' in the case of Child 1. Also of note was the language used by SR about children 'telling' about the incidents.'*

74. Mrs Libbey was wrong to say that Mr Reader had admitted that he 'lost control' in the case of Child 1. He had not made such an admission.

75. Mrs Libbey made two recommendations in connection with alleged Incidents 1 to 4. Firstly, she said 'SR's behaviour management practice requires development. An appropriate de-escalation model needs to be adopted in the school.' Her second recommendation was that 'There is a case to answer in respect of SR's behaviour management style and the loss of control SR admitted to.' Here, again, Mrs Libbey wrongly asserted that the claimant had admitted to losing control.

76. Mrs Libbey's report then went on to address allegations 2, 3, 5 and 6 set out in the terms of reference. There was no mention of allegations 4 and 7 and I infer Mrs Libbey found no evidence to support those allegations. Her conclusions on allegations 2, 3, 5 and 6 were as follows:

76.1. Allegation 2 concerned the complaints process. Mrs Libbey said: 'Given the conflicting accounts and lack of a complaint log it is not possible to evidence this claim.' She recommended 'for the sake of accountability and transparency' that a complaints log should be maintained, and a report about the volume and nature of complaints presented within the Head Teachers report to the governing body.'

76.2. Allegation 3 concerned the claimant's management style and alleged 'bullying'. Mrs Libbey said: 'bullying and harassment have been ruled out as no member of staff could evidence this or provide an account that they are bullied'. She added, however that the claimant '…has clearly been affected by the pressure of his role and this reluctance to delegate tasks to his leadership team have had an effect on his demeanour and wellbeing, and it's reasonable to assume this has manifested in an unpredictable mood.' She recommended that the claimant undertake refresher training on leadership and management and reflect on his management style. Mrs Libbey also referred to there being a 'divide' between staff working in Key Stage 1 and those in Key Stage 2 and recommended that steps be taken to unite the teams.

76.3. Allegation 5 concerned processes with regard to SEN students and staff appraisals/pay progression. Mrs Libbey said the claimant had identified SEND processes as 'an area of deficit' and had already taken steps to address that issue. Mrs Libbey noted that pay progression meetings had been taking place but recommended that 'for the sake of accountability and transparency, all pay progression meetings/performance reviews to be recorded, targets recorded explicitly, and formal feedback/action plans provided to teachers/staff.'

76.4. Allegation 6 concerned the use of the school credit card and mismanagement of funds (the latter arising out of criticisms from some individuals that there was an unfair distribution of funding across the school). Mrs Libbey said one of the credit card issues had been discussed with governors and resolved. The second had involved the claimant paying for personal car hire on holiday, which the claimant had admitted and resolved on return to work, immediately paying back the money, as corroborated by the Vice Chair of Governors. Regarding allegations made by Mrs Garr about mismanagement of funds, i.e. unfair distribution of funding across the school, Mrs Libbey said that was 'subjective' and could not be evidenced.

77. Mrs Libbey also recorded in her report that staff had not reported their concerns about the claimant's management of children as they should have done, notwithstanding that they were aware of the procedures to safeguard children. She noted that 'staff have said that they were too scared of SR and his reaction to challenge or report.' She said this 'gives rise to question whether staff are identifying and reporting other safeguarding concerns. There is no excuse for staff not to report any safeguarding issues.

78. Ms Libbey sent a copy of her report to Mrs Scanlon in or around late March or early April 2018. The report was not sent to the claimant at this time.

79. A further LADO Strategy Meeting was held on 8 May 2018. The meeting was chaired by Mrs Bagley and attended by Mrs Scanlon, Ms Libbey, Mrs Fairbrother, Mr Morris, Mr Rumney (a solicitor employed by the respondent) and a note-taker. At the meeting, those present discussed the four alleged incidents relating to the claimant's interactions with pupils (Incidents 1-4). Mrs Libbey explained her findings from the investigation by reading from her report. The minutes record that Mrs Libbey repeated

80. The LADO meeting was given inaccurate information in some respects:

80.1. It was told that the claimant admitted that he removed Child 1 from the situation by taking them by the arm when he was out of control. This was not correct. He had said that he had taken Child 1 by the hand, not arm and had removed them from the situation. He had accepted that he would have been angered and had lost his temper but not that he had lost control.

80.2. The LADO meeting was told that two members of staff heard the claimant shouting at Child 2 when only Mrs Winter said she had heard shouting. The meeting was also told the staff had said there was no formal recording mechanism for such incidents to be logged. They had not said this. Indeed at the disciplinary hearing that followed several months later Mrs Scanlon accepted that the appropriate policies were in place.

80.3. The meeting was told that "a member of staff" had witnessed the alleged headlock incident when in fact at least one other member of staff had witnessed it, potentially two, neither of whom had been interviewed.

80.4. The claimant's account regarding incident 4 was misreported. It was said that the claimant had said that he may have pulled Child 4 out from under the desk by [their] arm. That was not what the claimant had said. He had said the child tends to slide under their desk and that he may have caught the child and pulled the child back up.

80.5. Mrs Libbey and/or Mrs Scanlon suggested the school did not have a behaviour log. This was incorrect.

81. The LADO meeting reached a series of conclusions, including that "there is a theme of inappropriate physical chastisement and inappropriate shouting at children." In setting out its conclusions the meeting stated, incorrectly, that the claimant had admitted to pulling a child by their arm, had acknowledged several incidents of shouting at children, had said he was shouting over a child when they were crying so the child could hear him, and had said he may have pulled a child from under a desk by their arm. I find that those present were influenced in reaching their conclusions by incorrect beliefs that the claimant had said these things.

82. Those present also reached the following conclusions:

82.1. 'there is concern about safety in the school' because of 'the lack of reporting of incidents and the lack of recording around incidents and concerns.'

82.2. 'Whilst all present at the meeting were of the view that Mr Reader had not intended to cause any pupil any distress or harm, they all concluded that emotional harm would have been caused. It was also concluded that Mr Reader represented a risk of harm to children, namely emotional harm arising out of his behaviour towards them.'

82.3. 'It was agreed that a referral to the DBS was not necessary at this stage as it is not believed that Mr Reader has intentionally tried to harm a child. However, the outcome of the investigation would need to be reflected in any reference should Mr Reader apply for another job at any point in the future.'

82.4. 'Beverley Scanlon felt referral to the National College of Teaching and Learning (Teachers Regulation Agency) should be deferred until the outcome of any further investigations.'

82.5. 'It is not believed that Mr Reader has intended to cause physical or emotional harm to a child. However, he has demonstrated a lack of awareness of the impact on his behaviour on children in the school which has caused emotional harm.'

83. Mrs Bagley sent the claimant a letter dated 15 May 2018 informing the claimant that allegations of a safeguarding nature had been made against him concerning 'incidents of discipline with children', that the allegations had been investigated and had been found to be 'substantiated', but that no further details were being provided in the letter 'due to the sensitivity of the subject'. The claimant was told of his right to ask for a redacted version of the minutes under Freedom of Information procedures. The claimant did subsequently ask for a copy and was provided with redacted minutes in the Summer.

84. Mrs Scanlon decided that there should be a disciplinary hearing. I find that it is more likely than not that she made that decision almost immediately after the LADO meeting in May 2018. The disciplinary hearing did not take place until December 2018. The respondent suggested the delay was due to difficulties identifying suitable panel members to deal with the disciplinary hearing and any subsequent appeal. However, it is clear that attempts to identify a suitable panel did not begin until September 2018, some four months after the LADO meeting. It appears that a decision was taken to do nothing to progress matters during the school holidays. Mrs Scanlon could not explain why nothing had been done in the two and a half months between the 8 May LADO

meeting and the start of the school holidays in July. When the issue was picked up again at the end of September 2018, at the urging of the claimant's union rep, there were then delays attributed to the fact that it was realised that it would be difficult to convene an impartial panel made up of governors from the school at which the claimant worked and therefore governors from a different school would need to be approached. Using governors from a different school required formal approval of the governors of both schools concerned. On 19 October the governors of the school at which the claimant worked agreed to another school undertaking the disciplinary process. There was then a further delay whilst various schools were approached with a view to identifying one which could take on the disciplinary proceedings. Eventually, on 19 November 2018, the governors at a different school agreed to hear the disciplinary.

85. The claimant was sent a letter dated 3 December 2018 notifying him that he was required to attend a disciplinary hearing on 12 December 2018. The letter was sent by Mrs Flynn, Clerk to the Governing Body of the claimant's school. It said:

> 'The purpose of the hearing is to consider the following:
>
> You have failed to carry out your professional duties and responsibilities as Head Teacher outlined in the School Teachers Pay and Conditions Document 2018, namely that you have:

- Failed to ensure that the safeguarding policy and complaints procedure have been properly and effectively implemented.
- Failed to promote the safety and wellbeing of pupils in the School.
- Failed to promote harmonious working relationships within the school by creating a division, perceived or otherwise, between staff In Key Stage 1 and Key Stage 2.
- Failed to ensure that staff have received the appropriate continuous professional development.
- Failed to establish a safe and stimulating environment for pupils rooted in mutual respect given the incidents set out and the real possibility that pupils were frightened by and of you.
- By your actions, failed to demonstrate the positive attitudes, values and behaviour which are expected of pupils.
- By your actions, failed to treat pupils with dignity, building relationships with mutual respect and at all times observing proper boundaries appropriate to a teacher's professional position.

- Failed in your regard for the need to safeguard pupils' wellbeing in accordance with statutory provisions.

86. In her letter, Mrs Flynn said 'As a consequence of a combination of your actions and omissions, the Council, as your employer believes that the relationship of trust and confidence which must exist between employer and employee has been destroyed.'

87. The letter did not set out the allegations against the claimant in any more detail. The claimant was provided with a copy of Ms Libbey's report at this time.

88. Mrs Scanlon prepared a statement for the disciplinary hearing. The claimant was not provided with a copy of that statement until the afternoon before the disciplinary hearing. Mrs Scanlon could not explain why the claimant was not given the statement sooner. Mrs Scanlon's statement began with an explanation of the background to Ms Libbey's investigation. It continued with a section headed 'Summary of Evidence'. That section had two subsections headed, respectively, 'Mr Reader's Behaviour Towards Pupils and Staff' and 'Mr Reader's failure to ensure that the appropriate policies were in place or applied'. In the section headed 'Mr Reader's Behaviour Towards Pupils and Staff', Mrs Scanlon referred to Incidents 1, 2, 3 and 4 respectively. I make the following observations about the section headed 'Mr Reader's failure to ensure that the appropriate policies were in place or applied'.

88.1. Mrs Scanlon said 'Schools are clearly expected to have a range of up to date policies and procedures in place to ensure that both staff and pupils are safe and their wellbeing is being addressed. Whilst Dunn Street Primary School, appears to have these in place, they do not appear to be effectively or consistently applied. Similarly the school's Complaints Procedure clearly states the process to be followed. However, it would appear that complaints were not processed in accordance with the procedure, although it is difficult to be clear on this because there is no centrally held file or log.'

88.2. With regard to safeguarding, Mrs Scanlon commented on the fact that no-one had made any record of Incidents 1, 2, 3 and 4 and nor had anyone reported any concerns about Incidents 2, 3 and 4 in the immediate aftermath of those incidents. She implied there was not a proper regime of reporting at the school as referred to in the Teachers' Standards Guidance and that 'no consistent system of recording and reviewing such incidents is used'. She acknowledged that the school had a safeguarding policy but implied it had not been 'implemented' or 'used'. She said it appeared that Mr Reader had failed to ensure that all staff were in no doubt as to their duty to raise any safeguarding concerns. She also said, however, 'it should be borne in mind that every teacher should have known their safeguarding obligations in terms of reporting concerns.' Mrs Scanlon added 'There are lower levels of safeguarding

referrals at [the school] in comparison to other schools which brings into question whether staff are identifying and reporting concerns appropriately.'

88.3. Mrs Scanlon also said it appeared that Mr Reader had failed to ensure that the school's Complaints Policy was followed. In this regard, she said 'Ms Libbey identified a number of conflicting accounts of whether complaints have been made, and if so, who submitted them, and how they had been dealt with. Again, like the Safeguarding Policy above, a Complaints Policy is valueless if there is no complaints log or file to verify the number of complaints received and the outcome of each one. The fact that only one complaint appears to have been referred to the Chair of Governors would point to either the school having an astonishingly low level of complaints or the Complaints Policy not being followed in every case. The lack of recording does nothing to allay the suggestion that the latter is likely to be the case.'

88.4. Mrs Scanlon also criticised the school's Behaviour Policy, saying it 'is not explicit as to how staff should interact with children when managing their behaviour. Ms Libbey's investigation found evidence that a difference of opinion existed on how to manage pupil behaviour within the school.'

89. Mrs Scanlon then referred in her report to the LADO investigation, summarising its findings, before outlining what she described as her 'conclusions.' In that section she repeated the allegation that neither Mr Reader not the staff of the school followed systems of recording for safeguarding referrals and complaints. Whilst accepting that each member of staff at the school had their own responsibilities, she said 'it is ultimately the Head teacher who sets the strategic direction of the school, determines the culture of the school and ensures that his or her team discharge their professional responsibilities. There seems little doubt that Mr Reader has behaved in such a way as to discourage those working for him from discharging these responsibilities.' On the same theme, Mrs Scanlon said 'Mr Reader appears to have created a culture at the school where safeguarding concerns are not appropriately reported and dealt with. If a staff member has concerns about another member of staff who may pose a risk of harm to children, this should be referred to the Head teacher. There is no evidence of this. If the concern relates to the Head teacher, and the incidents set out show there have been instances of this, then that should have been referred to the school's Chair of Governors. This clearly did not happen.' She added 'I believe Mr Reader has allowed a culture to develop at the school where the staff are divided and where at best, staff felt uncomfortable making safeguarding disclosures and at worst, unable to make safeguarding disclosures.'

90. Mrs Scanlon ended her report by saying 'I have reached the conclusion that the trust and confidence placed in Mr Reader as Head teacher at Dunn Street Primary School, to effectively manage the school, to effectively protect and safeguard the

well—being of the pupils, to ensure that professional boundaries are adhered to at all times and to ensure that staff are appropriately trained to respond to and disclose concerns, has been destroyed.' She then referred to the LADO investigation again before concluding 'Should the Governing Body accept that Mr Reader's behaviour and professional role as Head teacher is no longer tenable then it falls to the panel to determine the appropriate response.'

91. The claimant was also, on 11 December, provided with anonymised copies of the notes of the meetings Mrs Libbey had with staff members and other as part of her investigation, in anonymised format.

92. The disciplinary hearing took place the next day, on 12 December 2018 before a panel of three governors from a different school, chaired by Mr Watson. Also in attendance were the claimant, his union representative and Mrs Scanlon. Mrs Bagley and Ms Libbey attended to give evidence (which included Mrs Libbey reading out her investigation report) as did a number of people on behalf of the claimant. Also present were Mr Morris and Ms Wollaston from HR and Mrs Flynn, the Clerk to the Governing Body.

93. In accordance with the respondent's disciplinary policy, Mrs Scanlon put the case that the claimant was expected to answer, which was in line with the statement she had prepared, which the panel also had. The panel understood that, notwithstanding that Mrs Scanlon had expressed her opinion on the matter of the claimant's conduct, it was for them to reach their own conclusions as to what had happened, whether the claimant had committed the misconduct alleged and what, if any, sanction should be imposed. Having deliberated, the panel decided that the claimant should be dismissed. The claimant was told this in a reconvened disciplinary meeting on 19 December 2018. He was told that all of the allegations against him had been upheld. At that meeting the claimant was handed a letter signed by Mr Watson confirming the decision. In that letter Mr Watson repeated the eight allegations that had been set out in the letter of 3 December 2018 and said that they had each been upheld.

94. The claimant appealed against his dismissal. The appeal was heard by a panel of three governors drawn from the same school as had dealt with the disciplinary hearing. Mrs Salkeld was one of the panel members. The claimant attended an appeal hearing on 1st March 2019 before the panel.

95. Immediately before the Appeal Hearing began, Mrs Flynn, the clerk to the governors, and Mrs Young from the council's HR department spoke to the three appeal panel members. They made comments about the allegations, using phrases such as 'He's definitely done that' and 'You have to imagine how you'd feel if it were your children''. Mrs Salkeld interpreted those comments as an attempt to influence the panel's decision.

96. The hearing was chaired by Mr McCrossan. Mrs Scanlon attended to present what was described as the management case. The panel had a copy of the report Mrs Scanlon had prepared for the disciplinary hearing. Ms Libbey and Mrs Bagley gave evidence as did five other individuals whom the claimant had asked to attend. Mrs Young attended from the Council's Human Resources Service. The meeting was clerked by Ms Flynn from the Council's Governors' Administration Service.

97. The appeal panel reconsidered the same eight allegations that had been before the original disciplinary panel ie that the claimant had:

1. Failed to ensure that the safeguarding policy and complaints procedure had been properly and effectively implemented.

2. Failed to promote the safety and wellbeing of pupils in the School.

3. Failed to promote harmonious working relationships within the school by creating a division, perceived or otherwise, between staff In Key Stage 1 and Key Stage 2.

4. Failed to ensure that staff had received the appropriate continuous professional development.

5. Failed to establish a safe and stimulating environment for pupils rooted in mutual respect given the incidents set out and the real possibility that pupils were frightened by and of [him].

6. By [his] actions, failed to demonstrate the positive attitudes, values and behaviour which are expected of pupils.

7. By [his] actions, failed to treat pupils with dignity, building relationships with mutual respect and at all times observing proper boundaries appropriate to a teacher's professional position.

8. Failed in [his] regard for the need to safeguard pupils' wellbeing in accordance with statutory provisions.

98. The appeal panel took around an hour to discuss its findings at the end of the day whilst Mr Reader and the other parties waited for their decision. The panel was unable to reach a unanimous decision by 6pm so they reconvened the following Monday, 4 March to continue their discussion by telephone conference. They reached a unanimous decision to uphold the claimant's appeal against his dismissal and determined that he should be reinstated to his post of Head teacher with a final written warning. In doing so, they decided, unanimously, to uphold three of the allegations. That decision was recorded in minutes of the meeting. The panel also made some recommendations, including a recommendation that Mr Reader should be supported with training and mentoring on his reinstatement to his role. For a reason that was not

explained, that recommendation was excluded from the typed minutes of the appeal hearing.

99. The claimant was notified of the outcome of the appeal by letter of 6 March 2019 in Mr McCrossan's name (which had been drafted by Mrs Young of HR). The letter listed each of the allegations, numbering the allegations 1-8 as I have done above. It recorded that the panel found allegations 2-6 not to be upheld and recorded the following observations:

99.1. Although neither the claimant nor his staff had undertaken any de-escalation and/or safe handling training, such training is not a mandatory requirement.

99.2. Although there was a clear and unhealthy division between staff in the two key stages, the panel did not believe that this division has been created by the claimant but by 'another member of the Senior Leadership Team'.

99.3. With regard to allegation 5, the panel had heard that the claimant both delivered and took part in a number of after school activities and did not believe that management had provided enough evidence to substantiate this allegation.

99.4. With regard to allegation 6, the panel believed that the children within the school were well behaved and that this was due to the environment they studied in, which was something that, as Head Teacher, the claimant had contributed to.

100. The Appeal Panel did, however uphold allegations 1, 7 and 8. Reasons for doing so were explained in the letter as follows:

100.1. Allegation 1 was that the claimant 'Failed to ensure that the safeguarding policy and complaints procedure had been properly and effectively implemented.' The letter simply records that 'the panel heard that both safeguarding incidents and complaints have not been recorded.'

100.2. Allegation 7 was that 'by [his] actions, [the claimant had] failed to treat pupils with dignity, building relationships with mutual respect and at all times observing proper boundaries appropriate to a teacher's professional position.' The letter states 'the panel heard details of four separate incidents you were involved in addressing the behaviour of pupils. By your own admission you have lost your temper and raised your voice when dealing with pupil behaviour.'

100.3. Allegation 8 was that the claimant had 'failed in [his] regard for the need to safeguard pupils' wellbeing in accordance with statutory provisions.'

> The letter simply states 'the panel heard details that safeguarding incidents and complaints were neither recorded nor acted upon.'

101. Mrs Salkeld's evidence at this hearing was that the reason the appeal panel upheld Allegation 7 was that the panel believed that the claimant had lost his temper when dealing with Child 1, and had probably shouted at the child, on the specific occasion the panel heard evidence about. Her evidence was that the panel did not believe the claimant had dragged the child or taken the child along forcefully as had been alleged and nor did the panel believe the claimant had behaved inappropriately towards Child 2, Child 3 or Child 4 as had been alleged.

102. There was no suggestion that Mrs Salkeld had any motive to misrepresent the panel's conclusions and nothing she said was inconsistent with the letter of 6 March. In particular, although that letter referred to the panel having 'heard details' of four incidents, it did not say that the panel thought that the claimant had behaved inappropriately on each occasion; the only specific reference to inappropriate behaviour is the mention of the claimant having lost his temper and raised his voice when dealing with pupil behaviour; and the panel concluded that allegations 5 and 6 were not made out. Based on Mrs Salkeld's evidence, read with the 6 March letter, I find the conclusions reached by the panel on those incidents were as follows:

102.1. Incident 1: the panel believed that the claimant had lost his temper when dealing with Child 1, and had probably shouted at the child, on the specific occasion the panel heard evidence about. The panel did not believe the claimant had dragged the child or taken the child along forcefully as had been alleged.

102.2. Incident 2 (concerning an allegation that the claimant had shouted aggressively at Child 2, in his office with the door closed): the panel were not satisfied that the claimant had shouted at the child but believed he had raised his voice over the sound of the child crying. The panel debated whether raising his voice was something the claimant should not have done and concluded that the claimant had not been at fault: he had not raised his voice above what was acceptable for someone of Child 2's age and it was difficult for the claimant not to raise his voice in that situation in order to be heard. The panel were of the view that this incident had not contributed to the reasons for that child leaving the school.

102.3. Incident 3 (concerning an allegation that the claimant had held Child 3 in a headlock): The appeal panel's conclusion was that the claimant had acted appropriately. They accepted the description of what had happened given by the claimant and the caretaker who had given evidence for him (and I infer rejected the suggestion that the claimant had held the child in a 'headlock'). The panel believed the claimant's actions had been appropriate in the circumstances, especially given that

the child's mother was present. The panel believed that the claimant had been acting in the child's best interests. The panel did not believe that the fact that the claimant had not had any de-escalation and/or safe handling training rendered the claimant's actions inappropriate.

102.4. Incident 4 (concerned an allegation that the claimant had dragged a child from under a desk, causing a mark to the child's arm): the panel found that this allegation was not made out. They decided there was not enough evidence that the claimant had acted inappropriately at all.

103. As for the finding about record keeping in relation to Allegations 1 and 8, Mrs Salkeld's evidence, which I accept, was that the panel based this conclusion on the fact that there were a number of references to a lack of record keeping about complaints and safeguarding incidents in the documents provided to the panel.

104. The panel's decision to reinstate the claimant was set out in the following terms 'Having given full and careful-consideration to the evidence presented and to your mitigation, employment record and length of service the panel have determined that you should be reinstated to your post of Head Teacher at Dunn Street Primary School with a final written warning.'

105. The claimant learned of the outcome of his appeal at a meeting on 8 March 2019. There, the claimant was told that he had been reinstated and given the letter of 6 March.

106. Notwithstanding the appeal panel's decision to reinstate the claimant, Mrs Scanlon decided that the claimant should be dismissed. That decision was not made by Mrs Scanlon alone; she made it in conjunction with Mrs Bagley, Mr Pearce, the Director of Children's Services, and Mr Fells, the Head of HR. Mrs Scanlon did not speak to any of the disciplinary appeal panel members to discuss the grounds on which they had upheld allegations 1, 7 and 8. Nor, I infer, did any of those with whom Mrs Scanlon made the decision to dismiss the claimant, given that there is no evidence or suggestion that they did. Based on answers given by Mrs Scanlon on cross-examination, I find that she had assumed that the Appeal Committee had found that the claimant had behaved inappropriately in the way he dealt with Child 1, Child 2, Child 3 and Child 4 and had therefore upheld all of the allegations concerning Incidents 1, 2, 3 and 4. I infer that Mrs Bagley, Mr Pearce and Mr Fells had made the same assumption.

107. Immediately after the meeting on 8 March ended the claimant was asked to go to a separate room next door to meet with two HR representatives from the Respondent. There he was told that he was to be suspended immediately from his position as Head Teacher until further notice. He was told this was due to the three allegations that had been upheld and for 'some other substantial reason'. The claimant was given no further information about the reasons for his suspension and was escorted from the premises, bewildered and confused.

108. Mrs Salkeld subsequently learned of the claimant's suspension by word of mouth. She was shocked by the local authority's actions.

109. On 11 March 2019 the claimant received a letter from the Respondent signed by a Ms Evans, with the job title 'Head of Integrated Commissioning'. That letter confirmed the claimant's suspension, the purpose of which was said in the letter to be to remove the claimant from work following 'the serious safeguarding concerns which have been substantiated against [him].' No further information was provided. The claimant was told he must not contact or speak to any work colleagues, parents or governors without express permission.

110. By letter of 19 March 2019 the claimant was told he had to attend a 'management meeting' on 26 March with Mrs Scanlon and someone from HR. The purpose of the meeting was said to be 'to discuss the present situation and to enable you to be advised of the Council's decision regarding your future employment.' No further information was provided. The claimant sent a letter to Mrs Scanlon saying he did not understand the decision to suspend him and asking what the purpose of the meeting was.

111. The claimant did not receive any further information before the meeting on 26 March. He went to the meeting. It lasted no more than 10 minutes. Mrs Scanlon read from a sheet of paper, telling the claimant that he was dismissed. She said

> 'The Appeal Panel upheld 3 allegations, all of which related to safeguarding practices and procedures, or your behaviour towards children. The Council disagrees with the sanction which was imposed by the Appeals Panel, by virtue of the fact that they raise significant safeguarding concerns. The Council's duty of care to pupils, not to expose them to a risk of harm coupled with the conclusions of the LADO process, have persuaded the Council that it is not reasonable to return you to your job …, or to deploy you in any role in which you would have contact with children. In any event, the Council is obliged to make referrals to the DBS and to the National College of Teaching & Leadership, as a result of the nature of the findings made against you by the Appeals Panel, and the conclusions of the LADO process, which provide support for each other. Against that background, the Council could not reinstate you in your job…whilst at the same time referring the findings made to the DBS and the NCTL. It is understood that the referral processes are unlikely to be concluded quickly, and the School is unable to justify suspending you on full pay until both referrals and if necessary, appeals etc. are exhausted. In view of the above, the Council has come to the decision that the nature of the misconduct which was found proven by both the Disciplinary and the Appeal Panels requires it to terminate your employment. This is separate and in addition to the requirements to make the referrals already mentioned, which themselves make your continued employment impossible. You will be notified of this decision in writing, and advised of your right of appeal against this, second dismissal.'

112. Mrs Scanlon sent a letter to the claimant dated 29 March 2019 in which his dismissal was confirmed. In that letter, Mrs Scanlon said 'You were advised that it was considered necessary to terminate your employment firstly on the basis that the three allegations upheld by the Appeal Committee on 1st March 2019 are serious enough to amount to gross misconduct, and secondly due to some other substantial reason, the details of which are set out below.' Mrs Scanlon went on to set out the reasons the claimant was considered to have committed misconduct, saying 'the Appeal Committee upheld three allegations, all of which related to safeguarding practices and procedures, or your behaviour towards, children. Those three findings are considered serious enough to amount to gross misconduct, sufficient to justify the termination of your employment.' She then went on to refer to each of the three allegations.

112.1. With regard to the allegation that there had been a 'failure to ensure that the safeguarding policy and complaints procedure have been properly and effectively implemented', Mrs Scanlon said this 'represents a breach of your professional duty to safeguard pupils' well-being, as set out in Part Two of the Teachers' Standards publication; as well as Paragraph 35 of the Keeping Children Safe in Education publication.'

112.2. With regard to the allegation that the claimant had raised his voice and / or lost his temper when dealing with pupil behaviour and thereby failed to treat pupils with dignity, or to build relationships rooted in mutual respect and at all times observe proper boundaries appropriate to his professional position, Mrs Scanlon said 'the Appeal Committee upheld allegations that you lost control when angered by a Key Stage 1 pupil; you raised your voice when disciplining a child of nursery age and that you handled & restrained a child and pulled a child without training.'

112.3. With regard to the third allegation, Mrs Scanlon said this had been 'upheld' and that the Appeal Committee had found that the claimant had 'failed in [his] regard for the need to safeguard pupils' wellbeing by failing to record or act upon safeguarding incidents and complaints.' Mrs Scanlon said this was considered to be in breach of Part Two of Teachers' Standards, and Paragraphs 35 and 36 of Keeping Children Safe in Education.

113. Mrs Scanlon then went on to give the following additional reasons why, she said, it was 'considered necessary' to terminate the claimant's employment.

113.1. She described the 'primary consideration' as 'the Council's duty of care to children and safeguarding concerns for their well-being and safety arising out of your conduct as found by the Appeal Committee.' She said 'The conclusions of the LADO process are clear in this regard. as regards findings that you harmed or may have harmed a child, and that you have behaved in a way which indicates you would pose a risk of harm to children.'

113.2. Mrs Scanlon said a 'secondary consideration' was the reputational damage to the Council and the effect on the School's budget. Elaborating on those points, Mrs Scanlon said:

(a) 'the Council could not be seen to put children at risk by allowing someone found to have behaved in the ways outlined in the three allegations above back into the position of Head Teacher';

(b) 'the Council could not allow you to return to your Head Teacher role in light of the risks identified by the LADO process, as applied to the allegations upheld by the Appeal Committee. She also said the LADO process 'requires the Council to refer those findings to the Disclosure and Barring Service ('DBS') and the Teaching Regulation Agency'; and

(c) that the DBS process can take several months to conclude and that maintaining a paid suspension for such a period of time would represent a substantial drain on the School's budget which would be unreasonable.

114. The claimant was not given any right of appeal against this decision to terminate his employment.

115. In cross-examination, Mrs Scanlon accepted without demur that in dismissing the claimant she, and those who took the decision with her, overruled the decision of the Appeal Panel, rode roughshod over the respondent's own disciplinary policy and defeated the aim of the disciplinary policy to give the claimant a fair hearing.

116. After dismissing the claimant, Mrs Scanlon made referrals to the Disclosure and Barring Service and the Teaching Regulation Agency.

Reason for dismissal

117. In order to determine whether the claimant's dismissal was fair I must make findings of fact as to the reason for the claimant's dismissal.

118. The decision to dismiss the claimant was taken by Mrs Scanlon in conjunction with Mrs Bagley, Mr Pearce, the Director of Children's Services, and Mr Fells, the Head of HR. It is, therefore, necessary for me to identify what facts were known to those individuals and/or what beliefs were held by them which caused them to decide that the claimant should be dismissed or, in other words, the factor or factors operating on their minds which caused them to take the decision to dismiss.

119. Mr Stubbs, for the claimant, seems to suggest in his submissions that the reason for dismissal was that Mrs Scanlon, and those she consulted with, believed the claimant to have committed misconduct. I agree that this was their belief. I also agree that this belief was formed before the disciplinary hearing took place, as was confirmed

by Mrs Scanlon on cross-examination and reflected in both the letter sent to the claimant requiring him to attend a disciplinary meeting and in Mrs Scanlon's report to the disciplinary and appeal hearings, in which she said 'I have reached the conclusion that the trust and confidence placed in Mr Reader as Head teacher at Dunn Street Primary School, to effectively manage the school, to effectively protect and safeguard the well—being of the pupils, to ensure that professional boundaries are adhered to at all times and to ensure that staff are appropriately trained to respond to and disclose concerns, has been destroyed.'

120. However, a different reason for dismissal emerges when one considers what Mrs Scanlon said when she dismissed the claimant and in the letter confirming dismissal, the evidence in chief in her witness statement and answers given by her in cross examination. They suggest, and I find, that the factors operating on the minds of Mrs Scanlon and those she consulted which caused them to take the decision to dismiss were that:

120.1. Mrs Scanlon and those she consulted believed that the Appeal Committee had (a) found that claimant had behaved inappropriately in the way he dealt with Child 1, Child 2, Child 3 and Child 4 and had therefore upheld the allegations concerning Incidents 1, 2, 3 and 4; and (b) concluded that the claimant had failed to record or act upon safeguarding incidents and complaints and had failed to ensure that the safeguarding policy and complaints procedure had been properly and effectively implemented; and

120.2. Mrs Scanlon and those she consulted with decided that the conclusions of the Appeal Committee warranted dismissal for the following reasons, each of which they thought warranted dismissal in its own right. Those reasons were that they believed:

(a) the allegations (they thought had been) upheld by the Appeal Committee constituted gross misconduct and that the appropriate sanction was summary dismissal rather than a final written warning;

(b) the allegations (they thought had been) upheld by the Appeal Committee gave rise to safeguarding concerns for the well-being and safety of children and dismissal was warranted because of the Council's duty of care to children; and

(c) the LADO process required the Council to refer the findings to the DBS (and the Teaching Regulation Agency); meanwhile it would be inappropriate to allow the claimant back into the position of Head Teacher as that risked damaging the Council's reputation because the conclusions (they thought had been) reached by Appeal Committee indicated the claimant was a risk to children; the alternative, of suspending the claimant on full pay until the DBS

process concluded, was not reasonable because it would be a substantial drain on the School's budget as the DBS process could take several months.

121. In reaching the conclusions at (b) and (c) in the preceding paragraph, Mrs Scanlon and those she consulted took account of the conclusions of the LADO process, those conclusions being that the claimant had or may have harmed a child and had behaved in a way which indicated he would pose a risk of harm to children.

Conclusions

Reason for dismissal

122. As recorded above I find that the reasons for dismissing the claimant were that Mrs Scanlon and those she consulted believed that:

122.1. the Appeal Committee (a) had found that claimant had behaved inappropriately in the way he dealt with Child 1, Child 2, Child 3 and Child 4 and had therefore upheld the allegations concerning Incidents 1, 2, 3 and 4; and (b) had concluded that the claimant had failed to record or act upon safeguarding incidents and complaints and had failed to ensure that the safeguarding policy and complaints procedure had been properly and effectively implemented;

122.2. the conclusions of the Appeal Committee warranted dismissal for each of the following reasons ie that they believed:

(a) the allegations upheld by the Appeal Committee constituted gross misconduct and that the appropriate sanction was summary dismissal rather than a final written warning;

(b) the allegations upheld by the Appeal Committee gave rise to safeguarding concerns for the well-being and safety of children and dismissal was warranted because of the Council's duty of care to children; and

(c) the LADO process required the Council to refer the findings to the DBS (and the Teaching Regulation Agency); meanwhile it would be inappropriate to allow the claimant back into the position of Head Teacher as that risked damaging the Council's reputation because the conclusions of the Appeal Committee indicated the claimant was a risk to children; the alternative, of suspending the claimant on full pay until the DBS process concluded, was not reasonable because it would be a substantial drain on the School's budget as the DBS process could take several months.

123. The respondent submits that these reasons were a combination of a reason relating to the claimant's conduct (the belief that the Appeal Committee's findings amounted to gross misconduct) and some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (the concerns about reputational risk and the cost of maintaining the claimant on paid suspension). I disagree. The respondent's reasons for dismissing the claimant all stemmed from a belief that the appeal panel had concluded that the claimant had done certain things that amounted to misconduct. The concerns that Mrs Scanlon and those she consulted had about reputational risk and the cost of suspension were concerns about (what they considered were) the consequences of the misconduct they thought the panel had found. As such, the respondent's reasons for dismissing the claimant all related to the claimant's conduct and fall within section 98(2)(b) of the Employment Rights Act 1996.

124. I am satisfied, therefore, that the respondent dismissed the claimant for a potentially fair reason.

Reasonableness

125. I turn now to the question of whether the dismissal was fair, applying the test in section 98(4) of the Employment Rights Act 1996.

126. Mrs Scanlon and those she consulted were wrong in their belief that the Appeal Committee had found that claimant had behaved inappropriately in the way he dealt with Child 2, Child 3 and Child 4 and had therefore upheld the allegations concerning Incidents 2, 3 and 4. That is not what the appeal panel concluded. Of all the allegations made about the way the claimant had dealt with children, the only wrongdoing found by the appeal panel was that the claimant had lost his temper and shouted at Child 1 on one specific occasion.

127. I have considered whether Mrs Scanlon and those she consulted nevertheless had reasonable grounds for believing that the Appeal Committee had found that claimant had behaved inappropriately in the way he dealt with Child 2, Child 3 and Child 4 and had therefore upheld the allegations concerning Incidents 2, 3 and 4. I conclude that they did not. Neither Mrs Scanlon, Mrs Bagley, Mr Pearce nor Mr Fells were privy to the discussions between the appeal panel members while they deliberated. Nor did they ask any of the members of the appeal panel what specific findings they had made about those incidents. They simply made an assumption about the panel's conclusions based on the contents of the letter informing the claimant of the appeal outcome, specifically the statement in that letter that the panel had upheld the allegation that the claimant had 'failed to treat pupils with dignity, building relationships with mutual respect and at all times observing proper boundaries appropriate to a teacher's professional position'. This wording simply mirrored the imprecise way the allegations had been set out in the letters requiring the claimant to attend the disciplinary and appeal hearings. As to why the panel had upheld the allegation, any reasonable employer could see that the letter was ambiguous. It

referred to the panel having 'heard details' of four incidents but it did not say that the panel thought that the claimant had behaved inappropriately on each occasion. Indeed, the only specific reference to inappropriate behaviour towards pupils in that letter is the mention of the claimant having lost his temper and raised his voice when dealing with pupil behaviour. Furthermore, the letter made it clear that the panel had not upheld the allegations that the claimant had failed to establish a safe and stimulating environment for pupils rooted in mutual respect and had failed to demonstrate the positive attitudes, values and behaviour which are expected of pupils. The rejection of those allegations tended strongly to suggest that the appeal panel did not believe the claimant had behaved inappropriately to all four children as alleged. Taking all of this into account, I find that the conclusion reached by Mrs Scanlon, Mrs Bagley, Mr Pearce and Mr Fells that the Appeal Committee had found that claimant had behaved inappropriately in the way he dealt with Child 2, Child 3 and Child 4 was not within the range of reasonable conclusions open to a reasonable employer.

128. That mistaken belief about the appeal panel's conclusions undermines the fairness of the claimant's dismissal in the most fundamental way. It infected all aspects of the decision to dismiss the claimant. The conclusion that the claimant should be dismissed because his behaviour constituted gross misconduct was based on the incorrect assumption that the appeal panel had found that the claimant had behaved inappropriately in the way he dealt with all four children in the ways alleged. It is apparent from the wording of the letter notifying the claimant of the reasons for his dismissal that the same mistaken belief about what the appeal panel had concluded also underpinned Mrs Scanlon's conclusion that the claimant's dismissal was warranted because his behaviour demonstrated that he posed a risk to children and he would have to be suspended pending the outcome of a referral to the DBS.

129. In the circumstances, it is my conclusion that the respondent acted unreasonably in dismissing the claimant for the reason it did. It follows that the claimant was unfairly dismissed.

130. Mr Stubbs submits that the claimant's dismissal was unfair for a number of other additional reasons. He criticises, amongst other things, the investigation carried out by the respondent, the way in which the management case was presented, the conclusions of the disciplinary panel, the conclusions of the appeal panel to the extent that the appeal panel found misconduct on the part of the claimant, the fact that the respondent overruled the appeal panel, the way the LADO process was conducted and its influence on the disciplinary process and many aspects of the disciplinary procedure followed by the respondent. Given my conclusion that the claimant's dismissal was, in any event, unfair for the reasons already stated it is unnecessary for me to address those points in this part of my judgment. I do, however, return to some of those issues below in my conclusions on certain issues relevant to remedy.

Remedy

Polkey

131. I consider now whether I can properly conclude that there is a chance that those who decided to dismiss the claimant would still have done so if they had acted reasonably.

132. Had the respondent acted reasonably, Mrs Scanlon, and those she consulted, would not have assumed that the Appeal Committee had found that claimant had behaved inappropriately in the way he dealt with Child 2, Child 3 and Child 4 and had upheld the allegations concerning Incidents 2, 3 and 4. Any reasonable employer would have made enquiries of the appeal committee and those enquiries would have revealed the true position, which was that, of all the allegations made about the way the claimant had dealt with children, the only wrongdoing found by the appeal panel was that the claimant had lost his temper and shouted at Child 1 on one specific occasion.

133. On cross-examination, Mrs Scanlon accepted that some teachers shout at pupils and shouting, in itself, is not something that would warrant dismissal. Her evidence was that shouting at a pupil 'is not generally acceptable as good practice; it doesn't get the best outcomes'. At the very least, that comment indicates that Mrs Scanlon would not have considered that a single incident of shouting at a child warranted dismissal. Indeed, it tends to suggest that Mrs Scanlon may not have considered that such behaviour warranted any disciplinary action at all.

134. I bear in mind that the appeal panel also found that the claimant had failed to record or act upon safeguarding incidents and complaints and had, therefore, failed to ensure that the safeguarding policy and complaints procedure had been properly and effectively implemented, resulting in a failure to safeguard pupils' wellbeing in accordance with statutory provision. That finding by the appeal panel was another factor in Mrs Scanlon's decision to dismiss. Again, however, the letter setting out the appeal panel's findings does not explain clearly what it was that the panel believed the claimant should have done that he had failed to do. Mrs Salkeld's evidence was that 'the panel based this conclusion on the fact that there were a number of references to a lack of record keeping about complaints and safeguarding incidents in the documents provided to the panel.' That does not reveal the grounds on which the decision was made. Given that the panel had concluded there had been no wrongdoing by the claimant in relation to incidents 2-4, it cannot reasonably have concluded that the claimant should have reported those incidents. And as the panel concluded that the claimant had not been responsible for any division in the staff or bullying, the panel cannot have reasonably concluded that the claimant was responsible for other staff members' failures to report safeguarding incidents if that is what they perceived them to be. In the management case presented during the disciplinary proceedings it was accepted that all appropriate policies were in place. That being the case, it is difficult to understand the panel's reasons for its conclusion and I am not satisfied that it had reasonable grounds for that conclusion.

135. In my view, no reasonable employer, acting reasonably, could have dismissed the claimant on the grounds of misconduct solely for shouting at child 1 as found by

the appeal panel, bearing in mind that the appeal panel had been given responsibility for deciding what had happened and the appropriate sanction, the panel had decided that dismissal was not an appropriate sanction and the claimant had been entitled to expect that the appeal panel's decision would be final, as stated in the respondent's own policy. Nor would was it within the band of reasonable responses to conclude that the claimant posed a risk to children based on that incident and that the school's duty of care to pupils required that he be removed from teaching duties. My conclusion on those matters would have been the same even if I had thought the appeal panel may have had reasonable grounds for its conclusion that the claimant had failed to ensure the safeguarding policy and complaints procedure had been properly and effectively implemented.

136. Mr Menon submits that, even if the respondent could not fairly dismiss for misconduct, it was inevitable that a DBS referral had to be made and the inevitable and practical consequence of a DBS referral was that C could not properly be permitted to work with children, let alone go back to as headteacher of the school. The reason for this, he submitted, was that public confidence in the school would be eroded and/or it would suffer reputational damage if it became known that the claimant was allowed to return despite having a finding of misconduct against him relating to the treatment of a child and the alternative, paid suspension, was not financially viable. Mr Menon referred me to the case of A v B [2010] ICR 849, where an employer was found to have fairly dismissed because of the risk to its reputation. However, whilst I accept that the case is authority for the proposition that there are circumstances when it will be fair for an employer to dismiss in order to guard against damage to its reputation, whether or not dismissal will be fair in a particular case depends upon the facts of the individual case. The facts in A v B are very different from those in this. In A v B, the employer had been officially notified that the claimant was a child sex offender and a continuing risk to children. If the allegations were true and he were subsequently exposed (which it was reasonable to anticipate) the fact that the employer had continued to employ him despite being provided with that information would severely shake public confidence in it.

137. The only inappropriate conduct found to have occurred by the appeal panel was that the claimant lost his temper and shouted at child 1 on a single occasion. That was a conclusion reached by an independent panel after a full hearing at which all the evidence was considered. I have already explained that no reasonable employer could have reasonably concluded, based on that incident alone, that the claimant, with over three decades' experience as a teacher and prior to this a clean disciplinary record, posed a risk to children and that the respondent's duty of care to children required that he be removed from teaching duties. Nor could any employer have reasonably concluded that reinstating the claimant and allowing him to work with children whilst a referral was made exposed the panel to any real reputational risk: indeed such a conclusion would suggest a remarkable lack of confidence by the respondent in the robustness of its own disciplinary proceedings. In all the circumstances, I do not accept that it would have been within the band of reasonable responses to dismiss the claimant on the basis that a referral to the DBS (and/or the Teaching Regulation

Agency) would need to be made. Even if the respondent still considered it necessary to make such a referral despite the appeal panel's findings, a decision to suspend the claimant in the meantime would have been outside the band of reasonable responses open to a reasonable employer.

138. For these reasons I conclude that there is no chance that the claimant would have been fairly dismissed in any event had the respondent acted reasonably.

139. In any event, I do not accept that it was inevitable that a referral would be made. Mr Menon relies, in support of this submission, on the case of A v B [2010] ICR 849, EAT. The situation considered in that case was one where a police force, or another public authority, made an unsolicited disclosure to an employer that an employee poses a risk to children. The EAT held that the focus of the employment tribunal's inquiry, pursuant to section 98(4) of the Employment Rights Act 1996, should be on whether the employer reacted reasonably to the disclosure and that, in principle and subject to certain safeguards, the employer must be entitled to treat the information as reliable and was not to be expected to carry out an independent investigation to test the reliability of the information and nor was it necessary for the employer to believe in the truth of what he had been. However, as the EAT stressed, that is subject to certain safeguards. In that regard the EAT held:

> *'an employer will not be acting reasonably for the purpose of section 98(4) if he takes an uncritical view of the information disclosed to him. Mistakes do sometimes happen; and the consequences when they do are devastating for the employee. The employer ought therefore always to insist on a sufficient degree of formality and specificity about the disclosure before contemplating taking any action against the employee on the basis of it. He will sometimes be in a position, either from his own knowledge or from information obtained from the employee, to raise questions about the reliability of the disclosed information: in such a case he ought, in the interest of fairness, to put those questions to the authority providing the information and to seek credible reassurance that all relevant information has indeed been taken into account.'*

140. This case is not one in which the suggestion that the claimant posed a risk was made by an external body. It was made by the respondent itself and, therefore, the respondent was in a position to raise questions about the conclusions reached.

141. Once the respondent had realised that the appeal panel had not upheld all of the allegations it would have been apparent that the conclusions of the LADO process that the claimant had or may have harmed a child could not simply be applied uncritically to the findings of the appeal committee. The LADO process had clearly reached its conclusions based on a finding that there was a 'theme of inappropriate physical chastisement and inappropriate shouting at children' rather than a single incident. That conclusion was at odds with the conclusion of the disciplinary panel that the claimant had shouted at a child once and had not physically chastised any child. In addition, the information provided at the LADO meeting by Mrs Libbey and/or Mrs

Scanlon was incorrect in some important respects, as described in my findings of fact. In all the circumstances, the respondent would not have been acting reasonably unless the LADO had been asked to consider whether its findings still stood, in light of the appeal panel's conclusions.

142. I do not accept the submission that it is inevitable that if Mrs Bagley (and others involved in assessing whether harm had been caused) had been asked to reconsider its conclusions as to harm, it would have concluded, in those circumstances, that harm had been caused and that a referral to the DBS was required. Mrs Bagley's evidence was that the LADO's conclusion was that the claimant had caused harm in relation to child 1 but that was on the basis not only that the claimant had shouted at child 1 but also that some of those present at the LADO meeting believed the claimant had dragged or pulled child 1 down the corridor and had admitted to losing control (which he had not). The context of that conclusion was also that the panel believed that this was not an isolated incident, a finding not supported by the appeal panel: that clearly influenced the panel's conclusions in relation to this incident. Furthermore, Mrs Bagley said in evidence that whether emotional harm is caused depends on an individual child's resilience and personality. To form a reliable view as to whether there had been harm in this case would therefore have required those charged with that responsibility to consider that matter, which would have required the provision of further information. The exercise of seeking to reconstruct the conclusion that they would have reached based on all of that information is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. That being the case, it would be inappropriate to make a Polkey deduction event if it would have been within the band of reasonable responses to dismiss the claimant on the basis that a referral to the DBS (and/or the Teaching Regulation Agency) would need to be made.

ACAS Code

143. Mr Menon submits that the ACAS code did not apply to the claimant's dismissal. I reject that submission. The claimant was dismissed for alleged misconduct and what were perceived to be the consequences of that alleged misconduct. He also submitted that the procedure followed by the respondent up to and including the claimant's appeal against the original disciplinary decision was immaterial and that the only matter, to consider was the final decision of the respondent to dismiss the claimant. The respondent dismissed the claimant because of the conclusions Mrs Scanlon and others thought had been reached by the appeal panel at the end of the disciplinary process, a process that began with Mrs Libbey's investigation and took in the disciplinary hearing in December 2018, the appeal process and the subsequent decision to dismiss.

144. Whether a failure to follow the code is unreasonable will depend on all the circumstances including, amongst other things, the size and administrative resources of the respondent. In this case the respondent is a large employer with an HR department and in-house lawyers. The head of HR was involved in decisions pertaining to the disciplinary process as was the respondent's legal department.

145. The Code says employers should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions. In particular it says that a meeting should be held with the employee to discuss the problem without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

146. In this case there was a long delay between the investigation starting in February 2018, when the claimant was suspended, and the initial disciplinary hearing in December 2018. Part of that time was taken up with Mrs Libbey's investigation and the LADO process and the respondent's own policies make employees aware that child protection procedures may take precedence and a disciplinary investigation may be delayed. I also accept that part of the reason for the delay was that there were difficulties identifying suitable panel members to deal with the disciplinary hearing and any subsequent appeal. However, that there could be such difficulties, and the delays it would cause, was predictable. No adequate explanation has been given for the respondent's failure to take steps to identify a suitable panel until September 2018, some four months after the LADO meeting. The need to deal with cases expeditiously was particularly important in this case as the claimant had been suspended. I find there was unreasonable delay in this case, which was a failure to comply with the ACAS Code.

147. The Code says that employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made. More specifically, it says 'if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.'

148. The respondent decided that there was a disciplinary case to answer in May 2019. It did not notify the claimant of that in writing – with information about the alleged misconduct – until 3 December 2018. Even then, the letter telling the claimant he was required to attend a disciplinary meeting did not clearly set out what the claimant was alleged to have done that constituted misconduct. The allegations were set out in broad and unspecific terms. Mrs Libbey's report was included but that report also dealt with allegations that it transpired were not part of the disciplinary process. Also, despite the fact that Mrs Libbey said in her report that she did not think there was sufficient evidence of some of the allegations and that she did not think the claimant had caused any child any harm, it only transpired when Mrs Scanlon's statement was later provided that the respondent would be arguing that the relationship of trust and confidence had broken down. It was not until the day before the disciplinary hearing that the claimant received Mrs Scanlon's report, from which he could glean the essence of the case against him. It was unreasonable to provide that information so late, particularly given the potentially career ending consequences for the claimant of

the disciplinary proceedings. That was a failure to comply with the recommendation in the ACAS Code to include sufficient information about the alleged misconduct with the written notification that there is a disciplinary case to answer to enable the employee to prepare to answer the case at a disciplinary meeting.

149. Nor did the notification include copies of the witness statements relied on by the respondent. The claimant did not receive them (in redacted form) until the day before the disciplinary hearing. No explanation has been given for that delay and I find it was unreasonable.

150. The Code says 'Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.' The respondent called Mrs Libbey and Mrs Bagley to give evidence at the disciplinary hearing. It did not tell the claimant that was its intention. That was a failure to follow the Code. No explanation has been given as to why the claimant was not told in advance. Mrs Bagley gave evidence about matters that were not the subject of Mrs Libbey's report, including a previous complaint against the claimant (that had been found to be unsubstantiated but which she nevertheless suggested was evidence of a pattern of behaviour) and about the findings of the LADO process. It was unreasonable of the respondent not to notify the claimant that she was to give evidence.

151. The Code says any written warning should set out the nature of the misconduct. In this case the appeal panel imposed a sanction of a final written warning. It did not, however, set out the nature of the misconduct in clear terms. This followed on from the fact that the allegations were not set out clearly from the outset. The consequence was that it was not clear what the appeal panel had concluded the claimant had done wrong. The implications of that failure were significant: the respondent made assumptions about the panel's findings that proved to be misconceived. The failure to set out the nature of the misconduct that the appeal panel had found to have occurred was an unreasonable failure to follow the ACAS code.

152. The Code provides that employers should allow an employee to appeal against any formal decision made in a disciplinary process. I accept that this does not mean that, if an employee appeals, an employee should be entitled to appeal against the decision reached on appeal. In this case, however, that is not what happened. After giving effect to the decision on appeal, the respondent reached a new decision that the claimant should be dismissed. It did so not only because it believed the appeal panel's sanction was too lenient but also because it took into account other reasons that the claimant had not previously been informed were under consideration, specifically, the alleged need to make a referral to the DBS and TRA and to suspend the claimant in the interim for reasons of cost and reputational risk. Those were not matters that the claimant had been told were being considered. He had had no opportunity to comment on them. In the circumstances, that was a decision that the claimant should have been given the opportunity to appeal. The failure to give the claimant the opportunity to appeal against that decision was a failure to comply with the AAS Code and was unreasonable.

153. I have found that the respondent unreasonably failed to follow the code in a number of fundamental respects. Those failings are particularly serious given that this case involved an individual whose career was at stake. The failures happened notwithstanding that the head of HR was involved in decisions pertaining to the disciplinary process and the respondent had access to legal advice. The failures are so serious that they warrant consideration of an uplift in compensation of the maximum amount permissible. Nevertheless, I recognise that the disregard of a fair process was not wholesale and some – though not all - of the respondent's failings were remedied on appeal. That being the case I consider that any compensatory award should be increased by 20% pursuant to 207A of TULRCA 1992.

Reduction for conduct

154. Mr Menon submits that I should reduce any compensation awarded to the claimant pursuant to sections 122(2) and 123(6) of the Employment Rights Act 1996 Act. Such a reduction in compensation is only possible if I conclude, on the evidence before me, that the claimant had in fact committed the acts of blameworthy conduct alleged to have occurred. In the case of the compensatory award I must also conclude that the blameworthy conduct caused or contributed to the claimant's dismissal.

155. Of relevance to this issue I make the following observations and findings of fact.

156. The claimant gave accounts of incidents 1, 2, 3 and 4 during Mrs Libbey's investigation, at the disciplinary and appeals hearing and at this hearing. Mrs Garr says she was a witness to incidents 1, 2 and 3 and was told about incident 4 by a Mrs Procter. She gave accounts during Mrs Libbey's investigation and at this hearing. Mrs Finnegan also says she was a witness to incident 1 and gave an account during Mrs Libbey's investigation and at this hearing. Mrs Winter says she was a witness to incident 2 and gave an account during Mrs Libbey's investigation and at this hearing. Mrs Libbey also interviewed other members of staff and the school's governing body during the course of her investigation, including Ms Proctor, who gave an account of incidents 1 and 4. In addition, the claimant arranged for other individuals to give evidence about his running of the school and his behaviour towards pupils during the disciplinary proceedings. They included the school caretaker, who gave an account of incident 3, and Child 2's class teacher.

157. Looking at all the evidence in the round, I have found the accounts given by Mrs Garr, Mrs Finnegan, Mrs Winter and Ms Proctor to be unreliable. I say that for the reasons that follow.

158. Mrs Garr claimed incidents 1, 2 and 3 all raised safeguarding concerns yet she did not report any of them at the time of the incidents in accordance with the school's safeguarding policy. Nor did Mrs Finnegan, Mrs Proctor and Mrs Winter report incidents 1 and 2 respectively. I find that Mrs Garr, Mrs Finnegan, Mrs Winter (who was a school governor as well as secretary) and Mrs Proctor (who was safeguarding lead) were all familiar with the policy and their responsibilities to report safeguarding

concerns. They all knew that they could report concerns about matters involving the claimant to the chair of governors and Mrs Garr, Mrs Finnegan, Mrs Winter knew they could, alternatively, report things to Mrs Proctor.

159. Regarding incident 1, Mrs Garr and Mrs Finnegan both said that the claimant screamed at child 1. If the incident had happened as they claimed -with the claimant screaming in a child's face and dragging them down a corridor- it is surprising that neither of them saw fit to make a safeguarding report at the time. When questioned about this at this hearing Mrs Garr said she did report the matter, saying this was the 'trigger' for her report. That is not correct. On her account incident 1 happened on 17 January 2018. That was after Mrs Garr had spoken to Mrs Quinn about concerns she said she had. On re-examination Mrs Garr said 'I had already reported it to the local authority so did not report it 'just for the records'.' There is no evidence that Mrs Garr told anyone at the local authority about incident 1 until she was interviewed by Mrs Libbey on 23 February 2018, over one month after this incident. I infer that she did not do so. The fact that Mrs Garr told Mrs Libbey about the matter then does not explain why Mrs Garr did not make a safeguarding report at the time.

160. In answer to questions at this hearing Mrs Garr said, albeit with some hesitation, that she believed incident 2 also give rise to a safeguarding issue. Mrs Garr did not, however, report incident 2 as a safeguarding issue at the time.

161. In her account of incident 3, Mrs Garr described the claimant holding child three in a 'headlock'. When being questioned at this hearing about whether she had reported this at the time as a safeguarding concern she equivocated. Her initial response was that it was 'difficult to know where to go' despite the fact that she acknowledged she could have reported the matter to, for example, Mrs Proctor who had safeguarding responsibility. She then said she 'would have' reported the matter to Mrs Proctor, but not in her capacity as safeguarding lead. When asked if she was saying she had reported the matter to Mrs Proctor she said that she had not done so. She said it was difficult to write a report and it was not very straightforward because the child's parent had been present. It is difficult to see why that would prevent a report being made if Mrs Garr genuinely believed the claimant had acted as she alleged.

162. There were suggestions during the disciplinary proceedings that staff were scared of the claimant and too intimidated to report safeguarding issues. When asked at this hearing why she did not make safeguarding reports at the time of the events Mrs Garr did not say that she felt scared or intimidated by the claimant. If these incidents happened as alleged by Mrs Garr it would appear to be a dereliction of duty for her not to have reported it at the time, particularly given her position of deputy head. The most obvious alternative explanation is that the incidents did not happen as alleged by Mrs Garr.

163. For her part, Mrs Finnegan said in her witness statement she felt intimidated by Mr Reader and thought he would retaliate if she complained about him. However, she had earlier made a complaint about the claimant when she had not been given a pay

rise. That undermines her claim to have been cowed by the claimant. I note that in the investigation with Mrs Libbey she also claimed that she was worried that if she spoke to the chair of the governing body the complaint would go no further. In that context she suggested that there had been a complaint about something previously that had gone no further. She claimed not to know how she knew about that matter.

164. Mrs Proctor told Mrs Libbey in the investigation that she witnessed incident 1 and that the claimant had shouted at child 1 and led her forcefully out of the dinner hall. She did not give evidence at this hearing. Mrs Libbey asked her why she had not reported it at the time. She responded that she felt she could not go to the chair of governors as the chair is friendly with the claimant. If this incident happened as alleged by Mrs Proctor then, as with Mrs Garr, it would appear to be a dereliction of duty for her not to have reported it at the time, particularly given her position of safeguarding lead. As with Mrs Garr, the most obvious alternative explanation is that the incidents did not happen as alleged by her.

165. Nor did Mrs Winter report incident 2 as a safeguarding issue at the time. When asked at this hearing why she did not make safeguarding reports at the time of the events Mrs Winter did not say that she felt scared or intimidated by the claimant. The reason she gave was that she did not feel she could because from past experience it was 'clear they did not act on anything.' When asked what part experience she was referring to Mrs Winter referred only to one occasion on which she said she had passed a complaint made by a member of staff about something to the chair of governors. She said that she, as a governor, had then heard no more. On further questioning, however, she accepted that the matter may have been dealt with without her knowing about it. I do not accept that the reason Mrs Winter did not report this alleged incident was because she believed the chair of governors would not act on it. The most obvious explanation for the lack of a report is that Mrs Winter did not in fact believe at the time that this incident gave rise to any safeguarding concerns.

166. During the investigation, Mrs Garr said incidents like the one she described involving child 1 happened 'all of the time' and that the claimant 'often' handled children in a rough manner. Similarly, Mrs Finnegan said she had seen the claimant grab and scream at children 'on many occasions.' If that was the case it is surprising that neither of them gave any more specific examples during the course of Mrs Libbey's investigation or, for that matter, these proceedings. Mrs Finnegan only gave one specific example of an incident she had witnessed i.e. that involving child 1. Similarly, the only example given by Mrs Garr of an occasion on which she witnessed the claimant 'screaming' at a child concerned child 1 and the only specific examples she gave of alleged incidents of rough handling of children that she said she had witnessed herself were those involving child 1 and child 3. The claims made by Mrs Garr and Mrs Finnegan that this sort of thing happened frequently contrast with what was said by others during the investigation, including Mrs Quinn, who said she had never seen such behaviour and Nicola Giles-Brewster and Mr Hymer, who both said that the claimant would raise his voice but in a controlled way. Mrs Proctor was asked in the investigation if she had ever had any concerns about the way the claimant

manages behaviour. Her response was that the only incident she had witnessed was that involving child 1. She also mentioned an incident that is said to be incident 4, but Mrs Garr's evidence was that this occurred several years earlier. I note that Mrs Quinn also said during Mrs Libbey's investigation that she had once 'challenged a safeguarding concern' which she had heard on the grapevine and that the claimant had been 'really accommodating'.

167. There were some differences in the accounts of incident 1 given by Mrs Garr and others.

168. Mrs Finnegan said the claimant had child 1 by the hand, which is consistent with what the claimant said. Mrs Garr said, during Mrs Libbey's investigation and in her witness statement, that the claimant had child 1 by the arm. During cross-examination she adjusted her position, saying the claimant held child one by the wrist.

169. Mrs Proctor said during Mrs Libbey's investigation that Mrs Winter witnessed incident one. Mrs Garr did not say Mrs Winter witnessed the incident. Mrs Winter herself claimed to have seen an incident that sounded similar but that was in autumn 2017.

170. These differences are not significant if looked at in isolation but, when the evidence is viewed in the round, they contribute to the overall sense that the accounts given are unreliable.

171. With regard to incident 2, Mrs Garr's evidence was inconsistent. During Mrs Libbey's investigation and in her witness statement for this hearing Mrs Garr said she heard child 2 crying but at no time did she say she had heard the claimant shouting at child 2. Rather, she said Mrs Winter had told her that she, Mrs Winter, had heard the claimant shouting. During cross-examination, however, Mrs Garr said she had heard the claimant shouting at child 2. I do not accept that evidence. If Mrs Garr had heard the claimant shouting at child 2 it is highly unlikely she would have failed to mention that during Mrs Libbey's investigation and in her witness statement. I find that Mrs Garr did not hear child 2 shouting.

172. I accept that Mrs Garr did hear child 2 crying. Given that she heard child 2 crying, the fact that she did not also hear the claimant shouting tends to suggest that the claimant was not shouting and that Mrs Winter's account of the incident is unreliable.

173. During Mrs Libbey's investigation Mrs Garr referred to child 2 having left the school after incident 2. She said during her interview by Mrs Libbey that the child's parent(s) did not want to make a complaint but would not bring him back. The clear implication was that the child was removed because of the way the claimant had dealt with him. During cross-examination, however, Mrs Garr acknowledged that she did not know why child 2 left the school. I accept the claimant's evidence, supported by what was said by the child's teacher during the disciplinary process, that the decision of

child 2's parent(s) to remove the child from school was in no way connected with the way the claimant had dealt with the child. Rather, child 2's parent(s) felt child to was not yet ready for school. I find Mrs Garr's statements about the child leaving the school were designed to portray the claimant in the worst possible light.

174. Mrs Winter's account of what she alleges the claimant said on this occasion is remarkably similar to the words used by the claimant during incident 1. It is possible that the claimant said the same thing to child 2 as child 1. An alternative explanation is that Mrs Winter was confused and mixing up two different incidents.

175. Child 3's parent was present at the time of incident 3 and expressed no concern either at the time or afterwards about the way the claimant had dealt with the matter. That is surprising if, as Mrs Garr claims, Mrs Reader held the child in a headlock. Mrs Garr's account of incident 3 is also contradicted by the account the caretaker gave in the disciplinary proceedings.

176. Mrs Garr's evidence regarding incident 4 also causes me to question her reliability. In her witness statement for these proceedings, which purported to set out the evidence she was to give and, I infer, was approved by her ahead of the hearing, she claimed to have witnessed incident 4 herself. When she began giving evidence she immediately corrected that and said she had not witnessed the matter herself. Nevertheless, for some reason she was still prepared to approve a witness statement containing evidence that she knew to be incorrect in a very significant way.

177. I do not find the account Mrs Proctor gave of incident 4 to be reliable. If Mrs Garr is to be believed, what Mrs Proctor told her, in February 2018, about the incident differs in significant respects from what Mrs Proctor told Mrs Libbey around the same time. Furthermore, Mrs Proctor provided the briefest of details to Mrs Libbey. Mrs Garr told this tribunal that her understanding was that the incident happened after she herself had joined the school in 2013 i.e. some five years at least before it was reported to Mrs Libbey. In addition, there is no suggestion that Mrs Proctor reported the matter as a safeguarding concern at the time of the alleged incident which calls into question whether she believed at the time that anything untoward had happened. In any event it is not clear that the alleged incident she was referring to is the same as that recalled by the claimant: it is apparent from answers given by the claimant that he thought Mrs Proctor had been talking about something 18 months or so earlier not something that had happened several years ago.

178. I note that Mrs Finnegan also referred to incident 4. She did not claim to have witnessed that herself, however, and did not explain how she came to believe that it had happened. Mrs Finnegan and Mrs Garr and Mrs Winter were all friends. The impression I gained was that the three of them, and Mrs Proctor, had discussed the alleged incidents amongst themselves. That would account for Mrs Finnegan's knowledge of this alleged incident as well as her reference to a complaint that had been referred to the chair of governors going unaddressed. It may also explain the similarities between what Mrs Winter said the claimant had said to child 2 and what he

said to child 1. I also find that Mrs Finnegan was aggrieved because the claimant had refused her a pay rise: she referred that matter during Mrs Libbey's investigation and in these proceedings. Mrs Garr also referred to that matter during the investigation and it is clear her sympathies lay with her friend.

179. As recorded above, I do not find the accounts of incidents 1-4 given by the respondent's witnesses or Ms Proctor to be reliable. I prefer the evidence of the claimant as to what happened in relation to incidents 1, 2, 3 and 4 and find as follows:

180. On an occasion in January 2018 Mrs Garr was dealing with child 1 who had been misbehaving. The claimant intervened because he believed the child was being cheeky and that Mrs Garr was not getting anywhere. He was angry at the child for being disrespectful. He took child 1 by the hand and led her to his office. He did not drag her or pull her or use unnecessary or disproportionate force. He stood her outside his office door and said to her, twice, in a raised voice 'who do you think you are'. Child 1 was crying. He led the child back to the dining room and told her to apologise to Mrs Garr, which she did. He then went back to his room with child 1. Later the claimant telephoned child 1's parent(s) to explain what had happened because there was an understanding between the school and the parents that they would be made aware of any poor behaviour by child 1. The claimant accepts, and I find, that he lost his temper, overreacted and he could have handled the incident in a calmer, more measured way. He denies shouting but admits he raised his voice more than was necessary. I find that the child is likely to have perceived that as being shouted at. In mitigation, the claimant was under some stress at that time, having had a recent health scare. Child 1 was upset at the time but subsequently told their teacher (after the incident in question) that they would not complete work for them, but would for the claimant. I find it is more likely than not that the child recovered from the incident quickly and was not frightened by the claimant.

181. On an earlier occasion child 2 was brought or taken to the claimant's office because he had been misbehaving. The child was crying. It is more likely than not that he was upset because he had been sent to the head teacher and knew he had done wrong. The claimant raised his voice so the child could hear him above his crying. He did not shout at the child. He did not use the words attributed to him by Mrs Winter. The child's parent(s) subsequently decided the claimant was not ready for school and withdrew him. That decision was unconnected with the way the claimant dealt with the child. On cross examination Mrs Scanlon accepted that if all the claimant did was raise voice to be heard above a child crying that was not a disciplinary matter. Although other teachers might not have raised their voice over a crying child and many may consider there are more effective ways to communicate with a child in these circumstances, I find the claimant's conduct was not culpable or blameworthy.

182. On a separate occasion the claimant was present as children were leaving the school when child 3 became upset because the child wanted to take a toy home but was not allowed to. The child became more even distressed when their teacher took the toy from them. The child, who is autistic, began flailing around, almost as if having

a fit. The claimant was concerned that he may hurt himself. He placed his arms around the child's torso to restrain, comfort and calm the child down. The claimant has an autistic child and this is a technique he has used at home. It could not reasonably be described as a headlock. The child's mother and teacher were present throughout. On cross-examination Mrs Scanlon accepted that it appeared that the claimant was simply trying to de-escalate matters. She added, however, that 'he shouldn't really put hands on a child without training in de-escalation techniques'. It is not disputed that the claimant has not had training in de-escalation and restraint techniques but such training is not required by any rules or guidance applicable to the school. What the claimant did was in line with statutory guidance on the use of 'reasonable force' in schools and colleges says:

> *'There are circumstances when it is appropriate for staff in schools and colleges to use reasonable force to safeguard children and young people. The term 'reasonable force' covers the broad range of actions used by staff that involve a degree of physical contact to control or restrain children. This can range from guiding a child to safety by the arm, to more extreme circumstances such as breaking up a fight or where a young person needs to be restrained to prevent violence or injury. 'Reasonable' in these circumstances means 'using no more force than is needed'. The use of force may involve either passive physical contact, such as standing between pupils or blocking a pupil's path, or active physical contact such as leading a pupil by the arm out of the classroom.'*

183. I find there was nothing improper about the way the claimant dealt with child 3. The claimant has experience of dealing with an autistic child. He intervened in an appropriate way to comfort and restrain a child who was distressed and at risk of hurting themselves or others.

184. Some years earlier the claimant was dealing with a child 4 who had a tendency to slide off their chair and under their desk. The claimant once caught child 4 as he was sliding down and pulled them back up to their seat. He did not drag the child out from under the desk as alleged and the child was not hurt in any way. I am not persuaded there was a mark on the child's arm. There was nothing blameworthy or culpable in the way the claimant dealt with child 4.

185. Mr Menon said the respondent also alleges that the claimant was guilty of blameworthy conduct in that he was responsible for a failure to log or record safeguarding concerns regarding children. I do not accept that this allegation has been made out. At the root of the respondent's case was that there was no safeguarding record made of incidents 1 to 4. I accept that no record was made. I find that was a reflection of the fact that those incidents did not in fact give rise to any safeguarding concerns. There was, therefore, no requirement for the claimant to report them himself. I have rejected the accounts given by the respondent's witnesses and Mrs Garr as to what happened on these occasions. I find it is more likely than not that they did not record these incidents as safeguarding incidents because they did not genuinely believe they were. In any event, if they had genuinely thought the issues

raised safeguarding concerns, the responsibility for reporting that matter lay with them. They were aware of the requirement to do so and I do not accept they had any good reason for failing to do so. I expressly reject the suggestion that the people were too scared to record safeguarding concerns and that the claimant had caused divisions that led to concerns going unreported.

186. Although Mr Menon did not advance the argument that the claimant was guilty of blameworthy conduct in failing to ensure the safeguarding policy was effectively implemented, for the avoidance of doubt the respondent has not satisfied me that that was the case. Mrs Winter's evidence was that there was a complaint that was referred to the chair of governors and that she, as a governor, did not hear any more about it. She seems to have assumed it was not dealt with but accepted in evidence that it may have been dealt with without her knowledge. References were also made to a complaint from a third party in 2016 but that complaint was clearly investigated at the time. I am not persuaded that simply because the level of complaints referred to governors was low that means it is more likely than not that complaints were not being referred. It is just as likely, if not more likely, to be evidence that there were very few complaints.

187. In respect of incident 1, the claimant accepts he did not deal with child 1 as he should have. I accept that there was a degree of culpability to the claimant's conduct notwithstanding the stress he was under. He accepts that to be the case himself. However, this was an isolated and fleeting incident in a long and previously unblemished career.

188. The appeal panel considered that the claimant's behaviour in relation to incident 1 constituted misconduct. That, in turn, was part of the reason the respondent decided to dismiss him. It is significant, however, that the appeal panel did not think the claimant's conduct warranted dismissal. And although it imposed a severe sanction, final written warning, that was because it had also considered the claimant had failed to ensure the complaints and safeguarding policy were properly implemented, a conclusion that on my assessment of the evidence I have not agreed with. Furthermore, the council dismissed the claimant because it (wrongly) believed the claimant's conduct in connection with child 1 involved rough handling, a conclusion I do not agree with. In addition, the council wrongly believed the appeal panel had upheld allegations concerning incidents 2, 3 and 4, demonstrating a pattern of worrying behaviour towards children and Mrs Scanlon's evidence to the Tribunal was that if an employee shouts at a child that does not in itself warrant disciplinary action.

189. Taking all of those matters into account I conclude that it would be just and equitable to reduce any basic award under section 122(2) of the Employment Rights Act 1996 Act and any compensatory award under section 123(6) of that Act by 10%.

190. All other issues relevant to the remedy for unfair dismissal, will be addressed at a remedy hearing, directions for which will be sent separately.

Employment Judge Aspden

Date 11 April 2021