Case Number: 3303416/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs K. Olliver	**v**	Licenced Trade Charity

Heard at: Reading by Cloud Video Platform **On:** 4, 5, 25 and 26 March 2021

Before: Employment Judge Chudleigh

Appearances
For the claimant: Ms Hart, Counsel
For the respondent: Mr Curtis, Counsel

JUDGMENT

The judgment of the Employment Tribunal is:

1. The claimant was unfairly dismissed by the respondent within the meaning of ss. 94 & 98 of the of the Employment Rights Act 1996.

2. The issues at paragraph 1(d) and (e) below as well as remedy are to be determined on 19 and 20 April 2021 by Cloud Video Platform..

3. The claimant is to serve an updated schedule of loss on 6 April 2021, the respondent is to serve a counter-schedule of loss on 12 April 2021 and the parties are to exchange any supplementary witness evidence on 12 April 2021.

REASONS

1. The agreed issues were as follows:

   a) What was the principal reason for the claimant's dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

   b) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent genuinely believe that the claimant was guilty of misconduct on reasonable grounds following a reasonable investigation and

whether the respondent acted in all respects acted within the band of reasonable responses?

c) Whether the decision to dismiss the claimant was within the band of reasonable responses?

d) If the claimant was unfairly dismissed:

i) if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed?

ii) would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

iii) did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

e) Whether the claimant was wrongfully dismissed?

2. Unfortunately, the time set aside for this hearing was woefully inadequate. The case had been listed for two days upon receipt of the claim which was to include time for deliberation and the delivery of a judgment. However, there was a primary bundle containing 542 pages of documents as well as a supplementary bundle. In addition, there were four witnesses including the claimant. The case was never going to be determined in two days and the parties' solicitors are at fault for not alerting the Tribunal to this fact.

3. In the circumstances, I heard evidence on matters relating to the issues at 1 (a) to (c) above on 4 and 5 March 2021. The case was then put over to 25 March 2021 for submissions. A judgment was delivered orally on 26 March 2021.

4. I heard evidence on behalf of the respondent from Christine Cunniffe, the Principal of Licensed Victuallers' School ("LVS"), Nikki Annable, the Human Resources Director for the respondent and Ian Mullins, the Executive Director of Education and Operations for LVS and the person who made the decision to dismiss the claimant. I also heard evidence from the claimant.

5. I made the following findings of material fact:

a) The respondent operates LVS, an independent, co-educational, day and boarding fee-paying school for pupils ages 14 to 18.

b) The claimant was employed by the respondent as the Deputy Head Pastoral/Head of Boarding at LVS. As the Head of Pastoral Care, the claimant was the Designated Safeguarding Lead ("DSL") for LVS which meant that she had lead responsibility for safeguarding and child protection. Her employment started on 1 September 2017 and ended on 6 January 2020 when she was summarily dismissed.

c) The claimant's employment entitled her to a discount on her child's school fees and site-adjacent accommodation.

d) On 30 November 2019 Christine Cunniffe sent Nikki Annable and Ian Mullins an email regarding various complaints from parents and pupils about the claimant running from 1 February 2019 to 29 November 2019. The complaints were about serious matters including "bullying" and "strong arm tactics". Christine Cunniffe also mentioned that the school's reputation was being affected and parents were "talking". She said "Can we tackle officially next week – what's good for you?". The email attached various written complaints and had been precipitated by complaint raised by a parent at a meeting on 29 November 2019 who had maintained that her child was anxious and worried about bumping into the claimant at school. Christine Cunniffe wrote to this parent on 2 December 2019 summarising the concerns and indicating that it would be logged as a stage 2 complaint in line with the school's policies and procedures.

e) The procedure Christine Cunniffe was referring to was the school's complaints policy that provided for a three-stage procedure for resolving parental complaints. Stage 1 was concerned with informal resolution, stage 2 with the first stage of formal resolution where the Head is required to make a decision in relation to the complaint and stage 3 involves a panel hearing. It is provided that complaints should proceed to stage 3 within 30 working days of the Head's decision.

f) Christine Cunniffe considered that although there was a learning curve associated with doing the claimant's role, there was by 30 November 2019 an accumulation of complaints a ramping up in nature regarding the claimant's alleged behaviour and the inappropriate behaviour was being repeated. There had been a "121" meeting between the claimant and Christine Cunniffe in July 2019 which occurred after some of the complaints mentioned in the email of 30 November 2019. At that meeting the complaints were discussed and the claimant was told that she could be rude, intimidating and aggressive, but the letter sent to the claimant on 9 July 2019 put things in a gentler manner, advising the claimant that sometimes she should just take a step back and listen and that she should be careful how she comes across to others. At this point Christine Cunniffe was being supportive of the claimant but by 30 November 2019 the volume and nature of complaints against her was such that it was reasonable to take formal action to address the concerns outlined in the email of 30 November.

g) On 2 December 2019 the school appointed Sarah Sherwood, Director of Special Educational Needs to conduct an investigation.

h) A calendar invitation was sent to the claimant for a meeting on 2 December 2019 with the title "catch-up Karen". No further details were given.

i) The claimant attended the meeting on 2 December 2019 and found Nikki Annable present as well as Christine Cunniffe. Nikki Annable's evidence was that at the outset of the meeting it was said that the meeting was being held on a without prejudice and protected basis. I did not accept her evidence on that.

j) It was explained that LVS had received complaints from three parents. Christine Cunniffe said that it was a serious situation. Nikki Annable told the claimant that the

matters would be reported to the Local Authority Designated Officer ("LADO") who is responsible for managing child protection allegation against staff who work with children. The claimant was advised to speak to her trade union representative and told that an investigation would be commenced.

k) The claimant mentioned that Rebecca Wilde, the Wellbeing Hub Manager employed by the school had been present at two of the meetings with the children concerned and suggested that she should be spoken to. Christine Cunniffe said "if we get around to that".

l) It was important to the school to deal with the allegations swiftly. This was because it was perceived by Christine Cunniffe that the claimant's behaviour was impacting on the school's reputation. Because of this it was suggested to the claimant that she could resign. Christine Cunniffe and Nikki Annable maintained that it was the clamant who had asked what her options were but I did not accept their evidence on this issue. It was suggested to the claimant that it was open to her to resign and she was told at the meeting that she had until 9am the next morning to do so. Nikki Annable advised her to discuss the situation with her husband and said "It's your career". It was intended that the claimant would be offered some form of severance package if she chose to resign. The claimant had the impression that if she resigned there would be no investigation at all and I considered that it was reasonable for her to have had this impression. It was not made clear to her at the meeting on 2 December 2019 that if she resigned the investigation would still proceed although I accepted that the respondent would have been required to investigate in any event due to the nature of the allegations.

m) Christine Cunniffe and Nikki Annable were hoping that the claimant would resign so that the school could move on from the matters that had arisen as quickly and quietly as possible.

n) At the end of the meeting the claimant was told that she was suspended with immediate effect.

o) I should point out here that the parties agreed that the provisions of s. 111A of the ERA were not relied on by either side in relation to what was said on 2 December 2019.

p) The next morning at 7.26 am the claimant emailed Christine Cunniffe to say that she had discussed the situation with her husband but not with her union representative which she intended to do that morning and she would let Christine Cunniffe know as soon as she could regarding her decision.

q) At 13.55 on 3 December 2019 Christine Cunniffe emailed the claimant to say that she had to follow protocol and start the investigation as she had not heard from her.

r) On 3 December 2019 the claimant was also sent a letter confirming her suspension. She was told in the suspension letter that the complaints centred around her behaviour with some parents and pupils which had been described as judgemental, insensitive, rude, intimidating and at times aggressive. She was also told that some parents had been very upset by her approach towards them including her not listening and making assumptions and that some pupils did not want to come into

contact with her and were reluctant to stay on to the next key stage at LVS. The letter mentioned that the claimant should not enter the school's premises from her accommodation or contact any staff without Christine Cunniffe's prior written consent. The letter emphasised that if the claimant did not obtain her prior written consent before contacting staff that could amount to a disciplinary offence. The claimant was told that the investigation could result in disciplinary proceedings.

s) At 15.33 on 3 December 2019 the claimant expressed her surprise in an email at the decision to proceed with the investigation, indicated that she intended to defend herself and her professional reputation and she asked for copies of the written complaints. This request was not acted on. Because she had been invited to resign the claimant believed that the Christine Cunniffe and Nikki Annable had concluded that she was guilty of the matters alleged against her. However, as she said in her email, she was determined to defend herself and Christine Cunniffe and Nikki Annable were not involved in the decision to dismiss that was taken on 6 January 2020.

t) On 4 December 2019 Sarah Sherwood invited the claimant to an investigation meeting on 9 December 2019 at 1pm. She was told that the purpose of the meeting was to investigate and establish further details relating to complaints from parents and pupils.

u) On 6 December 2019 the claimant's union representative, Ian Stevenson wrote to the respondent confirming that he was not available for a meeting on 9 December 2019 but he could attend a meeting on 16 December 2019 at 2pm. He also requested copies of the complaints and details of the allegations. These were not supplied at that stage or indeed any stage until service on the claimant of the investigation report.

v) The school considered that because it was an investigation meeting the claimant had no right to be accompanied. Further, it was not willing to delay the meeting to 16 December 2019 but it did reschedule it for 11 December 2019. On 10 December 2019, Vanessa Wilson a solicitor from the claimant's union informed the school that the claimant had a medical appointment on 11 December 2019 and the meeting was then put off until 12 December 2019 but the respondent was clear that the claimant was not entitled to be accompanied. Vanessa Wilson suggested as an alterative that the school could put written questions to the claimant but it did not take up this suggestion.

w) In the email of 10 December 2019 Vanessa Wilson also mentioned matters relating to the meeting on 2 December 2019 and alleged improper conduct by the school. She said that in view of the respondent's ongoing conduct in relation to the disputed facts arising from the meeting where the claimant was asked to resign "or be suspended", the resignation request and suspension which was indicative of pre-judgement of the claimant's conduct, the refusal to provide any details of all of the complaints and the refusal to allow the claimant to be represented without reason amounted to grounds to believe that the respondent's conduct was prejudicial to any reasonable and fair investigation.

x) The claimant failed to attend the investigation meeting scheduled for 12 December 2019 due to the failure to permit her to be accompanied, so the investigation report was completed without her input.

y) The claimant alleged at the Tribunal hearing that she had a contractual right to be accompanied at investigation meetings. I did not agree that this was so. The disciplinary procedure mentioned a right to be accompanied at all stages of the procedure, but the stages of the procedure outlined in that document did not mention investigation meetings.

z) Sarah Sherwood's investigation report is dated 17 December 2019. She indicates in it that interviews with witnesses and telephone statements were undertaken on 5 and 9 December 2019. The report summarises her conversations with eleven witnesses and gives what is described as an overview of the issues raised by the witnesses. They are divided into three categories; student wellbeing issues, judgment issues and safeguarding issues. The report indicated that the LADO had indicated that the claimant was acting in an inappropriate way towards children and overstepping the mark. She also advised that the lack of records relating to one incident involving a suspected pregnant student was a "breach of safeguarding". The LADO's advice was that the school should follow its own disciplinary procedures and Sarah Sherwood indicated that she considered there was "a case for proceeding with a disciplinary".

aa) Sarah Sherwood did not interview or seek an account from Rebecca Wilde, the member of staff who had been identified as having been present on the occasion when a child was said to have been brow-beaten into revealing the name of a friend she suspected was pregnant and indeed was alleged to have been complicit in applying inappropriate pressure on the child.

bb) On the same day, 17 December 2019, the claimant was told that a decision had been made to proceed to a formal disciplinary hearing when she would be given the opportunity to present her defence and her version of events. The claimant was told that there were four allegations to be considered and was given an example of each. The allegations were:

i) **That your conduct has created and/or exacerbated student wellbeing issues on more than one occasion**. One example of this is that you are alleged to have placed unreasonable pressure on a student of divulge the name of another student who may have been pregnant. This pressure made the student feel so distressed that she was unable to attend lessons all day. Further examples are contained in detail within the enclosed investigation report under the heading student well-being issues;

ii) **That a number of parental complaints have been received about the manner in which you communicate with them and handle pastoral and safeguarding matters**. An example of this is where a student was known to be absent from school pending a report from a specialist and you stated to them that if they were not able to provide proof, social services would be knocking at the door. Other examples are contained in detail within the enclosed investigation report under the heading "parent issues ";

iii) **That your conduct has created an atmosphere of fear among students whom you are required to provide pastoral support for as part of your**

role. An example of this is a student who now walks the perimeter of the school to avoid coming into contact with you as well as several other reports that children will not approach you with pastoral issues as they feel you are unpleasant and unapproachable. More examples and details of this are contained within the enclosed report;

iv) **That you have exercised poor judgement in relation to pastoral and safeguarding issues and not satisfactory to discharged your duties as DSL, including breaching the Keeping Children Safe in Education 2019 guidelines.** An example of this is that no safeguarding file was created for a pupil despite there having been a number of incidents involving them and further, that you have not kept accurate and up-to-date records of safeguarding incidents. More details of these issues are contained in the enclosed investigation report under the headings "judgement issues" and "safeguarding issues".

cc) The disciplinary hearing was scheduled for 19 December 2019 at 11.30am. This was very short notice in my view. The claimant was provided with the investigation report and the evidence on which the school was to rely as well as a copy of the disciplinary procedure. She was warned that her employment could be terminated and told she could be accompanied by either a trade union representative or a work colleague.

dd) On 19 December at 09.43 am Ian Stevenson wrote to the school indicating that he could not attend a hearing that day but he could do 30 December 2019 at 2pm. LVS agreed to move the hearing to that date but at 4.30pm rather than 2pm to suit the availability of Ian Mullins who was to chair the meeting.

ee) However, on 23 December 2019 Vanessa Wilson emailed the school asking for the meeting to be postponed to a mutually agreed to date in the Spring term. The reasons she gave included that the claimant had family commitments during the Christmas holiday period and would be away from home. She also mentioned that there were 11 potential witnesses who could only be contacted via the school and the ability to contact them would be affected by the closure of the school. Her final point was that the offices of the National Education Union would be closed from 23 December 2019 to 2 January 2020 and the union representative would be on leave.

ff) The request for a postponement was refused by the school on 24 December. In that email Nikki Annable asked to be provided with the names of the claimant's witnesses. She also said that the claimant would be able to raise points about witnesses at the disciplinary hearing which could be adjourned if needed to obtain further information. Having sent that email to Vanessa Wilson at 12.08 on 24 December 2019 Nikki Annable received an out of office email in reply saying that she was on leave until 10 January 2020.

gg) There was no further word from the claimant or any of her representatives before 30 December 2019 and the claimant did not attend the hearing.

hh) The school did not go ahead with the disciplinary hearing on 30 December 2019 and on 31 December 2019 rescheduled it for 6 January 2020 without having consulted the trade union or the claimant as to their availability. The claimant was told that if she failed to attend the meeting it would be held in her absence.

ii) On 3 January 2020 Vanessa Wilson asked for the meeting to be postponed as insufficient notice had been given and because the trade union representative was on leave on the day in question. She indicated that if the decision was made to proceed with the hearing then the correspondence regarding the request for a postponement should be provided to the disciplinary panel.

jj) The claimant did not attend the hearing on 6 January 2020 and it went ahead in her absence.

kk) The trade union did not supply the school with a list of the claimant's suggested witnesses at any point despite the request made by Nikki Annable on 24 December 2019.

ll) Ian Mullins reviewed the documentation he had been provided with including the investigation report and its appendices, the school's e-safety policy, the behaviour policy, the Keeping Children Safe in Education training certificate, the claimant's training record and the disciplinary procedure.

mm) He decided not to adjourn the hearing despite the claimant not being present because he considered the claimant had no intention of attending meetings. He thought the school was being stalled and he needed to respond to a parent's stage 3 complaint connected to the case.

nn) Overall, my finding was the school proceeded hastily with the disciplinary process. The allegations were serious. They potentially would impact on the claimant's professional reputation and if made out could impact on her losing not just her job, but her home and her child's school fees concession. The investigation stage was short, the first invitation to a disciplinary hearing was with less than 48 hours' notice and there was, it seemed to me, a desire to hold the disciplinary hearing before the start of the Spring term on 8 January 2020 for no good reason.

oo) In terms of the evidence before Mr Mullins, Mr Curtis stated the following in his submissions, no objection was taken by Ms Hart to his assertion that these facts were common ground and in any event, I concluded that as a matter of fact, Mr Curtis' assertions were factually accurate (the numbers in square brackets refer to pages in the bundle and the witnesses are those referred to in the investigation report):

a. Parents and/or children had made the following complaints against the Claimant:

i. The claimant lacked compassion and understanding, and failed to show empathy to a child whose brother had passed away (witness 8/allegation 1 [356-7], [320])

ii. When speaking to the parents of a child who had ill-health: the claimant's approach was like an interrogation; The claimant contradicted the account of the child's teacher re: whether the child made friends; the claimant threatened the parent re: having "*social services knocking on your door"*. The claimant's behaviour was so bad that the parent did not want to speak to her again, and did not

want their child coming into contact with her (witness 9/allegation 3 [362-6], [321]).

iii. The claimant was abrupt, condescending and regarded children as guilty before investigating a situation. The manner in which she spoke to the parents of a pupil re: a suspected pregnancy was inappropriate as the claimant had not spoken to the child; the timing of the call was on a Friday afternoon as the parents were on their way to the bus stop to collect the child; there was no invitation to the parents to come in for a meeting to discuss the issue. Further, the claimant had not properly supported a child in a previous 'sexting' allegation, contrary to the school's E-safety policy (witnesses 10 & 11, allegation 4 [375], [381-2], [321]).

iv. The claimant together with another teacher, was involved in putting 'unacceptable pressure' on a child, brow-beating her, using 'strong arm tactics and interrogation' until the child 'cracked' and revealed the name of a friend whom she suspected was pregnant. This included asking the child how she would feel if the friend went on to self-harm or commit suicide. The claimant had said that she wanted children to be scared of her, and children would not go to her because she was unpleasant and unapproachable (witness 1, allegation 5. [377], [316]).

v. The claimant upset a child with cerebral palsy to such an extent that he walked around the perimeter of the school to avoid seeing her. The parents did not want the claimant teaching their child in the remaining time at the school. The parents did not trust the claimant's judgment when raising a safeguarding issue (witness 4, allegation 6 [378], [384], [318]).

b. Items ii-v above came to light in the period 9 October 2019 to 29 November 2019.

pp) Ian Mullins determined that the claimant was in breach of points 48 and 49 of the relevant Keeping Children Safe in Education guidelines which provided:

Record keeping
48. All concerns, discussions and decisions made, and the reasons for those decisions, should be recorded in writing. If in doubt about recording requirements, staff should discuss with the designated safeguarding lead.

Why is all of this important?
49. It is important for children to receive the right help at the right time to address risks
and prevent issues escalating. Research and serious case reviews have repeatedly shown the dangers of failing to take effective action.15 Examples of poor practice include:

- failing to act on and refer the early signs of abuse and neglect;
- poor record keeping;
- failing to listen to the views of the child;
- failing to re-assess concerns when situations do not improve;

- not sharing information;
- sharing information too slowly; and
- a lack of challenge to those who appear not to be taking action.

qq) Mr Mullins found that the claimant was in breach of guideline 48 as the records she had kept of discussions and decision made were not recorded in writing as they should have been. He told me and I accepted that on its own this issue would have resulted in a final written warning.

rr) He also said that it was clear from the evidence that the claimant was unapproachable, insensitive, rude and had demonstrated poor judgement on a number of occasions. It was clear to him that a number of parents and students no longer wanted to have contact with the claimant.

ss) Additionally, Mr Mullins found that the claimant's behaviour was bringing the school's reputation into disrepute amongst parents and in an online community. He concluded that this was wholly inappropriate and not what was expected from the head of pastoral care and DSL.

tt) He considered that if the complaints had been one off events the outcome might not have been quite so severe but due to the volume and severity of the complaints cumulatively the matters amounted in his view to gross misconduct. However, he was also of the view that the recent complaints made by the parents of three pupils would have constituted gross misconduct even if they were considered in isolation. I will not name the children in these reasons, even by their initials so as to preserve their anonymity, but they are the children who were the subject of the allegations outlined in §§ oo(a) (iii), (iv) and (v) above.

uu) One of these incidents ((iv) or allegation 5) was said to have been witnessed by another member of staff – Rebecca Wilde. Mr Mullins did not consider that it would be appropriate to interview her as she was a new member of staff and junior to the claimant whereas the claimant as DSL would have been leading the discussions. Further, he thought that if Ms. Wilde had been involved in browbeating and interrogating a pupil then the claimant, as the DSL, ought to have stepped in to stop the situation and therefore the claimant would still have been culpable

vv) In the circumstances Ian Mullin's decision was that the claimant was guilty of gross misconduct.

ww) In relation to sanction, Ian Mullins concluded that a demotion or a lower sanction would not be a suitable alternative to dismissing the claimant due to the seriousness of the allegations against her and the potential harm she had caused and could continue to cause pupils. He was not aware that the claimant had demonstrated remorse for her actions or recognised that her behaviour may have been inappropriate or adversely affected pupils. In the circumstances, he concluded that the claimant should be dismissed with immediate effect.

xx) On 7 January 2020 Mr Mullins wrote to the claimant confirming that she was dismissed. He informed the claimant that she had the right to appeal but she did not exercise that right.

yy) It was the claimant's case that the dismissal was predetermined by the respondent from 2 December 2019 onwards when the claimant had been invited to consider resigning and that the complaints were prejudged. Christine Cunniffe had responded to a number of the parents' complaints indicating that the claimant's behaviour had been unacceptable and she said in evidence that she believed there was substance to the complaints. It was also the case that Nikki Annable considered that the parents and children were to be believed. I considered that Christine Cunniffe and Nikki Annable did believe that it would be best if the claimant left the respondent's employment as there had been such a large number of complaints about her behaviour which was impacting on the school's reputation. However, it does not follow from this that they influenced the outcome of Sarah Sherwood's investigation. I have carefully considered her report. It is essentially just a summary of what the various witnesses told her together with an overview and recommendations. The substance of the key allegations was the same as in the written complaints and I could detect no prejudgment or outside influence in relation to the investigation.

zz) Equally, I did not accept that Ian Mullins did not have an open mind or that he was influenced in his decision making by the views of Christine Cunniffe and Nikki Annable. He had been a party to Christine Cunniffe's email of 30 November 2019 setting out her concerns about a series of parental complaints and he had spoken to the investigating officer but that does not mean that the outcome of the process was predetermined and I concluded that it was not.

Submissions of the parties

6. Both counsel supplied me with extremely helpful written submissions which they supplemented orally. I will not set out those submissions in full in these reasons but will refer to them below where relevant in relation to the law and my conclusions where appropriate.

The law

7. For the most part, the law is uncontroversial. Pursuant to s 94(1) of the ERA an employee with sufficient qualifying service (as in this case) has the right not to be unfairly dismissed by his or her employer.

8. S. 98 of the ERA 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.

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

.....

(b) relates to the conduct of the employee,

(4) Where the employer has fulfilled the requirements of subsection (1), the

determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(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.

9. As Ms Hart submitted, the ACAS Code of Practice on Disciplinary and Grievance Procedures (ACAS Code) is admissible in evidence and Employment Tribunals are required to take it into account to the extent that it appears relevant.

10. In cases involving allegations of misconduct it is for the Tribunal to consider whether the employer genuinely believed that the employee was guilty of misconduct on reasonable grounds following as much investigation into the matter as was reasonable in all the circumstances of the case*:* **British Homes Stores v Burchell** [1978] IRLR 379.

11. As well as being an essential element of the **Burchell** test, it is well established that the duty on employers to conduct a reasonable investigation prior to dismissal is an essential safeguard: **Polkey v AE Drayton Services** [1987] IRLR 503. In **Weddel & Co. Ltd. v Tepper** [1980] ICR 286 at 279E-G the Court of Appeal indicated:

> *"Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And, it seems to me, they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the industrial tribunal in this case, "gathered further evidence" or, in the words of Arnold J. in Burchell's case, post, p. 303 "carried out as much investigation into the matter as was reasonable in all the circumstances of the case." That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably."*

12. The gravity of the charge and the potential effect upon the employee are matters that a Tribunal is entitled to take into account when considering the reasonableness of the investigation although an employer is not required to consider all possible lines of enquiry.

13. Critically, it is important to bear in mind that the range of reasonable responses test applies to the procedural aspects of any decision to dismiss as well as substantive considerations: **J Sainsbury plc v Hitt** [2003] IRLR 23. Furthermore, an Employment Tribunal must not substitute its view for that of the employer. However, as Ms Hart submitted and Mr Curtis did not disagree with, the band is not infinitely wide. A Tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer: **Newbound v Thames Water Utilities Ltd** [2015] IRLR 734.

14. There is an issue in this case about the right to be accompanied at the investigation meeting. It was accepted on behalf of the claimant that she had no right to be accompanied at the investigation meeting under s10 of the Employment Rights Act 1999 (ERA 1999). There may of course be cases where there is an express contractual right to be accompanied. Ms Hart argued in addition that a right to be accompanied may arise under the implied obligation of trust and confidence. She cited the High Court case of **Stevens v University of Birmingham** [2015] IRLR 889 in support of this proposition. Mr Curtis pointed out that in that case the employee had a contractual right to be accompanied at investigation meetings by a friend or a trade union representative. The claimant had no suitable friend to accompany him and was not a member of a trade union but was a member of the Medical Protection Society ("MPS"). He wanted, not unreasonably as the High Court held, to be accompanied by his MPS representative. The MPS was a medical defence organisation, not a trade union. It was also the case that other witnesses had been allowed more favourable treatment – see § 96 and also the employee had two employers and the policy of one allowed representation by a medical defence union representative. That case was quite different to the present one.

15. I concluded that there may well be some cases where the implied term of trust and confidence will oblige an employer to permit an employee to be accompanied at an investigation meeting, but this is not a rule of universal application. In unfair dismissal cases whether it was unfair not to permit an employee to be accompanied at an investigation meeting will depend on all the circumstances of the case and the application of the band of reasonable responses.

16. It was common ground that there is a right to be accompanied at a disciplinary hearing under ERA 1999 s.10. S.10(4) and (5) provide

    (*4) If—*
    (a) a worker has a right under this section to be accompanied at a hearing,
    (b) his chosen companion will not be available at the time proposed for the hearing by the employer, and
    (c) the worker proposes an alternative time which satisfies subsection (5), the employer must postpone the hearing to the time proposed by the worker.
    (5) An alternative time must—
    (a) be reasonable, and
    (b) fall before the end of the period of five working days beginning with the first working day after the day proposed by the employer.

17. Accordingly, employers must postpone a disciplinary hearing to a time proposed by the worker, where that alternative time is reasonable and within 5 working days.

18. Ms Hart argued and I accepted that even where a date is proposed outside the strict 5-day period provided by s.10, a refusal to allow a hearing to be postponed so that the employee can be accompanied may still result in an unfair dismissal since s. 98(4) is based on reasonableness in all the circumstances: **Talon Engineering Ltd v Smith** [2018] IRLR 1104 (EAT). **Talon** concerned a refusal to postpone for 2 weeks to enable a union representative to accompany the employee. Again, however, the issue of fairness depends on all the circumstances of the case and the application of the band of reasonable responses.

19. As to sanction, Ms Hart pointed out that the ACAS Code para 3 states that "*Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case".* Further, she said that *a*s a matter of logic, a finding of gross misconduct is not determinative of the question as to whether a dismissal is fair. Dismissal in such circumstances may be an option but is not inevitable, the Tribunal must still consider all the circumstances with regards to equity and the substantial merits of the case (as is required by the statutory test): **Brito-Babapulle v Ealing Hospital NHS Trust** [2013] IRLR 854. Mr Curtis did not argue with these propositions and I accepted them as being correct.

Conclusions

20. The claimant did not dispute that the reason for her dismissal related to her conduct, within the meaning of s.98(2) of the ERA. I concluded that Mr Mullins who made the decision to dismiss genuinely believed that the claimant had been guilty of misconduct. The more difficult issues were whether he formed that view on reasonable grounds following a reasonable investigation. I will address these issues in the course of addressing the specific heads of complaint put forward on behalf of the claimant.

21. Ms Hart said that the claimant's primary case was that a decision had been made from the outset to get rid of her, as was clear from the ultimatum that she resign or be investigated made on 2 December 2019. It was the claimant's case that the dismissal was predetermined by the respondent from 2 December 2019 onwards when the claimant had been invited to consider resigning and that the complaints were prejudged. I considered that Christine Cunniffe and Nikki Annable did believe that it would be best if the claimant left the respondent's employment as there had been such a large number of complaints about her behaviour which was impacting on the school's reputation. However, I have found as a fact that they did not influence the outcome of Sarah Sherwood's investigation and that Ian Mullins had an open mind and was not influenced in his decision making by the views of Christine Cunniffe and Nikki Annable. His decision was not predetermined. I accepted his evidence that he decided to dismiss having reviewed the investigation report and its appendices which included copies of the complaint documents. Those complaints raised serious concerns about the claimant's behaviour and it is those complaints that informed the decision to dismiss, not any pre-determined outcome.

22. In reaching these conclusions, I accepted Ms Hart's submission that it is rare to find direct evidence that a disciplinary outcome was predetermined, but having assessed the evidence including the emails, the evidence as to what discussions were had between the various participants in the process and the matters concerning the proposed resignation I did not accept her case on this point.

23. Next, it was submitted that it was unfair not to provide the claimant with copies of the complaints prior to the investigation meeting.

24. It was common ground that until 17 December 2019 when she was supplied with the investigation report and its appendices, the claimant had not been given copies of the complaints although on 2 December 2019 she had been told the names of the three parents who had recently complained. Before 17 December 2019 three requests had been made for copies of the complaints, one by the claimant herself on 3 December 2019 and then by Ian Stevenson and Vanessa Wilson on 6 and 10 December 2019

25. The respondent did not provide an adequate explanation as to why copies of the complaints were not provided to the claimant before any of the proposed investigation meetings. It would have been perfectly possible for them to have disclosed them to her. However, the claimant did have a general idea to the nature of the recent complaints and she was supplied with all relevant documents on 17 December 2019 which was before any of the proposed disciplinary hearing dates. Furthermore, the claimant failed to attend the investigation meeting due to the failure to permit her to be accompanied, not the failure to supply copies of the written complaints.

26. I must apply a range of reasonable responses test to this issue and having done so I concluded that it was within the range of reasonable responses not to supply copies of the written complaints to the claimant before the scheduled investigation meetings. In reaching this decision I took into account that the complaints were so serious as to be career threatening and that a number of requests were made for copies of the complaints. The key issue in my view was that the investigation meeting was to be an opportunity only to seek the claimant's input on the allegations for the purposes of the investigation. It was not the occasion when the claimant was to be asked to put forward her defence.

27. Ms Hart also submitted that the investigation was not balanced. It is a fundamental principle of fairness that those involved in disciplinary investigations keep an open mind and look for evidence which supports the employee's case as well as evidence against. It was extraordinary she argued that those staff who were unhappy with the claimant were interviewed, but Rebecca Wilde a key witness in relation to the potentially most serious incident (complaint 5) was not. Christine Cunniffe admitted she had not provided Sarah Sherwood with the name of Rebecca Wilde, despite being aware that Rebecca Wilde was a potential witness from 24 November 2019 onwards and being informed by the claimant that Rebecca Wilde should be spoken to at the 2 December 2019 meeting. Further, she submitted that even if Christine Cunniffe had not influenced who Sarah Sherwood interviewed, no explanation has been provided by Ms Sherwood as to why she did not interview Rebecca Wilde, given that the parent identified her as being present when the student was spoken to by the claimant in the email of 24 November 2019.

28. Ms Hart submitted that whilst it is accepted that an employer is not expected to exhaustively interview all witnesses, nevertheless this was a direct eye witness in relation to a complaint that was otherwise hearsay (since no account was provided by the student herself at any point).

29. On behalf of the respondent Mr Curtis argued that at no stage did the claimant suggest that Rebecca Wilde, or any other witness, ought to be spoken to. This was not the case as the claimant specifically mentioned Rebecca Wilde at the meeting of 2 December 2019. He also argued that in light of Ian Mullins' evidence that Rebecca Wilde was a new and young member of staff whereas the claimant was the DSL who would be leading the discussion, the conclusions Ian Mullins reached were conclusions which were open to him to reach.

30. I considered this issue most carefully. The **Burchell** test requires that conclusions be reached on reasonable grounds following a reasonable investigation. The range of reasonable responses test applies to the decision as to who to interview. However, in this case the key witnesses were parents who were reporting what they understood from their children second hand. Rebecca Wilde was a member of the school's staff, would therefore have been accessible to the school as a witness and was identified in a parent's complaint as having been present at a key event. She may well have given a quite different version of events to that of the parent which may have cast doubt on the parent's second-hand account. Further and importantly, the incident that she was party to was one of the most serious allegations against the claimant. It was also of relevance that the claimant did not participate in either the investigation or the disciplinary hearing. Obtaining an account of an eye witness to this key event was even more important because of this.

31. In all these circumstances, taken individually and as a whole, I concluded that it was outside the band of reasonable responses not to interview Rebecca Wilde either at the investigation stage or before Ian Mullins reached his conclusions on the material before him. I have taken into account that the trade union failed to supply the school with a witness list as requested. The respondent already knew that Rebecca Wilde was a witness to a key event.

32. On this ground alone the dismissal of the claimant was unfair in my view. Ian Mullins did not reach his conclusions on reasonable grounds following a reasonable investigation because of the failure to interview or obtain an account from Rebecca Wilde.

33. The next issue was whether it was unreasonable not to permit the claimant to be accompanied at any of the proposed investigation meetings. There was no express right to permit the claimant to be accompanied. Nor, in my view was the refusal to permit her to be accompanied a breach of the implied term of trust and confidence since it was contrary to procedural fairness and without reasonable and proper cause.

34. Ms Hart argued that on the facts of this case it was obviously procedurally unfair to refuse the claimant the right to be accompanied, in circumstances where the respondent had refused to provide her with details of the complaints in advance and that the respondent had sought to put pressure on the claimant to resign at the 2 December 2019 meeting. Having someone accompany the claimant would have provided her with reassurance and someone to take a note of what was said. Further the claimant was facing allegations with serious consequence for her livelihood and reputation, home and child's education. In such circumstances it was unreasonable to expect her to attend the investigation interview alone.

35. Mr Curtis argued that there was no suggestion at the time from the claimant that there was a right be accompanied. There was only a request to be accompanied. The refusal of a request when there is no right does not amount to unreasonableness. An employer is perfectly entitled to say that an employee has no statutory or contractual right to be accompanied.

36. I did not accept the submission that on the facts of this particular case the failure to permit the claimant to be accompanied at the investigation meeting was a breach of the implied term of trust and confidence. **Stevens** was a quite different case. The claimant did believe that the Christine Cunniffe and Nikki Annable had concluded that she was guilty of the matters alleged against her but she was determined to defend herself and the interview was to be with Sarah Sherwood. Further, it was not unreasonable, as I have already said not to give the claimant copies of the written complaints in advance. I accepted Mr Curtis' submissions and concluded that it was within the range of reasonable responses not to permit the claimant to be accompanied at the investigation meeting.

37. The final procedural point raised by Ms Hart on behalf of the claimant was that the respondent unreasonably refused to postpone the disciplinary hearing to a mutually agreed date. I have found this the most difficult of all the issues.

38. Ms Hart argued that there is no evidence that the claimant was refusing to engage in the disciplinary process. She was represented by the union throughout, and the union repeatedly sought dates to be mutually agreed to enable her to attend and be represented. This is the exact opposite of someone who was not intending to attend and defend herself. I agreed with this submission.

39. Ian Mullins decided not to adjourn the hearing on 6 January 2020 despite the claimant not being present because he considered the claimant had no intention of attending meetings. He thought the school was being stalled and he needed to respond to a parent's stage 3 complaint connected to the case.

40. Ms Hart argued that it was unreasonable for Ian Mullins to assume the claimant was stalling and that each date when the claimant had not attended a meeting needed to be looked at.

41. I accepted that the claimant had only not attended one investigation meeting despite three dates being proposed. The meeting that she did not attend was that which was scheduled for 12 December 2019. The claimant failed to attend as she was not allowed to be accompanied. I have already found that the decision to refuse a right to be accompanied was not unreasonable but it is the case that the claimant did not attend as she did not wish to go alone, not because she did not wish to defend herself.

42. The claimant's non-attendance at the disciplinary hearing was because of the respondent's refusal to agree a date and time that all parties could attend and because she had no trade union representation available to her on the day of the hearing. It went ahead on 6 January 2020, a date when the respondent was aware from the out of office response that Vanessa Wilson was on leave and they had been told that the trade union representative was on leave.

43. The evidence before the respondent on 6 January 2020 was that the claimant had indicated that she wanted to defend herself and the union was suggesting that the hearing should be arranged on a mutually agreed date. It is significant that throughout this process not only did the respondent refuse to agree a mutual date and time with the claimant but also the respondent never accepted the alternative

dates and times proposed by the claimant, always proposing something different that meant that the claimant could not attend.

44. In my view it was not relevant that it was still the Christmas holidays for the claimant as I would have expected her to attended an important event like this two days before the start of term. Further, there was no evidence before me that the claimant had tried and failed to contact witnesses over the Christmas period. However, the fact that it was the Christmas period impacted on the availability of the claimant's representative which was an important matter.

45. In my view the 30-day time limit for completing an investigation into a parent's complaint or the need to respond to a parent generally was not of particular relevance. Any such time limit was not mandatory and dealing with a parent's complaint could be put off for a period of time.

46. Mr Curtis said that Ian Mullins had concluded that the claimant had been given a reasonable opportunity to attend an investigation or disciplinary hearing. He argued that this conclusion was open to him based on the information he had it was not irrational or perverse. The claimant is, he argued effectively asking the Tribunal to substitute its view for Mr Mullins' decision on this point and the Tribunal ought to avoid falling into the substitution trap.

47. My decision on this issue is that it was outwith the range of reasonable responses for the respondent to have gone ahead with the disciplinary hearing in the claimant's absence on 6 January 2020.

48. I have found a fact that the school proceeded hastily with the disciplinary process. The allegations were serious. They potentially would impact on the claimant's professional reputation and if made out could impact on her losing not just her job, but her home and her child's school fees concession. The investigation stage was short, the first invitation to a disciplinary hearing gave less than 48 hours notice and there was, it seemed to me, a desire to hold the disciplinary hearing before the start of the Spring term on 8 January 2020 for no good reason.

49. Moreover, the claimant had said that she intended to defend the allegations and her trade union was trying to arrange a mutually agreed date for a hearing after the Christmas period.

50. Furthermore, as the claimant had not attended the investigation meeting, Ian Mullins did not have an account from her in relation to any of the allegations. The disciplinary hearing would have been an opportunity for Ian Mullins to have heard the claimant's version of events which so far had not been given to him.

51. In these circumstances, it was unfair to proceed with the disciplinary hearing on 6 January 2020 and not to agree or seek to agree a mutually acceptable date with the trade union.

52. Accordingly, for this reason also the dismissal was unfair.

53. In these circumstances, dismissal was not within the range of reasonable responses open to the employer. However, there are issues to determine in the case as to **Polkey** and contribution and I will say no more at this stage about sanction other than in my view, if all the allegations had been made out, dismissal was squarely was within the range of reasonable responses open to the respondent particularly when viewed as a whole.

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Employment Judge Chudleigh

Date: 26 March 2021

Sent to the parties on:

……16 April 2021

For the Tribunal:

THY…….……..