EMPLOYMENT TRIBUNALS

Claimant: **Ms Amy Mackey**

Respondent: **Hearts Academy Trust**

Heard at: **East London Hearing Centre (by CVP)**

On: **29 September–02 October 2020**

Before: **Employment Judge Housego**
Members: **Mr T Burrows**
Mr T Brown

Representation

Claimant: Angelica Rokad, of Counsel, instructed by Birkett Long LLP

Respondent: Stephen Peacock, Solicitor, of Weightmans LLP

JUDGMENT

1. **The claim for unfair dismissal is dismissed.**
2. **The claim of disability discrimination is dismissed.**
3. **The claim for wrongful dismissal succeeds.**
4. **The Respondent is ordered to pay to the Claimant the sum of £8,700.**

REASONS

1. Ms Mackey was a newly qualified teacher at one of the Respondent's 6 schools. She was summarily dismissed on 22 March 2019. Ms Mackey has ME and fibromyalgia, diagnosed in March or April 2018. The Respondent accepts that this qualified as a disability for the purposes of the Equality Act 2010 and that they knew of it from April 2018.

2. Ms Mackey claims unfair dismissal, wrongful dismissal (notice pay) and that her dismissal was disability discrimination. She also claims pre dismissal

detriment (S15) and a failure to make reasonable adjustments.

3. The Claimant gave oral evidence, as did Ms Mackenzie (Executive head teacher: investigation), Ms Coggin (Co-head of the school where Ms Mackey worked: dismissal) and Ms Rogan (CEO of the Respondent: chair of the appeal panel). There were some 500 pages of documents considered. Both advocates provided clear and succinct written submissions.

4. The agreed list of issues in the disability claim is as follows:

> "8. C alleges she was treated unfavourably because of something arising in consequence of her disability in the following respects:
>
> 1. C claims she was not excused from all 'twilight sessions' and in November 2018 was told she would not pass her NQT if she did not attend.
>
> 2. C claims she was subjected to a significant delay between her suspension and the investigation meeting.
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> 3. Referring to C's performance being hampered by her medical condition in her NQT report.
>
> 4. R's decision to dismiss C from her employment on 21 March 2019.
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> 9. R contends that the 'something' remains to be identified by C in respect of this claim.
>
> 10. Further to C's letter to the Tribunal dated 27 January 2020, C alleges that the 'something arising' are as follows:
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> 1. The need for sufficient breaks during the working day
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> 2. The need for rest periods during extended hours
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> 3. The inability to drive/travel long distances; and
>
> 4. The need to attend medical appointments
>
> 11. Can R show that the unfavourable treatment was a proportionate means of achieving a legitimate aim?
>
> **C. DISABILITY DISCRIMINATION; Failure to Make reasonable adjustments; s20 EqA**
>
> 12. C claims R failed in its duty to make reasonable adjustments in the following respects;
>
> 1. C claims the adjustments recommended in the occupational health report in July 2018 were not implemented, discussed with C or taken seriously by R;
>
> 2. C claims she was not excused or provided a rest break before attending a 'twilight session' in November 2018;

3. C claims R should have afforded her some flexibility in respect of R's school absence policy which required her to contact her line manager on the first day of her absence;

13. R contends that the PCPs remain to be identified by C in respect of this claim.

14. Further to C's letter to the Tribunal dated 27 January 2020, C identifies the following PCPs:

    1. R's absence policy which required all staff to make personal contact with their line manager, without exception, in order not to be subject to the risk of disciplinary sanctions;

    2. R's twilight session policy which required consistent attendance by NQT's at twilight sessions organised by the Respondent, in order successfully pass the NQT programme;

    3. R's requirement for employees to consistently attend their place of work;

    4. R's NQT policy which required NQT's to fulfil their training requirements within a specified period, without providing exceptions for disability-related absences;

    5. R's disciplinary policy which applied to all employees which requires staff to submit supporting evidence not later than three working days before the disciplinary hearing.

15. Did one or a combination of the above PCPs put C at a substantial disadvantage because of her disability? The Claimant pleads these were one or a combination of the following:

    1. R refusing to sign off C's NQT because of C's disability related absences

    2. R's application of its twilight policy despite recommendations made by

       the occupational health report dated July 2018.

    3. R's application of its disciplinary procedures in December 2018 and

February and in reaching its dismissal decision on 21March 2019.

16. Should R have done one or a combination of the following to avoid the substantial disadvantage? C pleads that R should have:

    1. Exercised its discretion in relation to the application of its absence policy considering C's disabilities and the recommendations of the occupational health report.

    2. Not count C's time off for her disabilities as normal sick leave in relation to her NQT given that she had enough 'teaching time'

3. Followed the recommendations of the occupational health report dated July 2018 and provide support to the Claimant.

4. Adjourned the disciplinary meeting on 21 March 2019 further to late evidence produced by Karen MacKenzie.

5. The Respondent's position is that it:

5.1. denies that Ms Mackey has 2 years' service, and says that for that reason she cannot claim unfair dismissal;

5.2. denies that the dismissal was anything to do with Ms Mackey's disability, and that it was fair and for gross misconduct: striking a child in her class (and so no notice was necessary);

5.3. complied with all the recommendations of OH, save provision of a fan which was needed to cope with heat, which did not apply in the autumn term;

5.4. says that everything other than the dismissal is out of time, and it would not be just and equitable to extend time;

5.5. says that the claims of Ms Mackey are generalised and not particularised,

5.6. says that the procedure followed was fair and not tainted by disability discrimination.

6. Ms Mackey does not dispute that dismissal for striking a child in class would be a fair gross misconduct dismissal.

Length of service – unfair dismissal claim

7. Ms Mackey started at the school on 04 November 2013, as a *"key worker"*: that is as support staff. Her contract ended on 31 August 2015 (71). She then trained as a teacher. All her placements were at the school. Ms Mackey was part of the School Centred Initial Teacher Training ("SCITT") programme. On 25 July 2017 (73) she was offered, and accepted, a post as a teacher at the school, starting 01 September 2017. She was away from her training from December 2015 to January 2017 as she had a baby (C's ws para 2)

8. The SCITT programme on which Ms Mackey was trained is not a secondment from employment. There is no guarantee of work or a job at the end of it. It involves study at a college or school through lectures, and placements at a school. There is no pay. There is no contract of employment. As Ms Mackey put it, she was not employed by the school, but she worked there. She ceased to be employed when she started her training, and she had a government bursary. There is now, and probably was at the time, a scheme where people can be trained while remaining employed; however Ms Mackey did not train on this basis. The training is overseen by Billericay Educational Consortium ("BEL"), which was responsible for awarding her the newly qualified teacher certification (NQT) and then certifying that a newly qualified teacher had met the requirements of a probationary year. It is the school at which someone works that

puts employees forward to train with BEL as teachers, plainly in the hope that they will end up with a newly qualified teacher. There is no obligation on them to offer the trainee a job, and the trainee may, when qualified, seek a job anywhere.

9. In cross examination Ms Mackey agreed that she was not an employee when training. Her point was that she worked there. Her employment resumed, as a teacher, on 01 September 2017. The gap was from 01 August 2015. There was no certainty that she would get a job as a teacher at the school, as Ms Mackey accepted. There was no link between the two employments.

10. Ms Rokad sought to bridge the gap between the end of the fixed term contract and the start of the NQT contract, and referred to Hussain v Acorn Independent College [2011] IRLR 463 (EAT). It is certainly possible to bridge between end of the summer term and the start of the autumn term, as Mr Hussain did when ending a fixed term contract in July and starting a new role in September. Ms Rokad points out that all the teaching placements were with the Respondent and all but one at the school where she had worked as a key worker and where she returned as a NQT. The Respondent described her (125, and C's ws para 3 citing 21 March 2019 minutes of dismissal meeting) as *"a School centred initial teacher training trainee* ***at the school*** *from 2015-2017"* (emphasis added). She points out that someone can be an employee without having a contract of employment. She points to others doing much the same (perhaps with more experience and so doing more teaching) who are salaried throughout their training. The SCITT scheme turns teaching assistants into teachers within the same school environment, and is not the same as going to teacher training college. All these points are correct.

11. However, these points do not mean that the Claimant was an employee at the school while training. Working at a school does not mean that a student is employed by that school. The training was overseen by BEL, of which the Respondent is part, which was the awarding body and is separate from the Respondent. While that does not necessarily mean that trainees are not employed where they work, there was no disciplinary process, for example for non-attendance. That would be a matter for the training body. There were lectures to attend, arranged and run by BEL. The salaried were effectively training while teaching (and paid to do so) and not on supported placements: this is in reality a difference not a similarity. Ms Mackey did not get maternity pay when she took a break for a year when she had a baby. She was not paid by the school, and she obtained a government bursary. There was no guarantee of a job at the end (even if the hope that she would do so was nearer to an expectation) and had to have an interview to obtain employment.

12. There can be a bridge between employment[1] if an employee is absent from work on account of a temporary cessation of work or is absent from work in circumstances such that, by arrangement or custom, she is regarded as continuing in the employment of his employer for any purpose. This was not a temporary cessation of work, and Ms Mackey was not regarded as continuing in *employment* for any purpose. Wherever the burden of proof lies there was no continuity. (It may be that there is a presumption of continuous employment between start date and finish date[2], so the burden would have been on the

[1] S212(3)(b) and (c) of the Employment Rights Act 1996
[2] S210(5) of that Act

Respondent to disprove, and if so then they have done so.)

13. Even if S89 of the Employment Rights Act applied to contractual notice (it does not) and there was a wrongful dismissal a term's notice would end at the end of the summer term, and there would still be a gap.

14. The Tribunal takes full note of the fact that a contract of employment can continue through a gap if there is some continuing contractual connection: if absent from work in circumstances such that, by arrangement or custom, she is regarded as continuing in the employment of his employer for any purpose[3]. There was nothing related to employment by the Respondent which so indicated.

15. Ms Mackey did not have two years' continuous service when dismissed in March 2019, and so her claim for unfair dismissal must be dismissed for want of jurisdiction.

16. Had this not been the case, the issues would ultimately have been largely the same as for the wrongful dismissal claim: if the dismissal was fair, then the wrongful dismissal claim would almost inevitably fail. If it was unfair for procedural reasons the Tribunal would have had to decide (if possible) what would have happened had a fair procedure been followed, and whether there was any contributory conduct. That last question is the same as the finding of fact for the wrongful dismissal claim. In short, is it more likely than not that Ms Mackey hit x on 08 February 2019 as alleged? In an unfair dismissal claim the Tribunal must not substitute its view for that of the employer: for the wrongful dismissal claim that is what the Tribunal must do if it disagrees with the employer's decision. On the evidence before the Tribunal, is it more likely than not that this occurred?

Disability claim

17. Ms Mackey's evidence was direct and plainly truthful. She accepted a variety of propositions put to her by Mr Peacock which were not to her advantage. That is one relevant factor when considering the totality of her evidence, in particular related to the assertion that she struck x. Ms Mackey accepted the following in her answers to questions put in cross examination.

17.1. BEL managed her training. She had no paid employment at the school but she worked there. The school did not pay her and she had a government bursary. Her time was spent as a mixture of college work and work in the school. At the end of the training she could apply for a job anywhere.

17.2. The OH report of July 2018 had been discussed with her. Arrangements had been made for her to have time for medical appointments. She had a permanent level 3 (ie experienced) Learning Support Assistant, and regular breaks. She had not complained about anything to the senior leadership team ("SLT") although the OH report encouraged her to do so if there was any problem. She had the recommended access to the school counsellor. The twilight sessions were accommodated by either

[3] S212(3)(c) of that Act

agreeing that she need not attend, or giving her time off when she needed to go to one.

17.3. She had a mentoring session with Ms Chudleigh on 09 November 2018. She did no after school clubs as a result of that meeting.

17.4. She agreed that it was important for her to attend the twilight meeting of 28 November 2018, about moderating key stage 1 writing assessments. She agreed that she should have attended it. While she disputed that she was given 3 options she did accept that this was a Thursday evening and she stopped work early on Friday (lunchtime) as time to rest over a longer weekend.

17.5. There was a further meeting on 04 February 2020 which was a return to work meeting after the out of school allegation had been dismissed, and after that she felt fully supported, and put her past concerns behind her. In the appeal hearing (157) she said:

"After 2nd OH report on 4th February, I was extremely pleased with measures put in place. This was second to none."

17.6. She understood the reasons why the Respondent felt as it did, but she had not done anything wrong. The allegation had been explained to her fully at the investigation meeting held by Ms Mackenzie (09 March 2019).

17.7. It was fair to say that there were 2 stark positions – she said nothing happened and other said it did. They were either accurate, mistaken or truthful and accurate. She agreed that the Respondent had to take disciplinary action. The statement of Ms Faris of 20 March 2019 said nothing different to what she had just been taken through (which did not include the initial handwritten note). While she had spent much of the time in a drumming class in the hall there was a time when this could have occurred in the classroom. The production of the timetable for the day did not put her at a disadvantage.

17.8. Ms Mackey did firmly maintain that words must have been put in the child's mouth (eg 157 at the appeal). She pointed out that Ms Faris expressed uncertainty about what she thought she saw. While she saw that they had accepted what others said, she did not do it so there had to be a way round it. That was why she had appealed.

17.9. She said they had tried to get rid of her: but she accepted (and could not get her head round) the fact that they had been very supportive over the December 2018 allegation.

17.10. It was not unreasonable of them to take Ms Faris' and the child's account but it was unfair as she did not do it.

17.11. She had not performed as well in the latter part of her time at the school, as illness had affected her performance. The NQT review

was correct in saying so.

17.12. The extension of her NQT was to help her fulfil the requirements of the training to pass her probationary NQT year.

17.13. The Respondent was not out to get rid of her because of her sickness absence record. On 07 December 2017 she had written a letter of resignation over another allegation (unrelated to pupils) and the co heads had prevailed on her to reconsider, and then found that there was insufficient evidence to hold a disciplinary hearing about it: had they wanted to get rid of her this was an easy opportunity to do so. But they had actively helped her to stay, and this was only a few weeks before the matter that led to her dismissal.

17.14. While she had not seen the risk assessment before, she agreed with it.

17.15. In her disciplinary interview on 21 March 2019 (page 129) she was asked:

"How well do you think your NQT year is going? What support have you had?"

She replied:

"It's gone really well, apart from ill health. I've had a lot of support from the DOLs (Directors of Learning) and from LPs (Learning Practitioners). Support from Terri and Nic (the co-heads of the school). Lots of support and different approaches and it's been second to none. I had a medical diagnosis half way through and despite this, things have gone very well. I've not been signed off (as a qualified teacher) yet though."

This is not consistent with later claims not to have been supported, and there is no reason to think that it was other than what Ms Mackey thought at the time.

17.16. Ms Mackey agreed that although they did not get on personally, Ms Faris had always been professional and there was no reason to think that she had any malicious reason for reporting her slapping a pupil.

17.17. Having received the report the school was bound to investigate it, and, if it was found proved, it would not be unfair to dismiss her.

17.18. It was not unreasonable of the school to consider that she had done it given what Julia Faris had said, and the pupil, but she did not do it, and she had thought that the process would not end the way it did.

18. These concessions mean that the matters about which she was unhappy about reasonable adjustments and S15 detriment are out of time, being more

than 3 months (plus early conciliation period) before the claim was made. While Ms Mackey was ignorant of the limitation date she made no enquiry of her union until March 2019 (when they told her they could not help because she had not told them that she was no longer a student). It would not be just and equitable to extend time when the only reason was not knowing of the time limit. The dismissal process was not be part of a series of actions extending back before 08 February 2019.

19. The disability claim is put in a variety of different ways. The claim was filed on 17 July 2019. The events leading dismissal commenced on 08 February 2019. Everything connected with the dismissal was part of a series of events, and so everything connected with that is in time.

20. Everything else is out of time and did not form part of that sequence. While Ms Mackey may have felt unsupported there is no credible evidence that the Respondent did not do everything that they should have done once they knew of the fibromyalgia and ME in April 2018. There was a helpful mentoring meeting in November 2018. Further, on Ms Mackie's return to work on 04 February 2019 she accepted that she was fully happy with everything that they were doing in connection with her disability. It follows that the latest date would be 04 February 2019. The exact period of the early conciliation was not in the bundle but if it was the full month those claims would still be out of time. Miss Mackey said that she did not have union support, having omitted to say that she was no longer a student, but she did not seek any union advice until dismissal was in prospect, so that was not the reason she did not claim. There is no sustainable reason to find it just and equitable to extend time.

21. Accordingly, the claims for disability discrimination other than relating to dismissal are all out of time must be dismissed, for on analysis, Ms Mackey accepted that the school dealt with her disability fairly, at least from 04 February 2018, for any matter that is in time for a claim to be made.

22. The Tribunal does not find any link between Miss Mackey's disability and the dismissal or the process leading to it. On 07 December 2018 Miss Mackey had tendered her resignation following an allegation of improper behaviour outside school. Had the school wished to get rid of Ms Mackey they needed to do no more than accept her resignation. Instead they did not accept it and urged her to think carefully over the next week or so, and then allowed her to retract it. They then considered the allegation against her and dismissed it for want of credible evidence. It is not credible that they then, and immediately afterwards, went on to dismiss her for a disability related reason, using a second allegation as a pretext. Delays were not so long as to be a detriment related to disability. The NQT certification was not signed off because of the allegations, and not because of anything related to disability, and the school had actively assisted Ms Mackey to have her NQT year extended, when her attendance was not sufficient. The sickness absence issue was solely that Ms Mackey did not have enough pupil facing time, and that was a qualification requirement of the authorising body, not the school.

23. Accordingly the disability claims relating to dismissal also fail.

Wrongful dismissal

24. Ms Mackey was dismissed for gross misconduct, without notice. She is unable to claim unfair dismissal because she was not employed by the Respondent for two years. She is able to claim notice pay, under S13 of the Employment Rights Act 1996 (or as breach of contract). That requires the Tribunal to make a finding of fact as to whether, on the balance of probabilities, Ms Mackey struck the pupil, this being the sole reason for dismissal. That is not the same test as for a claim for unfair dismissal.

25. The burden of proving this lies on the Respondent. The standard of proof is the balance of probabilities. That means that something must be more likely than not to have occurred (a 51% chance). That is a single unwavering standard of proof. However, the more serious the allegation the more cogent the evidence must be, and the more anxious the scrutiny of it, before a finding of fact that it occurred is to be made. An allegation of striking a child is (as Ms Mackey accepted) one that usually leads to dismissal and is often career ending. Plainly decisions in such cases require great care to be taken.[4]

26. Teaching is a profession, and as disciplinary proceedings can interfere with an Article 8 right[5], so an Article 6[6] compliant hearing is required of an employer[7] whether or not the charge is criminal. The establishment of teaching is based on statute: these are civil rights and obligations. The absence of such a hearing will affect the view this Tribunal has of its findings of fact. Article 6(1) states:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*
>
> This is such a hearing.

27. The Respondent has a Child Protection policy. Section 10 applies:

> *"10. Allegations about members of the workforce*

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[4] Secretary of State For The Home Department v. Rehman [2001] UKHL 47, and H & Ors (minors), Re [1995] UKHL 16, "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

[5] A v B & Anor (Unfair Dismissal) [2014] UKEAT 0409_13_2002

[6] European Convention on Human Rights, in both cases.

[7] See, for example, para 18 of R (on the application of Sarah Johnson and Lynette Maggs v The PCC of the NMC [2008] EWHC 885 (Admin)

All staff members are made aware of the boundaries of appropriate behaviour and conduct. These matters form part of staff induction and are outlined in the Staff Handbook / Code of Conduct. The schools work in accordance with statutory guidance and the SET procedures (ESCB, 2018) in respect of allegations against an adult working with children (in a paid or voluntary capacity). Section 7 of the current SET procedures provides detailed information on this.

The schools have processes in place for reporting any concerns about a member of staff (or any adult working with children). Any concerns about the conduct of a member of staff will be referred to the Head of School (or the Deputy Headteacher in their absence). This role is distinct from the designated safeguarding lead as the named person should have sufficient status and authority in the school to manage employment procedures. Staffing matters are confidential and the school must operate within statutory guidance around Data Protection.

Where the concern involves the Head of School, it should be reported direct to the Executive Headteacher. Where it concerns the Executive Headteacher, it should be reported direct to the CEO/EHT. Where it concerns the CEO/EHT it should be reported direct to the Chair of Trustees.

SET procedures (ESCB, 2018) require that, where an allegation against a member of staff is received, the Head of School, senior named person or the Chair of LAB must inform the duty Local Authority Designated Officer (LADO) in the Children's Workforce Allegations Management Team on 03330 139 797 within one working day. However, wherever possible, contact with the LADO should be made immediately as they will then advise on how to proceed and whether the matter requires Police involvement. This will include advice on speaking to pupils and parents and HR. The school does not carry out any investigation before speaking to the LADO."

28. Ms Faris' report to Ms Chudleigh (99) is in manuscript and was prepared by Ms Chudleigh on 08 February 2019, at 1.25pm. It states:

"In maths assessment x was sitting at a table. AM was sitting at the adjacent side table to x's left. As JF looked up from her group she saw AM strike x around the head. ***JF was unsure at the time if this was a joke or there was actual contact****. After lunch (AM off site) JF asked x if anything had happened during maths work with AM. X said "yes she hit me around the head." X said "I'm not lying because when she hit me I dropped my pencil and hit my head again on the table." JF also expressed concern about AM's manner with the children since her return. Children have said to JF that they are unhappy that AM shouts in their face. JF voiced her concerns to up who advised to take to HoS"* (emphasis added).

29. Ms Chudleigh then spoke with x at 2:20pm on 08 February 2019. The note says at its head, plainly added later and in a different colour *"TC (Ms Chudleigh) spoke to child VP made notes 8/2/19 2.20pm".* The note says:

"Working with Miss Mac

No other children – 2 children y and x
X finished first
Mrs M hit x around head then 'I bent down to get my pencil off the floor'
X said 'she was looking at y's work and then Mrs M hit me round the head'
Mrs M didn't say anything but told me to do my work.
X hit Mrs P (sic) *with a little bit of pressure + said it was a little bit hard & used the word slapped"* [The confusion in the last sentence was never questioned before this hearing.]

30. In the disciplinary hearing Ms Mackenzie set out some of what x had told her (125), recorded as follows:

> *"I spoke with x first, as I wanted to do this as soon as I could. I said that I wanted her to talk to me about what had happened before the weekend in school. I said that I wanted to know if anything had worried her in the classroom. X said "Do you want to know what happened when Miss Mackey slapped me round the head?". I asked her if she could tell me a bit more about it. "I was sitting on a chair in our class". X told me that it was [name] Class and that she was sitting next to Miss Mackey at the table. "I was doing my work, it was an activity, she was looking at my work and she slapped". X demonstrated an open palm and swung her arm in a circular motion. I asked her how she felt and she said, "A little bit sad". "Miss Mackey shouts when everyone talks and then... it wasn't yesterday, it was the other day, no other people got a slap, it was little bit hurt'. X went on to say that "No other ones shout" (I asked about this and x said she meant other adults). "Noone can do bullying play, if you do you go to Mrs Chudleigh, if you do it again you go back to Mrs Chudleigh". X was very clear about what she was saying had happened and was very matter-of-fact about it.*
>
> *She showed me what had happened with a slap. X demonstrated this with an open palm. She indicated to me that she knew what inappropriate behaviour was and described it in a very matter of fact way. She wasn't emotional about it at all."*

31. The issues with this process are:

31.1. Ms Chudleigh's manuscript notes have never been typed up, and were not provided to Ms Coggin who dismissed the Claimant, and were not provided to the Claimant or to her solicitors (who asked for all notes – the appeal hearing makes this entirely clear at 156) and was not provided to the appeal panel (although it appears that Ms Chudleigh took them with her to the appeal and referred to them in that meeting). The doubts expressed in it were not before either decision maker. They are relevant to the finding of fact that must be made about whether there was gross misconduct or not, as are the other matters below.

31.2. On 08 February 2019 Ms Faris was unsure whether there was contact or not. This is an uncertain basis for a career ending decision. The Respondent says that it is a basic point in child protection that people often will have the view that, in summary *"I*

could not believe my eyes". The Tribunal accept the evidence of Ms Rogan to that effect. No one asked Ms Faris why she had said that: it is simply an assumption that that is what she must have thought. It is not safe to rely on such an assumption.

31.3. Ms Faris spoke to x in the playground at lunchtime that day. This was not, as Ms Rogan suggested, to reassure the child (who, according to Ms Coggin, is a feisty child who had not been distressed and was in need of no reassurance). On the contrary it was to reassure Ms Faris. This means that there is no true independent evidence, for Ms Faris' evidence is based (at least in part) on her first conversation with x.

31.4. It also follows that the first evidence from x against Ms Mackey is hearsay from her accuser. The issue with this does not need elaboration.

31.5. Ms Rogan was firmly of the view that this discussion was not investigation as it was open questioning. First, that is Ms Faris account, accepted without question. Secondly, Ms Rogan was unable to say why this was other than an account of the proper way of investigating: plainly it was investigation.

31.6. There is a reason why there is a policy which precludes such investigation. It is to avoid contamination of evidence, as Ms Rogan accepted. Ms Rogan thought this conversation contained no such risk. The Tribunal finds that it does. Ms Coggin (and the management statement of case) was of the view that it breached the policy, but that it was understandable, as such thing happened very rarely. That is no reason to justify not following the policy, and nor does it being understandable (if it was) make it right, or less unsafe.

31.7. It also follows that Ms Faris did not hear any sound, which is a point apparently not asked of her.

31.8. The note does not say how far away Ms Faris was from the child, which is an important consideration. The classroom is about 5m across. The Tribunal was not able to ascertain the number of pupils in the class, but it does not appear to be a small class.

31.9. Ms Faris spoke to x at lunchtime: which was not in accordance with the Child Protection policy. She says that she did not ask other than open questions, but the possibility of confirmation bias is present, and doubtless that is one of the reasons for the policy's provisions. There is also the problem that an account once given tends to be repeated, so if the first encounter is subject to suggestibility the account acquires its own momentum[8].

31.10. The account is that x was looking at the book of another pupil, y,

[8] See Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor [2013] EWHC 3560 (Comm) paragraphs 15-21

but y was not spoken to at any time. It is said by the Respondent that y has limited vocabulary, so that it might have been difficult to get a credible account from him. That does not appear likely, for no complex words are needed. It is not said that y's mental capacity is impaired. If it was so, then caution would also be needed in the case of x, who was also categorised as vulnerable and attracting a pupil premium because she is the child of an illiterate single parent. There is no obvious difference between the weight to be attached to what either x or y had to say. Ms Rogan said that there was no evidence that y was seated next to x at the time, just that it was y's work that x was looking at. At the appeal hearing Ms Coggin said that she had not thought to speak to y because of his withdrawn nature and limited speech, not that he was not there. It may be that there were sound reasons for not speaking to y, but if so they appear to the Tribunal largely to be ex post facto justification.

31.11. Ms Chudleigh then spoke to x at 2:20pm on 08 February 2019. While understandable this was also not in accordance with the Child Protection policy, because that policy required this to be reported to the Executive Headteacher (presumably Ms Mackenzie, but certainly not Ms Chudleigh).

31.12. The note of that conversation (101) states *"I was looking at y's work and then Mrs M hit me around the head."* Ms Rogan said there was no evidence that he was sitting next to x at the time, just that x was looking at y's work. No-one asked Ms Faris this question. Ms Coggin said only that *"he was a very vulnerable little boy, with very limited vocabulary and wouldn't have made a very good witness"* (163), which is a different reason.

31.13. Ms Coggin and Ms Chudleigh suggested about 8 confident children in the class for Ms Mackenzie to speak to and she chose 4 of them. There are no notes of those meetings, but Ms Mackenzie said that none recalled anything amiss. There is an absence of any supporting evidence from any other child.

31.14. Ms Mackenzie interviewed Ms Faris on 12 February 2019 and on 06 March 2019 (125, disciplinary hearing). If she made notes of those meetings they have never been provided. These were important meetings, and what Ms Faris was asked and what she said was of great importance in assessing what (if anything) happened. The absence of these notes is important in my personal assessment of the evidence provided by the Respondent to seek to prove their allegation.

31.15. Ms Mackenzie made notes of her discussions with x. She referred to them in the disciplinary hearing (127):

"I can see in my notes that the child definitely said 'activity'"

These notes are important and they have never been produced to anyone. Given the way Ms Faris' evidence has been rendered simpler

than it was there is the greater need to examine those notes carefully. Ms Mackey's point was that she never used the generic word 'activity' and nor did the children, and it was unlikely that x would have done so: so indicating that she had been coached or the reported account was not accurate.

31.16. Ms Mackenzie prepared a *"summary of findings".* The purpose of an investigation is to gather evidence, not make findings of fact. Ms Mackenzie stated (113) that it was important to interview Ms Faris. She records *"Julia Faris reported that she witnessed Amy hitting x round the head…"* There are no notes of that interview provided to either dismissal or appeal hearing or to us. It appears that Ms Chudleigh showed Ms Mackenzie her notes, but Ms Mackenzie did not append them to her report. Her *"Summary of findings"* states *"Terri's* [Ms Chudleigh's] *notes about her meeting are entirely consistent with Julia's words to me."* This is misleading, because they are not entirely consistent. There is no shred of doubt in what Ms Mackenzie reports as Ms Faris' account.

31.17. Ms Mackenzie then sets out conclusions:

"I have a reasonable belief that an incident did take place as this has been corroborated by the LSA and the child's version of events, despite Amy's clearly denying any kind of incident took place."

It is not for an investigator to make findings of fact, but to set out the evidence gathered and recommend (or not) that the matter proceed to a disciplinary hearing. The limit of judgment should be whether the evaluation of the evidence is sufficient for there to be a case to answer.

31.18. Ms Faris made a written statement, relied on in the disciplinary process (122) which is dated 20 March 2019. This was prepared by someone other than Ms Faris, presumably Ms Mackenzie, and states:

> *"Julia Faris reported that she witnessed Amy hitting x round the head, this incident happened between breaktime and lunch time on Friday 8th February. Julia is the learning support assistant who was working with two children in [name] class doing writing assessments. When Julia looked up she saw Amy hit x across the head. Julia was shocked by what she had seen. She didn't say anything to anyone at lunchtime because she began to doubt herself. After lunch she spoke to x and said "When you were doing your maths with Miss Mackey, did anything happen?" X said "Yes, she hit me round the head" Julia then reported what she had seen to Terri Chudleigh, one of the heads of school.*
>
> *I confirm that the above account is a true statement of fact as reported to Karen* [Mackenzie] *on 12th February 2019"*

This omits the observation that when she saw something she was not sure if there was actual contact. The statement contains nothing other

than a statement of total certainty. That uncertainty (which must have been why Ms Faris spoke to x at lunchtime) is important for a decision maker to evaluate. The person who wrote it cannot have seen Ms Chudleigh's note of the first conversation with Ms Faris (at best).

31.19. Ms Coggin set out in her dismissal letter (134) the reasons for dismissal. She said:

"I therefore conclude on the balance of probabilities that you did 'hit' child K around the head in [name] classroom after 11.45am and before 12.10pm on Friday 8" February 2019 and that this constitutes gross misconduct."

The word *"hit"* is in inverted commas. Even taking into account the lengthier assessment (at 136) in the dismissal letter here are further matters, below, where Ms Coggin stated it "*could"* have occurred and the suggestion that Ms Mackey's medication made it more likely that she had hit x which are relevant to an assessment of whether she was right to conclude as she did.

31.20. There is a management case in support of the decision to dismiss (147 et seq). That is entirely sensible. Ms Rogan signed this off and corrected it. It was her statement of the management case, even if she did not draft it. It bears her imprimatur. She approved it. There is absolutely no way that the chair of a decision making panel should associate herself with the management case. The case law[9] about perceived bias makes this abundantly clear. This is a big organisation and the chair of the panel should have been demonstrably at arms' length, not correcting and signing off the management case. Ms Rogan said that she was only one of three, which meant it would be fair. This is palpable nonsense, as to have one of the 3 potentially biased in favour of one party is obviously unfair.

31.21. The summary of the case and the statements in it are in part couched in incendiary and emotive language:

"The handwritten notes not being provided as evidence which were used to support Nicola's decision to dismiss – The handwritten notes had been typed up and provided to Amy as part of the disciplinary pack, a copy of which was provided to Amy in accordance with the guidelines set out in the Hearts Academy Discipline and Dismissal Policy. So the fact that evidence was used which hadn't been given to Amy prior to the hearing is false. Amy questioned the use of the word 'activity' by the child and Karen Mackenzie the investigating officer pulled out her handwritten notes to double check that the word had been used by the child. The claim made in the appeal letter that Amy has not been given the opportunity to respond

[9] For example Magill v. Porter [2001] UKHL 67 & Lawal v. Northern Spirit Ltd [2003] UKHL 35, and relevant to teachers and this case S & Ors v London Borough of Brent & Ors. Oxfordshire County Council Head Teacher of Elliott School & Ors [2002] EWCA Civ 693

to this evidence is totally untrue."

That Ms Rogan associated herself with these comments amplifies the concerns over perceived bias. Even if it was her role to superintend such a document (which it was not) it should have been stripped of such terms as *"false"* and *"totally untrue".*

In addition, the statement above is incorrect. Ms Mackey was *not* given the opportunity to examine or contest the evidence. The manuscript notes of Ms Chudleigh were not typed up (99-101). They were never provided to Ms Mackey or to her solicitor. There are photographs of them in the bundle, but not in any document provided in the process. Ms Mackenzie may have *"pulled out her handwritten notes"* in the dismissal meeting (127) but she did not show them to anyone, and nor were they provided to us.

31.22. Ms Faris was not at the appeal hearing; Ms Coggin and Ms Mackenzie were. Ms Mackey had wanted her there. Ms Rogan said that Ms Mackey had the opportunity to call witnesses but had chosen not to do so. The letter calling the appeal hearing indeed says that Ms Mackey may call witnesses.

31.23. It is not normal for someone accused of something to call her accuser as a witness. Ms Mackey made it clear that she wanted Ms Faris there.

31.24. Ms Coggin was asked about it in the appeal and said (164) that the whistleblowing policy said she could be anonymous. While this was certainly a public interest disclosure, Ms Faris was not anonymous: this is not a reason why she was not there. Ms Rogan said there was no power to compel Ms Faris to attend. This is not so: it would be a reasonable management instruction to do so. On further enquiry of Ms Rogan her view was that this was not an appropriate thing to do, as Ms Coggin reported that Ms Faris was very stressed by the whole thing and did not want to do so. One of the panel, John Young, asked (164), about the absence of Ms Faris, saying *"Is that fair?"* and Ms Rogan closed off the point saying" *"It would depend on the Head, whether they wanted to put her through this. Regarding Amy's relationship with the class. The evidence says that Amy was angry."* The heads in question are Ms Coggin and Ms Chudleigh. It was they who suspended Ms Mackey and it was Ms Coggin who dismissed her. It was Ms Coggin's decision that was being challenged, and it was Ms Coggin who decided that the main witness to the alleged hitting of a pupil would not attend the hearing, so preventing the appeal panel from hearing from her. Ms Rogan effectively curtailed any consideration of whether that was fair or not. It was not. While witnesses are not often called to such meetings, if they are called, all relevant witnesses should be called.

31.25. The report of Ms Mackenzie (page 114) reports that Julia Faris *"did not say anything to anyone at lunchtime because she began to doubt herself"* but no-one asked her about that comment, or

considered it. It was assumed that this was the stereotypical reaction described by Ms Rogan to us.

31.26. Ms Coggin said to the appeal panel that *"on the balance of probabilities it could have taken place*" (163). This is emphatically the wrong test. Of course it *could* have taken place – the test is whether, on the balance of probabilities, it *did* take place.

32. The last words in the appeal were from Ms Coggins who said:

> *"Based on the evidence I still believe there is a case for gross misconduct. Timings have all given time for it to happen. All trust policies had been followed. In the balance of probability this incident did occur. We did not want to 'get rid' of Amy, we didn't accept her earlier resignation. During mentor meetings it was disclosed that the medications Amy was taking made her feel paranoid and anxious. Based on that we had no choice but to say this did happen."*

Whether there was a case for gross misconduct is not the point, which is whether the case is made out. Trust policies were not followed: this statement was wrong. The conclusion reveals a further reason why Ms Mackey was believed to have done this: an adverse effect on her mental health or behaviour caused by medication. Ms Mackey had indeed said in the past that the medication made her feel anxious, but nowhere is there any discussion with her or anyone else that she may have acted out of character because of the effect on her of medication, or that such an effect was a reason why it was believed she did it.

33. Ms Rogan's assertion in oral evidence that the discussion Ms Faris had with x at lunchtime on 08 February 2019 was within policy and reassurance for the child is illogical, and wrong: the management case which she signed off stated (148):

> *"Julia's breach of school policy.* [This was a heading in the letter of appeal] *This incident was thankfully a rare and unique one. Julia did what she felt was right at the time. Systems and training have been reviewed since and appropriate management action taken."*

This, of course does not address the point, which that the policy is there for a reason, and that someone did not follow it because she *"was doing what she felt was right at the time"* does not make it ok. Training people so that it does not happen again does not have any corrective effect on the case where it was not followed.

34. Ms Mackey put it well herself in the appeal hearing (155-156). The record of the Respondent of what Ms Mackey said at the start is:

> *"The first point, I fully agree. Julia failed the procedure and took it upon herself to question the child, therefore prompting her to say things.*
>
> *The classroom is open plan. We have a visual on each other. The timetable has proved wrong. This conversation was incorrectly minuted as discussed. The evidence is false.*

My Solicitor requested copy of handwritten notes. These should have been sent out.

Julia signed a statement 5 weeks after the investigation. This is poor practice. Things were vague. How can this be reliable source?

I did agree for the extra evidence to be produced. I knew it would be false. The false timetable was due to me proving it was false.

The suspension letter was wrong, being signed by Terri and Nic.

Can you prove that Julia did not lead the question in any way? The dismissal is based only on what Julia and the child said.

Witnesses. How could I call witnesses as the incident didn't occur?

…

Suspension. Nic and Terri suspended me. Both spoke and read, and signed the letter.

Therefore, Nicola was not impartial.

The handwritten notes have not been given as requested. This child has limited schooling and would never have used the work activity. Not many 5 year olds would.

…

As I have previously discussed. Julia did not leave the child in question. Although she says she was a hit, the accounts have changed three times."

35. The claim for wrongful dismissal requires the Tribunal to find, as a matter of fact, whether or not Ms Mackey was guilty of gross misconduct by striking a pupil on 08 February 2019.

36. The Tribunal unanimously finds that she was not guilty of gross misconduct. The three members of the Tribunal have differing reasons for so concluding. All three members of the tribunal consider that process was unfair and flawed, and that had there been an unfair dismissal claim it would have succeeded.

37. Mr Burrows focuses on the incident alleged to have happened and does not, for the most part, consider the procedural difficulties relevant to decision the Tribunal has to make. Something prompted Ms Faris to believe that something untoward may have happened, which is why she spoke to the child. She is a long-standing and well regarded LSA and had not made such an allegation before. The child's statements were similar but not identical, as would be expected. There was some detail in the account of the child such as dropping her pencil. She had demonstrated what she said had happened, on two occasions. No one suggested that Ms Faris was malicious. That Ms Mackey was said to be *"a bit shouty"* on occasion was some small support for thinking

that she might have done something without stopping to think about it. Overall this was enough to meet the balance of probabilities test of more likely than not, if not by a large margin, that something untoward had happened. Mr Burrows was concerned that Ms Faris had not been sure what she had seen, and that was why she asked the child. While Ms Faris said that there were open questions there was still a concern about the possibility of inadvertent coaching. There was no adequate explanation as to why she attended neither hearing. There had been no reaction from the class or the girl herself at the time, and the most this would have been was a mild cuff, to the extent of being, in the vernacular, something and nothing. However overall, on the balance of probabilities Mr Burrows finds that some impermissible contact had happened. Even allowing for very high behavioural standards rightly expected of teachers in schools this was not sufficient to warrant dismissal and so necessarily not a gross misconduct dismissal.

38. Mr Brown's view is that the gross misconduct dismissal was in effect for assault. The only adult in the room was not sure at the time. This was the word of one five year old, and there was no pushback from anyone at the time, from the child herself (who was described in oral evidence by Ms Coggin as feisty), from Ms Faris or from any other pupil (despite this being an extraordinary event), and an absence of information about the boy who may have been sitting next to her. It was possible some sort of contact had taken place but if so the evidence of this was not enough to believe, on the balance of probabilities, that it was an assault. The child said that she had dropped her pencil and banged her head on the table when picking it up, and while that could be consistent with the child dropping the pencil because she had been struck, that was not what she had said. Nor did Ms Faris record that. Nor did anyone else in the class notice her being struck, itself remarkable. The child had reportedly said that *"I'm not lying because I dropped my pencil…"* which may indicate a response to a question rather than being spontaneous, and so it is a concern that the evidence may have been led. The only evidence is that an adult half saw something, and the child later saying that she was struck and she struck her head on the desk afterwards. The allegation was of gross misconduct and so in effect there is only the evidence of the 5-year-old to rely on. So Ms Faris saw something but says what she thought might have been an assault, which was why she spoke to the child. There was no obvious stimulus to the alleged slap, other than Ms Mackey apparently saying she was not to look at y's work. It is said to be out of the blue, rather than the result of a loss of temper, as might be more likely. Mr Brown's conclusion is that there is insufficient evidence that there was contact amounting to gross misconduct.

39. My view is that the flaws in the procedure are many, varied, and substantial. They are set out above. My colleagues share those concerns, and the findings above are unanimous. Those concerns would have been relevant to an unfair dismissal claim, but they are also relevant to my finding of fact about whether or not Ms Mackie slapped the child. This is because they affect the weight which can be given to the evidence placed before us. Ms Mackey gave entirely straightforward evidence, much of it plainly truthful as her answers meant that her case on other aspects could not succeed. That has some relevance to an evaluation of her evidence on the crucial point for the wrongful dismissal claim. She could not call any witnesses when her case was that nothing had happened, and it is not for her to prove anything. Ms Mackey has no propensity to such an act in years of working with pupils in school. It is said to have occurred

out of the blue. When applying the test set out above, my finding is that the problems throughout the process mean that the evidence placed before us has been weakened or devalued to the extent that I cannot find that, on the balance of probabilities, Miss Mackie struck, slapped or hit the child at all.

40. These three views of the event all lead to the same conclusion, which is that Ms Mackey was not guilty of gross misconduct.

41. It follows that her claim for notice pay succeeds. The parties agreed that the sum was £8,700 and so the Tribunal orders the Respondent to pay that sum to the Claimant.

Employment Judge P Housego
Date 28 October 2020