



EMPLOYMENT TRIBUNALS

Claimant: Abdul Mohammad Basit

Respondent: Education Partnership Trust

Heard at: Liverpool

On: 6-9 April 2021
16-18 June 2021
1 July 2021

Before: Employment Judge Ord

Representation:

Claimant: Mr A Modgill (Counsel)

Respondent: Mr J Barron (Solicitor)

Judgment

- 1- The claimant's complaint of unfair dismissal is well-founded.
- 2- The claimant's complaint of wrongful dismissal is well-founded.

Reasons

Introduction

1. The main basic facts of this case are not disputed. Four boys (pupils B, C, D and E) arrived late for the claimant's maths lesson and were punished for this. Pupil D was sent outside the classroom and collected by the headmaster. Later in the lesson pupil A got into a cupboard at the back of the classroom for a short period of time. This was in response to something said by the claimant. After the maths lesson, pupils A, B, and C complained to the headmaster about the claimant with respect to the cupboard incident. The claimant was dismissed because of this incident.

2. It is the context of what happened and what was said that is important in this case. There is conflicting evidence from pupils and the claimant and the issue of credibility is paramount.

Claim

3. By a claim dated 1 October 2020, the claimant brought a complaint of unfair dismissal and wrongful dismissal.

Issues

4. The issues were agreed at the hearing as being:

(A) Unfair Dismissal

- What was the reason for the claimant's dismissal?
- If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant? In particular:
 - Did the respondent genuinely believe that the claimant had committed the misconduct?
 - If so, was this based on reasonable grounds?
 - At the time the belief was formed, had the respondent carried out a reasonable investigation?
 - Was the procedure within the band of reasonable responses?
 - Did the respondent act reasonably in treating the misconduct as sufficient to dismiss the claimant?
 - Was dismissal within the band of reasonable responses?
- If the reason was Some Other Substantial Reason capable of justifying dismissal, in this case a breakdown in trust and confidence, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

(B) Wrongful Dismissal

- Did the claimant fundamentally breach the contract of employment so as to justify the respondent treating the contract as at an end?

Evidence

5. The tribunal had before it a joint bundle of documents of 1,120 pages, and a separate document numbered 284A (Disciplinary Appeal Hearing – Basit Written Submissions). It also had a Pupil Anonymisation Schedule and SEN details for one pupil.
6. Pupil behaviour records were ordered by the tribunal, given their relevance to the case. They were included within the bundle. All those documents which contained pupil details, including statements, had the names of the pupils redacted.

7. It was not apparent from the face of the documents which pupils were being referenced. However, from the evidence presented at the hearing, and with the assistance of the Pupil Anonymisation Schedule, the tribunal is confident that it had sufficient knowledge to understand the evidence and the references made.
8. The claimant produced his own witness statement and supplementary witness statement, together with a witness statement from Assad Khan (head of the maths department). The respondent produced a witness statement and supplementary witness statement from both Jonathan Georgy (Governor and respondent's finance director), and Andrea Hepplestone (Chair of Governors). All of these witnesses gave oral evidence on oath.
9. Closing submissions were heard from both the claimant's and the respondent's representatives and these were also submitted in writing.
10. The numbers in brackets in the Findings of Fact below are references to pages within the joint bundle of documents.

Findings of Fact

Undisputed Background Facts

11. The claimant had been a teacher since 2012 and worked for the respondent since 1 September 2016 at Pleckgate High School. His duties included teaching maths to 11 to 16-year-olds, and he taught maths to class 9Q4, amongst others. This was a low ability class and many of the pupils within it had behavioural issues.
12. At the relevant time, the respondent employed about 300 staff over several sites. At Pleckgate High School there were around 174 staff. The respondent had an in-house HR function.
13. The claimant loved his job and his appraisals were consistently good, his management skills were praised, and his pupils made good progress. His teaching style was to use light hearted humour, including jokes in his lessons, and he used behaviour management techniques, such as asking a pupil to stand up, switch seats, go to the back of the class or wait outside. Pupil management was one of the claimant's strengths and his use of these techniques was generally effective.
14. The claimant had a clean disciplinary record. There was a spent record relating to an unsubstantiated allegation in May 2018 concerning the use of inappropriate language. However, the claimant denied the allegation and it was never investigated and was not the subject of disciplinary action. The claimant was not given an opportunity to defend it and it was dealt with by way of an informal chat.
15. There was an incident on 10 January 2020, which led to an investigation.

The Investigation

16. Mrs Tessa Robinson (Assistant Head Teacher) was appointed investigating officer and she was supported by Nicola McGonagle (HR operations manager).

Undisputed facts available to the investigation.

17. On 10 January 2020, the claimant was teaching class 9Q4 in period 5 from 14.00 to 15.00. Four pupils arrived 5-7 minutes late (pupils B, C, D & E) and this was not the first time they had been late to the claimant's class. When the claimant asked them why they were late, they lied about the reason. He discovered this when Mr Cadman (the teacher whose class they had just left) phoned the claimant in response to an e-mail enquiry to express his annoyance over the pupils' dishonesty. Consequently, the claimant gave all four of them a behaviour point on the School Information Management System (SIMS) which was part of the school behaviour system.
18. Pupil D was unapologetic and argumentative and the claimant told him to wait outside of the classroom in the corridor and called the Senior Leadership Team to have him removed. There was CCTV in the area of the corridor where D was standing. D had only recently moved to 9Q4 and this was as a result of his poor behaviour in his previous class, and the claimant did not want him setting a bad example to the rest of 9Q4. Mr Mark Cocker, the head teacher, arrived and went into the classroom at about 14.15 to speak to the claimant about pupil D. At that stage, the pupils were quietly listening and working. Mr Cocker removed pupil D.
19. There were 17 pupils in class that afternoon. The claimant was setting them work and periodically circulating around the classroom to check the pupils' progress. At about 2.40 the claimant started to mark the pupils' work and circled the class to check they were marking their work correctly, and giving feedback. The claimant noticed that one pupil, pupil A, was not engaged and appeared to be dozing despite several prompts. Using his normal management techniques, the claimant asked him to stand at the back of the classroom. Pupil A walked slowly to the back of the classroom.
20. There was a large cupboard at the back of the classroom and the claimant made a comment to pupil A, which resulted in pupil A getting into the cupboard and exiting it a short while thereafter.
21. The lesson continued and finished on time at 15.00. Most of the pupils were allowed to leave, but the claimant kept back pupils B & C for a short time as punishment for lying. He then let them go.
22. Unbeknown to the claimant, pupils A, B, and C then met up and went to Mr Cocker's office to make a complaint about the claimant. According to a statement given by Mr Cocker, this would have been close to the end of the school day, which would have been around 3-5 mins after pupils B and C were released by the claimant.
23. Pupil B made a disclosure to Mr Cocker that the claimant had forced pupil A into the cupboard. Mr Cocker's statement indicates that pupils B & C

were the most forthcoming in reporting the alleged happenings. Mr Cocker took statements separately from each of the three pupils.

24. The three statements alleged a significant number of potentially unprofessional incidents in class against the claimant relating to the afternoon of 10 January and other times. There were inconsistencies between the statements and similarities. With respect to the events that afternoon, all made allegations about the cupboard, the throwing of a book, and the claimant saying he would be kicked out/would leave the school. They also mentioned a book being thrown some time ago. As a result of these statements an investigation was commenced.
25. On Monday 13 January 2020 the claimant was taking form time, which was between 8.20 and 8.50. At about 8.40 he was asked by Rob Hamilton (the Deputy Head and Designated Senior Lead) if anything had happened during period 5 on 10 January regarding the class cupboard.
26. The claimant told Mr Hamilton that pupil A had got into the cupboard in response to the claimant making a joking remark, and he apologised for making the joke. Mr Hamilton asked the claimant to provide a statement about what happened and to make it clear it was a joke. He told the claimant that he would then return to his class at the end of form time to carry on teaching.
27. At that stage the claimant did not know about the allegations that had been made and he was not told how seriously the school were treating the incident. He therefore made a quick handwritten statement (77) on the pro-forma document he was given. It was brief and rushed as he was trying to complete it in time to return to class for the first lesson of the day.
28. Contrary to Mr Hamilton's assurance, the claimant was not allowed to return to class and instead was made to wait in a staffroom for over an hour. He then met with Ms McGonagle and Mr Cocker in Mr Cocker's office where he was told he was suspended on full pay pending investigation. The suspension letter (71) drafted by Ms McGonagle (76) and signed by Mr Cocker outlined the allegations against the claimant as:
 - Unprofessional conduct, further specifics being that you have had no regard to safeguarding pupils' wellbeing and failure to treat pupils with dignity, namely on Friday 9th January 2020, you instructed a pupil to get into a cupboard for a prolonged period of time, in the presence of peers during a lesson. This brings into question the trust and confidence placed in you as an employee at school.
 - Use of inappropriate and derogatory comments to pupils.
29. The incident was the topic of conversation amongst pupils at school on Monday 13 January. Ms Tabassem Hussain (Teaching Assistant) in answering a witness questionnaire said that pupil B was very excited to inform her about the incident on Friday 10 January. *"He was chuckling with laughter but barely could make sense of the incident..."*

30. Ms Hussain was never interviewed about the incident as part of the investigation or at all.

Contents of Statements

31. The most pertinent parts of the statements are noted below.

Pupil B's statement (68-69)

32. Pupil B alleged that the claimant had done/said a list of things such as: screaming at him and his mates for being late, and telling them that they were lying; threatening him that if B said sorry one more time he would no longer have a job in this school because he would be kicked out; telling B to stand at the back and throwing a book across the classroom and saying bull-crap; forcing B to say he was pathetic. B also wrote about alleged incidents that he said happened in the past such as throwing a book at B's face and using videos to make fun of A.

33. With respect to the cupboard incident, he went on to write: *"..he told [pupil A] go in the follow me and took him to the cupboard and forced him to get in even though [pupil A] didn't want to so he shouted at him and then put him in the cupboard and shut it."*

Pupil C's statement (92-93)

34. Pupil C also alleged that the claimant had done/said a number of things. He said *"so first Mr Basit threw my book" "so later he started screaming at me.." for a few months now he has been saying stuff to [B] and threw a book at him..... He also said to [B] that if he says sorry again he will leave the school."* He commented that the claimant screamed at him when he came in late but not at [E] *"..because [E] is his favourite student"*. He mentioned the claimant using a video to make fun.

35. With respect to the cupboard incident he wrote: *"..he told [A] to stand up and he forced him to go in the cupboard."*

Pupil A's statement (66-67)

36. Pupil A alleged a number of things against the claimant, for example, that the claimant *"got [C's] book and chucked it across the classroom."* *"He also said to [B] if you say sorry one more time then I will not have a job here anymore. He went on "about 1 or 2 months ago he got angry at [B] for not marking his work and he got [B's] book and chucked it at him."* He mentioned the use of a video to make fun.

37. Regarding the cupboard incident he wrote: *"he took me to the cupboard and said get in and I was ?? no then he said just get in now so I got in and locked the cupboard."*

Claimant's statement to Mr Hamilton

38. The claimant followed Mr Hamilton's instructions by clearly stating that the incident was meant as a joke. He wrote *"I asked [A] to go into the*

cupboard as a joke.....I didn't think he'd actually go in, but he did. I thought I'd entertain it but took him out as it was clear he wasn't leaving himself." "I have a running gag that the cupboard is haunted just to egg on the low set pupils into working".

Other pupils interviewed

39. On 13 January, 13 pupils out of the 17 pupils who were present in class during maths period five on 10 January were asked by Aishling McGinty (Deputy Head and Safeguarding Officer) to detail any concerns they had about the maths class that afternoon. In response, they wrote statements in their own handwriting (78-100).
40. There were a lot of inconsistencies in the pupil's statements. Some mentioned the cupboard and some did not. Ms McGinty identified those pupils who mentioned the cupboard and asked further questions of them. It is not known what these questions were or how they were asked. Ms McGinty then added any additional information to the pupils' statements in her own handwriting. A few mentioned that the claimant had said the cupboard was haunted.
41. Pupil D, who had been sent to stand outside the classroom on the Friday, said in his statement that he heard loud shouting and he jumped because the claimant threw a book at the door. However, when he was taken to the Head's office that Friday, he made no mention of any book being thrown.

Claimant's further statement

42. On 15 January the claimant sent a statement to Ms McGonagle (102-103), which set out his version of events. In it he emphasized that the context of what happened was incredibly important so as to avoid misinterpretation. The most pertinent points he wrote were as follows.
43. He had asked pupil A to go the cupboard, which is somewhere he usually made students face at the end of the lesson if they were disruptive to other students or off task. On this occasion, as a joke, he asked A to step inside and A giggled and to the claimant's surprise, did so. The claimant entertained him whilst he revealed an answer on the board and then made sure A exited the cupboard, which he did giggling. The whole event took 10-15 seconds. At no time was the claimant angry, shouting or forceful. Everything was light-hearted as it was nearing the end of the lesson and the end of the week.

Statements from members of staff and members of the community

44. The claimant provided statements from several members of staff and a number of members of the community. Tessa Robinson also obtained answers to witness questionnaires from a few staff members. The witnesses spoke of the claimant in the highest regard and attested to his professionalism, teaching skills and general good character. None of them had a bad word to say about him.

45. The following extracts demonstrate that the professionals who worked with the claimant had complete confidence in his pupil behaviour management and found him to be trustworthy and reliable. They show that his colleagues believed the claimant achieved excellent pupil results, that he was dedicated to his students and that he was polite and professional.
46. Assad Khan (Head of Maths), who was responsible for the claimant's appraisals said *"..I have seen [the claimant's] professionalism, passion for his students and subject on a daily basis. The claimant] is a strong member of the mathematics department who has always gone above and beyond for the students in his class.....Within the classroom setting [the claimant's] behaviour management skills are excellent and highly developed."*
47. Mrs Janet Perry (Maths Teacher), who taught a lunchtime maths club with the claimant, spoke of his trustworthiness and competency. She said *"Some of the students had challenging behaviour, but where I would get annoyed, [the claimant] was a very stabilising influence by talking quietly to the students and showing them what they should be doing."*
48. Another colleague, Stella Harrison, used to appraise the claimant and said she had observed him in class on numerous occasions. She spoke of his honesty, and respect for pupils, and his way of operating with a firm but fair approach. She said *"I place my trust completely in his professionalism."* She spoke of the consistently poor behaviour of some pupils in 9Q4 and other classes and that some pupils had needed to be moved around. She said *"I am sure the behaviour records of these pupils will confirm this."*
49. S. Mirza (Maths Teacher), who worked with the claimant, spoke of his integrity and desire to improve the lives of young people, and said *"He has been excellent in behaviour management and at times will share his sense of humour with pupils."*
50. Zahedra Patel, a colleague who shared a class with the claimant once a week said *"...he has always conducted himself professionally and has always been friendly and supportive."*
51. S. Munsh, spoke of knowing the claimant professionally and commented on how he always wanted to do well for the students and showed them great respect.
52. Mr Iqbal, who supported some of the claimant's maths classes all of which needed different levels of support, spoke of the claimant as being a fantastic teacher who was *"...gifted, talented and very trustworthy..."* He said he showed high levels of professionalism, was a good role model and demonstrated *"....a very well established rapport with all pupils and staff."*
53. Mrs Ruksana Qureshi (Teaching Assistant), who had supported the claimant said he was very professional.
54. Tabassem Hussain (Teaching Assistant), who supported the claimant with class 9Q4 one hour a week spoke of his extremely professional conduct.

She said he showed “..*excellent behaviour management skills and will address any issues regarding behaviour immediately....*”

55. Members of the community similarly gave good character references, speaking about the claimant's wider contributions to the community, his considerate nature and his trustworthiness, amongst other things. These people included an MP, a doctor, Councillors, his former line manager at his previous school, the community Imam at the local Mosque, and the Community Faith Coordinator for Lancashire County Council.

Investigation Meeting

56. On 16 January Ms McGonagle sent an e-mail to the claimant inviting him to an investigatory interview on 17 January. In it she set out the allegations to be investigated, namely: 1) that the claimant instructed a pupil to enter into a cupboard, which the pupil alleged was against their will during a lesson, and 2) that the claimant used unprofessional and inappropriate language in the classroom. It gave no warning of the potential consequences of the outcome.
57. At the meeting, the claimant read out an additional statement that he had prepared (108-109). Amongst the points made he said he was aware of the seriousness of the situation and he hoped that his honest recollections would help reach a better understanding of what happened.
58. He set out the facts as he remembered them, emphasising that it was a joke and not an instruction. The comment was made in the context of him previously joking with pupil A and others in class that they kept finding themselves standing by the cupboard, which was a naughty spot. He admitted it was poor humour and that he may have been too relaxed and casual towards the end of the lesson on a Friday afternoon. The atmosphere in the classroom was very relaxed and what happened was seen in a light-hearted way.
59. The minutes of the meeting (110 – 115) record aspects of the pupils' statements that were read out to the claimant. In response, amongst other things, the claimant denied that pupil A went in against his will and that the time period he was in there was five minutes (the claimant said that was ridiculous and it was 10-15 seconds). He also denied touching/forcing pupil A and shouting, (the claimant said there was no aggression) and that pupil A was distressed (the claimant said he was laughing). He denied throwing a book.
60. The claimant also pointed out the possibility of the pupils colluding over the weekend. He said it had happened before and staff had got into trouble. He thought it had been built up and was a massive misunderstanding.
61. Ms McGonagle raised the 2018 file note saying that it recorded the claimant making inappropriate comments to pupils and now there was a further allegation being raised of a similar nature. The claimant denied using inappropriate language and asked for witness statements to be taken from his colleagues.

Investigation report

62. Tessa Robinson wrote an investigation report with the support of Ms McGonagle (154-165). In it, Ms Robinson selectively detailed parts of the pupils' statements, including the allegations made about the cupboard.
63. She also set out the claimant's case including that he contended it was a bad joke made within the context of a light-hearted atmosphere. She noted his explanation that he had in the past joked with pupil A and others that they kept finding themselves standing by the cupboard.
64. The claimant also explained that it was not meant as an instruction. It was said in humour towards the end of the lesson and pupil A giggled and to the claimant's surprise actually got into the cupboard. The claimant's impression was that pupil A was fooling around and the claimant expected him to come straight out.
65. The claimant said he returned to the board to reveal the answer to the question. However, when he turned around, pupil A had not come out, so the claimant instructed him to leave the cupboard and to just get on with his work. Pupil A was giggling when he returned to his seat and seemed to find the whole thing amusing, as did some of the other pupils, whilst others were not paying much attention. The time he spent in the cupboard was no longer than 10 to 15 seconds. The claimant just simply carried on with the lesson and they packed up soon afterwards.
66. The claimant also made known that he did not intend to offend anyone and that he accepted the joke was in bad taste and an error of judgment and he apologised.
67. Ms Robinson remarked that pupil A was 14 years old and 5'7" tall, and that it would have taken time and effort for him to get into the cupboard. She established that the cupboard doors did not close.
68. She noted Mr Iqbal's statement that the claimant had an excellent relationship with all pupils and staff; and that of Mr Assad Khan, who said there were some difficult individuals in that set who previously had had to be removed.

Tessa Robinson's findings.

Allegation 1)

69. Based on the statements collated, on a balance of probabilities, the claimant asked pupil A to get into the cupboard in an attempt to implement a behaviour management strategy.
70. There were six statements that corroborated that the claimant made the request in a tone of anger and that he instructed pupil A. The claimant was likely to have been in a frustrated state due to the four boys arriving

late and lying, which impacted on his ability to implement effective behaviour management.

71. The claimant closed the door and returned to the front of the classroom and continued with peer feedback and marking before returning to the back to let pupil A out of the cupboard. This would bring into question the timescales proposed by the claimant around the duration that pupil A was in the cupboard.
72. The door to the cupboard did not shut and there was no key. So, the allegation of locking the cupboard was not substantiated.
73. The claimant's concern about colluding was not accepted.
74. Pupil A's emotional wellbeing may have been impacted as he said he entered against his will.
75. On the basis of the evidence submitted by senior members of the Maths department, it was concluded that the claimant's behaviour management was positive when observed. However, none of the observations were with 9Q4 and none of these staff were present on 10 January.
76. In conclusion, on the balance of probabilities a pupil entered a cupboard, the impact of which had the potential to have a detriment to a pupil's emotional wellbeing. The incident brings into question the claimant's professional judgment, which was found to be in breach of the school's Behaviour Policy and teachers' standards.

Allegation 2) language

77. Concerns were raised having reviewed the pupils' statements. The claimant denied making the alleged statements. Reference was made to the historical file note of 2018 and that it related to concerns of a similar nature.

Outcome

78. On 30 January Ms Robinson reverted both matters to a disciplinary hearing.

Disciplinary (minutes at 178-216)

79. On 31 January the claimant was invited to a disciplinary hearing by Ms. McGonagle (148) scheduled for 14 February, from which it was said a decision would be made based on the findings reached during the investigation. The allegations to be considered were set out in the letter as follows:

You allegedly instructed a pupil to enter into a cupboard, which the pupil alleges was against their will, during a lesson and that you used unprofessional and inappropriate language in the classroom.

80. Jonathan Georgy (School Governor and respondent's finance director) was appointed as chair and disciplinary officer. He was supported by Ms McGonagle and Caroline Howarth (Head of HR).
81. The claimant prepared a document to assist his defence at the hearing (217-218) which set out a timeline of what happened during the lesson and a plan of the classroom. He indicated that pupil A liked to play the class clown. He also gave his recollection of the words used in his joke to pupil A, making it clear that they were not verbatim. These words were to the effect of "you can go in the cupboard, you've been at the back that many times". He also wrote "A seemed amused and was determined to get in, and did so, as if it was a challenge and was smiling whilst giggling." "Being A, I thought nothing of it except that he wanted to be the class joker." When getting him out [A] mumbled something like – it's actually nice and cosy in there".
82. The claimant also prepared a detailed defence document (190-204), which he read out at the hearing. This dealt with a range of matters. These included, what the claimant believed were overall shortcomings in the investigation (190-194).

Claimant's concerns about investigation

83. In brief, the main points he made were that the investigation was unfair because:
- Not all pupils were interviewed. The report did not say why only 13 pupils were interviewed when there were 17 in the class that afternoon.
 - There were many inconsistencies in the pupils' accounts.
 - There was no explanation of how the pupils' statements had been taken or how the questions had been asked.
 - Ms Robinson unfairly accepted the pupils' inconsistent accounts in preference to the claimant's consistent account.
 - Relevant CCTV footage was not obtained despite the claimant identifying it as potentially relevant to pupil D's allegations against him.
 - Pupils' behaviour records had not been obtained. The pupils had appalling behaviour records with behaviour management plans in place and their consideration was crucial when considering the issue of credibility.
 - Insufficient weight had been given to the potential of pupil collusion.
 - No weight was given to the positive references made by teaching staff and community members about the claimant.
 - Ms Robinson made findings on the balance of probabilities that entering the cupboard may have damaged A's emotional welfare, yet there was no evidence of this. There was evidence that A was laughing. Only Ms McGonagle raised the issue of A being potentially upset when there was no evidence of this.
84. Some of these concerns were addressed in more depth at the disciplinary as discussed below.

Behaviour records.

85. At no stage of the disciplinary procedure did the relevant decision makers have the pupils' full behaviour records before them. The claimant had asked Ms Robinson for these records as he believed they would support his defence. The claimant repeatedly made it clear that the records were of crucial importance to the question of credibility and how trustworthy the pupils were. This request was repeated to Ms McGonagle, Mr Georgy (and later the appeal panel) but was always refused. There were summaries available but these did not show the full picture and were inadequate in the circumstances of the serious allegations being made.
86. At the disciplinary hearing Ms Robinson said that the records comprised personal data and the Data Protection Officer's advice was that this information could not be provided without consent. There was never any attempt made to obtain consent.
87. Ms McGonagle said that consent had not been requested because the information in the witness statements and that provided by the claimant was proportionate. She put it like this: *"The behaviour of the children is part of your case and was not considered relevant to the allegations that were within my remit to review."* *"We didn't feel this would be relevant. We just focused on what they said happened in the statements. The behaviour of the student would be part of your case to make."*

CCTV

88. The investigation did not view the CCTV footage from the corridor outside the classroom. The claimant pointed out that if the footage were reviewed it might have picked up D's alleged reaction when he said he jumped upon hearing the book being thrown. Nonetheless, this was not done at any stage of the procedure.

Pupil statements

89. The claimant raised concerns at the disciplinary about the pupils' accounts as identified in his defence (194-197), which included the following.
90. He had not been informed of the questions asked of the pupils and the questions should have been made apparent to him. Ms McGonagle's responded to this, rather than Mr Georgy, by saying a reasonable and proportionate investigation had been undertaken. However, the way the pupils were approached was not completely transparent, although an initial question asked appears to have been – did you have any concerns?
91. The claimant pointed out that there were discrepancies in the pupils' statements, and that their accounts varied from some making no allegations at all to others making additional claims (194-197).
92. Some pupils had not noticed that any of the alleged incidents happening. Others said the claimant was screaming all through the lesson, despite Mr Cocker saying the class was quiet and working when he arrived. The claimant pointed out that this allegation came from a group of friends and

was not made by others. One student initially said the claimant did not shout and then crossed it out. The claimant pointed out a certain pattern of words being used by friends.

93. Although past unprofessional incidents were alleged, no pupils had complained before. The alleged book incident on that afternoon was not mentioned in one pupil's initial statement but was added in by the interviewer later. Many pupils did not mention anything about a book being thrown that afternoon.
94. With respect to the three boys who complained, there were several differences in their accounts compared to what other pupils said. For example, all three alleged that the claimant:
- 1) used videos to make fun of A and showed "baby is a whore" to the class, but no other pupils mentioned this. They were inconsistent about when the video was shown. One said it was the previous day, another a few days prior and another a few months ago.
 - 2) threw a book at B months ago but no other pupils said this.
 - 3) used threatening language but nobody else said that.
95. None of the three mentioned the four pupils coming late to class and lying about the reason for their lateness. A said that the claimant locked the cupboard, but there was no lock on the cupboard. B said the claimant used the word "bullcrap" but nobody else said that.
96. The claimant pointed out that B had put more allegations in his statement than the others and he told the hearing that he believed this was because B had an axe to grind due to being told to stay behind after school. The statement from the Teaching Assistant, Ms Hussein, that he was laughing about it the following Monday, supported this belief.
97. Another pupil, who had a generally positive behaviour record, said in his statement that nothing of any significance happened in the lesson. However, the claimant was concerned that no weight had been given to this statement.
98. There was also an issue about missing statements. Whilst there were 17 pupils in class on the Friday afternoon, only 13 were interviewed.
99. In a post disciplinary hearing interview, Ms McGinty said the reason why the whole class were not interviewed was because only those in the tutor group on Monday morning were asked. The other five were not in form on Monday morning and interviewing them later would run the risk of their statements being tainted by school gossip over the incident.

Collusion

100. The claimant pointed out that the pupils who made the most significant allegations, including that A was in the cupboard for five minutes, used a similar pattern of words and were in the same friendship group. He asked whether pupils had been questioned about friendships. He told the hearing that those making the allegations were friends and

they would have had the chance to collude over the weekend by phone, social media, console or in person.

101. The claimant raised issues around Instagram and pictures of teachers being taken on IPADs by pupils and being shared amongst their friends. A few staff had been referred to in an offensive way on social media by pupils. Assad Khan confirmed to the disciplinary hearing that this had been raised in the Head's briefing.

102. Mr Khan also told the hearing that he had year 9 for period 3 on Monday 13 January and they were all talking about the cupboard incident. He reported that other maths staff had said the same. There were numerous different versions of events. It was all around the school and he had needed to stop the children talking about it.

103. However, Ms Robinson's view was that it would be incorrect to assume that the pupils had colluded. Mr Georgy said it did not lead to the fact that they had colluded but he would consider it.

Frustration

104. Ms Robinson had concluded that the claimant was frustrated by the four students coming late to the lesson, but the claimant pointed out that he had simply disciplined them in a proper manner. He was concerned that Ms Robinson had disregarded the statements from colleagues about his good classroom management skills. The claimant gave evidence that he had never been in a frustrated state with the students in the classroom and that there had never been any evidence of him being frustrated with a class. Ms Robinson confirmed that she reached this conclusion on the basis of the pupils' statements.

2018 incident

105. The investigation had concluded that the 2018 record showed that the claimant had a pattern of behaviour. The claimant denied this and questioned why the incident was being considered, given the circumstances under which the record came about.

106. Mr Khan said he was surprised at the use of the word pattern: *The behaviour records and results speak for themselves for these students. I've never had any issues when managing [the claimant].*

The claimant's supportive references

107. Despite the claimant's colleagues all speaking highly of him in relation to his character and his abilities, and community members referring to his good deeds and character, little weight was given to this. The explanation given was that none of those people were present in class on the afternoon in question.

After the disciplinary hearing

108. After the disciplinary hearing on 14 February Mr Georgy spoke personally to Mr Cocker (228-229) and Ms. McGinty (226-227) on his own without a note taker. The claimant was told on 25 February by letter (231) that Mr Georgy would speak to Mr Cocker and Ms McGinty that day and was asked to submit any questions. The statements from these two witnesses are actually dated 24 February, that is the day before the claimant was told, and they are unsigned.
109. On 25 February Mr Cocker questioned whether this additional information gathering veered into an investigatory role and he queried whether it was acceptable (233).
110. On 26 February Mr Georgy interviewed pupil A (236-237) in the presence of a Teaching Assistant (Jayne Ferguson). The claimant was not told about this interview. In response to questions put to A, he said he was told to get into the bottom of the cupboard and that the claimant put him in the cupboard. He said the claimant was angry and he closed the door as far as it would go; it felt like it was five minutes that he was in there. A said that after class he went to his friends and asked "*shall we go and tell Mr Cocker what just happened and they said yes let's go and tell Mr Cocker*".
111. The statements were typed up on 28 February and sent to the claimant (243), who was given a short time until 2 March to comment on them. He did so (244), pointing out that A's response nearly two months later was inconsistent with his initial statements on 10 and 13 January. For example, amongst other things, he was now saying "*get in the bottom of the cupboard*" "*crawling out*" which also no other pupils had mentioned. A was not questioned about why he initially said "locked" and was now saying closed "*as far as it would go*". The claimant pointed out that the inconsistencies had not been challenged.
112. The claimant also expressed concern about pupils B and C never being re-interviewed. The only evidence they had provided were those initial statements of 10 January, despite the respondent placing so much importance on what they said.
113. He again mentioned his belief that there had been collusion and said that there was ample time for the three boys (A, B, & C) to discuss matters and then go to the Head's office. He gave his view that B had been the instigator, which was backed up by Mr Cocker's evidence that he was the one that made the disclosure and Ms Hussain's comments that B was exuberant because the claimant had been suspended.
114. He also again expressed concern that nobody had questioned or commented on the credibility of the students during the investigation and discrepancies in their statements had not been challenged.

Disciplinary Outcome letter

115. Thereafter, Mr Georgy (had a discussion with Ms McGonagle (xx of JG) to explain the findings he wanted in the disciplinary outcome letter and Ms McGonagle prepared a draft for him (249). Mr Georgy raised a

concern about whether it was fair to say in the letter that the claimant shut the door, as there were few, if any, other statements that said he did (249). However, despite his concern, this was not changed in the final letter.

116. The outcome letter (259), amongst other things, concluded that:

- The claimant was highly likely to have been in a frustrated state and the lesson was fragmented and challenging.
- The incident was for the claimant's "own humour".
- The running gag about the cupboard being haunted was used as a threat to manage behaviour.
- The claimant differentiated his stance dependent on the ability of the pupil rather than in a consistent manner, and this was a concern.
- The claimant shut the doors.
- The claimant's frustrated state transferred to an angry tone of voice.
- Pupil A was acting on the claimant's instruction. By the claimant joining A at back of room, it was the claimant's intention to use the cupboard as a behaviour management strategy and by closing doors this demonstrated this motive.
- Instructing A to get into the cupboard was an action against his will. A stated he didn't want to get in.
- Pupil A described his feelings as upset and scared. This was found to be concerning and strong terminology from a year 9 pupil.
- There was limited opportunity for collusion.
- With respect to behaviour records it was not considered that the pupils' past behaviour should mean that any allegation they raised should be dismissed.
- In relation to the claimant's character statements and lesson observations, the evidence was considered that the claimant stated supported his professionalism and good character, but it was noted that none of the adults were present in the classroom at the point of the incident.

Final conclusions

117. The conclusions within the final letter dated 5 March, contained a number of strands Including:

- *Allegation 1* – the claimant used a behaviour management strategy outside policy, which was not consistent with that used for higher ability pupils, and created an environment not conducive with learning. Mr Georgy did not have trust and confidence that there would not be further complaints from pupils around the impact of the claimant's behaviour.
- *Allegation 2* – gave weight to the historical matter relating to alleged derogatory comments. Although Mr Georgy indicated that in the current case he could not corroborate the specific comments, based on the claimant's behaviour management and use of humour, he felt it highly likely that inappropriate comments were used that caused offence and upset.
- As a result of the above, Mr Georgy dismissed the claimant for gross misconduct with immediate effect. He went on to say that, had this not been the case, he would have dismissed for "some other substantial

reason” due to the breach of trust and confidence by the claimant’s behaviour.

118. Therefore, the claimant’s employment with the respondent came to an end on 5 March 2020. The claimant was given a right of appeal.

Appeal

119. The claimant exercised his right of appeal and wrote to the respondent on 11 March (267) setting out his initial nine grounds of appeal. In brief, these were 1) inappropriate investigation, 2) procedural unfairness, 3) dismissal not within band of reasonable responses, 4) disregarding mitigation and colleagues’ statements, 5) assertion of frustration, without evidence, 6) inappropriate conclusion that cupboard used as a threat and for behaviour management, without evidence, 7) finding of shutting cupboard, without evidence, 8) cherry picking and misquoting claimant, for example, saying he accepted that joking about the cupboard was an ill-judged behaviour strategy when in fact he said it was made in poor humour and error of judgment, 9) too much emphasis placed on trust and confidence and the potential for further complaints from pupils when there was no basis for this finding. He did not accept making the alleged 2018 comment (dealt with informally) and no other complaints had been made apart from what was being dealt with now. He later made another submission (286-293) setting out his case in greater detail and adding a couple more grounds relating to unfair approach and the credibility of pupils not being investigated.

120. An appeal panel was constituted, chaired by Andrea Hepplestone, Chair of Governors at Pleckgate High School, who sat with fellow Governors, Sharon Roscoe and Daniel Lord. There was a delay in progressing the appeal and it was not actioned within the school’s 20 working day time limit (594 para 7.2). The claimant chased the respondent on several occasions to have the matter considered and suggested it be dealt with remotely due to the pandemic.

121. The appeal panel did not receive the papers until 19 May. There was new evidence in the form of an incident log concerning pupil A, but this was not sent to the claimant until 1 June. The respondent proposed to the claimant that the appeal be conducted in writing and Ms McGonagle suggested a timeframe [284] for the process. Therefore, the appeal was conducted on the papers, although the respondent did not adhere to the timescale.

122. During the process, the claimant asked questions of the panel in writing, which were never answered.

123. Turning to the contents of the new evidence, this related to a log dated 20 January 2020 regarding pupil A and another teacher, Ms Swales, and out what happened in a detention. It said that A was messing around and when Ms Swales tried to call Ms Hartley, A said that *“they weren’t messing around and if [Ms Swales] told Miss Hartley, he’d make something up about [Ms Swale].*

124. The claimant commented on this in a letter to Ms McGonagle on 3 June (308). He pointed out that this was a behaviour record of A's, which proved what the claimant had been saying about their relevance. He had been asking for such records throughout. He noted that the log showed that A was threatening to make up things if his behaviour was challenged, which is what had happened to him. He asked a number of questions including why the records were not checked before he was dismissed and why this record had been produced now. He never received substantive answers.
125. Another relevant matter was known to the respondent, but does not appear to have been put before the appeal panel. It was contained in a record dated 13 March 2020 (268-269E) and concerned the questioning of pupil A by Mr Cocker about an incident the day before. Pupil A had made a threat to a supply teacher, Mrs McCaughran, to the effect that he would "get her out, like [he] did with another teacher".
126. When questioned, A admitted saying that he would get her sacked for a joke but swore that he did not mention Mr Basit (the claimant). A was asked if he had said something like this before and replied "Yes, as a joke to Ms Swales."
127. Mr Cocker made no reference to this record in his e-mail evidence to the appeal panel. The matter was not disclosed to the claimant.

Behaviour records

128. In his grounds of appeal, the claimant set out why the credibility of the pupils should be questioned and asked, in the interests of a fair investigation, for the behaviour records of the students to be produced and scrutinised. He submitted that they would uncover, amongst other things, issues or poor behaviour towards teachers and other students, large numbers of behaviour points and days spent in isolation or exclusion and histories of lying. He referred to the Head acknowledging that pupil A could be silly and the records would show the panel what the pupils were like and why some of the better-behaved pupils made no mention of the allegations.
129. He also complained that the investigation or disciplinary process did not contact the school behaviour officer nor the Head of Year, who could have shed some light on the behaviour and attitude of the students in question. He pointed out that ironically, Ms McGonagle felt the pupil behaviour records were irrelevant, yet she questioned the claimant's integrity and professionalism based on his behaviour records of a nonsensical accusation over 18 months old that was not investigated.
130. The claimant asked again for the behaviour records and they were refused. Whilst a snapshot of behaviour records was made available, this was very limited.
131. The claimant prepared his closing submissions on 26 June (363-365) without the benefit of the requested behaviour records or answers to questions he had asked.

Appeal Panel deliberations and outcome

132. The appeal hearing, which consisted of the panel's remote deliberations, took place on 6 July. However, the decision was not confirmed to the claimant until 22 July. This was about four and a half months after the summary dismissal. During this time the claimant suffered from significant stress-related health issues brought about by the situation.
133. There were only partial minutes of the deliberations (398-401) as the computer battery died. There are no handwritten notes.
134. The appeal panel widened the scope of the allegations to include a physical health and safety risk to A, which had never been raised before. The disciplinary had focused on emotional harm to A. The panel commissioned a health and safety report. The claimant was unaware the report was being commissioned and his views were not sought on its terms of reference. He was however, given an opportunity afterwards to comment on the report.

Appeal outcome letter.

135. In the appeal outcome letter dated 22 July 2020 (425 to 441) the panel upheld the finding of gross misconduct.

Allegation One

136. With respect to allegation one, the first part of the letter conveyed the finding that the claimant's conduct breached the school's disciplinary policy with respect to 1) Unprofessional conduct and/or failure to disclose the same, 2) a serious breach of health and safety rules, and 3) a serious breach of trust and confidence. Taking each in turn as follows:

Unprofessional conduct and/or failure to disclose the same

137. The panel said that, even if the claimant had made the comment about the cupboard as a joke, this would still not demonstrate that he had treated pupil A with dignity. The comment itself was unprofessional conduct, but as a joke would not amount to gross misconduct.
138. However, the panel's concern was about the events that occurred from A entering the cupboard to him leaving. They felt that this amounted to serious unprofessional conduct. They said that the claimant, having seen A enter the cupboard, did not take appropriate steps to remove him immediately but instead "entertained" it, and therefore showed wilful disregard for A's wellbeing, which the panel felt was a serious safeguarding issue.
139. Therefore, regardless of the claimant's motivations behind the comment, the claimant's actions following A entering the cupboard were sufficiently serious to be a serious issue of unprofessional conduct. It also amounted to a failure to disclose.

Serious breach of health and safety rules

140. This dealt with two strands, namely emotional wellbeing, and risk of serious physical injury. They stated that they felt this formed part of Mr Georgy's decision-making process and was not a new accusation.
141. The panel noted that the cupboard was not attached to the wall and said there could have been a risk of it toppling over. They felt there was a failure to safeguard against potential serious harm. Consequently, they found there was a serious risk to the health and safety of pupil A, both to his physical and mental health.

Serious Breach of Trust and Confidence

142. The panel recognised that this was a one-off incident and said that on the face of it there may have been scope to say it was not a breach of trust and confidence. However, because of their perception of the claimant's attitude, they believed the claimant showed little awareness and acceptance of his actions. They were therefore concerned that he might do something similar in the future. They also remarked that the regret the claimant showed was very narrow, and there was a lack of remorse.
143. The panel considered a lesser sanction, which involved transfer to one of the two other secondary schools within the Trust, but felt this was not an option due to the claimant's lack of remorse and potential to do something similar in the future.

Mitigation in respect of claimant's own admissions

144. Whilst the panel considered the good character references, like with the disciplinary, they gave them little weight because none of the witnesses were present in the classroom.
145. They took account of the claimant's long service and said they gave very limited weight to his previous file note and considered that he had a good disciplinary record prior to the incident.
146. They noted that some pupils did not witness the incident, but as the majority of issues were not in dispute did not feel that this was a significant element of mitigation.

Conclusion based on claimant's own admissions

147. The second part of the letter continued to reach conclusions based only on those incidents that the claimant had admitted, which the panel noted was just with respect to allegation one. They concluded that the claimant's actions were sufficiently serious to warrant dismissal for gross misconduct.
148. The panel felt that the events during the period immediately after pupil A entered the cupboard were the most damaging. They noted that the claimant did not immediately tell A to exit, but "entertained it", thereby

allowing a risk to health and safety. They felt that the fact of A was so serious that the claimant should have raised it with a colleague or manager. Therefore, they concluded that the claimant's actions were serious professional misconduct and a breach of health and safety rules and his lack of remorse caused a serious breach of trust and confidence. This justified summary dismissal.

Determination of those matters in dispute

149. The panel felt it was appropriate to make determinations about the issues in dispute with respect to allegation one.
150. They considered the credibility of the allegations and noted that the issues were limited. They referred to the new evidence with respect to the threat to Ms Swales but felt this was just pupil A using the claimant's situation as a "badge of honour" post event. The panel referred to the three pupils who made the accusations and said that a poor attitude to learning did not make the accusations any less credible. In any event they felt that, as the vast majority of facts were not in dispute, and they were unsure that even if they questioned A's credibility, it would affect their decision.
151. The panel considered whether the claimant had forced A into the cupboard and looked at the question of collusion, concluding that there had not been any, as not every pupil used the same vocabulary and not all pupils focused on the same events. They also believed on the balance of probabilities that the claimant did not make the comment as a joke. Based on the witness statements the panel felt that the claimant had forced (albeit not physically) A into the cupboard.
152. They also felt that the upset A had expressed about the incident was credible. They noted he had approached Mr Cocker immediately after the lesson and this was likely to be because of the upset the incident caused him. They did not believe that the claimant's evidence of how A felt was credible.
153. Whilst the panel did not think A was in the cupboard for five minutes, they accepted that it might have felt like five minutes to him, further evidencing how upset he was. The panel did not believe that A was only in the cupboard for 10-15 seconds based on the timeframe of events, although they said that the length of time was to an extent irrelevant. The issue was the delay in the claimant's response in getting A out, whether this was a few seconds or a few minutes.
154. With respect to the cupboard door, the panel accepted that it was unlikely to have been locked, but felt on balance that it was partially closed. The panel did not feel however that this led to any questions around A's credibility.
155. As for inconsistencies in pupils' accounts, they noted that there were some consistencies, and that the inconsistencies were minor. They said there was no evidence of collusion and if there had been, they found

it unlikely that no pupil would have disclosed that someone had attempted to collude with them or they were aware that collusion had taken place.

156. The panel determined that:
- The clamant was not joking and he insisted that A enter the cupboard;
 - A was genuinely upset about the incident;
 - A was in the cupboard for longer than 10-15 seconds.

157. The panel confirmed that the claimant's actions amounted to gross misconduct and dismissal was the appropriate outcome in respect of allegation one.

Allegation Two

158. The panel concluded that it was probable that the claimant made inappropriate comments that he believed to be humorous. They did not feel that if this allegation had taken place in isolation, it would have been gross misconduct.

159. The letter then went on to address the claimant's 11 grounds of appeal but did not uphold any of them. It concluded by upholding the decision to dismiss on the basis of gross misconduct. The panel said they were mindful of the effects the decision might have on the claimant's future career but unanimously decided that dismissal was the appropriate sanction.

Tribunal's order for disclosure of the pupil behaviour records

160. The tribunal hearing into the claimant's complaints commenced with the claimant's application for disclosure of the relevant pupil behaviour records and this was granted. The records were voluminous and contained hundreds of entries, including entries for dishonesty, abuse to teachers and disruption in lessons. The records relating to Pupils A, B, C and D are of particular note and the most pertinent entries can be summarised as follows:

- A – 364 behaviour record entries, including for dishonesty, abuse to teachers, abuse to pupils and disruption in lessons.
- Pupil A was also noted to be of SEN status, but there was no evidence that this impacted on his ability to understand behavioural requirements or that it affected his ability to do day to day tasks.
- B – 605 behaviour record entries, including for dishonesty, abuse to teachers, abuse to pupils, periods of exclusion, disruptive behaviour.
- C – 244 behaviour record entries, including abuse to teachers and disruption.
- D – 492 behaviour record entries, including dishonesty, abuse to teachers and pupils and disruption in class and school.

161. The behaviour records of other pupils who made damning remarks about the claimant were also very poor.

Law

162. Section 98 of ERA provides, so far as is relevant:

(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-

- a)
- b) Relates to the conduct of the employee

98(4) whether the dismissal is fair or unfair

(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.

163. The **ACAS Code of Practice 1** on Disciplinary and Grievance Procedures 2015 applies to the procedure followed.

164. Also of relevance is the **ACAS Guide: Discipline and Grievance at Work (2019)**, which says "*...the nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against it.*"

165. The main caselaw that the tribunal took account of is set out below, although other cases were also considered, which were referred to by the parties.

166. It was held in ***Abernethy v Mott, Hay & Anderson*** [1974] ICR 323 that: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee."

167. ***British Home Stores Ltd. Burchell*** [1980] ICR 303 held that "First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds,

had carried out as much investigation into the matter as was reasonable in in all the circumstances of the case.”

168. When determining reasonableness, the tribunal should not focus on whether it would have dismissed in the circumstances and substitute its view for that of the employer – ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, EAT.
169. The test to be applied in determining reasonableness is whether the employer’s decision to dismiss fell within the range of reasonable responses available to it – (1) ***Post Office v Foley*** (2) ***HSBC Bank plc v Madden*** [2000] ICR 1283, CA.
170. In ***J Sainsbury plc v. Hitt*** [2003] ICR 111, the Court of Appeal said that, in applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer’s decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere.
171. A disciplinary procedure should follow the principles of natural justice although a breach of these rules does not automatically make a dismissal unfair ***Slater v Leicestershire Health Authority*** [1989] IRLR 16.
172. The extent of the investigation required will depend on the circumstances. The gravity of the consequences and the impact on an employee’s career will be relevant, such as where the allegation of misconduct could mean disqualification from a profession, such as with teachers. See for example ***Salford Royal NHS Foundation Trust v Roldan*** [2010] ICR 1457, Court of Appeal; and ***Turner v East Midlands Trains Ltd*** [2013] ICR 525, Court of Appeal.
173. Where the consequences of an internal disciplinary procedure could lead to external statutory procedures, the standards of procedural fairness may be higher than in general ***Kulkarni v Milton Keynes Hospital NHS Trust*** [2010] ICR.
174. In ***Chhabra v West London Mental Health NHS Trust*** [2014] ICR 94 SC, the Supreme Court held that an employer had acted in breach of an employee’s implied contractual right to a fair process, as well as an express undertaking, where a HR manager had unduly influenced a case investigator’s report. The Court clarified it would be legitimate for HR to assist a case investigator in the presentation of a report, for example to ensure all necessary matters had been addressed and to achieve clarity, but not to go beyond that.
175. Whether or not a procedural defect is sufficient to undermine the fairness of the dismissal as a whole, is a question for the tribunal. Not every error will do so. It is crucial to assess the gravity of any procedural defect and consider its impact on the fairness of the decision as a whole – ***Pillar v NHS*** 24 UKEAT/0005/16/JW [2017] All ER (D) 173 (Apr).

176. A failure to follow the ACAS Code of Practice or internal procedures is not determinative of the fairness of a dismissal. The tribunal must address whether the procedure followed overall was reasonable – ***UPS Ltd v Harrison*** (UKEAT/0038/11/RN)(16 January 2012 unreported).
177. The tribunal must have regard to the appeal process when considering the unfair dismissal claim. It should examine the fairness of the disciplinary process as a whole and each case will depend on its own facts – ***Taylor v OCS Group Ltd*** [2006] ICR 1602, [2006] IRLR 613.
178. In ***Brito-Babapulle v Ealing Hospital NHS Trust*** [2013] IRLR 854 it was held that where dismissal is for gross misconduct, the tribunal has to be satisfied that the employer acted reasonably both in characterising the conduct as gross misconduct, and then in deciding that dismissal was the appropriate punishment.

Conclusions

Unfair Dismissal

What was the reason or principal reason for dismissal?

179. The respondent's dismissal letter said that the reason for dismissal was gross misconduct. It talked about trust and confidence and went to say that if it had not dismissed for this reason, it would have dismissed for some other substantial reason. However, it was clear from the letter and the disciplinary process that took place that the reason for dismissal was conduct.
180. The tribunal's finding is therefore that the reason for dismissal was misconduct.

Did the respondent genuinely believe that the claimant had committed misconduct? Was this belief based on reasonable grounds, following a reasonable investigation? Was this within the band of reasonable responses?

181. At each stage of the process there were faults, sometimes leading to imbalanced or baseless conclusions.
182. Mr Georgy reached his decision based largely on the findings of the investigation and there were significant flaws with the investigation.
183. The extent and diligence with which an investigation is required to be conducted is dependent on the circumstances of the case. The more serious the matter and the more serious the consequences for the employee, the more thorough and careful the investigation must be.
184. In this case there were serious allegations of misconduct alleging safeguarding of a pupil, and the potential consequences for the claimant as a teacher were grave, in that his professional career and livelihood were at stake. Accordingly, the most thorough and careful of investigations was required. This investigation did not meet that standard.

185. There were a range of faults as the following paragraphs show.

Behaviour records

186. First, there were substantial gaps in the evidence, the most concerning being the failure to produce and examine relevant pupil behaviour records. Despite the allegations being made by children with poor behaviour, and the claimant asking for the records throughout the process to demonstrate credibility issues, the full behaviour records were never obtained. The respondent, as a body, had seen the records, but unreasonably refused to put them before the disciplinary decision makers.

187. At the disciplinary hearing, Ms McGonagle took the lead on this matter, even though she was not the disciplinary officer, but an HR advisor. She said that the behaviour records were part of the claimant's case and they were not considered relevant to the allegations that were within her remit to review. There are a number of problems with this.

188. First, it was not for Ms McGonagle, as an HR advisor, to make this call. It was for Mr Georgy as the disciplinary officer to decide. This demonstrates that she was acting beyond her remit. Second, the records were relevant. They went to the issue of credibility and trustworthiness of the pupils and consequently were important when deciding what weight to give to the pupils' accounts. Thirdly, the claimant made it clear that the records would support his case, and it was unreasonable not to afford him access to them.

189. Following the tribunal's order for disclosure, it was apparent how important the records were to the investigation. Had this information been available, it would have provided context and a profile of what the pupils were like. From the records, the decision makers would have gained knowledge of how challenging certain pupils were, some having been accused of matters of dishonesty and teacher abuse. They merited careful scrutiny before reaching any conclusions on the reliability of pupil statements.

190. Whilst advice was obtained that the records should not be disclosed without consent, that consent was never sought. No serious attempt was made to ascertain whether disclosure was possible under the circumstances.

191. Although a snapshot of behaviour records was available at the appeal, they did not show the full picture and this was inadequate in the circumstances. There was even more reason to see the full records at this stage, given the new evidence concerning pupil A threatening teachers, but again they were refused.

192. The full behaviour records for the relevant pupils were crucial evidence in the context of this case, and given the seriousness of the potential consequences to the claimant, they should have formed part of the investigation. It was not reasonable to omit them.

Other gaps

193. The details of the incident relating to pupil A threatening Ms Swales was not made available to the disciplinary hearing despite it occurring some time before Mr Georgy made his decision. Although the record was available to the appeal panel, given the timeline, it was unreasonable not to have this evidence considered at the disciplinary stage.
194. The details of the threat pupil A made to Mrs McCaughran does not appear to have been before the appeal panel and was never disclosed to the claimant during the process. Yet the incident occurred months before the panel deliberated and it was a relevant matter that was known to the respondent as a body. This was a significant omission given the similarity of issues and this was unreasonable.
195. With respect to the CCTV footage, this could have picked up pupil D's reaction to the alleged book-throwing incident and this was potentially important evidence going to the credibility of D. Yet, despite the claimant asking for its production, it was not considered and this omission was unreasonable.
196. Only 13 out of the 17 pupils in class were interviewed because the other five would have had to be interviewed at a later stage and Ms McGinty believed this risked their statements being tainted by school gossip. This unreasonably threw doubt on the remaining five pupils' credibility in contrast to others. It was not reasonable to omit the accounts of anyone who might have witnessed the incident and who might have given valuable information.

Collusion

197. There was clear evidence before both hearings that pupils in the school were collaborating on social media to abuse teachers, and the Head had warned staff about this. The hearings were made aware of friendship groups and there were similar patterns of words used within some friendship group statements.
198. Teenagers constantly use social media to communicate and there would have been ample time over the weekend for these pupils to discuss the situation amongst themselves. With respect to the three boys who complained on the Friday, the main instigator B, as well as C had just been given behaviour points and made to stay behind. Their motive in complaining was apparent and the three to five minutes it took them to arrive at the Head's office was sufficient time to confer.
199. Little weight was given to the opportunities and likelihood of collusion at both the disciplinary and appeal stages and it appeared to be all but dismissed. The appeal panel thought that if there had been collusion, staff would have been told about it by some pupils. However, this was a baseless assumption. In the context of this case, it was unreasonable not to give more weight to the potential for collusion.

Issues with pupil accounts

200. The facts demonstrate that there were significant discrepancies in the pupils' accounts, yet these accounts were not tested or questioned. With respect to pupils B and C, despite the substantial weight that appears to have been given to their initial statements, they were never re-interviewed or questioned. Nor was pupil A questioned about the inconsistencies in his statements. Given the seriousness of the allegations, failing to test the pupils' accounts was not reasonable.

201. Also, the way the statements were obtained was not fully transparent or neutral. The initial question asked about whether pupils had any concerns was not completely neutral as the word "concern" could implant the idea of something going wrong. Moreover, it was not clear how the answers to the additional questions (those written in the interviewer's handwriting) were obtained. This adds to the lack of reasonableness.

202. Furthermore, it is unclear what weight was given to those pupil statements that indicated that nothing of note happened in the class. However, the appeal panel did not consider this to be a significant element of mitigation, which suggests that the weight given was limited, contrary to those who made the allegations. This appears unbalanced and adds to the unreasonableness.

Claimant's character references

203. Little weight was given to the character statements of colleagues and members of the community, the explanation being, at both the disciplinary and the appeal, that none of these people witnessed the incident. That is not the point. These many shining references, go to the credibility of the claimant and it was unreasonable not to give them more weight.

Finding of Frustration transferring to an angry tone of voice

204. This does not take adequate account of the claimant being used to dealing with poor behaviour, and behaviour management being a particular strength of his. It gave insufficient weight to Mr Cocker's evidence that when he arrived in class the pupils were working quietly. There was no evidence of the claimant being frustrated. This was a baseless assumption that was made at both the disciplinary and appeal stages and was not a reasonable conclusion to draw.

2018 incident

205. Despite the respondent labelling the incident as a safeguarding issue, this did not justify using an historical record of an informal warning as evidence. This is particularly so, as the claimant disputed the allegation and was given no opportunity to defend himself. Whilst the appeal panel said that they gave this record very limited weight, it was nonetheless something that was unreasonably taken into account.

Instructing pupil A against his will.

206. Mr Georgy found that the claimant instructed pupil A to get into the cupboard against his will. The appeal panel did not believe that the claimant made the comment about the cupboard as a joke and they found that he had forced pupil A into the cupboard. However, this been the case, it is unlikely that those pupils whose statements said nothing much happened, would have given such evidence. Also, little weight appears to have been given to the inconsistencies in A's accounts and his lying about the door being locked. It takes little account of the evidence that he was smiling and laughing and the claimant's consistent evidence that it was a joke and A would have understood it as such. It was unreasonable to give so much weight to A's statements.

A's emotional well-being

207. There was little evidence that pupil A was emotionally harmed. There was however evidence from both the claimant and others that he was laughing and known to be silly, and the claimant had described him as the class joker. Emotional welfare had not been a concern until it was raised by Ms McGonagle at the investigation stage. This was overstepping her remit as HR adviser, as she was not the investigating officer. At both the disciplinary and appeal stages there was an unreasonable imbalance in the weight given to the various pieces of evidence.

Allegation 2

208. There was little evidence upon which to uphold this allegation, and at the disciplinary stage, Mr Gregory admitted that he could not corroborate specific, alleged comments. Nonetheless, at both the disciplinary stage and the appeal stage, it was considered probable that the claimant made inappropriate comments based on his behaviour management and humour. This was supposition and without an adequate evidential basis. Consequently, it was unreasonable.

Other issues at disciplinary stage

209. At the disciplinary stage, the finding that this transferred to an angry tone of voice again demonstrates an overreliance on a few pupils' statements and little reliance on that of Mr Cocker and the claimant's abilities to manage.

210. Similarly, the finding that the incident was for the claimant's own humour was baseless and an unreasonable inference to make, particularly in the knowledge of the claimant's management style.

211. Finding that the gag about the cupboard being haunted was a threat to manage behaviour was an unrealistic conclusion. The pupils were streetwise 14-year-old teenagers and would not have believed the cupboard was haunted. They would have taken it in the light-hearted joking manner it was meant.

212. With respect to Mr Georgy's concern about the differentiation of stance being dependent on pupil ability, this unreasonably gave

insufficient weight to the claimant's acknowledged strength in behaviour management.

213. The finding that the claimant shut the doors should not have been made, as Mr Georgy expressed doubts about this to Ms McGonagle, but she failed to remove it from the dismissal letter.

214. Mr Georgy found that the pupils' poor behaviour should not mean that their allegations should be dismissed. Whilst on the face of it this was not an unreasonable finding, taken along with the other findings it demonstrates how unreasonably little weight was given to their behaviour and its impact on reliability and credibility.

Other issues at appeal stage

215. The appeal panel dwelt on the claimant's word "entertained" and interpreted it to mean that the claimant delayed in getting pupil A out of the cupboard. The claimant's case was that they misconstrued what he said and took it out of context. As this word became instrumental in the panel's finding of gross misconduct, it was crucial that they understood what was meant by it. Had the appeal proceeded by way of remote hearing, the panel would have been able to probe and explore this aspect with the claimant, but this was not done. Reaching this conclusion without discussing it with the claimant was unreasonable.

216. The panel should not have considered health and safety as this was not an allegation before the disciplinary hearing and therefore their findings were unreasonable.

217. Based on their perception of the claimant's attitude, and their concern that he might do something similar again, the appeal panel found a serious breach of trust and confidence. They were influenced by what they perceived as a lack of remorse, yet the claimant had repeatedly apologised and expressed his regret. Furthermore, to make such a serious finding in the circumstances of this case, without seeing the claimant, was disproportionate and unreasonable.

218. The panel considered disputed matters that went to the question of credibility without seeing the claimant and assessing his reliability. The inconsistent, untested accounts of a few pupils with appalling behaviour records, including for dishonesty and teacher abuse, were believed in preference to the tested, consistent account of a trustworthy, dedicated teacher, with a clean disciplinary record and exemplary character references from colleagues and the wider community. This was unreasonable. The following findings from the panel provide examples.

219. The perceived delay in getting pupil A out of the cupboard was crucial to the appeal panel's findings and whilst they did not think it was five minutes as alleged by pupil A, they thought it would have felt like five minutes to him. Despite his exaggerated account, they appeared to find his evidence reliable. They did not believe the claimant's evidence that the time-frame was only 10 to 15 seconds and found that it was more, thereby dismissing his reliability.

220. Despite pupil A initially saying that the claimant locked the cupboard door (there was no lock) and then changing his mind in a later statement, the panel did not think this impacted on A's credibility. Against the claimant's evidence, they found that the door had been partially closed.

Conclusion

221. There is nothing in the evidence to suggest that the respondent did not hold a genuine belief that the claimant had committed the acts alleged and therefore I find that it held a genuine belief. However, this was not based on reasonable grounds following a reasonable investigation and was not within the band of reasonable responses.

Was the procedure within the band of reasonable responses?

222. There were significant faults at each stage of the procedure.

223. For the reasons given above, the investigation was inadequate in the circumstances of the case. Furthermore, at the time the claimant was asked to give his initial statement, he was not told that there was an investigation and that the statement was being taken in evidence. When asked to an investigatory interview by Ms McGonagle, she did not warn the claimant of the potential outcomes. These failings were unreasonable.

224. There were insufficient written details provided to the claimant with respect to allegation 2. The alleged unprofessional and inappropriate language was not specifically set out in the disciplinary letter, dismissal letter or appeal outcome letter so that it was unclear throughout exactly what remarks were being investigated. This was unreasonable as the allegations the claimant needed to address should have been specific.

225. On a number of occasions Ms McGonagle overstepped her remit as HR advisor and ventured into aspects of the actual investigation and disciplinary decision making, thereby exerting improper influence. This included introducing the allegation of harm to pupil A's emotional welfare, refusing to seek disclosure of the disciplinary records, not changing the final version of the disciplinary letter regarding closing the cupboard door when Mr Georgy had expressed doubts about this finding. The HR function should avoid straying into areas of culpability and it was unreasonable in this instance to do so.

226. The appeal panel considered the claimant's credibility without seeing him even remotely. The process was undertaken by way of written representations and this did not afford the means to properly assess his reliability. At the tribunal hearing the claimant came across as a credible witness who gave consistent evidence, but the appeal panel did not have the benefit of such an observation.

227. Given that the claimant's credibility was paramount to the decision, it was important that the appeal panel was able to see him to assess his trustworthiness. Even if a face to face hearing was not possible due to the

pandemic, in the Spring/Summer of 2020 there were sufficient remote platforms available to conduct a remote hearing by video conference. To conduct a wholly written procedure in the circumstances was unreasonable.

228. There was considerable delay in commencing the appeal procedure and the respondent failed to keep to its own timescales. It took about four and a half months from summary dismissal to reach an appeal decision and this prolonged the stressful impact on the claimant, which affected his health. Even with the difficulties of lockdown, the extent of the delay was unreasonable.
229. The fact that the appeal panel broadened the scope of the allegations to include a breach of health and safety/physical harm to pupil A was against natural justice and prejudicial to the claimant. It was unreasonable to introduce new aspects of investigation at the appeal stage.
230. Other issues concerned the short timeframe given to the claimant for submitting questions to Mr Georgy for Mr Cocker's and Ms McGinty's interviews and thereafter commenting on their statements; not telling the claimant about the additional interview with pupil A without explanation and providing a very short time frame for commenting on his statement; Mr Georgy carrying out these additional investigations rather than Ms Robinson; and not answering the claimant's written questions at appeal stage
231. By reason of the above, the respondent breached aspects of the ACAS Code of Practice, and the procedure was not within the band of reasonable responses.

Did the respondent act reasonably in treating the misconduct as sufficient to dismiss the claimant? Was dismissal within the band of reasonable responses?

232. The identified gross misconduct ultimately boiled down to a perceived delay in getting pupil A out of the cupboard, whether this was a few seconds or a few minutes. This, coupled with a perceived lack of remorse, led to the unreasonable finding of a breakdown of trust and confidence, resulting in the sanction of dismissal.
233. For a well thought of teacher of good character with a good disciplinary record, dismissal was an extremely harsh sanction and not within the band of reasonable responses.

Overall Conclusion

234. The tribunal finds that the respondent did not act fairly in dismissing the claimant. Accordingly, in accordance with equity and the substantial merits of the case, the claimant's complaint of unfair dismissal is well-founded.

Wrongful Dismissal

235. For the purposes of the wrongful dismissal claim, the tribunal has considered its own view of events during the incident of 10 January 2020. In finding its own facts, the tribunal has taken account of the claimant's consistent evidence of what happened, which stood up to lengthy cross examination, and accordingly it considers him to have been a credible, reliable witness.

236. The tribunal finds that the claimant made a remark to pupil A in jest to the effect that he might as well get into the cupboard given that he found himself at the back of the room so often. The claimant's style of teaching was often light-hearted and he sometimes used humour in class. This was understood by the pupils.

237. Pupil A understood the claimant's comments to be a joke but liked to play the class clown and decided to take the claimant's words literally. He therefore, to the claimant's surprise, got into the cupboard for a short period of up to 15 seconds, by which time the claimant had got him out. This timescale did not amount to undue delay. Pupil A came to no harm and was smiling and laughing at the event.

238. This was not gross misconduct on the part of the claimant and did not amount to a repudiatory breach of contract that entitled the respondent to summarily dismiss him. Therefore, the claimant's complaint of wrongful dismissal is well founded.

Employment Judge Liz Ord

Date: 26 July 2021

ORDER SENT TO THE PARTIES ON

27 August 2021

FOR THE TRIBUNAL OFFICE

Notes

1. The hearing took place on a remote video platform. Neither party objected to the format of the hearing.