EMPLOYMENT TRIBUNALS

Claimant: Mr C Dale

Respondent: Oakwood Infant & Nursery School

Heard at: Midlands (East) – Hybrid (Cloud Video Platform and attended)
On: 21, 22, 23, 25, 28 and 29 June 2021
Reserved to: 10 and 11 August 2021

Before: Employment Judge Blackwell
Members: Mrs F French
Mr C Tansley

Representation
Claimant: Mr A Serr of Counsel
Respondent: Mr D Brown of Counsel

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claim that the Claimant was unfairly dismissed pursuant to section 103A of the Employment Rights Act 1996 (the 1996 Act) fails and is dismissed because the Claimant did not make a protected disclosure within the meaning of section 43A and section 43B of the 1996 Act.

2. The Claimant's claims that he suffered detriments on the ground of having made a protected disclosure pursuant to section 47B of the 1996 Act also fails for the same reason.

3. The claim of unfair dismissal pursuant to sections 94 and 98 of the 1996 Act succeeds. Accordingly:-

3.1 the Claimant is entitled to a basic award pursuant to section 122 of the 1996 Act but that it would be just and equitable to reduce the amount of that award by 50% because of the conduct of the Claimant before dismissal, and

3.2 the Claimant is entitled to a compensatory award pursuant to section 123 of the 1996 Act, but it would be just and equitable also to reduce that award by 50% because of the actions of the Claimant which caused or contributed to the dismissal, and

4. It would further be just and equitable to reduce the compensatory award to a period extending to 12 months from the effective date of termination, namely 12 October 2018.

RESERVED REASONS

1. Mr A Serr of Counsel ably represented the Claimant and he called the Claimant to give evidence. Mr Brown, also of Counsel, ably represented the Respondent and he called:

- Mr J Jacques, a Governor of the School who chaired the disciplinary panel which determined to dismiss Mr Dale.
- Mr C Edwards, also a Governor who chaired the appeal panel.
- Mrs J Cater, who was at all relevant times the Head Teacher of the School.

We also heard evidence from Mr R Tice, who carried out the investigation into Mr Dale's conduct. He appeared by way of witness summons and no written statement was produced for him. There was an agreed bundle of documents and references are to page numbers in that bundle. We are also grateful to both Counsel for their helpful final written submissions.

2. There was an agreed list of issues:

List of issues

Protected disclosure (s.43B ERA 1996)

1. On 16 October 2017, the Claimant presented a 20-page document to the Respondent; did that document disclose information which, in the Claimant's reasonable belief, tended to show that the health and safety of an individual had been endangered or that a legal obligation had been breached (s.43B(1)(d) or (b) ERA 1996)?

2. If so, was the disclosure made in the public interest?

3. Was the disclosure made in good faith (s.49(6A) ERA 1996)?

Automatic unfair dismissal (section 103A ERA 1996)

4. If the Claimant made a protected disclosure, was that the sole or principal reason for his dismissal?

Protected disclosure detriments (s.47B ERA 1996)

5. If the Claimant made a protected disclosure, was he subject to the following detriments on the ground of having done so:

a. the Respondent instigated a disciplinary investigation against the Claimant first through Mr Hughes in November 2017 and then Mr Tice in February 2018;

b. the disciplinary investigation and/or disciplinary procedure was flawed in that;

i. the evidence was anonymised;

ii. the Claimant was not provided with all relevant evidence requested in advance of the hearings;

c. the disciplinary panel appears to have taken evidence and/or interviewed witnesses without the Claimant having been given the opportunity to see or comment on this evidence;

d. the disciplinary panel failed to consider the Claimant's version of events and dismissal was pre-determined;

e. the Claimant's appeal was rejected

f. the disciplinary panel chose to refer the Claimant to the Teachers Regulation Authority and the Disclosure and Barring Service;

Time limits

6. With regard to s.48(3)-(4) ERA 1996, does the ET have jurisdiction to consider each of the aforementioned detriments?

Unfair dismissal (ss. 94, 98 ERA 1996)

7. What was the reason for the Claimant's dismissal? The Respondent contends that the Claimant was dismissed for the potentially fair reason of 'conduct'.

8. If the reason was conduct, did the Respondent have reasonable grounds to sustain its belief (the Claimant contends that the witness statements relied on by the Respondent do not support a conclusion of gross misconduct and that

Respondent failed to consider his version of events)?

9. Was the decision to dismiss pre-determined?

10. Did the decision to dismiss, fall within the range of reasonable responses?

11. Did the Respondent follow a fair procedure? The Claimant relies on the following matters:

a. the Claimant's grievance was never actioned;
b. the Claimant was not provided with relevant evidence in advance of investigation and disciplinary hearings;
c. the Respondent revived the allegations against the Claimant a significant period of time after they were said to have occurred and having indicated no further action would take place;
d. the Respondent revived allegations that had been resolved;
e. evidence was not given at the disciplinary hearing by the witnesses and/or there was no proper opportunity to challenge their evidence;
f. the Claimant was never subject to an improvement plan or warnings prior to dismissal;
g. Mr Tice was an inappropriate person to have conducted the investigation as he was not independent;
h. the evidence forming the basis for the Claimant's dismissal was anonymised, unparticularised witness evidence that was unreasonably difficult to challenge;
i. additional allegations were added unfairly during the process;
j. the panel appear to have taken evidence and/or interviewed witnesses without the Claimant having been given the opportunity to see or comment on this evidence;
k. the appeal against dismissal was procedurally flawed and unfair

12. If the dismissal was procedurally unfair, should the compensatory award be reduced on the ground that the Claimant would have been dismissed absent any established procedural error (*Polkey*)?

13. If the Claimant was unfairly dismissed, did he contribute to his dismissal such that a reduction should be made to any compensation (and if so, to what extent)?

3. There was a preliminary issue determined.

Preliminary issue

4. The Respondent's application that part of page 650 in the agreed bundle of documents is inadmissible in these proceedings is granted to the extent that that page is inadmissible from and including the paragraph which reads:

> "*With respect to the hearing itself I did say to Sarah that if she was prepared to have a without prejudice conversation, which she subsequently confirmed that she was, the hearing in reality is unnecessary.*"

5. There are a number of questions to be determined and we are grateful for both Counsel's skeleton arguments on the point. The without prejudice general rule is perhaps most succinctly put in the quotation at paragraph 11 of Mr Brown's written submissions. It is from a decision in ***Portnykh v Nomura International Plc [2014] IRLR 215***. His Honour Judge Hand said:

> *"It is, after all, very obvious that the operation of the* [without prejudice rule] *is likely to cause a forensic disadvantage to one party or another but the public policy supporting the exclusionary rule is predicated on that disadvantage being overridden by the need to create the most beneficial circumstances so as to encourage and facilitate the settlement of disputes and avoid litigation."*

6. That being the general rule, does the document at page 650 (or at least part of it) attract the protection of the general rule?

7. Firstly, there has to be in contemplation litigation. The context of the document is that it is a telephone attendance note by Mr Nicklin, a Solicitor with Flint Bishop who was advising the Respondent. It is an attendance note of a conversation with Miss Valentine of the trade union representing Mr Dale, the Claimant in this case.

8. The first part of the document is about the logistics of a disciplinary hearing. At that point, Mr Dale had been invited to attend a disciplinary hearing (see page 646). In that document, there are no less than 12 allegations set out, all of them serious in nature.

9. Further, at that point, indeed as far back as October 2017, in the document which is pleaded as the protected disclosure in this case, Mr Dale made a number of serious allegations, against Miss Carter, the Head Teacher. Such allegations included accusations of discriminatory behaviour. Thus, it seems to us that it is plain that litigation was in contemplation. The letter, as is normal in these cases, indicates that dismissal is a potential outcome of the disciplinary hearing.

10. The next question is whether the attendance note attracts the protection of the general rule. There are three crucial paragraphs, the first reads:

> "*With respect to the hearing itself I did say to Sarah that if she was prepared to have a without prejudice conversation, which she subsequently confirmed that she was, the hearing in reality is unnecessary."*

11. The second relevant paragraph reads:

> *"Sarah is perturbed by the fact that there are allegations a to L(* ie the allegations referred to above in the invite to the disciplinary hearing) *and that it would appear that the school will not be allowing Mr Dale to return."*

12. The third paragraph is a response which reads:

> *"I confirmed obviously without prejudice that this was the case. Mr Dale would not be returning to work as a teacher of Oakwood Infant and Nursery School and therefore the resolution for us would be to either proceed with the process which would involve a dismissal and a lengthy employment tribunal process presumably or moreover we come to an understanding with regard to a negotiated withdrawal."*

13. It seems to us that those paragraphs and the final paragraph on page 650 clearly attract the protection of the general rule.

14. The next question is whether or not privilege has been waived. The facts are that the document was disclosed in the form that we see at page 650, ie unredacted as a consequence of a Subject Access Report and that was on 2 March 2020.

15. On 12 March 2020, the Respondent's Solicitors took exception to the inclusion of that document in the bundle. As we understand it, waiver of privilege has to be unambiguous. In our view, it cannot be said that the disclosure in these circumstances constitutes a waiver of privilege.

16. The final question is whether or not the document, and in particular the paragraph in which Mr Nicklin says: "*I confirmed obviously without prejudice that this was the case. Mr Dale would not be returning to work …*" does that fall within the exception to the general rule?

17. Mr Serr in his submissions says as follows:

> "*Finally, the reference* [ie the exception] *being relied on is subject to unambiguous impropriety.* [Mr Dale's] *claim is for whistleblowing which is a form of unlawful victimisation. While there is no general exception to the [*without prejudice] *rule in such cases the context is relevant – Woodward v Santander ULK Ltd [2010] I.R.L.R. 834*."

18. He goes on:

> "*In the present case Mr Nicklin has conceded that the decision to dismiss* [Mr Dale] *is a foregone conclusion* <u>*before*</u> *the disciplinary hearing has even taken place. This is particularly grave given (i) the fact that Mr Nicklin was a solicitor and an officer of the court (ii) the intimate role Mr Nicklin and his firm played in the disciplinary proceedings and the fact that* [Mr Dale] *claims the disciplinary proceedings were only revived following the presentation of a disclosure document at a meeting in which Mr Nicklin was present and provided the advice (iii) wholly undermines*

> [the Respondent's] *case that the decision was taken freely fairly and independent.*"

19. In our judgement, that falls far short of the threshold of unambiguous impropriety.

20. Further, we note that our finding that it is inadmissible does not prevent Mr Dale from advancing all of the claims that he has pleaded, both by way of his original Claim Form and amendments thereto.

21. For that reason, we find that the document from the paragraph identified is inadmissible in these proceedings.

Background findings of fact

22. The Claimant has the following qualifications: BA MA PGCert Special Educational Needs (SENCO Award). He began his career as a primary school teacher in 2007 and began his employment at the Respondent (Oakwood) on 1 September 2015. Oakwood is a relatively small infant and nursery school, having at the relevant time 9 teachers, including the Head Teacher Mrs Carter, Miss Cottam, the Deputy Head and Miss Chapman, an Assistant Head Teacher, English coordinator and Head of Key Stage 1, who was effectively Mr Dale's line manager. There were also 24 part-time Teaching Assistants (TA). There were a number of ancillary and support employees bringing the total employment at the School up to around 60.

23. In October 2015 and November 2015, concerns were expressed about Mr Dale (see pages 264 – 266 and 267 – 268) which led to a meeting with Mrs Carter and Miss Chapman on 9 November 2015.

24. In March 2016, further concerns were expressed (see pages 273 – 275 and 276 – 279). On 19 October 2016 further concerns were expressed (see pages 284 – 285).

25. On 13 January 2017, there had been a breakdown of the relationship between Mr Dale and his Teaching Assistant, Miss Notley. As a consequence, Mrs Carter and Miss Cottam met with Mr Dale and Miss Notley on 30 January. It is a feature of this case that both Mrs Carter and Mr Dale produced their own notes of their discussions but there was never any agreed note and Mrs Carter never shared her notes with Mr Dale.

26. As a further consequence, Mrs Carter rang the Child Protection Unit at Derby City Council (known as LADO) and a record of that conversation appears at page 958. On 20 February 2017, Mr Dale was informed of the LADO referral and again there are two sets of notes, Mrs Carter's at pages 320 – 321 and Mr Dale's at pages 322 – 323. There is a conflict of evidence about this discussion, to which we will return.

27. The next day, Mr Dale was absent through sickness and was certified not fit for work with the conditions being variously recorded as "stress at work" or "acute reaction

to stress".

28. An occupational health report was obtained on 10 August 2017 (see pages 400 – 403). Mr Dale returned to work on 6 September 2017 on a phased basis and there were discussions about the phased return in September and October 2017.

29. On 12 October 2017, Mrs Carter wrote to Mr Dale at page 371 asking for the return of an Individual Stress Risk Assessment, which was to be discussed between them. Mr Dale replied in a lengthy email beginning at 372.

30. The Stress Risk Assessment was not produced before the meeting, which was held on 16 October, the notes of which begin at page 376. The Stress Risk Assessment begins at page 376 and is the document which is alleged to be the Protected Disclosure.

31. On reading the document, Mrs Carter (in our view correctly) identified the document as a grievance aimed at her.

32. A disciplinary process was then begun, which led to an invite to an investigatory meeting to be held by Mr Hughes, who was at that time Joint Head of Governors.

33. On 22 November 2017, Mr Hughes met with Mr Dale and his trade union representative. It is not in dispute that Mr Hughes behaved badly, which led to Mr Hughes no longer being involved in the disciplinary process.

34. In late January 2018, concerns were raised about Mr Dale encouraging a child to call him "Uncle Dale" (see pages 450 – 454). That led to a further report to LADO (see pages 458 – 459).

35. By early February 2018, Mr R Tice, Head of the Employment Law Branch at the firm of Flint Bishop, Solicitors (the HR advisers to Oakwood) was appointed to recommence the investigatory process begun by Mr Hughes.

36. Mr Dale wrote to Mr Tice on 19 February 2018 a lengthy letter beginning at page 464 setting out in considerable length his response to the charges made against him. He also made, at page 474, a number of requests for documents and in particular documents relating to references to LADO. Those documents were not disclosed to Mr Dale until after the commencement of these proceedings.

37. On 23 April 2018, Mr Tice wrote to Mr Dale inviting him to attend an investigatory meeting at the offices of Flint Bishop on 10 May 2018. In addition to setting out the allegations of inappropriate behaviour, Mr Tice forwarded eleven anonymous statements which begin at page 604. There was further correspondence between the two, but Mr Dale did not attend an investigation meeting on the basis that documents requested had not been provided.

38. On 31 May 2018, Mr Tice produced his investigation report (see pages 591 – 645). That report included the same eleven anonymised statements.

39. On 13 June 2018, Mr Jaques, who was the Chair of the Disciplinary Panel, wrote a letter at pages 646 – 648 inviting Mr Dale to a disciplinary hearing. The letter identified the allegations and also said:

> "*The Panel will also consider whether it will be feasible for you to return to your role at the School in view of the number of individuals at the School who have raised serious concerns regarding working with you in the future and whether there has been a breakdown in trust and confidence in you.*"

40. There followed further correspondence between both Mr Dale and his trade union and Mr Tice. In particular, Mr Dale wrote a lengthy letter to Mr Tice beginning at page 652 on 18 June 2018, commenting on the allegations made. On the same date, Mr Dale wrote to Mr Jacques a letter beginning at page 659 asking for further information and enclosing a list of documents he intended to refer to.

41. On 2 July 2018, a somewhat shambolic disciplinary hearing was held, flagging up that the disciplinary procedure required the investigating officer to attend to present the case but Mr Tice was not present. The notes are at pages 686 - 691. The meeting ends with requests for further information from Mr Dale's trade union representative.

42. At pages 720 and 721 Mr Tice responds to questions raised by Mr Dale and his trade union representative.

43. On 6 August 2018, Mr Dale (beginning at page 738) sets out a comprehensive response to the allegations made against him.

44. On 28 September 2018, Mr Jacques invited Mr Dale to attend a reconvened hearing set for 4 October (see pages 784 and 785). Mr Dale did not attend.

45. On 12 October 2018, by letter at pages 803 – 806, the panel concluded that summary dismissal was appropriate. It found the following allegations proven and that they amounted to gross misconduct:

> "*a. Humiliation of children;*
> *b. Using inappropriate language with children;*
> *…*
> *d. Inconsistent behaviour with children, favouring certain children and harsh behaviour with others;*
> *e. Failure to follow agreed School behaviour procedures (children having to stand for a whole input, extending sessions of time out and inconsistency of rewards and sanctions;*
> *…*
> *g. Dictating to children what they can have for lunch;*
> *h. Inappropriate physicality (Picking children up when it is inappropriate to do so, sitting them on his knee, forcibly moving children's arms and other*

> *examples set out in the statements) despite a management instructions not to do this.*
>
> …"

46. They found that in relation to allegations I, j, k and l, there was insufficient evidence to amount to gross misconduct but that the panel were satisfied that the likelihood was that these incidents also occurred. The letter also concluded that there had been a complete breakdown in trust and confidence.

47. On 24 October 2018, Mr Dale wrote two letters, one appealing against dismissal, this was again a lengthy and comprehensive response, both to the decision and the allegations against him. Also on the same date, he wrote a four page grievance beginning at page 810 complaining about the behaviour of the Governing Body.

48. Mr Dale then proceeded to write to the employers of each of the panel members complaining about their conduct. On 7 November 2018, Mr Dale's trade union ceased to represent him.

49. On 16 November 2018, Mr Dale was invited to an appeal hearing to be Chaired by Mr Edwards.

50. That hearing that took place on 29 November 2018, the notes beginning at page 870 and at 872 – 882 are comprehensive opening and closing statements by Mr Dale.

51. On 11 December 2018, see pages 884 and 885, Mr Edwards wrote to Mr Dale dismissing the appeal. They said:

> "…
>
> *The appeal panel unanimously agree that, on the balance of probabilities, the decision taken by the disciplinary panel to dismiss you for gross misconduct, and the disciplinary process followed in reaching this decision, was both fair and reasonable in all the circumstances.*
>
> *Further, we were particularly mindful of the fact that, notwithstanding your denial of the allegations, of the 11 members of staff who raised complaints against you as part of this process, 6 of these members of staff have said they could not work with you again. You have also raised numerous grievances against others throughout this process, including a grievance against the Head Teacher. In your appeal letter you state how you agree that there has been a breakdown in trust and confidence. Having now held the appeal hearing with you, and, having reviewed all necessary appeal documents, we would be in agreement with you on this issue. We discussed these issue with you as part of the appeal hearing. Ultimately, we feel that it would be virtually impossible for you to be able to return to work. I would also pose a huge difficulty within the school if were you to return, in that several employees have stated they could not*

> *work with you again. For these reasons as well, we feel that your dismissal is fair and reasonable in all the circumstances.*
>
> …"

Issue 1

52. Was the document set out at page beginning at 379 and headed: **Individual Stress Action Plan** and ending at 398 with appendices beginning at 399, a protected disclosure within the meaning of section 43B of the Employment Rights Act 1996?

53. We are indebted to both Counsel for their comprehensive written submissions on this point. The issue between the parties is in connection with the requirement that the disclosure must be made in the public interest. Mr Serr in his submissions set out at his paragraph 16 the principles that His Honour Judge Tayler applied the case of ***Dowbie v Paula Felton trading as Felton's Solicitors***. At paragraph 3 of that guidance, HHJ Tayler says:

> "… *the exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest …*"

54. At paragraph 8, HHJ Tayler sets out a four-fold classification of relevant matters being a useful tool to assist in the tribunal's analysis (derived from the ***Chesterton*** case).

55. The first is the numbers in the group whose interest the disclosure served. That is arguably the 9 teachers and 24 teaching assistants.

56. Second, the nature of the interests affected and the extent to which they are affected. This is a difficult question to answer in the context of the facts available here, save that all members of staff should not be bullied.

57. Thirdly, the nature of the wrongdoing disclosed is primarily the actions of Mrs Carter towards the Claimant but also general allegations of bullying. Finally, the identity of alleged wrongdoer is either Mrs Carter or Oakwood generally as the employer.

58. We have analysed the document said to be the protected disclosure and, save for general allegations of bullying by Mrs Carter and Miss Cottom at pages 388, 390, 393 and 397, it consists of a series of complaints against Mrs Carter about her treatment of Mr Dale.

59. Mr Brown in his submissions refers us to the Judgment of the Court of Appeal in the case of ***Chesterton Global Ltd v Nurmohamed [2018] ICR 731***. He draws attention to the paragraph in which Underhill, LJ said:

> *"I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the*

public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B (1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never."

60. Mr Serr submits that having regard to the ***Dowbie*** guidance, the individual Stress Action Plan is clearly a protected disclosure. As we have said, it is a difficult decision but, on balance, our educated impression is that it is overwhelmingly a personal complaint against Mrs Carter in respect of her behaviour towards Mr Dale over a period of more than 2 years.

61. We conclude, therefore, that the individual Stress Action Plan is not a protected disclosure within the meaning of section 43B of the 1996 Act. It therefore follows that the claims brought under sections 103A and 47B of the 1996 Act must fail.

Unfair Dismissal

What was the reason for the Claimant's dismissal?

62. We accept the evidence of Mr Jacques who chaired the panel which reached the decision to dismiss Mr Dale that the reason for the dismissal was Mr Dale's conduct as set out in the letter of dismissal of 12 October beginning at page 803. We also accept Mr Edwards evidence that that was the basis upon which Mr Dale's appeal against dismissal was refused. However, it is clear from the outcome of appeal letter at page 884 and which is quoted at our paragraph 51 that Mr Edwards and his panel held the view that there had also been a breakdown of trust and confidence, so too did Mr Jacques. Such can amount to some other substantial reason. In our view both these matters were in both Jacques's and Mr Edward's mind and both are potentially fair reasons for dismissal.

63. The Respondent's advanced only conduct and we accept that as the reason for dismissal. We have no doubt that both Mr Jacques and Mr Carter's panels had a genuine belief in the conduct complained of.

Fairness of the decision to dismiss

64. This must of course always be determined in accordance with subsection 4 of section 98 of the 1996 Act.

……"

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

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

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

Before doing so we would respectfully, and we appreciate with hindsight make the following criticisms of Mrs Carter who has now retired. Firstly, she has failed to grasp the nettle of the behaviour of Mr Dale. We appreciate that Mr Dale's mental health complicated the matter but there were a number of very serious allegations against Mr Dale throughout 2015 and 2016 and again early in 2017. It is our view that at the point of the second LADO referral Mr Dale should have been suspended and a disciplinary process begun. The next criticism of Mrs Carter is that the only notes of discussions were in her daily journal and these were never disclosed to Mr Dale during his employment. There should have been an agreed note of all of the discussions, and it should have been made clear to Mr Dale the nature of the discussions.

65. In that context we come to the conflict of evidence as to whether on 20 February 2017 Mr Dale was told by Mrs Carter that the concerns about his conduct were closed as a disciplinary issue. Mrs Carter's evidence was that she always intended to begin a disciplinary procedure in respect of the 2015, 2016 and 2017 issues. Her notes are in our view ambiguous. Mr Dale's note is clearer and to the effect that the matter was closed, and we accept that is what he believed. Again, had there been an agreed note the matter would not now be before us. We accept that Mrs Carter did suggest that Mr Dale might benefit from contacting his Union representative and/or general practitioner but that in our view was more likely to be in the context of the news that he had for the second time been referred to LADO and that he had already had a period of absence with mental health issues. We therefore conclude on the balance of probabilities that Mr Dale's recollection is the more accurate namely that the historic issues were closed.

66. That leads to the question of why the disciplinary process was begun after the meeting to discuss the stress risk assessment on 16 October 2017. Mrs Carter's evidence is once again that she had always intended to commence the disciplinary process, but we note that Miss Notley was moved following the meeting of 30 January and that there were no further individual discussions between Mrs Carter and either Miss Notley or Mr Dale. Further in our view the LADO note at page 958 is more consistent with matters being resolved informally than with the institution of disciplinary proceedings.

67. Further there is no evidence that Mrs Carter discussed the question of disciplinary proceedings against Mr Dale before October 2017 nor was he suspended as in our view he should have been. Nor was there a referral to Occupational Health to determine whether Mr Dale was fit to face a disciplinary process.

68. As Mr Serr points out the timing of the commencement of the disciplinary process is extraordinary and Mrs Carter accepted in cross examination that it looked awful. We have not heard from anyone other than Mrs Carter as to why disciplinary proceedings began after the meeting of 16 October 2017.

69. On balance it seems to us that disciplinary proceedings began then because it was abundantly plain to Mrs Carter and Mr Nicklin that there had been a complete breakdown of the relationship between Mrs Carter and Mr Dale. We also conclude that

Mrs Carter and Mr Nicklin had reached the view that Mr Dale would have to be dismissed. However, they were not the decision takers though they no doubt influenced the disciplinary process.

70. In that regard we also have criticisms of Mr Tice. The first is that his very appointment gives rise to a perception of bias. He was at all material times the Head of Flint Bishop's Employment Branch and Mr Nicklin who advised Oakwood throughout this process was a member of that department answering to Mr Tice. In our view Mr Tice's appointment was inappropriate.

71. The second criticism of Mr Tice is that in our view his investigatory report was one sided: -

a. He failed to obtain important contemporaneous evidence such as Mrs Carter's notes or the LADO notes.
b. He did not make further enquiries of potentially exculpatory witnesses such as Miss Higgins and Miss Castle.
c. In substance he ignored Mr Dales request for documentary evidence and in particular the LADO notes.
d. He made no real attempt to investigate whether Miss Hitchcock had left Oakwood's employ because of her relationship with Mr Dale or as Mr Dale alleged, she left because of bullying by Mrs Carter.

72. Further in regard to the decision to dismiss, Mr Serr's main criticism is that Oakwood were not entitled to revive the historic allegations which were the basis for the decision to dismiss. We agree with that submission firstly because as we have found Mr Dale was informed that that matter was closed but more importantly it was unfair within the meaning of subsection 4 of Section 98 to revive those allegations at all. We say this because no formal disciplinary action was ever taken against Mr Dale. We note that if it had been and warnings were issued then such warnings would have been time limited as is proper and fair in any disciplinary process. See at page 180 the relevant Derby City Council Policy at paragraph 2.14.3. For that reason alone we would have found the dismissal to be unfair.

73. Further there are a number of procedural matters the first being the complete confusion as to which of the disciplinary processes was to be followed, either the Derby City Policy or that of the Respondent. Mr Jacques panel appears to have followed the Derby Policy whereas Mr Edwards panel followed the Respondent's own Policy.

74. Mr Jacques panel properly put some of Mr Dale's evidence to the witnesses but did not disclose the evidence gathered to Mr Dale.

75. As noted above Mr Dale was never provided with Mrs Carter's notes, nor the LADO notes.

76. Mr Edwards discussed the issues with the Members of the Dismissing Panel before reading a decision on Mr Dale's appeal.

77. Mr Brown correctly submits that we are to look at the process as a whole. He submits that no unfairness arises from procedural defects, but we do not accept that submission. The procedural defects listed above taken with the considerable delay and the wholly inappropriate behaviour of Mr Hughes in our view render the dismissal unfair.

78. We would say that we make no criticism of Mr Jacques panel. We are satisfied that they behaved independently and reached a decision on the material that was before them. As to Mr Edwards' appeal, it seems a somewhat cursory effort but again we accept that Mr Edwards' panel acted independently and determined the matter on the material that they had. We accept that all of the Governors had the safeguarding of children as their principle concern.

Polkey

79. Mr Serr helpfully referred us to the case of ***Software 2000 Limited v Andrews [2007] ICR 825*** beginning at page 825 at paragraph 52, Elias J, the then President of the EAT's said as follows: -

> *"The case emphasises that the task is for the Tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened had there been no unfair dismissal. To fail to do this could lead to overcompensating the employee, which would not be a just outcome. In this context we would caution against taking the phrase "constructing the world as it might have been" too literally".*

At paragraph 54 Elias J set out a number of principles emerging from case law and matters to be followed by Tribunals. He emphasised that the burden lay on the employer as follows: -

> *"If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment including evidence from the employee himself".*

80. What then is the relevant evidence? There is clear evidence from the anonymised statements that two Teachers, one of whom was Miss Chapman, Mr Dale's Line Manager no longer wishes to work with Mr Dale. They were joined by three Teaching Assistants of similar views. We remind ourselves that this is a small School with a total of nine Teachers. Mrs Carter was also clearly of the view that she could no longer work with Mr Dale, but we note that she retired after Mr Dale's dismissal.

81. Miss Cottam who was also very critical of Mr Dale, though falling short of saying that she would not work with him, had retired by the time of Mr Dale's appeal.

82. We recognise also that a reasonable employer would have sought to mediate between the parties. However, given the size of the School we think it highly unlikely that such mediation could have succeeded.

83. We have also taken into account Mr Dale's performance of his duties over the years. As we have said above, he should have been suspended not later than February 2017 and his conduct up to then should have been subjected to a disciplinary process.

84. We note also that the "Uncle Dale" incident which emerged in January 2018 is further evidence of a lack of judgment on Mr Dale's part.

85. There are also a number of criticisms of him not following management instructions and protocols see for example page 607, 612 and 613. We also see a file note at 364 prepared by Miss Chapman of 28 September 2017, a matter not referred to in the disciplinary process, but which again showed Mr Dale acting in an unauthorised manner and doubting his account. We note that Mr Jacques in his decision letter records the following at paragraph 2.2 on page 805: -

> "*Your attitude to the matter. You have not acknowledged the seriousness of your actions and have shown little remorse for your actions. We also believe you have not shown understanding of why your behaviour was inappropriate".*

86. We have read Mr Dale's responses to all of the allegations against him and they are lengthy and comprehensive. They show he understood the allegations. We have also taken into account his evidence before us and his correspondence to the employers of those who sat on the disciplinary panel. We agree with Mr Jacques impression. In our view Mr Dale shows a lack of judgment and we also note that since at least early October 2017 i.e. before the start of disciplinary proceedings he had embarked on a vendetta against Mrs Carter, see the wholly inappropriate and ill judged email beginning at page 372. He also comes across as a "barrack-room lawyer", again illustrated in that document.

87. At page 815 in his letter of 24 October 2018 appealing against the decision to dismiss Mr Dale says as follows: -

> *"In the letter dated 12 October 2018 to myself it is stated that there has been a complete breakdown of trust. I agree with this statement however this is not down to me in anyway, I have always sought to be factually correct, provide evidence where I am able to so (despite being hindered by the School, the Governors and Flint Bishop's Solicitors) and engage fully with an increasingly discriminatory and biased process".*

In that context Mr Dale repeatedly made allegations of disability and sex discrimination, see for example page 466, though such allegations were not pursued before this Tribunal.

88. Taking all these matters into account, and in particular that six Governors had concluded that there had been a complete breakdown of trust and confidence, we can say with confidence that Mr Dale's employment would have been terminated fairly and lawfully within 12 months of the effective date of termination. Thus, the compensatory award should end at that anniversary.

Contributory Fault

Section 122 sub section 2 of the 1996 Act

89. **Basic award:**

……"

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".

The conduct involved must be culpable or blameworthy which effectively amounts to the same thing. In assessing culpability, we are entitled to take into account the whole of the evidence before us including the historic allegations and the undoubted breakdown in trust and confidence.

90. We give full weight to Mr Dale's rebuttal of the charges against him in particular as given in his proof of evidence. We have the clear impression that by reason of his qualifications he believes that in general that he knows best. He seems somewhat dismissive of Teaching Assistants and in particular Miss Knotley. All of his Managers expressed disquiet about his inability to follow management instructions and we are satisfied that at least in part his conduct led to the breakdown of relationships between himself and some of his colleagues. Thus, there was blameworthy conduct. The second question is whether or not that blameworthy conduct led at least in part to the dismissal. We have no doubt that it did.

91. To what degree would it be just and equitable to reduce the compensatory award. We take into account that we have already found that it would be just and equitable to limit the compensatory award to a period of one year we therefore conclude that it would be just and equitable only to make a further reduction of 50%.

Compensatory Award

92. **Section 123 sub section 6 of the 1996 Act**

….."

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

93. Though the wording differs from that relating to the basic award we see no reason in principle to depart from the reasoning applied above. We therefore conclude that it is just and equitable to reduce the compensatory award by 50%.

Remedy

94. Given the limited parameters we would hope that the parties can come to an

agreement on the sums to be awarded to Mr Dale. If they cannot then Mr Dale must apply to the Tribunal for a Remedy hearing within 28 days of the date of this Judgment.

Employment Judge Blackwell

Date: 1 September 2021

JUDGMENT SENT TO THE PARTIES ON

3 September 2021

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FOR THE TRIBUNAL OFFICE

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