



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms D Phipps

**Respondent:** The Sovereign Trust

**Heard at:** Manchester (as a hybrid hearing)      **On:** 5, 6, 7, 8, 9, 12 & 13 July  
2021 with submissions &  
chambers deliberation on  
13 August 2021

**Before:** Employment Judge Johnson

**Members:** Ms V Worthington (by CVP)  
Ms J Pennie (by CVP)

## Representation

Claimant: Mr B Williams (counsel)

Respondent: Ms L Carr (solicitor)

# JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's complaint of constructive unfair dismissal is well founded. This means that the claimant was constructively unfairly dismissed.
2. The claimant made a protected disclosure in accordance with section 47B(1)(c) Employment Rights Act 1996 in relation to her letter of appeal dated 18 July 2018 concerning possible disciplinary action relating to 'whistleblowing'.
3. The claimant was not subject to any detriments contrary to section 47B Employment Rights Act 1996 nor was her resignation prompted by any detriments which arose from the protected disclosure identified in paragraph 2 of this judgment, contrary section 103A of the Employment Rights Act 1996. Accordingly, this means that the whistleblowing complaints are unsuccessful and are dismissed
4. The case will proceed to a remedy hearing on a date to be confirmed, to determine the quantification of the successful complaint of constructive unfair dismissal.

# REASONS

## Introduction

1. The claimant was employed by the respondent as a Level 2 Special Needs Teaching Assistant at their Pictor Academy in Timperley from 21 June 2010 until her resignation with effect from 3 September 2018.
2. She presented a claim form to the Tribunal on 16 November 2018 following a period of early conciliation and brought a complaint of constructive unfair dismissal. The respondent presented a response resisting the claim and at a case management hearing before Employment Judge Hoey on 31 May 2019, the claimant was permitted to amend her claim so that she could also bring a complaint of detriments/dismissal arising from the making of a protected disclosure. The respondent was permitted to present an amended response in reply.
3. The case was initially listed for a 7-day hearing in the Manchester Employment Tribunal and it was to be heard by Employment Judge Dunlop from 18 to 25 March 2020. However, due to a personal matter involving one of the advocates, it was necessary to postpone the hearing on day 2, (the first day being a reading day) and to re-list for a 7-day hearing before this Tribunal.

## Issues

4. The parties spent the first day of the hearing agreeing a list of issues while the Tribunal carried out its initial reading of the papers. Mr Williams provided a draft list in time for the hearing of witness evidence which began on the second hearing day. It was not a finalised list due to certain issues remaining in dispute between the parties. For completeness, the list of issues is included below:
5. Did R adequately investigate the incidents for which C was disciplined having regard to the relevant procedures (1<sup>st</sup> ET1 §10, 13, 20)?
6. Was the decision to suspend lawful, reasonable and/or made in accordance with the relevant procedures (1<sup>st</sup> ET1 §11, 19)?
7. Did R comply with its own procedures, the ACAS code in relation to the disciplinary procedure? (1<sup>st</sup> ET1 §12-17, 21-22, 26, 37)
8. Did R fail to investigate or follow up on Ms Heywood's role in the "swearing incident" on 26 April 2018 and her complaint of threatened violence? (1<sup>st</sup> ET1 §24)? *[Proposed by the Claimant; objected to by the Respondent]*

9. Did R inappropriately rely on the “swearing incident” during C’s disciplinary process? (1st ET1 §25)
10. Did R investigate C’s grievance adequately and in accordance with the relevant procedures? (1st ET1 §27)
11. Did C comply with the requirements of the grievance procedure in submitting and pursuing her grievance? (para.9 AW Statement)
12. Did R treat C in a manner that was inconsistent with its treatment of other staff? (1st ET1 §28-29)
13. Did the complaints raised by C (on 25 May, 5 June, 11 June, 25 June and 18 July 2018), or any of them, amount to protected disclosures within the meaning of s.43B ERA 1996? (1st ET1, §30; Amended ET1, §4-7)
14. Did C suffer any detriments for the purposes of s.47B ERA 1996 on the ground that she had made a protected disclosure? (1st ET1, §30; Amended ET1, §4-7)
15. In the circumstances, was the sanction of a final written warning appropriate? (1st ET1 §5-6)
16. If there were any defects in R’s process or decision-making, including in relation to the issue of a final written warning, were they corrected on appeal? (1<sup>st</sup> ET1 §7-8; Amended ET1, §9)
17. Did the provisions of the grievance and disciplinary procedures form part of C’s contract of employment? If so, did R by its conduct breach any term (either the implied term of mutual trust and confidence, or the provisions relating to grievance and disciplinary procedures) of C’s contract of employment?
18. If any such breach related only to the express grievance and disciplinary provisions, was it a repudiatory breach (noting that breach of the implied term is always repudiatory)?
19. Did C resign in circumstances where she was entitled by reason of the cumulative effect of R’s conduct to treat herself as dismissed?
20. In all the circumstances, was the dismissal unfair for the purposes of s.98 ERA 1996? If so, did C’s conduct cause or contribute to her dismissal?
21. **If C’s dismissal was unfair for the purposes of s.98 ERA 1996, would she, by her conduct, have been dismissed fairly in any event? (para. 37 BO Statement)**  
***[Proposed by the Respondent; objected to by the Claimant.]***

22. Were C's alleged protected disclosures the reason, or principal reason, for C's dismissal (1st ET1, §30; Amended ET1, §4-7)?
23. Was C's constructive dismissal wrongful? (Amended ET1, §10)
24. **What is the effect of R's failure to file and serve an amended ET3 in accordance with the Tribunal's order of 27 June 2019? [Proposed by the Claimant; objected to by the Respondent.]**
25. To what compensation should C be entitled?
26. The Tribunal heard submissions from both Ms Carr and Mr Williams concerning the issues were in dispute and took these into account when considering its decision.

### **Evidence Used**

5. The claimant Ms Phipps gave oral evidence in person and also relied upon the witness evidence of former colleagues:
  - a) Ms Christine Aulton, a teaching assistant in the same class (written statement only with no oral evidence); and,
  - b) Ms Nicola Kinsella, the teacher for the same class (remotely).

The claimant was reminded that a statement submitted in writing without the witness giving oral evidence under oath, would have limited evidential value.

6. The respondent called a number of witnesses:
  - a) Ms Marie Holden, the claimant's trade union representative (in person);
  - b) Ms Beverley Owens, Chief Executive of the Sovereign Trust (in person);
  - c) Ms Jacqueline Wheble, former Head of School at the Pictor Academy (remotely);
  - d) Mr Simon Birch, former Deputy Head Teacher at the Pictor Academy (remotely);
  - e) Mr Andrew Wilson, Director of the Schools HR & Employment Law Co-Operative (remotely);
  - f) Mr Ian McGrath, Director of the Sovereign Trust (remotely).
7. The original hearing bundle prepared for the postponed hearing was available, together with an additional supplemental hearing bundle.
8. A helpful list of 'Dramatis Personae' and a chronology were provided, and these were understood to be uncontroversial between the parties.
9. As this was a case involving issues relating to a child at the school, the parties agreed that it while her name might be used during the hearing, she would not be identified in any judgment or other public document provided by the Tribunal. While the final hearing was held in public, careful attention was paid to those attending and any additional observers were reminded of the Tribunal's decision concerning this matter and its application of Rule 50

in this regard. Insofar as the child is referred to in this judgment, she will be identified as 'child A'.

## **Findings of fact**

### Introduction

10. The respondent ('Sovereign'), is an academy trust in the North West of England. It operates a number of schools and the Pictor Academy in Timperley is one of them.
11. Sovereign is a relatively large employer and has access to significant HR support services. The Tribunal noted that there were a number of policies and procedures which applied to all staff including a Disciplinary procedure (which appeared to have been retained from Trafford MBC following the school's conversion to an academy), grievance procedure and positive handling policy.
12. The claimant, ('Ms Phipps') initially worked at the Pictor Academy as a volunteer and from 21 January 2010, she commenced employment as a Teaching Assistant and at the date her employment ended, she was a Level 2 Special Needs Teaching Assistant, ('L2 SNTA').
13. As part of her duties, Ms Phipps was allocated to support a girl, 'child A', who had special needs and required the support of an SNTA.
14. Ms Phipps was clearly a dedicated member of staff and believed in supporting the children in her care. However, it did appear that at times the relationship she built up with children and parents went beyond the professional boundaries that would normally be found amongst teaching staff. This possibly may be explained by her personal circumstances and the way in which she entered the SNTA profession. She appeared to have built up a particularly close relationship with child A and her mother. To some extent this is understandable as it appeared that A's mother had her own difficulties and as a parent of a child with SEN, she needed to have trust and confidence in the way her child was supported at school. The Tribunal understood that Ms Phipps would email A's mother at the end of each school day with an update of what happened. It also seemed that Ms Phipps would message A's mother outside of the school day and to some extent, it appeared to the Tribunal that her professional boundaries had become somewhat blurred.
15. However, there was no evidence that this had caused any concerns with her managers before the incidents which are discussed below and if there had been such concerns, there was no evidence of relevant warnings or retraining having taken place

### Altercation on 26 April 2018

16. On 26 April 2018, Ms Phipps was helping with the preparation of nomination papers for a teaching union election before the school day started at around 8:15am. It was difficult to understand precisely what happened, but Ms

Phipps had become frustrated with her colleague Jill Holden whom she believed had duplicated a lot of the work that she had just done. What does not appear to be in dispute is that Ms Phipps slammed the nomination papers down by Ms Holden's side, Ms Holden responded by saying '*grow up!*' and Ms Phipps replied by saying '*fuck off*'. It is understood that while other staff could have heard the altercation, no children were in the vicinity of the incident.

17. Ms Holden however, decided to raise a complaint against Ms Phipps with their line manager, Tracy Hutchins and a meeting then took place with Ms Wheble, who was the Head of School. It appeared that Ms Holden was suggesting Ms Phipps' behaviour had been more aggravated than verbal abused and alleged that she had threatened *...to kick her head in*'. Ms Phipps complained that while accepting she swore, she did not threaten violence against Ms Holden.
18. Mr Birch who was the Deputy Head, was permitted to deal with the matter by way of a '*restorative meeting*' which the Tribunal understood to be an informal meeting between Ms Phipps and Ms Holden and with Mr Birch effectively acting as an *honest broker*. Although not particularly amicable, Mr Birch was hopeful that the meeting which took place on 27 April 2018 resolved matters, although he did not appear to have recorded an agreed resolution and Ms Holden was described by him as remaining '*...[not] entirely satisfied*'.
19. Eventually, Ms Holden decided that she wanted to bring a formal complaint and notified Mr Birch on 4 May 2018. She produced a letter which developed her recollection of what she originally complained of, by suggesting that Ms Phipps had said '*...I just want to rip your fucking face off*'. This was somewhat different to what she had alleged shortly following the incident. Mr Birch raised this matter with Mr Wilson as HR advisor and as he believed he was '*conflicted*', he confirmed he would instruct external HR support to investigate.
20. It appears that nothing further of significance happened before the next incident took place and the swearing incident became subsumed within the later '*water incident*' described below. However, while swearing at colleagues within the workplace should not be acceptable, the Tribunal were surprised that this matter was not fully resolved on an informal basis by Mr Birch at the restorative meeting. It appeared to be a relatively minor matter which was allowed to escalate due to two strong personalities not being managed more assertively. Unfortunately, Mr Birch seemed to adopt a passive approach and relied upon his optimistic belief that the matter would die down over time, which of course did not happen.
21. Unfortunately, this was not the end of the matter and a further development took place on 22 May 2018, caused significant trouble for management at the Pictor Academy and for Ms Phipps.

#### 'Water incident' on 22 May 2018

22. On 22 May 2018, Ms Phipps was in her class and was looking after child A. There was no dispute that A and Ms Phipps were sat at a table and were

drinking water. A's behaviour became more challenging and she gestured to throw water over Ms Phipps, who responded by saying that if this happened, she would throw water back at A. It seems that A then threw some water at Ms Phipps and she responded in the same way.

23. Sovereign had a *Positive Handling Policy and Procedure* and Appendix 2. There was a section entitled *De-escalating behaviour* and which the Tribunal understood applied to all staff and it encouraged staff to avoid *'[t]hreatening consequences of a behaviour'*, when managing concerns involving a child's behaviour. Ms Phipps said that she did not see this document until after the incident took place.

24. Ms Phipps' written description of the event produced shortly after 22 May 2018, was that:

*'it was very calm'. 'There were no histrionics...trying to get her [child] to see... ..afterwards she became calm'*.

Ms Phipps said that she had a concern that as a year 6 child, child A would have a difficult transition when moving to her new school and was worried about how her challenging behaviour might be received in the new school. While this was laudable, the Tribunal accepts that Ms Phipps was behaving in a way which was intuitive rather than in accordance with the expectation of how professional staff would be expected to behave in an educational setting involving children with SEN.

25. Ms Kinsella was in the same classroom but had her back turned to Ms Phipps and child A. However, she was aware of what had happened shortly after the water incident had taken place. The Tribunal noted that she did not report the incident to Ms Wheble until next day and this seemed indicative of a feeling on her part, that this incident was minor in nature of incident. Ms Phipps conceded that with hindsight, she should not have retaliated in the way that she did.

26. In accordance with the usual arrangement, Ms Phipps messaged child A's mum by email in the afternoon at 15:09. She described the water incident, how it happened and how she believed it had produced a good outcome. A's mother replied quickly and was very unhappy saying;

*'I'm sorry but that is NOT acceptable you are an adult and a teacher I don't see how that is teaching her anything but to be afraid of you'*.

Ms Phipps then attempted to resolve the matter by providing an email explanation, but A's mother asserted that she had *'assaulted a child'*. She said that her daughter was *'hysterically upset saying she scared of you this is not acceptable and you are very lucky I am not getting the police involved...'*. From the contents of her original email, Ms Phipps did not appear at all frightened about reporting what had happened to A's mother and this suggested to the Tribunal that she was somewhat naïve about how A's mother might react.

27. Despite what A's mother said in her reply, she decided to complain, and Mr Birch received an email which described events having taken place

between Ms Phipps and A which went beyond the description of the original water incident described by Ms Phipps. She said that;

*'[A] has told her [Ms Phipps] has grabbed her arms and legs to put her in the den and I've seen the evidence of this as she was covered in fingerprint bruises...'*

Understandably, upon initially receiving this complaint, Mr Birch needed to treat it seriously and refer the case to Trafford MBC's Multi Agency and Referral and Assessment Team, (known as 'MARAT'), who are a single point of contact for all professionals and members of the public to report concerns about a child. He did this by email on 23 May 2018 at 8:29, shortly after receiving this complaint. He then completed a referral to the Local Authority Designated Officer, (known as the 'LADO'). The form which was apparently completed by Mr Birch, referred to Ms Phipps and her relevant details and referred to an allegation regarding the throwing of water, (and notably did not include the mother's complaint that child A's arms and legs had been grabbed). He also indicated in the referral form that the disclosure had been made by Ms Phipps herself. Accordingly, it appeared that Mum's complaint had been concluded by Mr Birch to be an exaggeration.

28. As a consequence of the referral to the LADO, Ms Phipps was suspended on 22 May 2018, but as the matter was not escalated further, she was informed by Mr Birch that she could return to work on 23 May 2018. The actual suspension letter was dated 23 May 2018, signed by Ms Wheble and referred to the disciplinary investigation. However, in his letter which he sent that day, Mr Birch confirmed Ms Phipps should return to work and was invited to a disciplinary meeting with Ms Wheble and him on 11 June 2018. She was informed that she could bring a union representative or a friend with her.

#### The disciplinary investigation

29. The Tribunal accepts that a disciplinary investigation was appropriate given that it related to possible inappropriate behaviour towards a child. However, it was carried out in a confused way and managers could have approached this matter in a more coherent way. There were lots of email within the bundle involving managers, but primarily involved Mr Birch, Ms Wheble and Mr Wilson. A particularly surprising email was sent by Mr Birch on 23 May 2018 at 15:01, shortly after he had commenced the disciplinary investigation and where he suggested to the others that:

*'I want to be a little cute with this and kill two birds with one stone.....'*

*I am going to ask Deby to come in for a disciplinary meeting tomorrow at 8:30 with me and Jacqui [Wheble].*

*Deby has erred and we need to make clear that her practice with the water is absolutely un-acceptable. I want her to know that in making the decision to give her a written warning and put some additional safeguarding re-training in, we have considered all mitigating factors beyond her poor practice within this incident. Positively she has worked incredibly hard and*



*gone above and beyond her poor practice within this incident. Positively she has worked incredibly hard and gone beyond in her class year, negatives include the allegation that she swore and was aggressive toward another member of staff.*

*Myself or Andy [Wilson] will speak to Jill Heywood today under the auspices of investigating her complaint against Deby [Phipps] and forthwith we will be able to demonstrate we have acted on it.*

*Please let me know if this seems a reasonable way forward asap so we can move on.'*

What was surprising was that despite commencing a process to investigate the water incident which related to a child and potential safeguarding, Mr Birch appeared to looking at how he could also introduce the earlier (and apparently unresolved) issue involving swearing, despite not having referred to this in the letter inviting Ms Phipps to a disciplinary investigation meeting. Moreover, he did not appear to recognise that both Ms Phipps and Ms Heywood had raised complaints against each other. Finally, his letter suggested that he was seeking to predetermine an outcome, which while looking to return Ms Phipps to work, involved him closing his mind to what the investigation meeting might have revealed.

30. Not surprisingly, Mr Wilson as a HR advisor, was unhappy with this proposal and reacted by saying

*'My strong advice is not to do that. She needs proper notice of a disciplinary interview and Marie Holden from NEU [National Education Union] at Trafford is now involved'.*

31. On balance and having considered the available evidence, what actually appears to have happened in relation to the water incident, is that Ms Phipps told Mr Birch shortly after it took place and initially, he was not perturbed by what had happened. He only became troubled when child A's mother called to complain about the incident. The mother made an allegation of bruising during the same call and by this stage he should have formalised a proper internal investigation once the issue regarding the LADO took place. Instead, Mr Birch seemed to be more focused upon 'tidying up' outstanding matters, rather than dealing with the water incident alone.

32. Ms Phipps began sickness absence leave from 24 May 2018 because of stress. She did not return to work after this date, apart from her attendances relating to the disciplinary process.

33. At the meeting which took place on 11 June 2018, Ms Phipps was recorded as accepting that her behaviour to child A was inappropriate, but when the swearing issues was mentioned, she said that she wanted to take it further and she clearly felt that this incident involved potential issues relating to Ms Holden's conduct in addition to her own conduct in swearing, which accepted was wrong, but which involved no threat of violence as alleged by Ms Holden. Ms Wheble sent a letter following the meeting and invited Ms Phipps to a disciplinary meeting on 3 July 2018 which Ms Wheble would chair and which involved the following allegations:

- '1. Inappropriate behaviour towards a fellow employee.*
- 2. Inappropriate response to a child's behaviour'*

Despite attending the 'informal' meeting on 11 June 2018 (which appeared to take the form of an initial investigatory meeting under the disciplinary process), Ms Wheble appeared to feel it appropriate to nominate herself as chair at the disciplinary hearing. However, the letter did at least make clear that the swearing incident had been added as an allegation, informed Ms Phipps that she could be accompanied and also the sanctions that could result, including dismissal or action short of dismissal. Ms Phipps was therefore left in no doubt that the process could have serious consequences concerning her continued employment and that Pictor academy were treating the disciplinary matter as being very significant indeed.

34. Mr Birch then produced a document entitled 'Report of an Investigation Under the School's Disciplinary Rules and Procedures'. However, despite its impressive cover, the report appeared to be a summary of what his understanding was of each of the two allegations, accompanied by some documents as appendices. Surprisingly, there appeared to be no formal investigation process where witnesses were spoken to initially, with Ms Phipps being then asked to provide a statement. Mr Birch argued it was not necessary to investigate the water incident because Ms Phipps had admitted to it. But if a disciplinary process is contemplated, a reasonable employer should still investigate. The argument advanced by Mr Birch during his evidence was not convincing and appeared to have been given with the benefit of hindsight. It seems that the 'informal' meeting on 11 June 2018 was actually treated by management as being some sort of investigation meeting, but this was not made clear to Ms Phipps before or when it took place. She was left to conclude that this is what had happened following the meeting, in the letter sent by Ms Wheble and from Mr Birch's investigation report. It was understandable that she became concerned about how management were conducting the process.

#### The disciplinary hearing

35. A letter was sent by Ms Wheble to Ms Phipps on or around 19 June 2019 and she said that the investigation would proceed to a disciplinary hearing to consider inappropriate behaviour towards a fellow employee and inappropriate response to a child's behaviour. Surprisingly, Ms Wheble was involved with the investigation and yet was identified as hearing officer.
36. Shortly before the disciplinary hearing however, it was decided that Beverley Owens should 'step in' as hearing officer. The actual disciplinary hearing appeared to follow a proper process on 3 July 2018. Ms Phipps was allowed to be represented by a union representative. Handwritten notes were made available of the hearing to Ms Phipps, although there initially appeared to be a reluctance on the part of management to produce 'official minutes', despite a note taker being available. However, Ms Phipps recorded the hearing and produced a typed transcript. Its contents suggested that Ms Phipps was able to advance her arguments the meeting was certainly not brief. Ms Owens advised that she would reserve her

decision and would return to Ms Phipps within 5 days.

37. A decision letter was sent on 4 July 2018 which explained the decision to find that both allegations were made out, that a final written warning would be imposed which would remain on her record for two years and that she would have a right of appeal.

#### Grievances and the appeal following the disciplinary hearing

38. Ms Phipps sent an email to Mr Birch on 25 May 2018 headed '*suspension from work*' and which explicitly stated that she was raising a grievance. She set out why she was unhappy and requested that the disciplinary process be paused while the grievance was investigated. Mr Birch acknowledged by email that day and said it would be passed to HR and Ms Owens. On 30 May 2018 Ms Phipps sent a further email to Mr Birch (copying in Mr Wilson and Ms Owen) which sought a reply to her earlier email, copies of relevant policies and answers to questions relating to the suspension. Mr Wilson seemed to feel that it was a *tactical* move by Ms Phipps and that she was trying to avoid the substantive issues under investigation. He simply replied that he acknowledged receipt and would pass it on to Ms Owens. While it was lengthy and may well have felt tedious to management, it was nonetheless identified as a grievance and raised concerns by the employee concerned.
39. Ms Phipps chased Mr Birch for a reply on 30 May 2018 and also sought clarification that the meeting on 11 June 2018 was '*an investigatory meeting only*'.
40. The relevant disciplinary and grievance procedures were provided by Mr Birch on 4 June 2018. Ms Phipps sent an email on 5 June 2018, which attached a letter of same date and questioned management's refusal to halt the disciplinary process and instead a decision to consider the grievance as part of the disciplinary process. She reasserted the issues raised in her email of 25 May 2018 referring to a failure to follow the ACAS Code of Practice. Mr Birch replied on 6 June 2018 confirming that the meeting on 11 June 2018, the matters under investigation, that its '*status*' would be '*informal*' and she could raise the points covered by her grievance then. This reply seemed to confuse Ms Phipps who believed the meeting was supposed to be formal. She also raised the issue of why the swearing incident was now being investigated when she thought it had been closed following the earlier informal restorative meeting.
41. Ms Phipps then raised this matter with her union representative Marie Holden and she felt the process was '*turning into a mess*'. The subsequent email discussions between Ms Holden, Ms Phipps and Mr Birch appeared to suggest that the confusion regarding the formality of the meeting was because the swearing incident had been raised as a formal complaint by Ms Heywood. Despite both Mr Birch and Ms Phipps saying that they thought that matter was closed, it is surprising that this was not discussed with Ms Heywood when she raised her complaint, especially as Ms Phipps had raised issues about her conduct in relation to the swearing incident. While a matter for management, this earlier incident did not seem at all suitable for being dealt with at the meeting on 11 June 2018, which was

provoked by the water incident and child A.

42. Ms Phipps sent a further email on 8 June 2018, which opened by saying that she was '*...hugely disappointed and frustrated with the way in which this process is being handled. As I understand matters, the school is driving the process, and I must look to you to ensure that the process is both fair and equitable*'. She referred to guidelines, which presumably relate to the ACAS guidelines on disciplinary procedures and the need for employees to be kept advised of the nature of the complaint at every stage, that there should be clear outcomes and that the process should be progressed quickly. She questioned whether this was happening in her disciplinary process and stated that it was causing her '*...great concern, stress and anxiety*'. She raised concerns regarding the way in which she was suspended, the length of time taken to deal with her grievances and questions and that she was still unsure whether the meeting on 11 June 2018 was informal or formal, especially as she believed it would involve 6 people attending. Whatever management's intentions were in this process, this email clearly indicated that Ms Phipps felt confused and uncertain as to where she stood in this process.
43. During 11 June 2018, when the 'informal' meeting with Mr Birch took place, Ms Phipps said she made disclosures regarding the failure to deal with incidents involving other members of staff. This complaint was not recorded in the minimal note of the informal meeting provided by Marie Holden. However, Ms Phipps referred to two other incidents involving employees of Pictor Academy which she felt had not been treated as serious as hers had been treated and felt this amounted to less favourable and disproportionate treatment. One incident related to staff members being allegedly intoxicated on duty and another regarding an assault on an elderly staff member by another member of staff. The Tribunal noted that Ms Phipps raised this alleged inconsistency in emails and the management witnesses were quite upset by these allegations as they felt they were not relevant and amounted to '*mudslinging*'.
44. Ms Phipps emailed Ms Holden on 13 June 2018 to express her unhappiness with the way in which the meeting was conducted and told her that she was '*...shot down at every opportunity*'. She was also concerned that Ms Holden was being allowed to escalate her complaint to a formal complaint and how it had taken some time for her to be informed of this development. She was also concerned that Mr Birch was not clear as to how the suspension was triggered and the order in which events occurred following the water incident and the mother's complaint. This email was followed by a further email which was sent to Ms Holden on the next day and Ms Phipps informed her that she no longer wanted her representation as she felt she was '*...in cahoots with the management not allowing me a voice – line of least resistance*'. Ms Holden disputed that this was the case and that she was '*...simply trying to stop you from going down the wrong way.*' She nonetheless agreed to arrange alternative representation. The Tribunal did find Ms Holden to be somewhat defensive in how she presented her witness evidence. It was clear that she had adopted a similar approach to Mr Birch in treating her admission that she had behaved inappropriately with regard to the two incidents as justifying a need to draw a line under the process, without acknowledging the issues which Ms Phipps had raised concerning

the way the process had been managed. While a representative is entitled to provide advice about how best to approach a disciplinary case, Ms Holden's approach seemed to be focused upon resolving and closing the matter down quickly, rather than recognising the grievances which had arisen and which Mr Birch had confirmed could be dealt with as part of the meeting on 11 June 2018.

45. On 25 June 2018, Ms Phipps sent an email and letter to Ms Wheble raising concerns about what will be considered at the disciplinary hearing on 3 July 2018. She alleged a failure to follow procedure and it provided a clear illustration of her frustration about poor processes in the case. In particular, she remained unhappy about the introduction of the now formal complaint raised by Ms Heywood concerning the swearing incident. She also provided a summary of her earlier complaints and her unhappiness in the way they had been responded to and her concerns about procedural failings to date. Ms Wheble shared her concerns with Mr Wilson and Ms Ownes about her ability to chair the disciplinary hearing, although primarily because *'...I haven't a clue what I'm meant to be doing – what the format is – what am I meant to do with this information – who is meant to see it?* She asked for advice and suggested to Ms Owens that she was not sure that she could deal with the case. However, the Tribunal concluded that this was not because she felt conflicted having previously attended the investigation meeting, but because she was overwhelmed with the process and did not feel sufficiently confident to hear the matter.
46. Ms Phipps gave notice of her intention to appeal in her email to Mr Wilson dated 5 July 2018. However, she sought specific information including specific information concerning the finding of inappropriate behaviour towards child A and additional documentation including notes of disciplinary hearing.
47. On 18 July 2018, Ms Phipps provided her grounds of appeal to her disciplinary sanction, following the disciplinary hearing. It was primarily an appeal letter, detailed in Ms Phipp's now typical way of presenting her complaints. On the 10<sup>th</sup> page is the following comment;
- 'in yet further insult to my integrity I was advised by John Easton of ATL Union on 12.7.18 that there was another allegation against me – that of 'whistleblowing', of which you are already aware. It is absolutely unbelievable that an educational establishment could consider the raising of a safeguarding issue to be a disciplinary matter, effectively amounting to a 'whistleblower witch-hunt'.*
48. This matter appeared to relate to the discovery that Ms Phipps had been complaining to another colleague by text or WhatsApp about inappropriate behaviour by other members of staff and which was not subject to the same disciplinary process which she was experiencing. Mr Wilson gave evidence about this matter and draft letters were included within the bundle which were ultimately not sent to Ms Phipps because she resigned, but which were intended to give notice of an investigation into a whistleblowing allegation against her. While the action was only contemplated, it does appear that Ms Phipps had become aware that it was under consideration.

49. While Ms Phipps' appeal email alludes to the term 'whistleblowing', it seems to emanate from Mr Wilson's misunderstanding of what is meant by whistleblowing when considering the investigation into Ms Phipps' messaging discussed above. It appears that she believed Mr Wilson was considering a disciplinary investigation concerning the matters which she had already raised at the disciplinary meeting.
50. However, while this may be the case, the Tribunal were left with the conclusion that Mr Wilson did not appreciate management's duty to investigate disclosures that might be in the public interest and instead felt that instead, the concerns being raised by Ms Phipps, which in this case involved messaging with a work colleague, were matters for potential disciplinary action against the employee making the disclosure. These complaints potentially related to alleged safeguarding involving other staff members. On the face of it, they could have been made in the public interest, therefore could have amounted to protected disclosures.
51. It was only when Ms Carr became involved with supporting Sovereign in relation to this matter, that the school finally became aware of its responsibility to investigate the allegations being made by Ms Phipps and the potential whistleblowing protections afforded by the Employment Rights Act 1996 as she alluded to in her letter to Ms Phipps on 13 July 2018.
52. It was noticeable that Ms Phipps continued to raise points of concern and defects that she felt existed in the process as it progressed. Management appeared to be unsympathetic and emails in the bundle reveal Mr Birch making flippant remarks about Ms Phipps. For example, in his email to Ms Owens, in response to Ms Phipps notice of appeal on 5 July 2018, he said *'welcome to my world of the previous few weeks Bev [Owens], it does drain'*. Indeed, the Tribunal finds that Mr Birch's behaviour was a key problem in the respondent's failure to follow process. It begins with his comments to Mr Wilson and Ms Wheble suggesting what outcome he wants ( the *'kill two birds with one stone'* letter) and his focus upon achieving the *'tidiest'* outcome for Pictor Academy, rather than ensuring a fair process took place. In his email of 30 May 2018 to Mr Wilson and Ms Owens, Mr Birch suggests that he was aware of the procedural shortcomings as he stated that *'[m]y only concern is that she that she picks us off policy and procedure wise.'* While it was no doubt frustrating to Mr Birch and his colleagues and at times Ms Phipps' complaints could be lengthy, they were provoked by a failure by managers to pause and reflect upon why these concerns were being raised and what could be done to restore confidence in the process.
53. The appeal hearing took place on 27 July 2019 and heard by the trustee panel consisting of Ian McGrath, Nicholas Gill and Dilys Morgan. Ms Phipps was accompanied by her representative Bill Allen. Mr Wilson provided advice to the panel. It followed a standard form with Ms Phipps and Mr Allen putting her case forward, questions from the panel, followed by management putting forward its case, questions and then summing up. While this was all straightforward, the evidence from Mr Wilson and Mr McGrath was that the panel wished to increase the penalty imposed on Ms Phipps at the original disciplinary hearing by Ms Owens and considered dismissing her. Mr Wilson confirmed that this was not permitted by procedure.

54. As a consequence the decision letter was drafted in a way which not only upheld the decision of inappropriate behaviour on both counts, but also that the panel felt that the imposition of a final written warning was a '**minimum sanction**' (and was typed in bold text in the original letter dated 30 July 2021). The letter also added that the panel believed Ms Phipps had contravened the Teaching Assistant Professional Standards and that the disciplinary action did not arise from any grudge. They acknowledged that Ms Phipps admitted the misconduct, but '*...were barely addressed by you in your appeal*'. This is not entirely surprising however, given that this was not an issue in Ms Phipps' appeal. Indeed, the tone of the letter gave the impression that the panel expected Ms Phipps to appear penitent and beg for their forgiveness. That is not the purpose of an appeal hearing and Ms Phipps had not disputed that her behaviour had been inappropriate during the hearing process. Ultimately, the Tribunal were left with the feeling that they could not step into Ms Owen's shoes as disciplinary hearing officer and dismiss Ms Phipps, hence the tone of the appeal decision letter. Despite the strong views expressed in the letter, there was little or no mention as to why the panel did not agree with the appeal raised by Ms Phipps on what was effectively a single page letter in terms of content.

### Resignation

55. Ms Phipps continued to be absent from work and was subject to absence review meetings under the sickness absence processes operated by Pictor academy.

56. On 4 September 2018, she sent a letter to Ms Wheble as Head of School and she expressed how upset she was with the outcome of the appeal. She felt that the appeal did not explain why her appeal was rejected and taking into account the overall process and the appeal decision, she gave notice of her resignation with immediate effect, asserting that she had been constructively dismissed. In essence, she was unhappy with the decision to resurrect the swearing incident, that the punishment was disproportionate and that the school's conduct in the process amounted to a fundamental breach of their duty of trust and confidence prompting her to resign.

### **The Law**

#### Constructive Unfair Dismissal

57. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by her employer if the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.

58. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

- (i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively

amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); (note that the final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.

- (ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069. Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI); .and
- (iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

59. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

60. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

61. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, that the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment; see Berriman v Delabole Slate Ltd 1985 ICR 546 CA. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, a Tribunal is under no obligation to investigate the reason for the dismissal or its reasonableness; see Derby City Council v Marshall 1979 ICR 731 EAT.



62. Under section 43A ERA 1996, a 'protected disclosure' means a qualifying disclosure (as defined by section 43B), which is made by a worker in accordance with any of sections 43C to 43H. Section 43C involves disclosures to an employer or other responsible person.

63. Section 43B ERA 1996 provides that:

*'(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following –*

- (a) That a criminal offence has been committed, is being committed or is likely to be committed,*
- (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*
- (c) That a miscarriage of justice has occurred, is occurring or is likely to occur.*
- (d) That the health and safety of any individual has been, is being or is likely to be endangered,*
- (e) That the environment has been, is being or is likely to be endangered,*
- (f) That information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.'*

64. For there to be a 'protected disclosure' under section 43 ERA, the claimant must have *disclosed information* (section 43B(1)).

65. The disclosure can be orally or in writing. It need not follow any special whistleblowing procedure, even if the employer has such a procedure. The factual disputes before the tribunal may be:

- a) If it was an oral disclosure, what exactly was said, to whom and when?
- b) If it was a written disclosure – where was it written and who received it/read it?

66. In terms of whether information was disclosed, the claimant needs to identify how exactly what she or he, said or wrote amounted to the relevant 'information'. Claimants may refer to the disclosure being a long email or letter. But what is relevant, is the actual 'information' contained within the correspondence or communication. Complaints, allegations and comments may or may not contain 'information' under section 43B of the ERA.

67. It does not matter that a claimant was telling his or her manager something which the manager already knew. It is still a 'disclosure of information'.

68. The information must, in the claimant's reasonable belief, tend to show one of the following, (as described in section 43B(1)):

- a. that a criminal offence has been committed, is being committed or is likely to be committed,
- b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- c. that a miscarriage of justice has occurred, is occurring or is likely to occur,
- d. that the health or safety of any individual has been, is being or is likely to be endangered,
- e. that the environment has been, is being or is likely to be damaged,
- f. that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

69. The Tribunal will want to pinpoint what issue the claimant had in mind. For example, if the belief concerns a criminal offence, what criminal offence? If it concerns breach of a legal obligation, what legal obligation?

70. The Tribunal does not decide whether in fact the *'thing'* disclosed had/was/is about to take place, (a legal obligation for example). Instead, it must decide:

- g. Did the claimant believe the information tended to show the relevant *'thing'*, for example; a breach of a legal obligation?
- h. If so, was that belief 'reasonable' for the claimant to hold?

71. The Tribunal must also consider whether the disclosure was, in the claimant's reasonable belief, made in the public interest. Again, the question is not whether the disclosure was in fact in the public interest. The tribunal must decide:

- i. Did the claimant believe disclosure was in the public interest?
- j. Was it reasonable to believe that?

72. It does not matter if disclosure was also made in the claimant's own interest.

73. The 'public' can simply be other people employed by the same employer.

74. What is in the 'public interest' is common sense looking at all the circumstances including:

- k. How serious was the matter?
- l. How many people might be affected?
- m. The identity of the wrong-doer.

75. As mentioned above, sections 43C to 43H ERA 1996 refer to who may constitute a responsible person for the purposes of disclosure. In this case, the claimant relies upon section 43C ERA 1996 only. This provides that:

*'(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –*

- (a) *To his employer, or*
- (b) *Where the worker reasonably believes that the relevant failure relates solely or mainly to –*
  - (i) *The conduct of a person other than his employer, or*
  - (ii) *Any other matter for which a person other than his employer has legal responsibility, to that other person.'*

76. In terms of detriments, section 47B of the ERA provides that a worker has a right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker had made a protected disclosure.

77. Additionally, section 103A of the ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

#### Breach of contract

78. Under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994, an employee can bring a complaint for breach of contract when their employment has ended and there has been a failure by the employer to pay money in lieu of contractual notice and the employee was entitled to terminate her employment without notice because of a contractual failure on the part of the employer.

#### **Discussions**

79. The Tribunal considered the list of issues provided by the parties in order as part of their deliberations.

#### Was there an adequate investigation?

80. As has already been discussed in the findings of fact, the investigation which took place into the alleged misconduct by Ms Phipps appeared to lack thoroughness and simply relied upon admissions that she had sworn inappropriately and had thrown water at child A when she should not have done. Both matters involved consideration of the context of each event, especially as witnesses were available and the complaint Ms Heywood appeared to have made inconsistent allegations.

81. The swearing incident appeared to have petered out before the water incident took place and its highest, it was dealt with as an informal matter with a 'restorative' meeting taking place, albeit with questionable results. It was only when Mr Birch commenced his investigation of the water incident that the swearing incident was resurrected as a disciplinary matter and only then, in relation to Ms Phipps. The Tribunal struggled to understand from the confused evidence of the respondent's witnesses as to why this took place. But it was left with the conclusion that Ms Heywood was prompted to make a formal complaint by Mr Wilson and Mr Birch and both she and Ms Phipps had no expectation that this matter would be resurrected. However, once this had been reopened, a proper process should have

taken place with witnesses being re-interviewed and Ms Phipps being given an opportunity to respond to the evidence obtained, before a decision was reached concerning whether or not to proceed to a disciplinary hearing.

82. The Investigation in both issues simply did not take place in way that would be expected by a large employer with access to HR policies as the context behind each incident was not properly considered. Mr Birch appeared to acknowledge that there were procedural problems in his emails with Ms Owens and Mr Wilson and his desire to resolve both the swearing and water incidents quickly and as part of the same process removed his ability to be objective, curious and reflective.

#### The decision to suspend

83. As has already been mentioned, when Ms Phipps told Mr Birch about the water incident on 22 May 2018, he did not react. It was only afterwards when child A's mother provided her complaint that Mr Birch suspended Ms Phipps verbally and with no letter provided in support at around 5pm the same day. Given the admission by Ms Phipps to Mr Birch that the incident had taken place and the mother's subsequent complaint, it is understandable that as Deputy Head, he had to act. As it gave the impression of a potential safeguarding matter, suspension was appropriate. It does seem surprising that he did not take the matter more seriously when Ms Phipps initially raised the matter. What confused matters further, was that the mother sent an email to Mr Birch at 8:26 the following day (23 May 2018) and making further allegations of bruising to her child from being physically handled by Ms Phipps.
84. The Tribunal was taken to the suspension letter dated 23 May 2018 which gave the reason being so that an investigation could take place into 'inappropriate response to a pupils behaviour'. Section 6 of the Disciplinary Procedure provides for suspension in relation to matters involving serious misconduct. The emails between Mr Wilson, Mr Birch and Ms Wheble during 23 May 2018 concerning the suspension letter would support the School's concern that it was faced with a potential safeguarding matter involving Ms Phipps which justified a suspension at that moment in time. Although not entirely clear who decided to suspend, the Tribunal accepts that the Head was involved in the decision and it was consistent with safeguarding practice.
85. Although reference was made to the referral to the LADO, the documentation available was not clear as to how this process was resolved. An email of 5 June 2018 from Mr Birch to Ms Phipps refers to the bruising incident and safeguarding. But the Tribunal notes that this was not referred to in the LADO referral document and finds that by 23 May 2018, the matter of bruising had been disregarded by management and the water incident appeared to be only matter remaining to be considered. A note sent to claimant dated 23 May 2018, confirmed that there would be no further external action and that the suspension was lifted, but that an investigation would take into 'inappropriate response to pupil behaviour. Suspension was reasonable as an immediate reaction to the safeguarding concern and LADO referral. It was, however, short in duration, was lifted as soon as possible and was therefore reasonable under the circumstances.

The respondent's compliance with the disciplinary procedure and ACAS Code

86. As has already been mentioned, Sovereign appeared to rely upon the standard Trafford Schools disciplinary procedure which was well established, and which identified the relevant matters and procedures that are recommended in the ACAS Code concerning disciplinary action. This is a case where there were numerous failures to follow process, but essentially the Tribunal noted several matters of concern.
87. We noted that there is an emphasis within the procedure and the ACAS Code upon employers taking informal action concerning minor matters wherever possible, (as opposed to routinely resorting to formal). The swearing incident appeared to be classic example of a matter where informal action would be appropriate. Indeed, initially at least, Mr Birch adopted this approach. However, it was then resurrected when he commenced a disciplinary process in relation to the water incident and then only against Ms Phipps and not Ms Haywood. This was despite both employees making complaints about the other and clear concerns that Ms Heywood had varied her allegations apparently with a view to make the case against Phipps look even more serious. This was an instance where Sovereign displayed a lack of consistency and certainty in relation to disciplinary action against Ms Phipps.
88. When Sovereign decided to take formal action, there was no evidence available to the Tribunal to suggest that they established facts by producing a detailed investigation report despite being a large employer, with access to an HR advisor. On 23 May 2018, Mr Birch emailed Mr Wilson to explain how the process would be resolved and suggested outcome before investigation took place. The disciplinary meeting on 11 June 2018 was confusingly described and not identified as being a fact-finding exercise and was described as informal at the actual meeting. Although she had her union representative Ms Holden present, no proper note was taken and there appeared to be no indication that it might proceed to a formal stage.
89. Ms Phipp's emails of 5 and 8 June 2018 are very telling in that they raise her concerns regarding the process and she notes a failure to keep her informed and her understanding that what she thought was a formal process turned out to be informal. It is not surprising that Phipps was confused and was unclear which meeting was which and what its intended purpose was. It cannot be reasonable for this amount of confusion to exist. It appears that the informal hearing was an investigation, but this was only confirmed when the letter was sent by Ms Wheble to Ms Phipps on or around 19 June 2019. This was when she said that the investigation would proceed to a disciplinary hearing and that this point identifies inappropriate behaviour towards a fellow employee and inappropriate response to a child's behaviour.
90. Mr Birch was involved in the suspension decision and the processing of the initial complaints by A's mother and should not have been involved in investigatory process. Ms Wheble was involved with the investigation and yet was identified as hearing officer. Mr Birch's involvement at the beginning probably led him to conclude that he did not need to interview

relevant employees as he had some knowledge about the matter already and as a consequence, a proper investigation did not take place. Mr Birch's report provided insufficient explanation as to how and why an outcome had been reached which explained why it was appropriate to proceed to a disciplinary hearing. While there may have been admissions regarding swearing and the throwing of water by Ms Phipps, no context was provided, and no consideration was provided as to why formal disciplinary action should take place. It is fair to say that it is not for Mr Birch to decide an outcome, but he should have at least explained why the matter should proceed to hearing and why the two allegations could amount to gross misconduct if proven, for which claimant could be dismissed.

91. Fortunately for Sovereign, it was decided that Beverley Owens should 'step in' as hearing officer. Although this was apparently because of Ms Wheble's anxiety about being able to deal with the challenges advanced by Ms Phipps rather than because of concerns regarding her previous involvement at the earlier meeting. Although the actual disciplinary hearing appeared to follow a proper process on 3 July 2018, it was critically undermined by earlier failures and claimant could not have confidence that a fair process was taking place and her decision to raise a grievance prior to the hearing was evidence of that.

92. However, following the disciplinary hearing, Ms Phipps continued to raise points of concern and defects that she felt existed in the process. Unfortunately, by this point, management appeared to have become fed up with her and did not give the impression that they were treating her concerns seriously. There was an unwillingness to review the procedural aspects of the disciplinary process and this continued to the appeal hearing.

Did the respondent fail to investigate or follow up Heywood's' role in the swearing incident on 26 April 2018?

93. In paragraph 24 of the grounds of complaint, Ms Phipps made clear complaint against Ms Heywood. Ms Phipps thought that the swearing matter had been resolved informally and was surprised when she was informed that it was being used in the disciplinary process against her alone, without being invited to confirm whether she wished to reconsider bringing a complaint against Ms Heywood. Mr Birch's email 23 May 2018 says;

*'Myself or Andy (Wilson) will speak to Jill Heywood today under auspices of investigating her complaint against Deby [Phipps] and forthwith we will be able to demonstrate we have acted on it'.*

The Tribunal finds that management decided to revisit the swearing issue, because Ms Heywood was unhappy with the earlier outcome and they had a disciplinary process for the water incident in progress as outlined in Mr Birch's email of 4 May 2018. However, there was a failure to consider that Ms Phipps was also unhappy with Heywood as Mr Birch had previously mentioned that if the matter was taken further, Ms Phipps would counter complain. It is therefore surprising that this matter was not explored by management or indeed simply questioning the fairness of bringing this matter into the disciplinary process against Ms Phipps alone. This was especially the case when Mr Wilson had already stated on 8 May 2018 to

Mr Birch that it should be dealt with externally.

94. In conclusion, it was not appropriate to deal with this particular matter internally and it was certainly inappropriate to simply add it to the disciplinary case against Phipps, especially as it was a factually different matter under consideration. Mr Birch was aware of Ms Phipps' concerns and counter arguments raised by Ms Phipps concerning the swearing matter, but his continued involvement in the process following the water incident on 22 May 2018, meant that he treated the swearing matter as a 'loose end' to be 'tied up'. On balance it appears that it was added to the disciplinary process to resolve that particular 'loose end' and to add weight to the case against Ms Phipps. It is unfortunate that Mr Birch did not consider the remaining 'loose end' of Ms Phipps' complaint regarding Ms Heywood which had not been pursued because she thought it had been resolved informally in April 2018. Had he done so, he might have appreciated that it was not appropriate to include this incident in the disciplinary process relating to the water incident.

Did the respondent inappropriately rely on the swearing incident during the claimant's disciplinary process?

95. This was discussed in the previous section and it is correct that the respondent inappropriately relied upon the earlier swearing incident for the reasons given above.

Did the respondent investigate the claimant's grievance adequately?

96. This was discussed above, and Mr Birch and others clearly became frustrated and fed up with Ms Phipps and appeared to see the issues that she was raising as undermining the desire of management to conclude this matter and 'move on'.

Did the claimant comply with the requirements of the grievance procedure in submitting and pursuing her grievance?

97. Ms Phipps sent an email to Mr Birch on 25 May 2018 which explicitly stated that she was raising a grievance and explained why she was unhappy and requested that the disciplinary process be paused while the grievance was investigated. Despite Mr Wilson's concerns that the grievance was a tactical move, it is reasonable for an employee to raise a grievance whenever a matter arises with which they are unhappy. This was especially the case given that Ms Phipps was being subjected to a disciplinary process and one which had not followed a clear process which enabled her to understand what was happening, why it was happening and what would happen next.

98. Grievance procedures are dealt with in the ACAS Code of Practice. It explains that;

*'anybody working in an organisation may, at some time, have problems or concerns about their work...[t]hey want the grievance to be addressed and if possible, resolved. It is...in management's interests to resolve problems before they can develop into major difficulties for all concerned'.*

Despite being an experienced HR manager, Mr Wilson seemed to have forgotten these basic principles outlined by ACAS and felt that Ms Phipps was being a nuisance or even cynical by raising this grievance. While she may not have used a specific form, Ms Phipps raised her complaint, identified it as a grievance and asked for copies of the relevant policies. It was the respondent's failure to quickly deal with this and assist her with the proper process, which was the problem here, not the manner in which the grievance was raised.

Did the respondent treat the claimant in manner that was inconsistent with their treatment of other staff?

99. The Tribunal did not hear any evidence to suggest that the incidents referred to by Ms Phipps were factually similar to the matters for which she was under investigation. However, we felt that this perception of difference of treatment was understandable given the way in which Ms Heywood had been treated and was effectively encouraged to rely upon her formal complaint to support the disciplinary process against Ms Phipps, while failing to ask Ms Phipps whether she wished to continue with her complaint regarding Ms Heywood. Mr Birch was aware of the mutual feelings of the two staff members and failed to recognise his inconsistency in taking the action that he did.

100. However, while the respondent was clearly upset by Ms Phipps referring to other situations which she felt had been treated less harshly, the Tribunal does not find that there is sufficient evidence to support an assertion that there was an inconsistency of treatment.

Did the complaints raised by the claimant (25 May, 5 June, 11 June, 25 June, 18 July 2018) amount to protected disclosures?

101. Ms Phipps did send an email to management on 25 May 2018 which raised a grievance about her suspension, arguing that it was contrary to the ACAS Code of Practice and sought disclosure of information. However, these complaints were specific to her and raised no real concerns about wider issues at work. The grievances were personal and did not convey a wider public interest, focusing purely upon her treatment. The grievance did not go into wider handling of safeguarding and whether it undermined this overarching duty.

102. The email and letter of 5 June 2018 related to management's refusal to halt the disciplinary process and instead a decision to consider the grievance as part of the disciplinary process. Ms Phipps repeated the issues raised in her email of 25 May 2018 referring to a failure to follow the ACAS Code of Practice and again alludes to safeguarding at 5.10 of the disciplinary procedure. However, the letter did not focus upon more general safeguarding concerns and the legal obligations that go with it, suggesting a disclosure that was made in the public interest.

103. On 11 June 2018, at the 'informal' meeting with Mr Birch, Ms Phipps says she made disclosures regarding the allegedly intoxicated staff and the alleged assault by a member of staff on another staff member. However, from the limited information available to the Tribunal, (the minimal note of



the informal meeting and the subsequent email that she sent to Ms Holden on 13 June), there was no evidence that this information was raised in way that revealed a relevant protected disclosure tending to show a contravention of section 43B of the Employment Rights Act 1996, or that they were made in the public interest.

104. Ms Phipps' email of 25 June 2018, alleged a failure to follow procedure and it provided a clear illustration of her frustration about poor processes in the case. However, this was not a disclosure which expanded to suggest a wider failure to suggest a relevant protected disclosure.

105. Ms Phipps' email of 18 July 2018 provided her grounds of appeal to her disciplinary sanction. It was primarily an appeal letter, detailed in Ms Phipps' now typical way of presenting her complaints. While the appeal alludes to the term 'whistleblowing', it seems to emanate from Mr Wilson's misunderstanding of what is meant by whistleblowing. It appears that Mr Wilson did not appreciate management's duty to investigate disclosures that might be in the public interest and instead felt that they were matters for potential disciplinary action against the employee making the disclosure.

106. The Tribunal does find that in relation to the disclosures contained within this email, they did relate to alleged safeguarding involving other staff members. On the face of it, they could have been made in the public interest and consequently, could amount to protected disclosures. It did include a disclosure of information which suggested that legal obligations or health and safety obligations under section 43B may have occurred. There was no suggestion that she did not believe it to be true and her WhatsApp messages included within the hearing bundle was supportive of that. It was also a matter which could be in the public interest given that it related to the interests of pupils, parents and staff and the disclosure appeared to be made in good faith. It was sent to Mr Birch, Ms Owens and Mr Wilson and in their shared emails of 1 July 2018, they were clearly unhappy with her arguments and felt Ms Phipps was being self-centred and (as Mr Birch put it), *'[s]he is determined to make as much white noise [as] possible I am sure Directors will be unimpressed.'* Their attitude towards Ms Phipps by this stage clearly undermined their duty as managers to recognise that information had been provided that could amount to a failure to comply with a legal obligation in relation to the conduct of other staff. While they may have felt it was made in bad faith, it nonetheless appeared to be a complaint which they dismissed out of hand without considering it properly.

107. Accordingly, while the emails 25 May, 5 June, 11 June and 25 June 2018 did not disclose information amounting to protected disclosures, the Tribunal accepts that the claimant's email of 18 July 2018 did disclose information which amounted to protected disclosures.

Did the claimant suffer any detriments for the purpose of section 47B Employment Rights Act 1996 on grounds she had made protected disclosure?

108. In relation to the disclosure made on 18 July 2018 (which the Tribunal finds was the only protected disclosure made), Ms Phipps argued that her appeal against final written warning was not overturned (it post-dated the earlier decision to impose warning and the other earlier disclosures referred

to in the previous section could not have amounted to protected disclosures). There were no notes of appeal hearing available. However, the witness evidence of Mr McGrath as a member of the appeal panel, was that he felt she should have been dismissed and that Mr Wilson informed him that the appeal panel had no right to impose higher sanction on appeal.

109. The panel's refusal to uphold the appeal was based on their perception of an admission by Ms Phipps to issues which were justified the imposition of a final written warning and which also, (in their view), justified dismissal. They also failed to identify any procedural errors.

110. On balance, by this stage of the process, the employer had imposed a final written warning, its appeal hearing officers felt it was an insufficient sanction. They clearly looked at the bare admissions rather than the context to the matters before them. This was an approach which continued throughout the process. However, while this might be the case, the Tribunal did not believe that this decision was triggered because of the disclosure provided in the appeal email concerning the alleged safeguarding issues. Accordingly, the claimant did not suffer a detriment arising from the protected disclosure.

Was the sanction to impose a final written warning appropriate?

111. The Tribunal has already stated that no proper investigation took place. The swearing incident was at its highest, a matter of misconduct which justified no more than a verbal warning. It was the first occasion that Ms Phipps had been investigated for such an incident, it was not in front of parents or children and she accepted what she had said and that it was inappropriate. But taking into account the absence of any investigation concerning Ms Heywood and her apparent inconsistent recollection and possible exaggeration of what happened, any formal process for this matter against Ms Phipps was inappropriate.

112. There is no doubt that the water incident involved inappropriate behaviour. However, there was no proper investigation, Ms Phipps acknowledged her behaviour and that it was inappropriate and that it involved no more than a few drops of water rather than pouring a whole glass of water over child A. Superficially, it appears that a final written warning could have been an appropriate sanction, but it was imposed without a proper consideration of context and without a proper investigation. As a consequence, the decision made on partial information and the sanction was not reasonable without a proper investigation having first taken place. It was no doubt a matter which did require some retraining to ensure ongoing capability, but to deal with it as a conduct matter, especially where it is treated as a matter which could give rise to a dismissal or a sanction stopping short of dismissal, did require a more rigorous following of disciplinary processes and the ACAS Code of Practice. Finally, it is noticeable that although the matter was reported to the LADO in Trafford MBC, it did not from the limited documentation available, appear to amount for them, as a matter of concern.

Were any defects in process corrected on appeal?

113. There appeared to be a total unwillingness on the part of management or the appeal panel to recognise any failure in process. Indeed, they were wholly focused upon the behaviour involved and if anything, would have dismissed if could. While they were fortunately prevented from taking this action by Mr Wilson, they upheld the final written warning having been given a clear direction that this was the minimum sanction and no correction took place.

#### Disciplinary and grievance procedures and the claimant's contract of employment

114. The Tribunal accepted that paragraphs 14 and 15 of Ms Phipps' statement of employment particulars provided that the grievance procedure and the disciplinary procedure respectively could be used and/or apply to her. Moreover, paragraph 4 of this statement of particulars made reference existing local and national collective agreements and also the National Agreement on Pay and Conditions of Service, (as well as '*other documents which are equally available to you*'). But importantly, paragraph 4 states that the '*...principle conditions at the time of issue of this statement are set out below.*' Given that the subsequent paragraphs 14 and 15 include the grievance and disciplinary procedures, the Tribunal must conclude that they form part of Ms Phipps' contract of employment.

#### Repudiatory breach?

115. The way in which management dealt with the disciplinary matters as described above, their failure to listen and their repeated failure to correct the initial errors went beyond a minor or a single express failure. Sovereign's management displayed arrogance, disingenuous and completely undermined trust and confidence. These failures were continuing and had a cumulative effect resulting in a repudiatory breach of the implied term of trust and confidence between employee and employer.

#### Was the dismissal unfair?

116. Although this issue was objected to by the claimant and was not in grounds of resistance, it clearly forms part of respondent's defence of constructive unfair dismissal claim and included in statements before the hearing. Ms Phipps was in a position to understand that this would form part of respondent's case.

117. Throughout the case, the intention of Sovereign's management was to impose a final written warning and to return Ms Phipps to work. Mr Birch spoke highly of her at beginning and noted she was good member of staff. Despite a large number of redundancies taking place throughout the Pictor Academy during 2018, it is significant that at no stage did Ms Phipps feature in the selection process. It may have been because of her commitment to a particular child, but there was clearly no intention on the part of the respondent, to find a way which would enable them to terminate her employment. Indeed, in evidence, the Tribunal heard that had child A left, they would have redeployed Ms Phipps into another TA role.

118. Mrs Owens referred to the disciplinary issues raised by Ms Phipps concerning other members of staff which were felt by her to be malicious

and which she asserted would have been dealt with had she not resigned. However, there was no convincing evidence that this was the intention of management and in any event, these comments arose from Ms Phipps' concern about the fairness of her treatment and would not have arisen had the process against her been managed more carefully. There was no evidence that she would have been dismissed in any event.

Were the alleged protected disclosure the reason or principal reason for the claimant's dismissal?

119. For the reasons given immediately above, there was no decision to dismiss Ms Phipps by the respondent and the only successful protected disclosure related to the notice of appeal. The failures in process by management related to the incidents which were the subject of the disciplinary process and they were connected to a perception by Mr Birch and others that the matter needed to be resolved quickly and with all apparent loose ends relating to Ms Phipps' conduct being resolved without her being dismissed. The treatment complained of, was not connected with the protected disclosure contained within the Notice of Appeal.

Was claimant's dismissal wrongful?

120. Ms Phipps was constructively dismissed and resigned without notice. She did have 8 completed years of service and should have received her full amount of notice pay. Her resignation without notice was justified and she was wrongfully dismissed.

The respondent's failure to file and serve an amended ET3 in accordance with the Tribunal's order of 27 June 2019?

121. This was not a material issue during the hearing. It was clear what the issues were between the parties, it was detailed in the respondent's witness evidence and neither representative did not raise this matter as a significant issue during the hearing.

Compensation

122. The case will need to proceed to a remedy hearing to deal with the successful complaints of constructive unfair dismissal and wrongful dismissal.

123. The Tribunal did feel that there had been considerable failures to comply with the ACAS Code of Practice and these failures continued despite being warned by the claimant on several occasions and despite the respondent having access to HR support. This was a large employer with HR procedures and the Tribunal feels that an uplift for these failures to comply with the ACAS Code of Practice is warranted at the maximum level of 25%.

124. In terms contributory fault, the Tribunal finds that there was none. The respondent was employer was irked by the claimant's unwillingness to simply go along with process as conceived by Mr Birch. However, there was nothing to suggest that Ms Phipps contributed to circumstances that

led to her dismissal by way of resignation. She accepted that she had behaved inappropriately from an early stage in the process. All she did was to assert her rights within internal procedures. She may have been a difficult employee to deal with in some respects, but her reaction in this matter was something that management provoked. A more sensitive approach to the relevant issues could well have avoided a resignation taking place.

125. The Tribunal did consider Polkey and whether a fair procedure would have changed matters and resulted in a fair termination. However, as has already been explained, it is doubtful that she would have been dismissed had a fair process taken place and if anything, a fair disciplinary process would have yielded a lesser sanction than a final written warning.

### **Conclusions**

126. The claimant was constructively unfairly dismissed, which means that this complaint was successful.
127. The claimant's complaint of wrongful dismissal is well founded, which means that it succeeds.
128. The claimant's complaint of detriments/dismissal arising from the making of a protected disclosure are not well founded which means that this complaint is not successful.
129. The case will now proceed to a remedy hearing to determine the quantification of the claimant's successful complaints.
130. The parties are ordered to provide agreed suggested case management orders to ensure that the case is ready for the remedy hearing, including an updated schedule of loss, counter schedule of loss, disclosure and remedy hearing bundle and witness evidence. The parties should provide these suggested orders to the Tribunal by no later than **10 November 2021**.

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Employment Judge Johnson

Date: 14 October 2021

JUDGMENT SENT TO THE PARTIES ON

27 October 2021

FOR THE TRIBUNAL OFFICE

**RESERVED JUDGMENT**

**Case No: 2416923/2018**

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