# EMPLOYMENT TRIBUNALS

**Claimant:** **A Headteacher**

**Respondents:** **(1) Essex County Council**
**(2) The governors of a primary school**

**Heard at:** **East London Hearing Centre (by Cloud Video Platform)**

**Before:** **Employment Judge John Crosfill**

**On:** **13 & 14 April 2021**

**Representation**

**Claimant:** **Andrew Faux of Counsel from the Reflective Practice**

**Respondent:** **Sam Stevens of Counsel instructed by Essex Legal Services**

# CORRECTED JUDGMENT

1. **The Claimant's claim for unfair dismissal brought under Part X of the Employment Rights Act 1996 is well founded.**

2. **The consequences of this decision shall be considered at a separate remedy hearing**.

# REASONS

1A On 18 February 2021 Employment Judge O'Brien issued a Restricted Reporting Order under rule 50(3) (d) of the Employment Tribunal Rules of Procedure and Section 11 of the Employment Tribunals Act 1996. He stated:

*"This case involves an allegation of sexual misconduct. Pursuant to section 11 of the Employment Tribunals Act 1996 and rules 50(1) and (3)(d) of the Employment Tribunals Rules of Procedure 2013, THIS ORDER PROHIBITS the publication in Great Britain, in respect of*

*the above proceedings, of identifying matter in a written publication available to the public, or its inclusion in a relevant programme for reception in Great Britain. 'Identifying matter' in relation to a person means 'any matter likely to lead members of the public to identify him as a person affected by, or as the person making, the allegation'. The following persons may not be so identified: The Claimant. Any of the pupils of Primary School.*

*The Order remains in force until both liability and remedy have been determined in the proceedings unless revoked earlier. This order has been made without having heard from any interested parties, and its continuation will be considered at the next listed hearing.*

*The publication of any identifying matter or its inclusion in a relevant programme Is a criminal offence. Any person guilty of such an offence shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.*

1. The Second Respondents are Governors of a primary school ('the school') that is maintained by the First Respondent. The Claimant is a teacher. He has worked at various schools maintained by Essex County Council since September 1983. In 1994 he became the head teacher of the junior school before the merger of the junior school with the infant school in 2003. Since 2003 the Claimant has been the head of the merged school.

2. On 26 June 2018 the Claimant was arrested at the school on suspicion that he had sexually abused infants from the reception class in his office. He was subsequently charged. On 30 May 2019, following legal arguments about the admissibility of evidence the crown offered no evidence against the Claimant and he was acquitted. Essex County Council took control of the school in order that it, rather than the second Respondents, would be responsible for any disciplinary proceedings. After an investigation was carried out the Claimant was invited to a disciplinary hearing that took place on 2 and 3 July 2020. On 21 July 2020 the Claimant was informed that he would be summarily dismissed. The Claimant appealed that decision, but his appeal was dismissed.

3. Following a period of ACAS Early Conciliation, the Claimant presented an ET1 on 5 November 2020. He has brought only a claim of unfair dismissal under Part X of the Employment Rights Act 1996.

## The Issues

4. The issues in the case were not in dispute and were as follows:

    4.1. Unfair dismissal

        4.1.1. It was admitted that:

            4.1.1.1. The Claimant had sufficient continuity of service to present a claim of unfair dismissal without needing to show any automatically unfair reason for the dismissal; and

4.1.1.2. There was no dispute that the Claimant had been expressly dismissed by the First Respondent; and

4.1.1.3. In his submissions on behalf of the Claimant Mr Faux accepted that the reason that the Claimant was dismissed was that Essex County Council held a genuine belief that the Claimant had sexually abused one or more children and that this would amount to 'conduct' a potentially fair reason for the dismissal.

4.1.2. The Tribunal needed to decide whether:

4.1.2.1. There were reasonable grounds for the Respondent(s)' conclusions which were;

4.1.2.2. formed following a reasonable investigation; and

4.1.2.3. whether the Respondent(s) followed a reasonable procedure; and

4.1.2.4. taking these matters into account whether the dismissal was fair or unfair applying the test in sub section 98(4) of the Employment Rights Act 1996?

4.2. At the outset of the hearing we briefly discussed whether the Respondent(s) were taking any point that, if the dismissal was unfair, should any compensatory award be reduced to reflect any possibility that, had the Respondent(s) acted fairly, the Claimant could or would have been dismissed in any event? The only point taken in the ET3 was to say that if there had been any procedural failures the Tribunal should conclude that as the Claimant had, as a matter of fact, sexually abused a child or children his dismissal was inevitable. Mr Stevens acknowledged that the First Respondent had not in its ET3 or its evidence argued that if the dismissal was substantively unfair (because no reasonable employer would have concluded that the allegations of abuse were made out) then it could have dismissed the Claimant on the basis of any present or future reputational risk.

4.3. The investigation in respect of the Claimant's conduct was broader than the allegations that he had behaved inappropriately towards children. The invitation to a disciplinary hearing leveled 3 allegations against the Claimant. Two were upheld. When the Claimant appealed, his appeal was allowed in respect of one of the allegations. The only allegation that was ultimately upheld was the allegation that the Claimant had behaved inappropriately towards children. The Respondent defended the claim on the basis that this was the only conduct upon which it relied. I have

therefore dealt with the claim on that basis.

4.4. We further discussed whether the Tribunal needed to consider whether if the dismissal was unfair any basic award and/or compensatory award should be reduced under sections 122(2) and/or 123(6) of the Employment Rights Act 1996 because of any conduct by the Claimant.

4.5. We agreed we would only deal with the issues above and, if the Claimant succeeded, any other remedy issues would be dealt with at a separate hearing.

## The hearing

5. The hearing was conducted by CVP. There were only minimal difficulties with the connection and no significant interruption to the hearing.

6. In advance of the hearing the parties had, in accordance with the directions of the tribunal, prepared an agreed bundle of documents running to some 2574 pages. They had also prepared and exchanged witness statements from the following people:

6.1. the Claimant; and

6.2. his wife; and

6.3. Clare Kershaw, the Director of Education for Essex County Council and the person who, following the Claimant's acquittal, commissioned an investigation for the purposes of an internal disciplinary process; and

6.4. Margret Lee, an Executive Director for Corporate and Customer Services and the person who took the decision to dismiss the Claimant; and

6.5. Pam Parkes a Director of Organisation Development, People and Service Transformation and the person who heard the Claimant's appeal against his dismissal.

7. The witness statement from the Claimant's wife, whilst generally supportive, was unlikely to assist me in any of the matters I needed to decide. Mr Faux indicated that he did not intend to call the Claimant's wife. Whilst I had read that statement, I have not taken it into account in reaching the conclusions below.

### The proper respondent

8. The parties agreed that under regulation 3 of the Education (Modification of Enactments Relating to Employment) (England) Order 2003. The second Respondents would ordinarily have been the proper respondents for the purposes of a claim of unfair dismissal. However, the decision by Essex County Council to suspend the school's delegated budget means that it is that

body who is to be treated as having dismissed the Claimant.

9. As I have found the Claimant was unfairly dismissed, I may be asked to consider the remedies of reinstatement and/or re-engagement. I have not heard any arguments as to whether the first or second Respondents might be responsible for complying with any such order. Accordingly, I shall not dismiss the proceedings against the second Respondents at this stage. For simplicity I shall refer to Essex County Council as the Respondent.

Submissions and skeleton arguments

10. In advance of the hearing both advocates had prepared an opening note/Skeleton Argument. I was supplied with a number of authorities. At the conclusion of the evidence I heard further oral submissions. After the hearing I was asked whether I would consider further submissions in respect of the relevance of the decision and means used by Essex County Council to suspend the school's delegated budget. Whilst my provisional view was that this was a matter of marginal significance, I permitted the parties to make further written submissions on this point. I received the parties' written submissions at the end of May 2021.

11. I do not set out the parties' submissions in this judgment but deal with the principal arguments below.

The delay in providing this judgment

12. I had warned the parties that I faced a considerable backlog at the time of the hearing and that there might be some delay. Unfortunately, this proved to be the case. Whilst my decision was prepared in rough draft shortly after the hearing, I have had very few opportunities to perfect it until now. I apologise for this. I am well aware of the anxiety that this will have caused the parties.

Findings of fact

13. In this section I set out my initial findings of fact drawn from the evidence I have heard and read. I shall not set out the entirety of the evidence but shall include only the evidence I considered sufficiently important to inform my decisions.

14. Below I set out the events that led to the Claimant's dismissal. In particular, I set out the processes followed initially by the police and social services and later by the Respondent. I shall summarise the evidence that was gathered in the course of those investigations, not for the purposes of evaluating that evidence for myself, but to identify the evidence that was considered by the Respondent. My summary will inevitably be incomplete but in making my decision below I have had regard to all the evidence before the Respondent. Where I comment on the quality of the evidence I do so to identify what was or should have been apparent had the matter been approached reasonably.

15. The Claimant had been appointed as the head of the junior school in

1994 and head of the whole school in 2003. Prior to the events giving rise to this case he had an unblemished career.

16. Within the school the two reception classes were side-by-side and open plan. The reception children had their own playground which could be accessed from the classrooms. The Claimant's office was adjacent to the administrative office midway down a corridor that could be accessed from either end. If it were accessed from the end nearest the reception classrooms it would not be necessary to pass the administration office. The office was on the first floor and had windows that looked out onto the carpark and entrance to the school.

The Police Investigation

17. The allegations made against the Claimant concerned 7 children. These have been referred to throughout as Children A- G. I shall use the same terminology. It is convenient to deal with the evidence obtained from the children during the police investigation separately before moving on to the other evidence.

Child A

18. On 26 June 2018 the mother of Child A (a five year old boy) telephoned the Local Authority Designated Officer ('LADO'). Child A's mother reported that in the context of Child A having a bath he pulled back his foreskin and commented that it had not popped out like that earlier. She said that he went on to say that he and 3 other boys had done this at school. She reported that he had initially said that this was in assembly but then said it was in the Head Teachers Office. She said that he had said that he had his penis out with the Head Teacher present and had been told to keep the game a secret and that if he told anybody the Head Teacher would choose somebody else to play. She reported that Child A had expressed some surprise that one of the other children had a black penis. Child A's mother told the LADO that she wondered if there was any other explanation for this. The LADO advised her to make a police report which she did.

19. Later on 26 June 2018 a police Officer DC Jennings and a social worker Ms Livanos made a visit to Child A's house. They spoke to child A and asked about what he had said to his mother. On 29 June 2018 Ms Livanos entered the following information on the Local Authority record system:

> *[Child A] said that he played the finger-point game (later referred to finger-touch game) by Police with 3 other boys, all aged 5 [Three names redacted]. He explained that it is where you can touch anywhere on your body. When explored where this happened and with whom, he said that it was in school, but did not know who the adult was, however confirmed it was not a teacher. Police drew a picture of a person and explored what Child A called his genital area. He said "private bits" and his mother confirmed that he calls it "willy". He pointed on the picture that he (redacted) touched his (own) eye, foot and penis with his finger*

*and this was underneath his clothes.*

*He was asked if anyone else touched him and he confirmed it was one of the other boys. He wrote down [redacted] and there was an adult but wouldn't say the name. He wrote down said that Mr [redacted but assumed to be the Claimant] played the game too and he played the adult one, where he can touch anywhere himself. [Child A] said that they played the game yesterday, but never before.*

20. Child A had named 3 other boys. These were Child B and two others. Those two others were later spoken to by DC Jennings. It appears from the other documents that DC Jennings simply recorded that neither of these two children made any 'disclosures'.

21. It is not entirely clear whether there are any other notes of the meeting with Child A on 26 June 2018. Sam Withers, the social worker who attended all later interviews gave a statement to the police that explained how the informal interviews were recorded. She said that DC Jennings had made hand-written notes which were then typed up and placed on the social services file of each child. It does not appear that the hand-written notes were ever provided to the Respondent.

22. Child A's parents both provided statements for the purpose of the criminal trial. These were later supplied to the Respondent. Child A's mother's statement broadly repeated what she had originally told the LADO but with slightly more detail. She again said that Child A had suggested that the 'touching game' had taken place in the assembly. She then says (with my emphasis added): *'I said 'there's a lot of people in assembly why would you do it there?' To which he said he was in assembly with three other boys as mentioned above. <u>He wasn't quite clear on this and all what he'd spoken about pointed towards him being in [the Claimant's] office at school'</u>*. I have added emphasis to highlight that the evidence available in the investigation shows that there was evidence that it was Child A's mother who first raised the suggestion that any game took place in the Claimant's office. She went on to say that she had asked why they were in the Headmaster's office. She says that Child A told her that the classroom assistant had sent them there to play games. He also said that he wasn't allowed on the big computer. Later in her statement she says that she said to Child A *'That couldn't have been in assembly where were you?'* She records the response as being in the Claimant's office.

23. Child A's mother says the following in her statement: *'I sent a message WhattsApp to [a classmates] mother to enquire if she'd heard anything from him or could possibly ask some gentle questions of her son. I told her what I knew regarding the touchy game. We spoke about the matter and who to report it to'.* She says that she <u>then</u> looked for how to report the matter. If her statement is accurate, she had told another parent what she had been told before it was reported any further.

24. Child A's father also records that Child A had said that the finger game

took place in assembly. Child A's father said that Child A had told him that the touching game involved the Claimant drawing body parts *'on the white board'* and getting the boys to touch those parts.

25. The classroom assistant referred to by Child A's mother was asked to make a statement by the police and did so on 4 July 2018. She worked as a mid-day assistant from 12:15 to 13:45. She said that the children in reception were always accompanied to the lunch hall and back and would then play outside or if wet watch a film on a smart screen. She says that she has never sent a group of children to play in the Claimant's office. As such her evidence contradicted Child A's account.

26. A decision was taken by the police that Child A (and the other children) would need to be assessed for competence before they were formally interviewed. This caused some delay.

27. Child A's first ABE interview was on 11 July 2018. In that interview he initially says that he had not played a game in the Claimant's office. He was then prompted by DC Jennings initially orally then by reference to the drawing he had done at his home. He then repeats a description of the game where he touched body parts including his willy. He said that he had only touched outside his clothing. He said that it was 'the Game' that told him what to touch – he refers to it being a computer. He explained a reference in the informal interview to the Claimant *'having a big one'* as being a reference to a computer (contrasting it with an ipad). He said that the game had actually been a bit boring. He said that the Claimant had been present during the game but was not playing. He said that the Claimant had not seen his willy. He went on to say that the Claimant had been in a different room.

28. Child A was further interviewed on 12 July 2018. He had the assistance of a trained intermediary. During that interview Child A said that he had played a finger touch game with the same 3 classmates as he had named earlier. He could not remember where the game had been played. He said that the Claimant had not taken part in the game and had only watched. He said that he had touched his own penis but outside his clothing. He said that he had not seen any of his classmate's penises.

<u>Child B</u>

29. Child B had been mentioned by Child A as having been present during the 'touching game'. On 26 June 2018 DC Jennings and a Social Worker Ms Withers attended the school and spoke to Child B. The only record of this conversation in the agreed bundle was the record kept on the Social Services file. From other documents it appears that DC Jennings may also have taken notes but these do not appear to have been provided to the Respondent. The notes from the social services file were placed on that file on 29 June 2018. They are not a verbatim report and do not include many of the questions asked or the replies given. They are no more than a summary. The note record that Child B said that somebody in his class had made him lie and that he did not like lying. He did not say who that was. When his mother was permitted to enter the room he was asked further questions. It is recorded that by nodding and

shaking of the head Child B indicated that he had played the 'finger game'. It follows from that that the subject must have been introduced by one of the adults. The notes record that when asked what part of the body the finger game entailed touching he pointed to the 'wee wee' area. He said that this was under his clothing. He is then recorded as saying that there were no adults in the room. The notes suggest that this was explored further he initially said that there were no adults in the room. The note records him then saying that the Claimant had been present and that he, and two children had touched his penis.

30. Child B was formally interviewed as part of the ABE process on 11 July 2018. In his interview he did not repeat any of the allegations he was recorded as making originally.

31. In the bundle provided to me the parents names have been redacted although their statements are behind post it notes marked A, B etc. It appears that Child B's mother made a witness statement on 19 July 2018. In that statement she gives her account of the interview that took place at the school. She says that she was asked to speak to her son. She says that when she did so, she was satisfied that the Claimant had not inappropriately touched her son.

Child C

32. On 2 July 2018 Child C's mother contacted the LADO. Later Child C's mother made 2 statements for the purposes of the police investigation. The mother's first statement discloses that the family returned from a holiday on 1 July 2018. She then saw on the reception class parents' WhatsApp group a message that linked to a press article and disclosed that the Claimant had been arrested on 26 June 2018. She says was concerned as she knew about an occasion where Child C had come home with a sticker which she said the Claimant had given her in his office. She says in her witness statement that when she saw the WhatsApp message she immediately recalled the incident with the sticker. It is clear that Child C's mother then asked her a number of questions. In her witness statement Child C mother said that Child C had on a number of occasions put crayons inside her vagina and had displayed sexualised behaviour by kissing with an open mouth.

33. Child C's mother contacted the LADO after speaking with some other parents. The note of that conversation is within the social services records. Child C's mother reported that Child C had said that she played games in the Claimant's office with three other girls. She said that Child C had said that the Claimant had 'scratched her all over'. She said that Child C had suffered from a vaginal discharge at times and that this had resolved itself when treated with thrush cream.

34. DC Jennings and Sam Withers then attended Child C's house and spoke to her and her parents. In common with the other informal interviews there is no record of the questions and answers. There is however a typed-up note placed on the social services file by Sam Withers. That note reveals that Child C had indicated that the Claimant played a tickling game. It is recorded

that he tickled her on her body including her private parts using his fingers. Child C says that this happened on numerous occasions while sitting on a sofa in the Claimant's office.

35. Child C then has two ABE interviews on 11 and 16 July 2018. The record of those interviews were given to the Respondent. DC Jennings conducts both interviews with the assistance of an intermediary. In the first interview Child C initially says that she has never played any games which she did not like or with the headmaster. She was asked whether the headmaster was good or bad and says both. DC Jennings then asked why he was bad (never touching on why he was good). She is them prompted by DC Jennings who tells her that she had previously said that the headmaster had scratched her. She then agreed that was the case. She later said that the Claimant had not scratched her and then that she could not remember. At one stage she suggested that if anything took place it was in the 'Lady's office'.

36. In her second interview Child C was asked whether she had been to the Claimant's office she agreed that she had. When she was asked what happened she is recorded as saying *'what did he do? I was thinking we did because I was talking to daddy last night but I don't remember now'*. Child C then suggested that she had been in the Claimant's office with Child D. Later on DC Jennings asked what the Claimant had done and the record of the ABE interview suggests that Child C picked up a doll, opened the dolls legs and put her thumb between them. She is then recorded as saying that he poked her underneath her clothes and knickers. She went on to say that she poked her on the *'front bit'*. Later on, she suggests that a number of other children were present during this incident. Having been reminded later in the interview that she had said that the Claimant poked her Child C also said that he had bitten her on her leg and her face. She later went on to say that when the Claimant had poked her it was on the outside and the inside. When asked how often this had taken place Child C said initially that it had happened five times and then said more than once. Child C was asked to do a drawing of where the Claimant had scratched her and appeared to indicate that he had scratched on her tummy, shoulder, leg, arm and the top of her legs. She then apparently describes the Claimant doing something to some other child.

37. Child C's mother reported that Child C was having nightmares including shouting out 'leave me alone'.

<u>Child D</u>

38. Child D had been mentioned by Child C as having been present during the 'tickle game'. The Social Services records show that she was spoken to by Ms Withers and DC Jennings on 2 July 2018. Again, those notes are only a summary. Child D is recorded as having denied playing any tickle game or finger game. It is also recorded that Ms Withers made reference to 'fannies' and the Claimant in the same sentence. The records suggest that Ms Withers though that Child D had clammed up at that point. There is a further record of an informal interview on 4 July 2018.

39. Child D's parents both made statements. These were provided to the

Respondent. The parents say that they had witnessed their daughter playing with a doll placing its foot beside or inside her vagina. They also refer to an occasion when their daughter had a sore vagina and underwent a medical examination. Neither parent expressed any concerns that the Claimant had behaved improperly.

40. Child D attended an ABE interview in Brighton on 26 July 2018. Her parents declined to release that interview to the Respondent and so the full interview was not available for the investigation. However, the social work records reveal that Child D made 'no disclosures' although the notes suggest that Ms Withers did 'suspect' that she was not being open and honest.

Child E

41. Child C had mentioned that Child E had been present in the school office. He was interviewed at school on 4 July 2018. Such records as there are of that conversation were within the social services file which was made available to the Respondent. Those notes disclose that Child E said that he had only been to the Claimant's office on one occasion. He said that the Claimant had sat on a 'spinney' chair and had a desk and a computer in his office. He is recorded as saying that there was nothing about school that he did not like. The record ends with a comment by Sam Withers who records that she had no concerns and that no disclosures had been made.

42. Child He was then interviewed again at his home on 18 July 2018. The only record of that interview what appears to be a typed-up note from DC Jennings found on the social services file. Child E said that he had been to the Claimant office at the start of the year and that the Claimant had read them a story. He named for other individuals who were with him. He was asked how they had got to the office and said that his teacher S had walked there. He said that the door had been closed and S had stayed throughout the story. He said that at the end S had taken another pupil and him back to class but that three other children had been kept behind because they had been naughty he said that the Claimant had made them sit on 'the red table' with a red card. He then went on to say that Child C had smacked the Claimant on the privates. He went on to explain that this was a different time and that had been in his classroom at lunchtime. When asked what the Claimant had done, he suggested that he had smacked child C back on the privates. He is recorded as being asked whether it was on top of or underneath her clothing and saying that it was underneath and that she was wearing a dress. He said that Child C had run out of the gate crying. He said that one other person and S were both there as well. He suggested that S could not have seen what was going on because she was looking at the computer.

43. Child E had an ABE interview on 23 July 2018. He starts off by repeating what he had said on 18 July 2018 that he had observed Child C and the Claimant each hit each other on the privates. 12 minutes into the interview he was asked that that was something that he saw and said no, it was something he been told by one of his friends, classmate 15. He was questioned about this and repeated that he had been told about this by classmate 15. There is then a break in the interview. Child E is then asked some general

questions about the Claimant and says that when people are naughty the teacher brings to the Claimant's office. He repeated his account of been taken to the Claimant's office to be read a story but on this occasion said that the teacher waited outside. He then reversed his account of who was required to stay behind after the story concluded suggesting that it was him and classmate 15 who were required to stay behind. Later however he suggests that classmate 15 was one of the children that left. Child E then appears to suggest that the incident when Child C smacked the Claimant in the privates took place in the office. He said that Child C was crying. He chopped and changed his mind about whether the teacher was outside or inside the office.

44. After a break, Child E said that the Claimant had smacked Child C hard on her privates underneath her clothing. This time when asked if it was something he had seen himself he said that it was. He said that it took place in the office and is recorded as saying that the Claimant, his teacher and himself were all present. He then changes his account again and says that the teacher was outside the office. He later suggested that Child C was wearing a dress on which the buttons had become undone and that it had fallen down. After a further break Child E suggest that there had perhaps been a further occasion when the Claimant and child C had smacked each other on the privates in the classroom. He suggested that one of his classmates had been nearby. He repeats his account that the teacher could not have seen because she was looking at the computer.

Child F

45. On 5 July 2018 Child F's mother (or perhaps grandmother) was spoken to by a social worker. The record of that conversation discloses that Child F's mother was keeping him away from school after the allegations of abuse had been made. She is recorded as saying that he has a bad memory and she felt that he would not be able to tell anyone if he was being abused. A visit took place to Child F's home on 9 July 2018 undertaken by DC Jennings and Sam Withers. He is recorded as saying that he had been present in the Claimant's office on just one occasion during which he was read a story. He said that only he was there at the time. He then went on to say that the Claimant had bitten him on his eye and on his shoulder. He was then asked whether the headteacher was wearing any clothes and is recorded as saying *'no he was naked, I saw his willy'*. He then said that the Claimant was playing with it with his fingers. He is recorded as saying: *'it looked different it was bigger than mine, mine is just, was pointing to the sky'*. At the conclusion of the interview he is asked once more how often he had been to the Claimant's office and he is recorded as saying just once.

46. An ABE interview took place on 16 July 2018. Child F said that he had been alone with the Claimant in his office. He said he did not remember why he had gone there. He then went on to say that the Claimant was playing with his willy in the office. He was asked where the Claimant's clothes were and he said a little bit on and then didn't know. He said that the Claimant had stopped playing with his Willy when somebody had come into the room. He said he didn't remember what happened then. Child F is then recorded as saying that the door was open during this incident. After a break Child F is asked about

clothing again and he said that the Claimants close were 'a little bit on'. Child F said nothing about being bitten by the Claimant until he was shown drawings he had done on 9 July 2018. He then repeated his account that the Claimant had bitten him on the eye and on the shoulder. He said that he had been bitten underneath his clothing. He went on to describe what he said happened using cartoon pictures. He said at this stage that the Claimant had been naked. Child F went on to say that he had been jumping around on the furniture and had jumped on the Claimant. Child F maintained an account that he had been bitten by the Claimant using his teeth. Finally, Child F says that the Claimant had touched his *'willy'* over his clothing. Child F then repeats an account of having jumped around the office and suggesting that he had jumped on the Claimant.

Child G

47. Child G was interviewed at the school by DC Jennings and Samantha Withers on 3 July 2018. Again, the notes of that interview are limited to typed notes found on the social services file. Those notes suggest that child G said that she had been to the Claimant's office with five other children. When asked what she did she said that the Claimant tickles her back, her bum and her front bum bum. It is said that she pointed to areas on her body whilst doing this. The notes record that when joined by Child G's mother she repeated the story about been tickled in those areas. It is also noted that the child's parents reported that she had again repeated the same story to them that evening.

48. Child G had ABE interviews on 11 and 12 July 2018. After being asked about 'the tickle game' Child G does mention the Claimant but then immediately goes on to mention another teacher who has been referred to as Teacher 17 as having participated. She appears to say that teacher 17 has tickled her on her tummy. She had various stages names a number of classmates she says played the game as well. The interview is protracted as Child G is asked numerous times to describe the tickle game and does not do so. DC Jennings at one stage introduces the concept of been tickled on her 'head her feet her back and bum bum' and goes on to say I want to know more about the 'bum bum'. That does not prompt any further statement at this stage from Child G who says that this would be dangerous. Child G does later say that the Claimant tickled her. She later uses words to suggest that a classmate had taken her knickers off. Child G at the end of the interview denies that either the Claimant or teacher 17 has touched her bum bum. She said that to do so would be dangerous.

The Claimant's arrest, suspension and charge.

49. The Claimant was arrested in his office on 26 June 2018. The only person who knew that the police were about to attend the school was the Deputy Headteacher. When she made a statement to the police she said that she had not given the Claimant any warning that he was to be arrested. When the Claimant was arrested the police say that he was working at his computer and had emptied his 'recycle bin'. The Claimant's work and home computer and his mobile telephone were seized and his home was searched. A forensic examination of those devices did not disclose any evidential material save for the fact that the Claimant had had an extramarital affair.

50. The Claimant was interviewed by the police on 26 June 2018 and three separate interviews which took place on 18 August 2018. Those interviews were later disclosed to the Respondent. The interview 26th of June 2018 primarily concerned the allegations relating to Child A and Child B. The Claimant explained that he did have lessons with older children in his office. He said that the circumstances where younger children would come would be when they were accompanied by a member of staff to either be disciplined or receive a sticker for good work. He referred to the fact that he saw the reception children in October and November in small groups to read them a story in groups of about 10 shortly after they started school. He explained that the reception children had toilets within their own classrooms and did not need to go out of the classroom to go to the bathroom.

51. The Claimant flatly denied ever having been alone with a group of four children in his office. He categorically denied having touched any child's penis. He also denied having seen any other child touching Child A's penis. DC Jennings warned the Claimant that his electronic devices would be searched and his Internet history retrieved together with any messages. The Claimant said that he was confident that any such search would find nothing whatsoever to do with children on any device. The Claimant was asked whether he had ever cheated on his wife and said that he had not. This was not true as the Claimant admitted on 18 August 2018.

52. On 18 August 2018 the Claimant was interviewed again in relation to the allegations concerning Child C, D and E as well as covering additional questions in relation to Child A. The Claimant explained how each year he would take reception class children into his office in groups of 10 in order to read them a story. He said that he had been doing that for many years. The Claimant maintained his denial of playing a touching or finger game. He said that when he read the children a story he did so from the text and not from a computer. The Claimant repeated the fact that occasionally children will be brought to his office to receive a sticker if they had done good work and said that they would be brought by a member of staff. When asked if children would just be dropped off the Claimant said no they would normally stay whilst the child was given a sticker. The Claimant was asked whether the reception children could wander around the school at lunchtime. He explained that they could not and that once they left the dining hall they will be taken back to the classroom area where they would play in their own playground and would not be allowed back into the school. He said they would be supervised all the time.

53. The Claimant denied that he had behaved inappropriately towards any child. In one interview, having taken legal advice, the Claimant accepted that he had not been frank in his first interview about having an extramarital affair. The Claimant was re-arrested in respect of the further allegations that had been made against him. In a final interview on 18 August 2018 the Claimant was asked about the seized telephones and computers. There was no evidence found on any of those devices that supported the allegations that the Claimant had behaved inappropriately towards children.

<u>The Adult Witnesses Interviewed by the Police</u>

54. The deputy headteacher was interviewed on 26 June 2018 and made a statement. She starts her statement by saying that she considers the Claimant to have been great with children she said he was a very fair man who jokes with the children but uses authority when it is appropriate. She said she'd never had any concerns about him. She said that at the school they operated an open-door policy to their offices. The only exceptions would be if you speaking to parents either in person or on the telephone all that was a senior leadership meeting. She said the Claimant's door was always open apart from confidential meetings with parents or during a senior leadership meeting. She said that the children would go to the Claimant office to receive praise and stickers to good behaviour or on occasions were telling off for bad behaviour. She said that occasionally if the behaviour of the children was very bad the door might be shut so the children could be spent on their own she said that this type of occasion was rare and that she was usually but not invariably present.

55. The deputy headteacher made a further statement on 3 July 2018. In that statement she gave information about the layout of the school. She said that there were eight iPads in the reception classrooms which we used with strict supervision. She said that children were not allowed access to computers during break times or lunchtimes. She said that reception children did not have access to computers anywhere else in the school. She said that the children were escorted around the school. She said that the Claimant did go to the reception class area but he's never alone with the children. There would always be another adult around either an LSA or a teacher.

56. The deputy headteacher made another statement on 16 July 2018 she said that when children went to the Claimant office they are accompanied by an adult. This is specifically the foundation at Key stage I children. Whilst Key stage 2 children might go on their own it is more likely they would go into pairs. Any child being reprimanded would usually be accompanied to explain the reason that they were there. She said that the Claimant did not have much engagement with the reception class and normally she would be the person required to reprimand them if necessary. She describes the Claimant's practice of taking groups of reception children to his office at the start of the year to read them a story. She said that this would be approximately 15 children at the time.

57. The deputy headteacher made a further statement on 12 September 2018. That statement dealt with the circumstances of the police attending the school on 26 June 2018. The issue it deals with appears to be whether the Claimant had been tipped off about the fact that he was about to be arrested. The deputy headteacher's evidence suggested that she did not inform the Claimant of the reason that the police had visited the school.

58. A teacher, S was the classroom teacher for Child A and Child B. She was first asked to give a statement to the police on 29 June 2018. Somewhat surprisingly she does not appear to have been asked whether these children had been taken to the Claimant's office recently. However, she does say that the children would be either in the classroom or outside in the reception playground. She says that she has never heard any child refer to the finger game and says that the Claimant had not asked to see any of the children recently. She said that she had concerns about the ability of Child B to

understand what is said to him and says that he commonly gives the wrong answer to questions through a lack of understanding.

59. S gave further statements on 29 June and third of July 2018. In those statements she explains that she had been informed that in the outdoor learning area the staff had created what was described as a *'finger gym'* to encourage fine motor skills through different activities. In her final statement she says that the Claimant is never on his own with the children in the reception class area or in their own play area as it is always a learning support assistant for herself there as well. In that final statement she gives an example about Child B's lack of understanding.

60. The police conducted an interview with a child-care assistant from a local preschool. She made a statement in which she said that she regularly picked up reception age children from the school and that to her knowledge the children had never been left on their own.

61. The other reception teacher ('K') also gave two statements to the police on 12 July and 12th of September 2018. In her first statement K described how the reception class were assisted over lunchtime. She said that the reception children would go to their lunch earlier than the older children and would be accompanied by mid-day Assistants. At the end of the day the children line up for collection by their parents and those going to the after-school club are taken to the dining hall to be collected. She said that: *'there is no point throughout the school day where the children are unsupervised. The toilets used by the Reception children are located within the classroom and no other facilities the children would need outside the classroom.'* She said that the Claimant did not have much dealings with the reception children. She went on to say that on the ninth and 11th of October 2017 there had been a one-off reading session with the children. She said the Claimant had come to collect the children she could not recall quite how many children were taken in each group but said the number would vary between 10 and 15. She said that all the children came back from the reading group having said they enjoyed themselves. She said that the Claimant had done this for years.

62. In her second statement K produced a friendship chart setting out the relationships between the various children that were interviewed by the police. She gave further information about how the reception classes were organised. She said that it was possible that a year six child could take a reception child out of the classroom at lunchtime but only with the authority of the mid-day assistant she gave an example of the child needing first aid.

63. Two office staff were both interviewed. They said that infant children were only brought to the Claimant's office to collect a sticker ought to be told off and would have another adult with them in those circumstances. One of the office staff described the fact that she could usually hear what was going on in the office and the Claimant's voice was loud. She said that she would regularly enter the office. She said that she was in and out of the office all day on 25 June 2018 as she was preparing for a governors meeting. Both office staff suggest that the Claimant generally kept his door open.

64. One of the mid-day assistants G was interviewed and made a statement on 4 July 2018. She was the person mentioned by Child A. Her evidence was that the reception children were always chaperoned outside of the classroom and playground. She said that she had never sent a child to the Claimant's office.

65. A statement was taken from the school inclusion manager who was asked about Child G. She said that she had no knowledge of any tickling game and had not been tickled Child G nor been tickled by her. Her dealings with Child G related to the fact that Child G had suffered a bereavement and needed counselling.

66. A statement was taken on 7 September 2018 from teacher 17. He was the individual named by Child G is participating in any tickling games. It does not appear from his statement that he was ever treated as a suspect. In his statement he describes Child G as being somewhat tactile and occasionally hugging him. He said that he would swiftly disentangle Child G and speculated that she might have perceived this as him tickling her. He denied that he had tickled her himself.

67. Whilst they were not made available to the Respondent the enquiries included interviewing some 23 further children. It is not suggested that any of those children gave any information to the police that suggested that there had been any improper behaviour by the Claimant.

68. On 29 October 2018 the police established a hotline to enable advice to be given to the public. The information before the Respondent did not include any suggestion that there had been allegations from any other children.

The Crown Court Proceedings

69. The Claimant was charged with six sexual offences against children on 29 October 2018. He attended Basildon Crown Court on 8 January 2019 where he indicated a not guilty plea. The matter was fixed for a trial commencing 3 July 2019 with a pre-trial hearing fixed for 17 May 2019. On 17 May 2019, Queens Counsel instructed by the Claimant had produced a lengthy skeleton argument in which he set out arguments why the evidence obtained by the police in the informal interviews of each child should be excluded as inadmissible hearsay. He further argued that the defects in gathering that evidence had fatally tainted the quality of the ABE interviews of each child. The skeleton argument is lengthy, and I shall not set out the detail of the argument here. It is sufficient to say that the Claimant later relied upon the same arguments in the internal disciplinary procedure and supply a copy of that skeleton argument to the Respondent.

70. At the hearing on 17 May 2019 HHJ Leigh indicated that she found the arguments presented by the Claimant's Queen's Counsel to be persuasive. She did not actually make any ruling but gave Counsel for the CPS an opportunity to take instructions and fixed a further hearing for 31 May 2019. On 31 May 2019 counsel for the Crown accepted that the defects in gathering the evidence meant that it was inevitable that the informal interviews would be

excluded as inadmissible and thereafter there would be there was no realistic prospect of securing a conviction. He accordingly offered no evidence against the Claimant. The Claimant had provided the Respondent with copies of the transcript of both hearings. The following two passages were included in those transcripts

> JUDGE LEIGH: — and it's not admissible. I can't see how it's admissible when all of the safeguards that are there under achieving best evidence and all of the guidance in relation to how you are supposed to question and ask is not there and the very first thing that's missing is truth and lies.

> *JUDGE [LEIGH]: Thank you. The Crown's taken the view that this case is not sustainable. I completely agree with them on their assessment, having taken two days myself out of court to watch the ABEs and read all of the statements and exhibits, and I therefore enter not guilty verdicts on them offering no evidence. This case is a prime example of when time should be taken to step back and actually evaluate what is actually being said, by who, and to then reflect on what is actually known from other sources. The simple fact of this case is, had Mr Rose and Ms Walsh known the full extent of the pre-ABE interviews, carried out by those investigating at the very start, I doubt seriously whether this case would ever have been charged, as there are fatal gaps in the evidence. The rules and procedures are in place to allow very young witnesses to provide evidence and that was not followed in this case by those investigating, and they should have been, and lessons must be learnt from it.*

> *'There is also another issue that caused me concern, and I've never had an answer to this, because one of the complainants made exactly the same allegation against another teacher in exactly the same way, and yet that teacher is a Crown witness. That logic simply defies credible explanation. [the Claimant] on the Crown offering no evidence, leaves this court as he started, with the presumption of innocence, and that's how he leaves the dock.'*

71. The Claimant was formally acquitted and received the benefit of a defendant's costs order.

<u>The First Respondent assumes control of the school</u>

72. On 8 June 2019 Clare Kershaw wrote to the staff at the school informing then that the proceedings against the claimant had been dismissed but also that the Claimant would not be returning to school at that point. On the same day she wrote to the parents and the Governors of the school. In her letter to the Governors Clare Kershaw said that the First Respondent intended to take over the employment and suspension of the Claimant by using the

statutory powers of intervention.

73. On 10 June 2019 Clare Kershaw purported to exercise a power under Section 66 Education and Inspections Act 2006 to suspend the delegated budget of the school. In fact Section 66 provides a power to do this only if the school is eligible for intervention. Section 60 sets out how a school might be eligible for intervention. The statutory mechanism provides that the local authority may issue a warning notice to the Governors provided certain criteria are met. The letter of 10 June 2019 relies on a suggestion that the safety of staff and pupils is threatened (a potential ground for a warning letter included in Sub-section 60(2)(c). An intervention is then only permitted after a period of 15 working days if certain conditions are met. As a matter of fact the First Respondent did not serve any warning notice nor did it follow the other procedures set out in Section 60.

74. When she gave evidence Clare Kershaw explained that she had been concerned by things said by the Governors that in her view suggested that they would favour the Claimant rather than being impartial.

<u>The investigation conducted by the First Respondent</u>

75. Clare Kershaw had written to the Claimant informing him that his suspension would remain in place. He was advised that the matter would be investigated internally as a disciplinary matter. Clare Kershaw decided to appoint an external investigator and also a child protection expert.

76. An approach was made to the CPS for the disclosure of materials obtained in the criminal process. In early June 2019 Norma Howes was identified as being a child protection expert. By 19 July 2019 Jo Reed, an external HR advisor, was identified as being suitable to carry out an investigation.

77. On 10 September 2019 the Claimant was informed by Clare Kershaw that an investigation would commence. The three matters that were to be investigated were said to be as follows:

> *1 . Inappropriate behaviour towards pupils at the school of a sexual and non-sexual nature breaching professional standards and boundaries as set out in the statutory guidance Keeping Children Safe in Education, [the school's] Child Protection Policy and the DfE National Standards of Excellence for Headteachers;*
>
> *2. Non-compliance with safeguarding procedures as set out in the statutory guidance 'Keeping Children Safe in Education' and [the School's] Child Protection Policy whilst holding the statutory position of Designated Safeguarding Lead;*
>
> *3. Actions which amount to a potential breach of trust and confidence in you as an employee namely (i) misrepresentation during a Police interview when questioned about your relationship with another*

*member of staff and (ii) breach of your conditions of suspension by contacting a member of school staff. These allegations breach [The school's] School Code of Conduct.*

Norma Howes investigation and report

78. Norma Howes CV was attached to her report. That sets out details of her qualifications and experience. She has formal qualifications as a Social Worker. She has further academic qualifications including in psychology. She has written and lectured extensively in the field of child abuse and domestic violence.

79. Norma Howes produced a report which is undated but was supplied no later than December 2019 (as it is referred to in Jo Read's draft report dated 31 December 2019). The materials made available to Norma Howes are set out at the outset of her report where she says:

*'To enable me to write this report I have:*

*1. Received and read the bundle of documents given to me by Mechelle De Kock the Local Authority Designated Officer involved in this case. This detailed the statements/interviews of children known as A to G, (but not the notes of the ABE interview for Child D). I have not met with or spoken to any of the children or their parents.*

*2. Received and read additional material requested to assist in this writing this report.*

*3. Attended meeting, at County Hall Chelmsford on 5th of September 2019 to lay out the scope of the investigation and my involvement.*

*4. Met with Jo Read on 30th October at her office in Stevenage.*

*5. Met with the social worker, Sam Withers, on 6th November 2019.'*

80. It does not appear that Norma Howes asked for, or was given, the statements of all of the adult witnesses obtained by the school. At an early stage she did ask for the police interviews with the Claimant, but she makes no substantive reference to this in her report. She does not appear to have been given or asked for the statements of the adult witnesses later interviewed by Jo Reed.

81. In her report Norma Howes sets out her report in 3 sections these are said to be:

*'1 . Veracity of the children's statements and evidence of this in the children's interviews.*

*2. Overview of the conduct of the Investigation by Police and Social Services.*

*3. Assessment of likelihood of inappropriate behaviour/offences were committed by [the Claimant]'*

82. Norma Howes states that she had intended to do a 'Statement Validity Analysis' A technique which she claims has been recognised by some courts. She went on to explain that this was not possible as there were no free narrative accounts from the children.

83. Norma Howes report includes the following statement of her opinion:

> *'I understand [the Claimant] contends the children could have colluded together and made up their allegations against him. It is my experience, as a professional and a Girl Guiding leader with experience of Rainbows aged 4 to 6 and Brownies aged 7 and 10, that children of Rainbow age do not have the emotional, educational or memory competencies to 'make up' such allegations, nor to collude in doing this, nor the developmental memory to remember their own individual experiences or roles in their allegations had these been made up by themselves or colluded with others.'*

84. It is reasonably clear that from this statement that Norma Howes is saying that 5 year old children do not collude. However, it does appear that she is going further and saying that children of that age do not *'make up'* such allegations. Unfortunately she does not then explain what she means by that. It seems most unlikely that an experienced social worker was saying that a child who makes an allegation is always to be taken as being accurate. Elsewhere in her report Norma Howes discussed the ABE process and the care that must be taken to establish that children understand the difference between truth and lies and the fact that the reliability of a child's evidence can be affected by whether the child is prompted by leading questions. Unfortunately the way this paragraph is phrased it could be read as suggesting that children never 'make up' allegations. It is a passage upon which heavy reliance was placed later in the disciplinary process. Norma Howes was never asked to explain what she meant.

85. Norma Howes gives a summary of the evidence of the children. She does not refer at any point to the evidence of any adult. Her summary is in no way complete. For example, she does not set out that Child A initially suggested that the finger game was played in Assembly nor that at some stages of his ABE interviews he suggests that the game took place somewhere other than the Claimant's office. When discussing Child C Norma Howes makes the statement that having a vaginal discharge is consistent with inappropriate sexual touching. She does not mention the fact that the Child had previously suffered from this and was known to have allergies. That information was available to her.

86. Having briefly summarised the evidence Norma Howes the second section of the report deals with the manner in which the police and social workers had conducted the investigation. This section of her report starts with the following passage which was to become of particular importance during the

disciplinary process:

> *'In the more relaxed informal interviews in their own homes or in school, led by the social worker Sam Withers, information of sufficient concern was given by the children to warrant formal interviews under the guidelines for ABE interviews. Both social and police officer were concerned by what the children said, by their affect and behaviours that there had been games played which included possible inappropriate behaviours or possible offences committed by the Claimant and concluded that further investigation was required. Even although there [unclear but in context probably 'few'] details of the questions asked in these informal interviews e.g. were they leading, closed or open, to obtain the information gained I would agree these interviews contained enough detail to conclude it was very likely something not just inappropriate but would meet the likelihood of sexual offending had happened in [the Claimant's] office involving him and the children.'*

87. Norma Howes then went on to set out the deficiencies in obtaining evidence from the children. She expanded on that in a short interview with Jo Reed that took place on 30 October 2018. In that interview Norma Howes makes the following statement:

> *'Since about 1990 following on from the Cleveland and Orkney Inquiries, the training clearly contained the view that police and social workers should neither believe nor disbelieve a child's disclosure however, it should be taken seriously and enquires should be conducted so a conclusion can be reached about if what the child has disclosed is the truth.*
>
> *A child should not be given the impression that they are disbelieved but should be asked questions about what happened in order to determine if a criminal offence has been committed. As soon as this initial assessment of the disclosure concludes that it is likely a criminal offence may have been committed, the process should move straight to an ABE interview. This is especially important in young children who are commonly referred to as "children of tender years"……..*
>
> *Very young children should only have a brief interview prior to their ABE interview and consideration needs to be given to who carries out the initial assessment/ABE interview during the planning meetings.*
>
> *The child's understanding of truth and lies should be carried out in the beginning stage of the ABE taking place and the guidance suggests that a lie is discussed with them to gauge their understanding.*
>
> *Leading questions should not be asked however if stuck they can be used but are only admissible as evidence if the child's response*

*contains more information than the question asked. Therefore, if a child just says "yes", "no" or "don't know" to a leading question it is therefore inadmissible.'*

88. In the same interview she went on to say:

*'The joint pre-ABE interviews carried out by the police and social services were too detailed and should have been stopped earlier so that the evidence was captured in the ABE itself.'*

89. Norma Howes was also critical of the decision that DC Jennings conduct the ABE interviews as opposed to Sam Withers. She is very critical of the decision to obtain a capacity assessment of each child before the ABE interviews and the delay that that caused. Within her summary of the children's evidence Norma Howes is deeply critical of the way that the ABE interviews were identifying (as did the Claimant's QC) numerous instances of the Children being prompted by reference to what they had been recorded as saying earlier or by being asked leading or tag questions.

90. In the final section of Norma Howes she sets out her 'assessment of likelihood' of inappropriate behaviour by the Claimant. She manages this in a single paragraph. She says:

*'It is my opinion that the information obtained from the children in the informal interviews led by the social worker did indicate these children had been involved in inappropriate behaviour/offences and that the Claimant was involved in these both as participant and observer. The time it took between first disclosure and ABE was too long, the process of using intermediaries for assessment and in interview added to this timescale and use of them as co-interviewers not helpful, the style of interviewing, the unsuccessful and not changed use of the 3 part questions all contributed to the poor quality of the ABE interviews to insufficient evidentially useful information for criminal proceedings to be obtained.'*

91. Norma Howes sets out a long bibliography to her report. Nowhere in her report does she say how that literature assisted her in forming the opinion she reached.

92. On the face of this report it is clear to a reasonable reader that Norma Howes is purporting to comment on the veracity of the allegations as opposed to only commenting on the quality of the children's evidence. She does so without referring to any of the other evidence and in particular the evidence of the teachers, LSAs, administrators and mid-day assistants.

93. Norma Howes also interviewed Sam Withers. A copy of the record of that interview was annexed to her report. Sam Withers is recorded as saying the following about how the children could have been taken to the Claimant's office:

*'She added that the Police had done a walk through on camera of the whole school to demonstrate how the Claimant could have taken any child into his room without being seen by anyone else. From what was said by the children, or through reactions to certain times of the day, it is believed that some of the children were taken to his room at lunchtime.*

*In regards to where children have said they were taken from their classroom, Sam explained that reception class children have a separate playground, through their classroom. It is hypothesised that they may have been collected from their playground and lead through their classroom to reach the Claimant's office, which is why they may be referring to being collected from their classroom.*

*Sam commented that from the positioning of the reception staff, it would be possible for staff or pupils to enter the headteacher's office without being seen by them at anytime of the day.'*

94. Norma Howes thought it appropriate to ask Sam Withers about her view as to whether children 'to collude together and destroy' the Claimant. Sam Withers did not think that this was a possibility. She referred to a friendship map prepared by the reception teachers. She is recorded as saying that in her view there was, no common connection between all of the children'. She is then askes about her opinion of the veracity of the allegations Sam Withers made it clear that she believed that the Claimant had abused these children.

Jo Reed's Investigation

95. Jo Reed is an HR Adviser working for Herts for Learning Limited. She was commissioned by Essex County Council to investigate the allegations three against the Claimant. I shall summarise only the steps she took in respect of the allegations that concerned the children.

96. On 12 November 2018 Jo Reed interviewed K. The record of that interview was agreed. K said that her original statements to the police were accurate. She described the reading sessions that took place at the beginning of term. She said that the children were divided into 3 groups of 10. She said that reception children were always accompanied outside the classroom by an adult. She described the occasions where a child was taken to the Claimant's office and said that these were limited to occasions when the child would be given a sticker for good work or rarely to be told off. She made it clear that on these occasions the children were always accompanied. When asked whether the Claimant had ever collected children from the classroom and playground she said *'No, Never'.*

97. K was asked about a suggestion made by Child C about Child D and by Child E about Child C that when the Claimant had hurt then they had told S. S said that this had not happened. She was asked whether the children had access to computers. She said that they did use an iPad in the classroom but always under supervision. She said that the children did not go to the

Claimant's office to use a computer. When K was asked if she had anything to add she said that the Claimant was always particularly careful about physical contact. She recommended that Jo Reed speak to the rest of the reception class team indicating that some had not been spoken to by the police at the time.

98. S was interviewed on 13 November 2018. Her account of the beginning of the year reading session mirrored exactly that given by K and the other witnesses save that she said that she selected the three groups of children based on the register. She described the same additional occasions (stickers and telling off) where a child might be taken to the office. She too said that the children would always be accompanied. She said that to her knowledge the Claimant had never collected a child from the classroom or playground. To her knowledge the children never left the classroom playground unaccompanied.

99. S was asked whether child C or D had ever reported being hurt by the Claimant. She said that she had been asked that by the Police and had made it clear that that had not taken place. She was then asked to comment on Child E's account of her taking him to the Claimant's office. Her answer was recorded by J reed as saying *'No, I do not remember that'*. When asked to agree the notes S says that she had said *'No, I never took child E to the Claimant's office'.* She is then asked about Child E's account of the Claimant spanking Child C's front bottom in the classroom whilst she was present. S said that there was never an occasion where she was present with the Claimant, and children C and E. She gave a detailed explanation as to why that could not have occurred at lunchtime.

100. When asked if she had anything to add S made positive comments about the Claimant and in relation to the questions about specific incidents where the children said she was present she said:

> *"I am extremely upset that I have only now been asked questions relating to particular incidents. 1 8 months on and this is the first that I have been made aware of children citing my involvement. I don't understand why the police did not address these incidents during my interviews, as I would have been able to say straight away that no, these things did not happen."*

101. On 13 November 2018 Jo Reed interviewed the two learning assistants and the Reception class cover. None of these three had been interviewed by the police. Each of them gave an account of the reading session at the beginning of the year that was consistent with the class teachers. Each described the occasions when a child might be taken to receive a sticker. Each said that there were no circumstances where the reception children would be taken to the Claimant's office unaccompanied.

102. The three administrative staff were also interviewed. They sat in offices close to the Claimant's office. Each of them said that in general the Claimant operated an open door policy. The Finance Manager was asked about child E's suggestion that the Claimant had a red table (where naughty children were

given a red card). She said that there was no such table. The thrust of their evidence was that they had never seen the Claimant take an unaccompanied child into his office with the exception of the groups of 10 at the start of the year.

103. Jo Reed interviewed the Claimant on 15 November 2018. In respect of what child A had said the Claimant referred to a friendship chart prepared by the class teachers. He said that all 4 children referred to by child A were shown as friends. This contradicted an assumption made by Sam Withers. The Claimant later explained that she had mistaken Child 7 for a child with the came name. When asked about 'collusion' the Claimant said *'It may take one child with these ideas who may be able to get other children to go along with the story'.*

104. When asked about the suggestion made by child F that he had been playing with himself whilst naked in his office the Claimant explained that his office had windows opening on to the car park. He said that the blinds were never shut.

105. When asked why these allegations had been made the Claimant said this:

> *'The police were very aware that all of this was on a year group WhatsApp groups on the day of my arrest so other parents in this class group would have got wind of that had been alleged. The police were quick to get this removed from social media but the damage had been done. I'd received no allegations from any other year group or any other child taught by me across my 35 year career. My name and address was in the paper - others would have come forward if I had done this before. Why would I go for the middle of the day, in my office in the middle of the school to abuse children? Why would I have chosen now to start abusing children when I was nearing the latter stages of my career? Why would I have done this with witnesses present?'*

106. The Claimant provided Jo Reed with the skeleton argument of his QC where a critique of the quality of the pre-ABE evidence is set out at length. He further provided copies of the witness statements of the adults who worked at the school and who were interviewed by the police.

107. The Claimant had gathered together 38 testimonials from present and former colleagues and friends. These testimonials covered his professionalism and how the writers had observed him interacting with children over a number of years. He offered to send these documents to Jo Reed by e-mail on 28 November 2018. Jo Reed declined to read or refer to these documents later recording in her report that *'they do not directly relate to the scope of this investigation and cannot be considered as evidence'*.

108. Jo Reed presented a draft report to Clare Kershaw in December 2018. Clare Kershaw then proposed amendments. Jo Reed had set out a summary

of the Crown Court proceedings under a heading 'Summary of the Court's decision to exonerate [the Claimant] of criminal charges'. Clare Kershaw asked that the reference to exonerate be removed from the report. She asked that a reference to the Claimant being found not guilty was removed. Jo Reed made both of those changes. As a matter of fact the Claimant had been found not guilty upon the crown offering no evidence.

109. In Jo Reed's report she set out all of the evidence that she had obtained. She then proceeded to an analysis of whether the Claimant had behaved in an inappropriate manner towards the children as alleged. She sets out a summary of the evidence relating to each child. She acknowledges that there are stark inconsistencies both internally and also between the evidence of the children and the adults. Despite this she gives an overall summary of the children's evidence where she says:

> *'There are no adult school witnesses to any of the other alleged incidents of inappropriate behaviour against the children so it is [the Claimant's] word against the children'*

110. It would be perfectly clear to any reasonable employer that the evidence could not be considered to be the Claimant's word against the children. There was a large number of adult witnesses who were saying either that the children never went to the Claimant's office in the manner alleged or that this was highly improbable. In particular the mid-day assistant actually named by Child A's mother made a statement that flatly contradicted the reported allegation that she had taken Child A to the Claimant's office. Jo Reed's statement simply mischaracterises the evidence.

111. Jo Reed acknowledges that there were 23 children interviewed in addition to the named children. She accepts that the fact that their statements were never relied upon by the police gives rise to an overwhelming inference that they did not support the suggestion that the Claimant behaved improperly. She says this: *'I do not consider this relevant as if they had any disclosures in them, they would have been provided as part of the court case so the only assumption that can be drawn here is that they did not contain any further disclosures'*. This rather misses the point made by the Claimant that amongst these additional 23 children were a significant number who had been named by the children A-G as having been present when inappropriate behaviour took place.

112. After her analysis of the evidence relating to the children Jo Reed says: *'In addition to this, there is no other alternative explanation given by either [the Claimant] or any of the school staff as to why these children have made these disclosures The responses given by school staff when asked if they had anything to add were fully in support of [the Claimant] and there was no mention of the children and the possible impact on them.'* If this is intended as a criticism or an indicator that the Claimant and/or the adults were being untruthful then it ought to be obvious to a reasonable employer that it is very unfair. If the Claimant was not responsible for any abuse or improper behaviour, why is it incumbent on him to explain conduct that may or may not

have occurred? Equally, given that the evidence of all of the adult employees of the school was that the events could not have taken place as described it is hard to see why in those circumstances the adults did not deal with the impact of events they did not believe had taken place. I consider that this statement is indicative of Jo Reed looking for evidence and arguments to support the allegations rather than approaching the matter with an open mind.

113. In a section dealing with the access of the Claimant to the reception class children Jo Reed acknowledges that all or the evidence from the adults supported the suggestion that the Claimant could not have had access to the children as they had described. She says:

> *'It is not impossible, given his position of Headteacher, that [the Claimant] was able to have all the children who said they were in the room together there however other evidence collected indicates that Reception Class children did not go unaccompanied anywhere in school and the only time [the Claimant] had groups of children in his office together was at his annual sessions with them in groups of 10.'*

114. Jo Reed then refers to what Sam Withers had said about the 'hypothesis' she and DC Jennings had put forward. She repeats the suggestion that it would have been possible for children to enter the Claimant's office unseen by the adjacent office staff. The difficulty with this evidence, perhaps tacitly acknowledged by Jo Reed, is that it deals only with the children entering the office. It does not do anything to rebut the evidence of all of the teachers, LSA and mid-day assistants who said that the Claimant did not collect the children from the classroom or playground. This point ought to have been entirely obvious to a reasonable employer. It was certainly a point raised by the Claimant during the disciplinary process.

115. When she seeks to weigh all of the evidence Jo Reed sums up the evidence as to whether the Claimant could have taken the children to his either alone or in small groups. She expressed a conclusion that for him to do so was 'not impossible'. She is unable to say how this might have occurred. She places weight on Norma Howes conclusions that the children's evidence tends to suggest that the Claimant had behaved inappropriately. Jo Reed did not simply conclude that there was a sufficient case to answer for the matter to proceed to a disciplinary hearing. She purported to reach a conclusion that the Claimant was more likely than not guilty of inappropriate behaviour towards the children.

116. When the Claimant received Jo Reed's report, he prepared a long document seeking to rebut her conclusions. I shall not attempt to deal with all of the points he made but have noted the following points.

117. The Claimant took exception to Jo Reed's categorisation of the evidence in the case boiling down to his word against that of the children. He pointed out that the children's evidence was contradicted by adults and the absence of complaint from all of the children said to have been present and not having reported any wrongdoing.

118. The Claimant provided a rebuttal of Sam Withers suggestion that there

was no connection between the children. He said:

> *'Sam Withers commented in her statement "there was no common connection between all of the children interviewed....and there was no consistency between the perceived victims being in a friendship group together". This is another biased and factually incorrect view given by Ms. Withers If JR had studied appendix 10 the friendship map prepared by others she should have come to the conclusion that all of the boys were in the same friendship group rather than what she reports on page 18. The information JR conveys in her report, or has been given, is incorrect. Classmate 7 was never mentioned of his involvement by Child A or B. It is Classmate 31 with a similar name and who is clearly in the same friendship group. This is evidenced in Child A's first ABE (page 5) when he mentions Child B, Classmate 1 and Classmate 31 being present. This was also confirmed by the Officer in Charge in my police interviews. JR may have been given the incorrect information but there is no excuse for Samantha Withers to be factually incorrect on this issue as she was present at the pre-interviews and the ABEs when the boys' names were mentioned. There is also evidence in Child C's first ABE on 11/7/18 of her friendship with Child G. Reference 15.54.28 her father is heard to say, but not recorded in the transcript, "and we'll go to Child G's house and get a smoothie...and a lollipop. All you've got to do is talk and you'll get all that you know what I mean ",*
>
> *3.30 The friendship group produced by the Class Teachers at the time clearly shows that all the boys were in the same friendship group as are many of the pupils they said were witnesses to the alleged offences. Classmate 15 is mentioned numerous times by a number of the complainants as a witness but his statement concerning the events is in the unused material! I have also shown above the link between Child G and Child C and the friendship grouping and the mention of Child D by Child C proves their connection. Child C also attended an after school club with a number of the boys including Child A This is another example of significant weight being given to evidence which contradicts other factual evidence which is not even mentioned. No balance at all.'*

119. The Claimant was invited to a disciplinary hearing. That hearing eventually took place over 2 and 3 July 2020. Some of the delay in organising this meeting was caused by the onset of the Covid Pandemic. The person charged with hearing the matter was Margret Lee she was at the time the Executive Director for Corporate and Customer Services. The Claimant attended the meeting attended by Paul Smith, a trade union representative.

120. When the Claimant was invited to the disciplinary hearing, he was informed that the policy that would be followed was that adopted by the Second Respondent. Had that policy actually been followed the disciplinary hearing would have been conducted by the Governing Body Dismissal Committee and any appeal by the Governing Body Appeals Committee. The policy permitted

the school to collaborate with another maintained school to draft in external governors to hear disciplinary matters. The school's disciplinary policy states expressly that all disciplinary hearings will apply the civil standard of proof – the balance of probabilities - to any decision that they need to take.

121. In the run up to the hearing Paul Smith and Clare Kershaw corresponded about the arrangements for the hearing. Initially it was proposed by Clare Kershaw that the hearing be conducted within 1 day. In an e-mail sent on 2 March 2020 Paul Smith expressed his reservations about this pointing out that the Claimant intended to call witnesses on his behalf. He suggested a 2 day hearing. Clare Kershaw responded on 5 March 2020. Surprisingly she assumed that the Claimant intended to rely solely on character witnesses and proposed that a limit of 2 such witnesses would be appropriate. She said: *'The allegations that have been put to [the Claimant] and the investigation have been very specific and clear and the hearing will focus solely on the evidence related to the allegations and due process. Please provide clear reasons why you think that the hearing is likely to take more than 1 day'*. I infer from this that Clare Kershaw saw this as a clear-cut case where the only the Claimant was able to comment on the allegations against him.

122. On 16 March 2020 Paul Smith responded to Clare Kershaw. He dealt with other matters before addressing the point raised about witnesses. He said that the witnesses that the Claimant intended to call went to the substance of the allegations against the Claimant. He indicated that the Claimant would call 4 witnesses. He went on to say that as the Respondent was relying on the report of Norma Howes it may be the case that she would be called as a witness.

123. Clare Kershaw stated in her witness statement that she had decided not to call Norma Howes as a witness. She says that she thought that as Jo Reed had interviewed Norma Howes it would be sufficient for the Claimant to ask Jo Reed questions.

124. Clare Kershaw presented the management case. The notes of the hearing disclose that she adopted the position of seeking to prove that the Claimant was responsible for inappropriate behaviour towards children.

125. In respect of the allegations about inappropriate behaviour towards children Clare Kershaw did not call any evidence from anybody who could be fairly described as a witness to the primary facts. She answered some questions herself and then called Jo Reed. The Claimant and his representative were allowed to ask Jo Reed questions.

126. When Clare Kershaw was asked about her understanding of the relevance of the criticism of the evidence gathering process during the criminal process she stated*: 'No one is disputing that the ABE interviews were not conducted appropriately but the pre-ABE interviews were; the children said what they said….'*. In fact the criticism that was made in the criminal process was primarily directed at the pre-ABE interviews. HHJ Leigh pointing out that they had been conducted without the safeguard of ensuring that the children understood the importance of telling the truth. A proper reading of the Crown

Court transcripts provided by the Claimant or the argument of his QC, tacitly accepted by both the Judge and the CPS, made this point quite clear. It does not appear that Clare Kershaw understood this.

127. When questioned Jo Reed maintained her stance that the testimonials provided by the Claimant and the fact that 23 children had been interviewed and provided no supporting evidence was irrelevant to the question of whether the Claimant was responsible for any inappropriate behaviour.

128. When Jo Reed was asked questions directed at how it was possible to suggest that child G's account of inappropriate behaviour by the Claimant was credible whilst at the same time not taking any action in relation to Teacher 17 who was said to have engaged in the same activities Margret Lee intervened. She suggested that the Claimant was only entitled to ask about his own investigation.

129. When the questions were asked of Jo Reed about child D Clare Kershaw intervened to say that she did not rely on any allegations towards this child and suggested that therefore the questioning was inappropriate. That missed the point that child D had been said to have been a witness to the treatment of child C.

130. In her evidence before me Margret Lee indicated that she had seen the skeleton argument of the Claimant's QC which attacked the quality of the pre-ABE interview evidence. In the notes of the hearing she indicated that she had taken legal advice about this she stated her conclusions as follows: *'Recap on debate on criminal versus employment and questioning using ABEs', the quality of those ABEs' and the pre-ABEs'. This was brought into a paper [the Claimant]'s barristers drew up <u>which cannot be brought up</u> as was never discussed in court.'*. In her evidence before me Margret Lee was unable to explain what arguments were deployed by the Claimant's QC in the criminal case and adopted by him in the internal disciplinary proceedings. I find that she did not ever get to grips with those arguments and, as she stated in the disciplinary hearing, she did not consider that they had any bearing on the issues she needed to decide.

131. The Claimant gave evidence on his own behalf. He maintained the position that he had all along that the allegations were false and that they could not have happened as described by the children. He identified numerous inconsistencies with the children's accounts. He repeated his critique of the conclusion of Sam Withers that the children were not in the same friendship groups. In the course of his evidence the Claimant did accept that children aged 5 would not collude as such but he went on to point towards the possibility of the children being influenced by their parents or others.

132. Towards the end of the Claimant's evidence Margret Lee asked him a question about what had been found on his computers seized by the police. In his statement of case the Claimant had said that there was nothing found on his computer and that had not been challenged by Clare Kershaw nor was there any evidence to contradict what was said. Margret Lee's question suggested that despite this she was not satisfied with that evidence . She is

recorded as saying: *'When I read that statement; there seemed to be a lot of concern from the Police. Are you able to confirm there is no evidence; you made the statement. My understanding is Police questioned you around quite a lot of evidence that had been delete from some of your devices.'*. the Claimant informs her that his devices were held for over a year and a forensic examination had disclosed no evidence against him.

133. The Claimant then called the two reception teachers S and K, the School's finance manager and the Inclusion Manager (who was then the acting deputy head. S, K and the Finance Manager gave the same evidence as they had given before. When questioned they did not depart from their previous accounts. Each dealt with the issue of how and when children would be taken to the Claimant's office and the issue of whether the Claimant could have collected the children from the classroom. The Inclusion Manager was one of the people who had provided a testimonial for the Claimant. She gave some evidence about the abilities of children E and F to understand and communicate. She stated that child E had poor understanding and would generally give one-word answers to questions. She said that child F's speech was impaired and that other children could not understand him. She also commented upon child G but did not suggest that she had any impairments. The rest of her evidence concerned the other allegations that were being considered.

134. No decision was announced at the conclusion of the hearing but on 27 July 2020 Margret Lee wrote to the Claimant. She informed the Claimant that she had concluded that all three allegations against the Claimant were upheld. In respect of the allegation relating to the children she determined that the appropriate penalty was summary dismissal. She reached the same conclusion about a separate charge that the Claimant had not complied with safeguarding procedures. In respect of the final charge that concerned the fact that the Claimant had initially concealed an extra marital affair from the police (and had contact with that person during the period of suspension) she decided that that merited a final written warning.

135. The reasons set out in the dismissal letter in respect of the allegation concerning the children are as follows:

> *There is a considerable amount of evidence in respect of this allegation and there are some issues with that evidence which both sides have acknowledged. Indeed, the criminal case was stopped due to the process undertaken to gather the ABE interviews. Nevertheless, excerpts from it are used by both sides to further their case, and to that extent, both sides have relied on it.*
>
> *In stepping back to look at the evidence as presented, including the interviews of the children and parents and the statements of the independent investigator and the Child Protection expert, ECC has presented a case where at least two children are saying the same or very similar things, and in some cases, their parents are confirming the narrative of the child (i.e., they are saying what the child told them*

*which is in line with the child's own account).*

*It is common ground by both ECC and you that children of this age don't collude. Further, under questioning at the hearing on 3 July 2020, you accepted that something must have happened to the children.*

*Whilst the access to your office has not been confirmed, the absence of firm evidence does not mean it did not, nor does it mean that it did. But it has been identified that it is possible.*

*I also considered the following points of mitigation in relation to allegation 1:*

*There were further statements referred to from a further 23 children which were not reviewed by ECCs independent investigator which you challenged. I agree that the independent investigator should have reviewed all relevant information, including these 23 interviews. However, whilst these statements may not say that an incident did happen, they could not say that it did not although they could say that they did not see the incident happen. I do not believe the lack of reference to the 23 statements diminishes the value of the 7 children (6 of which form the basis of the allegation).*

*There were a number of testimonials from staff and I understand more are available from other people who have known you in some cases fora number of years. All of these that I have seen speak positively of you and the extent of trust they place in you. However, they can only reflect on their experience of you in certain circumstances. They cannot serve to rule out an activity which is alleged to have occurred when they weren't present.*

*Summing this up:*

*• ECC has presented a case where at least two children are saying the same or very similar things.*

*• You have accepted that something must have happened to the children concerned*

*• It is common ground by both ECC and yourself that children of this age don't collude*

*• Norma Howes, the CP Expert stated that children of this age 'do not have the emotional educational or memory competencies to 'make up' such allegations, not to collude in doing this, nor the developmental memory to remember their own individual experiences or roles in their allegations has these been made up by themselves or colluded with others.'*

*Given this, whilst I cannot say categorically the events alleged did happen, on the balance of probabilities, I believe that to be the case.*

136. In her witness statement Margret Lee set out her approach to the evidence as follows:

136.1. At paragraph 24 she said (with emphasis added): *'When I was considering all evidence that was presented, with all the flaws, I realised that there were no adult school witnesses to any of the alleged incidents of inappropriate behaviour against children so it was effectively [the Claimant's] word against the children. ECC presented a case where at least two children were saying the same or very similar things (see above), and in some cases, their parents are confirming the narrative of the child (i.e., they are saying what the child told them which is in line with the child's own account).'*

136.2. At paragraph 26 she suggests that it is probative that the Claimant had said that he accepted that 'something must have gone on'.

136.3. At paragraph 31 she accepts that [the Claimant] had said that the First Respondent should have ensured that Norma Howes was available to answer questions. She agrees that this ought to have been done but then says that she *'did not feel that it affected the hearing unduly'*.

136.4. At paragraphs 32 to 34 she acknowledges that the entirety of the adult evidence that dealt with the possibility of the Claimant having access to the children in the manner described by them was that the children were always accompanied by an adult.

136.5. At paragraphs 36 and 37 she dealt with the evidence of S in relation to child E (who had said that she had taken him to the Claimant's office and at some points suggested that she had waited outside). She notes that this was denied by S but explains that to herself by saying: *'As the actual date or timing of the alleged abuse is not clear, I was not sure how S could categorically state that she was not in these places when it occurred'*.

136.6. At paragraphs 38 and 39 she deals with the evidence of K who had denied that child C or D had ever reported that the Claimant had harmed them (as reported by Child C and E). She says *'with a situation where an adult is saying one thing and a child another, I could not draw any conclusions from this'.*

136.7. She then returns to the issue of how the Claimant could have had access to the children in the manner described. At paragraph 41 she quotes Jo Reed as having found that access

> was *'not impossible'*. She then says at paragraph 42 *'In my consideration of access issues I was looking to see if access was possible. Once I established that it was, I then considered whether the events that were alleged to have taken place, actually took place on the balance of probabilities'.*

137. Paragraph 42 appears to state in terms that Margret Lee approached the decision making process in a linear manner. Deciding whether the children could have had access to the Claimant's office then having decided that this was possible that matter was put to one side rather than being weighed together with all of the evidence. Margret Lee was asked a number of questions by Mr Faux and by the Tribunal about her approach. I find that her answers did indicate that this was the approach that she had taken. She had ample opportunity to say that she had weighed all of the evidence together but did not do so. Mr Stevens suggested in his closing submissions that I should not take the contents of Margret Lee's witness statement as the definitive statement of her reasoning. He argues that the reasons set out in the dismissal letter show that all of the evidence had been considered. I do not accept that submission.

138. The dismissal letter acknowledges the evidence from the adults and includes the conclusion that it was not impossible for the Claimant to have had access to the children. However, nowhere in that letter is there an explanation of how that important evidence was taken into account. That is explained in the Claimant's statement. I would have expected Margret Lee to have recognised that her witness statement was the place for her to set out her reasoning. I find that Margret Lee did approach the evidence in the linear manner I have outlined above. That conclusion is supported by the fact that Margret Lee states in terms in her witness statement that it was the word of the Claimant against that of the children. That could only be the case if the extensive evidence of the adults had been put to one side.

139. The Claimant appealed his dismissal. His appeal was heard by Pam Parkes. She was an interim manager for the Human Resources and Organisational development service. The appeal was heard on 26 August 2020.

140. When Pam Parkes gave evidence she confirmed the nature of the exercise that she undertook. It was put to her that she had conducted a review and not a rehearing. She accepted that she had not herself weighed up the evidence and come to any conclusion. She put the matter this way in the appeal outcome letter dated 10 September 2020 (with my emphasis added).

> *'During the hearing and appeal, there was a lot made of the number of children interviewed, the number of children statements that did not concur, the number of statements which were not presented to the hearing, the inadequacies of the police process and the possibility of children being influenced by others and colluding against you. However, what still remains, as presented by the disciplinary hearing officer at the appeal, and not contested by you, save for it not having been you, is that there are at least two children who remain consistent*

*in their allegations and statements to their parents and professionals that you behaved inappropriately with them.*

*It is, therefore, my assessment that nothing has changed from the time of the disciplinary hearing where the "safety" of the evidence is any more or any less "safe" to the time of the appeal hearing. What remained for my consideration as part of the appeal, is whether it was reasonable for the disciplinary hearing officer to have relied upon this evidence at the disciplinary hearing in coming to her judgement.*

141. Pam Parkes did agree with the Claimant that the sanction of dismissal in respect of any failings in respect of safeguarding was too severe. She reduced that to a final written warning. She did however decline to reduce the sanction given to the Claimant in respect of his concealing his extramarital affair from the school and the police. She stated that had she been the initial decision maker she would have dismissed the Claimant but as this was an appeal she decided not to do so. It follows therefore that the only extant reason for the Claimant's dismissal was the finding that he had behaved inappropriately towards children. It is for that reason that the parties limited their evidence and submissions to that issue.

**The law to be applied - Unfair dismissal**

142. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

*98 General.*

*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*

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

*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

*(b) relates to the conduct of the employee*

*(c) is that the employee was redundant, or*

*(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

*(3) …..*

*(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.*

143. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': ***Thomson v Alloa Motor Co Ltd*** **[1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable ***JP Morgan Securities plc v Ktorza*** **UKEAT/0311/16**.

144. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points ***Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129.**

145. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

146. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23**. Mr Stevens relied on ***Orr v Milton Keynes Council*** **[2011] ICR 704** for the same proposition and reminded me that the focus is on the Respondent's conduct and not on whether the allegations are true or false (and

that thereby the employee has suffered an injustice).

147. In terms of the reasonableness of the investigation and the procedure that was followed and the decision to dismiss itself, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee ***A v B*** **[2003] IRLR 405** and see also ***Salford Royal NHS Foundation Trust v Roldan*** **[2010] EWCA Civ 522** referred to by Mr Faux. ***A v B*** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not. However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions ***CRO Ports London Ltd v Mr P Wiltshire*** **UKEAT/0344/14/DM**.

148. When looking at the process followed a tribunal should look at the entirety of the process including any appeal see ***Taylor v OCS Group Limited*** **[2006] IRLR 613**. That case is also authority for the proposition that there is no rule of law that a defective first instance hearing cannot be cured by a review rather than a full rehearing.

149. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

150. Unless the employee seeks reinstatement or re-engagement the Tribunal must consider making both a basic and compensatory award. ***Polkey v A E Dayton Services Ltd*** **[1987] IRLR 503** is authority for the proposition that in assessing what compensation is 'just and equitable' an employment tribunal is entitled to have regard to the possibility that had the employer acted fairly there might or would have been a dismissal in any event. The proper approach to hypothetical as opposed to real events is that set out in ***Software 2000 Ltd v Andrews*** **[2007] IRLR 569** although that now needs to be understood in the light of the repeal of the statutory dismissal procedures (see the references to Section 98A(2)). Elias J (P) (as he then was) gave the following guidance:

> *"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*
>
> *(2) 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 any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).*

*(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.*

*(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.*

*(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.*

*(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.*

*(7) Having considered the evidence, the tribunal may determine:*

*(a) That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).*

*(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.*

*(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.*

*(d) Employment would have continued indefinitely."*

151. Following the repeal of the statutory dismissal procedure in ***Ministry of Justice v Parry*** **[2013] ICR 311** it was said (by Langstaff J (P)):

> *"We should add that some of the way in which this subject is dealt with in Harvey has the capacity to be misleading. At para 2558 (Vol 1, D1) it cites Software 2000 Ltd v Andrews [2007] IRLR 568, [2007] ICR 825, and accurately quotes a lengthy passage from the judgment of the EAT given by Elias P. Under para 54, at point (7) under in his distillation of the effect of the authorities he says:*
>
> *"(7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the employer has satisfied it-the onus being firmly on the employer-that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A(2); (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly . . . ."*
>
> *Unfortunately, it is not made clear in the text of Harvey that this part of the decision is no longer appropriate guidance, since s 98A(2) was in force at the time it was delivered, and has been repealed since. When it was in force the range of chance of dismissal met a watershed at 50% above which – by however little or however much – a completely fair hypothetical dismissal was to be assumed for the purposes of compensation to be awarded for an actual one already held unfair. It is not in force any more. Chance of dismissal now runs across the whole spectrum from zero to 100%, as assessed by the tribunal. It would therefore be best if this part of the otherwise very helpful guidance were no longer put forward as if it might be relied upon.*

Unfair dismissal - discussions and conclusions

152. The concessions made by the parties limited the issues before me. The Respondent accepted that the Claimant had sufficient continuity of service to present a claim of unfair dismissal. It was accepted that the Claimant was dismissed for the purposes of Section 95 of the Employment Rights Act 1996. The Claimant accepted that when she took the decision to dismiss him the reason or principle reason Margret Lee had for that decision was a belief that he had behaved inappropriately towards children (and had failed in his safeguarding duties). The Claimant accepted that that was a potentially fair reason. The Claimant further conceded that if the Tribunal found that there were reasonable grounds for that conclusion following a reasonable investigation then he could not sustain any argument that dismissal as a sanction was outside the range of reasonable responses.

153. I was left with the issue of whether the First Respondent had reasonable grounds for concluding that the Claimant had behaved inappropriately towards children and whether those grounds were the product of a reasonable investigation. If I concluded that the dismissal was unfair, I would need to deal with the question of whether the Claimant could or would have been fairly dismissed.

154. The evidence that pointed towards the Claimant having behaved

inappropriately towards children and relied upon by Margret Lee came from the following sources:

154.1. The records of conversations with the Children conducted pre-ABE interviews ('the pre-ABE evidence'); and

154.2. Evidence from some of the Children's parents that (1) they had reported matters to them and (2) in respect of two children that their behavior had altered; and

154.3. the records of the ABE interviews themselves; and

154.4. the opinion evidence of Norma Howes and perhaps Sam Withers that the children were being accurate historians.

155. Both Clare Kershaw and Margret Lee were at pains throughout the process and before me to point out that the Respondent was not conducting a review of the criminal process but determining for itself whether the Claimant had behaved inappropriately towards children. They said, rightly in my view, that the Respondent was not bound by the same rules of evidence as the criminal court and intended to determine the question applying the civil standard of proof. I see no proper objection to proceeding on that basis. Whilst the Claimant can rightly claim to have been exonerated of all criminal charges that does not mean that his employer could not conclude that it was more likely than not he had behaved inappropriately towards children.

156. However, I find that a reasonable decision maker would have had regard to the manner in which this evidence had been obtained. The manner of obtaining and recording that evidence is plainly relevant to the weight that should be given to it. I find that Jo Reed, Clare Kershaw and Margret Reed appreciated that point in respect of the ABE interviews. However, I find that Margret Lee failed to properly consider the quality of the Pre ABE evidence.

157. Within the documents supplied to Margret Lee was a good explanation of the process of 'Attaining Best Evidence'. Norma Howes explained that when obtaining evidence from a child any initial questioning should be brief. Once there is sufficient information to believe that some improper conduct had occurred then any initial questioning should stop. The child would then have an ABE interview. An ABE interview is captured on video. At the outset of that interview the child would be tested to ensure that s/he has sufficient understanding of the difference between truth and lies. Then the child should be encouraged to give their own account. Norma Howes identified that the interviewed would need to take care not to ask questions which suggested an answer or to ask questions where the child was asked to choose between several answers. It ought to have been clear to those conducting the investigation that the reason for this is that children at that age are suggestible and may not be reliable historians without any such safeguards.

158. Norma Howes said, in her report and in her interview with Jo Reed that when the children had been questioned in informal pre-ABE interviews the questioning had gone on for too long. There was additional material to support that in the skeleton argument of the Claimant's QC. That document set out at great length the reasons why

the pre-ABE interviews were unreliable. The QC agrees with Norma Howes that the interviews went well beyond the point where the ABE guidance suggests that safeguards ought to be put in place. The Claimant's QC's skeleton argument sets out further reasons why the informal records should not carry any weight (and should therefore be excluded). He criticizes the fact that there is no verbatim account of the interviews. He argues that the importance of that is that it is impossible to see whether the information said to have been given by the children is spontaneous or the result of prompting by a leading or suggestive question. He makes the valid point that when DC Jennings formally interviews the children, she frequently asked leading or suggestive questions. That was very clear from the transcripts themselves.

159. Margret Lee had a transcript of the comments of HJ Leigh. She was not bound by the views of a Circuit Judge but if the comments were relevant a reasonable employer could be expected to afford them some consideration. HHJ Leigh is recorded as identifying that the pre-ABE interviews had been conducted before any attempt was made to explain the importance of truth and lies to the children. Had she considered the matter she ought to have recognized that this had a bearing on the whether what was recorded in the notes of the pre-ABE interviews was reliable.

160. Unfortunately, when the Claimant presented and adopted the critique of his QC Margret Leigh declined to consider it on the basis that it had not been considered by the court. In fact, it was quite clear from the documents provided that the document had been considered by both HHJ Leigh and Counsel for the CPS. An indication was given by HHJ Leigh that the arguments were going to be accepted and the CPS agreed. Even if it had not been read by the court Margret Lee had been asked to look at it by the Claimant. Had she read and understood it she ought to have recognized that that there were some significant question marks over the reliability of this evidence.

161. I accept that all parties accepted that there were some serious question marks over the evidence obtained by the ABE interviews on the basis that inappropriate questions were asked. However, as Margret Lee did not consider the Claimant's QC's skeleton argument, she would not have been aware that he made an additional criticism which was that DC Jennings commonly used the pre-ABE interviews to prompt the children in their evidence.

162. I do not think that it matters whether this failure to consider an argument is categorised as a failure to investigate or whether it undermines the conclusion that there were reasonable grounds for the conclusions reached by Margret Lee. In simple terms failing to look at what the Claimant was saying, which was relevant in that it went to the weight that could be placed on the pre-ABE interviews, was unreasonable and unfair.

163. I turn to the report of Norma Howes. In ***A v B*** at para 78 Underhill LJ expressed some disquiet at the idea of an expert witness however experienced giving evidence as to the truthfulness of a witness that they had never met on the basis of documents alone. I do not consider it unreasonable for the First Respondent to enlist the services of Norma Howes. She was well placed to comment on how the ABE interview process was meant to work and the defects in that process in the present case. I further accept, disagreeing with Mr Faux, that Norma Howes had relevant experience as a child phycologist. That much is apparent from her CV.

164. What is of very real concern about Norma Howes is that she purports to give expert evidence that the children are telling the truth without considering the evidence of the various adults who say in terms that the inappropriate behaviour could not have taken place. On any fair reading of Norma Howes report this is exactly what she purports to do. I consider that any reasonable employer ought to have been alert to the obvious danger of this approach. An assessment of the credibility of children which either willfully ignores or at least entirely disregards the exculpatory evidence of adults is worthless. Any reasonable employer would have recognized this and treated those parts of her report with very real caution. Unfortunately, I find that that was not the approach of the Respondent.

165. I would accept that it was not unreasonable to ask Norma Howes's expert opinion on whether children collude. Ultimately, she and the Claimant agree that they would not collude as such. However, Norma Howes seems at one point to suggest that children do not make things up. That might surprise many parents. The report carefully explains why questioning of children needs to be careful to avoid any suggestions being planted in young minds. This may not be collusion, but the effect can be the same.

166. It is not at all clear why Norma Hughes having given an uncontroversial account of the ABE process and having noted that the pre-ABE interviews are not fully recorded she can then say that they are sufficiently reliable that they support the suggestion that the Claimant has behaved inappropriately. On the one hand she says that the ABE guidelines were breached in a number of ways on the other she reaches what appears to be a firm conclusion. She may have had her reasons but they are not readily apparent from the report.

167. The Claimant had no opportunity to challenge or ask questions of Norma Howes. Clare Kershaw elected not to call her as a witness. Her reasoning being that the Claimant could ask Jo Reed any questions he needed to. Jo Reed had interviewed Norma Howes but only briefly. The difficulties in the report are not touched upon in any way. It would be quite impossible for the Claimant to effectively challenge the report without Norma owes attending the hearing. Given the weight that this report ultimately carried I consider that there was significant unfairness in not permitting the Claimant to challenge it effectively. I do not consider that any reasonable employer would place any weight on the opinion of Sam Withers as to the veracity of the children.

168. I accept that fairness does not always demand that a person is allowed to cross examine a witness against them. However, the School's disciplinary policy certainly envisages the calling of witnesses. It was recognized by Margret Lee that it would have been better to have ensured that Norma Howes was available for questioning. The fact that she did not feel that the hearing was effected does not persuade me that the failure to call Norma Hughes to give evidence was fair.

169. I have set out in my findings of fact above my concern that Jo Reed miscategorised the evidence as being the Claimant's word against that of the children. That was very clearly not the case. Numerous adults had all spoken with a common voice saying that the children could not have gone or been taken to the Claimant's office without an adult being aware of that. Those that had been directly asked made it clear that the Claimant had never collected children from the classroom or playground (other than in groups of ten months before the allegations of abuse

were made). Several classroom teachers S, K and Teacher 17 directly contradicted the children's account of their involvement. There was also evidence such as the fact that the Claimant's office had windows looking out to the car park and that office staff would frequently enter the office which undermined the suggestion that the Claimant would be naked in his office playing with himself.

170. The danger of miscategorising the evidence in the way that Jo Reed did is that it can infect the decision-making process as it did in this case. Margret Lee repeats the same suggestion in her witness statement. Only by ignoring or putting to one side the evidence of a large number of adults can it possibly be said that it is the Claimant's word against the children. I find that that was the approach that was taken.

171. In her report Jo Reed sets out the hypothesis reached by DC Jennings and Sam withers about how the children could enter the Claimant's office unseen by the administrators in the adjacent offices. If this hypothesis is intended to explain why no adult was able to comment it is obviously deeply flawed. The focus of this hypothesis is on the Claimant's office. What the hypothesis ignores is the fact that, if all of the adults are right and the children were supervised at all times, there is no explanation of how they could have been collected from the classroom in the first place or their absence overlooked. Jo Reed does not attempt to explain how this can have occurred.

172. This leads me to examine the reasoning of Margret Lee. I have found above that her description in her witness statement of her reasoning process is accurate. I have found that she took a linear approach dealing first with the question of whether it was impossible for the Claimant to have taken the children to his office as alleged then putting that aside before addressing the remaining evidence. That is the only way the dispute could have been catagorised as the Claimant's word against the children.

173. I consider that such an approach is obviously and deeply flawed. It is irrational and it is unfair. Any reasonable decision maker would recognise that this was not a case of the Claimant's word against the children and that what was required was a careful evaluation of all of the evidence taken together. In this case that would have required the decision maker to recognise the flaws in the manner in which children's evidence was gathered, recognize that Norma Howes was purporting to give evidence about the veracity of children she had never met and without seeing any other evidence and recognising that the adults universally undermined, at least to some degree, the accounts of the children.

174. Other parts of Margret Lee's reasoning are equally poor. She discounted the unequivocal evidence of S that she had not taken Child E to the Claimant's office at all by reasoning that, as nobody knew when it was, she could not possibly remember what she had done. That is irrational.

175. Margret Lee's approach to K's evidence that no child had reported an injury is equally surprising. She did not attempt to resolve that one just saying that it was the words of an adult against a child. This is all the more surprising given her willingness to catagorise the case against the Claimant in the same terms but go on to make a finding against him. She fails to grapple with why a teacher with many years' experience would not recall a child reporting an injury caused by an adult or

would not have acted upon it.

176. The manner in which Margret Lee considered the Claimant's argument that the investigation should have included looking at the 23 statements that did not suggest any wrongdoing is equally unsatisfactory. Her approach was to say that, as the statements clearly did not disclose wrongdoing, they shed no light on the evidence of the 7 child witnesses. That overlooks the fact that it is clear from the ABE interviews that the children who are interviewed name others they say were present.

177. The same point arises in respect of child G and teacher 17. The Claimant is not permitted to ask questions about Teacher 17 who child G alleges engaged in the same conduct as the Claimant. It is suggested that this is not relevant. HHJ Leigh is recorded as noting the extraordinary suggestion that Teacher 17 could be named as a prosecution witness when he is alleged to have behaved in the same way towards child G. It is clearly relevant that nobody has thought that the allegations against Teacher 17 had any substance whereas the same allegations against the Claimant are said to corroborate the accounts of other children and be true.

178. Margret Lee entirely discounted the character evidence provided by the Claimant. This covered both the Claimant's professional and family life. Whilst I accept that such character evidence may not have great weight it cannot reasonably be said to have none at all. It is a matter that a reasonable employer wound have considered together with all of the other evidence.

179. The parties asked me to consider submissions about the relevance of the decision by Clare Kershaw to remove the schools delegated budget and thus take charge of the disciplinary process. Mr Stevens says that I have no jurisdiction to decide whether the decision was lawful. I do not need to resolve that. I am satisfied that Clare Kershaw led the decision to remove the budget as she was concerned that the school would not undertake a fair disciplinary process. I do not need to decide whether Clare Kershaw was biased against the Claimant. The decision to dismiss the Claimant was taken by Margret Lee.

180. I have not attempted to deal with every point raised by the Claimant or the Respondent. I have dealt with those that I consider the most important.

181. I accept that Margret Lee was faced with a difficult decision. There was evidence from children that suggested some inappropriate behaviour. Against that there was evidence there was considerable evidence that went the other way. What was required was a reasonable and careful evaluation of that evidence. I regret to say that the combined efforts of Norma Howes, Jo Reed. Clare Kershaw and Margret Lee fell far short of that.

182. The Claimant was given a right of appeal. I would accept that Pam Parkes could have cured any of the defects I have identified if she had (1) recognized the defects and (2) reached her own view of the evidence evaluating it for herself. The appeal achieved neither of those things.

183. I am fully aware that I must not substitute my own view of the evidence for that of the Respondent. The criticisms I have made were matters that were either blindingly obvious or were raised by the Claimant or his Trade Union representative

in the course of the disciplinary process. I recognize that in an internal disciplinary process I should not be rigid in my approach to the quality of the reasoning. The test is always whether the investigation and reasoning fell within a band of reasonable responses.

184. I have no hesitation in concluding that the decision to dismiss was not taken on reasonable grounds and/or there was not a reasonable investigation. Many of the points I have made above straddle those two considerations and it is artificial to put them into separate categories. I do not consider that an employer has reasonable grounds for a decision simply because there is some evidence taken in isolation that supports the conclusion. Where, as here, the effect of the reasoning process has been to take the plums and to leave the duff. Whether this is a failure to properly investigate or whether it is a failure to have reasonable grounds for the decision it is in my view so unfair as to fall outside a range of reasonable responses.

185. I have made numerous criticisms, but I should make it clear that I would have found the dismissal unfair on the following basis alone:

185.1. The failure to give the Claimant any adequate opportunity to deal with Norma Howes opinion evidence and in particular her evidence on veracity.

185.2. The failure of Margret Lee to at least read and consider the Claimant's QC's argument that the pre-ABE evidence was unreliable; and

185.3. Her miscategorisation of the evidence as the Claimant's word against that of the Children which required her to relegate the evidence of numerous adults to a threshold consideration.

<u>Would or could the Respondent have fairly dismissed the Claimant?</u>

186. The Claimant has sought reinstatement or re-engagement. If I make either of those orders the issue of making a deduction on 'Polkey' grounds may not arise. However, the parties have asked me to consider the position on a contingency basis the Respondent having made it clear that it will resist any order for reinstatement or re-engagement.

187. As I set out above if the Respondent seeks to persuade the Tribunal to reduce the compensatory award on the basis that, had it acted fairly, it would or could have lawfully dismissed the Claimant. In considering this point it is for me to make primary findings of fact.

188. At the conclusion of Margret Lee's evidence Mr Stevens asked her a question in re-examination. He asked whether having heard the arguments and questions raised she would still have dismissed the Claimant. I recorded her answer as being 'I do not think I would, I might have asked more questions'. When we discussed this response in final submissions Mr Stevens said that I had got that wrong. His note was that Margret Lee had said that she did think that she would have dismissed the Claimant. Mr Faux, very graciously said that he had no note but accepted that he would have had a punch the air moment if I had been right. I did not think it appropriate

to recall Margret Lee. I have decided that I will proceed on the basis that Mr Stevens is correct as he is tacitly supported by Mr Faux.

189. I need to make findings of fact. I am not bound to accept Margret Lee's evidence. I find that Margret Lee was simply shooting from the hip. I am not asking whether Margret Lee would have dismissed the Claimant but whether she would have done so fairly. What was required was a very careful evaluation of the evidence. She did not give any indication in her evidence that she recognised how flawed her analysis was. I simply cannot accept that at the conclusion of her evidence she had accepted that it was and had taken all the criticism on board. Indeed, Mr Stevens on instructions went on to argue that the dismissal was fair. Margret Lee did say that she would need to ask more questions. That part of my note was not challenged. If more questions needed to be asked how could Margret Lee possibly say that she would definitely make the same decision? I therefore place little weight on this response.

190. Mr Stevens asked me to address two possible routes to a possible fair dismissal. The first was that, if there were procedural or substantive defects, there remained evidence that the Claimant had behaved inappropriately and that the First Respondent could have fairly dismissed the Claimant. The second argument arose from a discussion at the outset of the hearing. I clarified that the Respondent was not seeking to rely upon reputational damage as amounting to some other substantive reason falling within Sub-section 98(1) of the Employment Rights Act 1996. As the Respondent had not advanced that at the time of the disciplinary hearing it could not have fairly dismissed the Claimant for that reason see ***K v L*** **UKEATS/0014/18/JW**. Mr Stevens suggests that I am entitled to decide that the Respondent could, or would, have fairly dismissed the Claimant on the basis of reputational damage either actual or future. I shall deal with each of those in turn.

A fair dismissal for misconduct

191. The school has adopted a disciplinary procedure that requires any allegation of misconduct to be proven to the civil standard before any disciplinary action is taken. Arguably that may be more generous than what is ordinarily required by the law of unfair dismissal (although Lord Summers in ***K v L*** holds otherwise). However, where that is adopted as a policy it would almost certainly be unfair to dismiss an employee applying any lesser standard. The issue for me must be whether in the evidence that was, or ought to have been, available could reasonably be believed to be sufficient to meet that evidential standard.

192. An employer is not bound by any rules of evidence and I should have regard to all the evidence whatever the source. I have set out a summary of the evidence above and draw on that to make my own findings of fact in this section.

193. Above I deal with the issues in relation to the pre-ABE statements attributed to the children. I would accept that on their face these statements suggest that the Claimant had engaged in inappropriate behaviour. I would also accept that on their face there are similarities between the accounts that provide some corroboration.

194. I am careful to say 'on their face' as I have set out above the concerns there

are about the manner in which this evidence was gathered and recorded. Firstly, I agree with HHJ Leigh, Norma Howes and the Claimant's QC that the questioning of the children went well beyond that necessary to establish that it would be appropriate to conduct formal interviews with proper safeguards. I agree with HHJ Leigh that foremost of these was an explanation of the importance of telling the truth. However, of equal importance in my view was the fact that the interviews are not and do not purport to be a verbatim record. It is not possible to see what questions were asked and what the responses were in any consistent way. I do not suggest that this means that the notes are of no value whatsoever just that I cannot be confident that the children understood the importance of the truth and that the questions asked were appropriate and did not suggest anything that went beyond what was actually said by the child.

195. There are some difficulties with the accounts given by the children internally. In the pre-ABE records. For example, child A says that the touching game took place in Assembly – plainly that could not be the case. Whilst there is some corroboration there are some accounts that contradict. For example, Child C says that Child D witnessed inappropriate behaviour. Child D does not report this at any time. Of perhaps greatest concern, never later explored, is the suggestion by Child B that somebody in his class has asked him to lie.

196. I have had regard to the evidence of the parents. Some care is needed in evaluating that evidence. What a parent reports a child has said is certainly evidence that the child has made a statement. It is not necessarily evidence that what the child said is true. Saying the same thing twice does not make it any more likely to be true.

197. The evidence of the parents of child A and Child C demonstrates that both parents questioned their children about what might have happened to them before speaking to the police. A fair reading of Child A's mother's statement leads me to conclude that it was her, and not child A who introduced the suggestion that the game described by Child A took place in the Claimant's office. Child A adopts this as his account after that. Child A's account of being taken to the office by the mid-day assistant was contradicted by direct evidence of that individual gathered within days of the alleged events. That evidence alone is sufficient to cast real doubt on child A's account. Child A's parent spoke to another parent – I find it was more likely than not Child B and described what was said. I find it very likely that the parent asked her son about what happened. Child C's mother finds out about the Claimant's arrest on the WhatsApp group and speaks to various parents before questioning her child. She appears to be unnecessarily concerned about her child being given a sticker. It follows that she must have learned that there were allegations about the headmaster.

198. Absent any medical evidence I would place no great weight on the evidence that Child C has a vaginal discharge. Her mother's statement makes it clear that Child C has had allergies in the past. This could provide an innocent explanation for this condition.

199. Child B's mother appears to have explored with her son the allegations after he is interviewed. She was satisfied that the Claimant had not touched him inappropriately.

200. Child F's mother was so concerned about what she learned that she had

taken the decision to keep her child from school before he was interviewed. It seems inevitable that she had spoken to her child about the Claimant.

201. The parents of two children say that their behaviour has changed. Child C is said to have nightmares. These children were subjected to a number of interviews. No doubt their parents were terrified that they had been abused. Children are capable of picking up on the feelings of adults. It is no surprise that their behaviours changed during and after the investigation.

202. There has been extensive criticism of the ABE interviews. I have read each transcript and agree that the interviews were poorly conducted. Of greatest concern was the fact that DC Jennings frequently prompts the children by reference to what she says they said before. In addition, as has been acknowledged Norma Howes and Jo Reed there are numerous leading and inappropriate questions.

203. In their ABE Interviews Child A retracts his account of the Claimant touching his penis and alters his account of being touched under his clothes. Child B does not say there was any touching game at all. Child C maintains her account at least to an extent and adds other detail including that this all took place in the lady's office. Child D apparently says nothing that suggests improper behaviour. Child E maintains an account that the Claimant smacked Child C on her front bottom but at one stage says that this was something he has been told by an identified classmate. Child F gives an extraordinary account of events on his ABE interview. He says that the Claimant bit him on the head and shoulder. He says that the Claimant was naked and playing with himself and that he only stopped when somebody else came in. Child G refers to tickling but says that Teacher 17 is involved.

204. Against this is the evidence of the adults (I shall exclude the Claimant himself at this stage). I have set that out extensively above. In short, the teachers, LSAs and mid-day assistants all say that the children are always supervised by an adult. They all agree that the children would only visit the Claimant's office in three circumstances. The story telling, if they are to be rewarded with a sticker and rarely if they had been naughty. For the story telling they go in groups of 10. On any other occasion they are accompanied by an adult. Where they were asked they confirm that the Claimant has not collected any children from the classroom in any circumstances other than the story telling sessions.

205. Some 23 other children were interviewed I infer that none of them said anything to support the suggestion there was any inappropriate behaviour. I find that this group includes children said by the others to have been present. The fact that they do not report anything inappropriate needs to be assessed with all of the other evidence.

206. I consider that the testimonials provided by the Claimant are of some small assistance. I accept that nobody who is not a first-hand witness can comment on whether something happened or not but evidence that the Claimant has behaved in an exemplary manner around children for decades both professionally and personally is evidence that supports his arguments. It may not carry much weight but cannot be left out of account.

207. In certain specific matters adult witnesses directly contradict the children.

Child E's account of there being a red table in the Claimant's office is one example. I have dealt with the evidence of S, K and teacher 17 above.

208. I would not accept that Norma Howes is able to comment upon the veracity of children without meeting them or having regard to the totality of the evidence. In this sense I mean that she is saying that what the children say is true. Insofar as she does so, I consider her report worthless. I accept that she might properly comment on the ABE process and the ability of children to fabricate an account.

209. I would accept that on the evidence gathered and before me the First Respondent could reject the suggestion of the children actively colluding. However, Child B does say in terms that he has been asked to lie. However, if the enquiry was to look at the possibility that the children's evidence has been contaminated by suggestions from other children and adults there is a body of evidence that would support that.

210. I consider that it is necessary to look carefully at child F's evidence. What he says is inherently unlikely. He describes the Claimant masturbating in his presence when fully or semi naked in a room with an unlocked door and windows facing the car park. He said that the Claimant only stopped when somebody came into the room. This is an extraordinary account. If it were true, the Claimant would not only have found some means of getting F away from the classroom undetected but be sufficiently reckless as to strip naked and masturbate with an unlocked door.

211. I have briefly set out what appears to me to be the important areas of the evidence. I have not tried to list all the evidence. The key considerations are the tension between the accounts of the children and the evidence of the adults at the school. The evidence of the children has not been gathered in a safe manner. It needs to be treated with caution. Against that was the evidence of the adults who all suggest that the Children's accounts of being taken to the Claimant's office in small groups or individually either did not happen at all or were highly improbable.

212. Taking matters as a whole I do not find that the Respondent had sufficient evidence that it was able to establish that it was more likely than not that the Claimant behaved inappropriately towards the children. If it is any different, I find that the First Respondent could not have reasonably concluded that the evidence that it had met the evidential standard of being more likely than not. There is a possibility that the Claimant behaved inappropriately but that is insufficient for the Respondent's own policy.

213. I therefore find that the First Respondent has not established that if it had dealt with the manner in a fair and balanced way it could have lawfully dismissed the Claimant.

A fair dismissal – reputational grounds

214. ***Leach v The Office of Communications*** **[2012] ICR 1269** is perhaps the leading authority in this area. In that case the Claimant was dismissed when his employers learned of police intelligence that he had committed sexual offences towards children in Cambodia. The employers successfully argued that they had had not taken the report at face value but had made proper enquiries. They said that as

a consequence of the report (and other matters) they had lost all trust and confidence in the Claimant and dismissed him to avoid reputational damage. The Court of appeal upheld the ET and EAT decisions.

215. The present case is slightly different. Here the first Respondent was able to carry out an investigation and in fact did so. I accept that the Respondent inherited the police investigation which had not been handled properly. I have concluded that on the evidence available the First Respondent could not reasonably have concluded that the Claimant acted inappropriately towards the named children.

216. I have considered whether the fact that the First Respondent cannot undo the damage done to the evidence by the Police and social workers puts the First respondent in an analogous position to the Respondent in ***Leach*** (in that the First Respondent is unable to ascertain the full picture). I do not think that it does. I accept that the failure of the police to carry out a proper investigation meant that the accounts of the children were unreliable. However, there was a substantial amount of evidence that suggested that had more care been taken the evidence against the Claimant would have fallen away not as opposed to gaining weight.

217. In order to justify a dismissal under Sub-section 98(1) the reason for the dismissal needs to be substantial. To surpass this threshold there would need to be evidence of an actual of future risk to reputation. In terms of an actual risk Mr Stevens suggested that there was a risk that parents would remove their children from school. Indeed some of the parents of the named children had looked at removing them from the school even before the criminal trial collapsed. Apart from that there was no evidence of what might have happened had the Claimant been reinstated (other than the evidence that the teachers and governors held him in high regard). Many people would be prepared to respect the outcome of the criminal process and a fair internal disciplinary process. I accept that for some there is no smoke without fire.

218. In terms of a future risk the suggestion was that if it was later shown that the Claimant had harmed a child the school would be criticised because it had not taken the decision to dismiss the Claimant. Whether a dismissal could be fair in those circumstances requires an evaluation of that risk.

219. I need to approach these issues in accordance to the principles set down in ***Software 2000 Ltd v Andrews***. I have no clear evidence of the overall reaction of parents and teachers were the Claimant to have been reinstated. I have come to the conclusion that if I were to try and assess the chances that the Claimant would or could have been fairly dismissed for these reasons I would be in the territory of pure speculation. On that basis, if I am dealing with the question of compensation, then I will not make any reduction on the basis that the Claimant could or would have been fairly dismissed.

Should I reduce the basic award and or compensatory award to reflect my findings about the Claimant's conduct?

220. I have not found that the Claimant committed any inappropriate behaviour towards children. I was not invited to take into account the other allegations which were upheld but for which the Claimant was not dismissed and I cannot see how it could be said that that conduct contributed to his dismissal. Accordingly, if I am

required to consider compensation I shall but reduce the basic or compensatory awards to reflect any conduct by the Claimant.

221. I will list a remedy hearing for a day but would suggest that the parties attempt to resolve or narrow their differences in order to avoid or reduce the costs associated with that hearing.

**Employment Judge Crosfill**
**Dated: 1 November 2021**