EMPLOYMENT TRIBUNALS

Claimant:	**Mr G Hughes**
Respondent:	**The Governing Body of Llansantffraid Church in Wales Primary School**
Heard at:	**Cardiff by CVP** **On: 6 - 17 December 2021**
Before:	**Employment Judge C Sharp**
Members:	**Mr M Pearson** **Ms P Humphreys**

Representation:
Claimant: Miss J Watson (lay representative)
Respondent: Mr C Howells (Counsel)

JUDGMENT having been sent to the parties on 20 December 2021 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Unfair dismissal

1. The Claimant's claim of unfair dismissal is not well founded and shall be dismissed.

<u>The claims</u>

2. The Claimant, Mr Gareth Hughes, was the head teacher of Llansantffraid Church in Wales primary school, the Respondent, and was employed by its governing body. In addition, from 2011 onwards he acted as head teacher of Llanfechain primary school, but he was not employed by its governing body - there was an arrangement between the governing bodies to the two schools.

By the time of the Claimant's dismissal, he had already terminated his role at Llanfechain.

3. The Claimant was dismissed with effect from 6 December 2018 on the grounds of gross misconduct. The Claimant issued these proceedings on 26 February 2019. It is understood that he started a new job in a completely different sphere on 18 February 2019.

4. The Claimant originally issued three claims:

   a) ordinary unfair dismissal;
   b) automatic unfair dismissal on the grounds that a principal reason for his dismissal was the making of a protected disclosure;
   c) suffering a detriment, the causation of which was materially influenced by the making of a protected disclosure.

5. However, during the course of the Respondent's evidence, the Claimant withdrew (and the Tribunal now dismisses) the claims of automatic unfair dismissal and detriment due to the making of a protected disclosure ("the whistleblowing claims").

6. The Respondent denies the remaining unfair dismissal claim. It says that it was entitled to dismiss the Claimant on the grounds of gross misconduct, and does not accept that the dismissal was procedurally unfair. It also pleads Some Other Substantial Reason ("SOSR") for the dismissal of the Claimant, which is a potentially fair reason under the Employment Rights Act 1996 within its original Response.

7. Prior to the hearing, it became clear that the representatives had been unable to satisfactorily deal with the issue of the hearing bundle and witness statements. The Claimant's representative, Ms Watson, an experienced lay representative who is being paid to assist the Claimant, sought to strike out the response under Rule 37 of the Employment Tribunal Rules of Procedure as amended on the basis that the behaviour of the Respondent's representative in the last two or so weeks prior to the start of the hearing was unreasonable. That application was unsuccessful and oral reasons were given at the time.

8. The Tribunal was supplied with three bundles - the main bundle totalling 1839 pages, a chronology bundle consisting of a variety of chronologies put together by the representatives, and a supplementary bundle which consisted of documents that should have been within the main bundle as they were relevant or unredacted copies of documents in the main bundle (or indeed clearer copies). The Tribunal also dealt with issues about whether documents should be adduced to the Tribunal; again, oral reasons were given in respect of both the documents that were permitted and the documents that were not. Two days of hearing time was utilised dealing with these issues.

9. At the outset of the hearing, the Tribunal disclosed that Mr Jonathan Walters, the independent investigator, was a regular advocate within this region of the Employment Tribunals of England and Wales and was known not to be a QC as alleged by the Claimant. In addition, the Tribunal disclosed that following the events of this case, Mr Rhys Evans, the presenting officer, had been appointed as a fee-paid employment judge within this region and was known in this capacity to the judge on this panel. Finally, the Employment Judge disclosed that in her other judicial role, she had dealt with Mr Robert Clive Pinney, a witness and monitoring officer of Powys County Council. The panel confirmed that no member had any actual bias in respect of these matters, that none of the individuals mentioned were friends or close acquaintances of any member of the panel and adjourned to allow the parties to give instructions to their representatives. On recommencement, neither representative had any application to make regarding apparent bias and the hearing commenced.

10. The Tribunal heard oral evidence from the following witnesses:

    a) Gareth Hopkins – chair of the disciplinary panel;
    b) Councillor Lucy Roberts – chair of the appeal panel;
    c) Miss Sarah Christoforou - human resources officer at Powys County Council;
    d) Mr Robert Clive Pinney - head of legal at Powys County Council;
    e) the Claimant himself;
    f) Ms Jenni Watson - representative for the Claimant.

11. The Tribunal declined to allow Ms Wheeler, a parent, to be called on the basis that she could not provide any relevant evidence to the issues that it had to determine. Ms Hovey, the Claimant's former union representative, had been expected to be called, but the Claimant elected not to do so after the withdrawal of the whistleblowing claims.

12. Ms Watson, as recorded above represented the Claimant; Mr Howells appeared on behalf of the Respondent. They both provided written submissions and were available for oral submissions and to answer questions from the panel. The Tribunal intends no disrespect by not summarising the submissions it received, it adopts them in full, and deals with them as where they were most pertinent in its decision.

13. On its own initiative and after giving the parties an opportunity to comment or object, the Tribunal issued a Restricted Reporting Order and an anonymity order in respect of three individuals (the mother and two children at the heart of this case). The parties did not object on the basis that they agreed the Convention rights of the children involved justified the departure from the open justice principle.

Background

14. The Claimant's employment as Head Teacher of Llansantffraid started on 1 September 2001. He took over as Head Teacher of Llanfechain in addition to his role for the Respondent in September 2011 until his termination of this role at Llanfechain during the disciplinary process undertaken by the Respondent on or around 8 September 2017.

15. In 2014, the Claimant commenced what he describes in his ET1 as an "*affair*" with Miss X. There is no suggestion that sex took place, but it is accepted the relationship was in essence an emotional affair. The Claimant was married, and Miss X was a parent of children at Llansantffraid. They met through the school. It is not clear whether the affair started in July or September 2014; it is not necessary for the Tribunal to determine the specific point the affair began. It is agreed that the Claimant kept his relationship with Miss X a secret, including after his deputy headteacher and deputy safeguarding lead raised concerns with him about safeguarding and placing himself in a vulnerable position with Miss X's family as the children were in his office frequently outside of core school hours, including during school holidays. The Claimant's oral evidence to this Tribunal was that he regretted not disclosing the truth, either to his deputy or the Chair of the Respondent.

16. Miss X had a number of children; Pupils A and B were two of her children and the focus of the allegations found proved against the Claimant in the disciplinary process that led to his dismissal. The Claimant accepts that in order to help Miss X, he regularly allowed these pupils to remain at school after the school day had ended, usually either in his office playing on a games console while he worked elsewhere in the building or playing in the field outside before coming in. At times, the Claimant was the only adult present. In addition, the Claimant accepts that he took one of these children alone on trips, including swimming in Wrexham where he said that he was less likely to be recognised as their head teacher, and to the cinema. The Claimant bought the children gifts, and away for overnight stays in Oxford during December 2014 and another overnight stay in London on a "*recce*" for a future school trip during October 2014.

17. During both of these overnight stays, the Claimant was alone in a hotel room with pupils A and B in the absence of their mother. There were particular concerns about Pupil B, who may have been the subject of sexual abuse at the hands of a relative and had continence issues. Miss X and her family had previous involvement with social services to the knowledge of both the Claimant and the Deputy Head Teacher at Llansantffraid, and Miss X had been subjected to domestic abuse in the past. The Claimant does not accept the description of the background of this family as "*chaotic*", but he did accept that he did not report all he knew about the family, or the history involving the former partners of Miss X that he gathered in the lead up to and during the affair.

18. The Claimant was the safeguarding and child protection lead at Llansantffraid, and had been trained to carry out this role. He denies seeing a Code of Practice for Employees whose work brings them into contact with children and young people [419 main bundle] issued by Powys County Council, though he accepted in his oral evidence (and in interviews with the independent investigator) that he would not dispute any of its contents as correct and applicable to his professional role.

19. On or around 6 March 2015, anonymous allegations were made against the Claimant that he was abusing/grooming Miss X's children (Miss X had a belief about the identity of the informant, but this has not been evidenced and is irrelevant for the purposes of this Tribunal). The matter appears to have been reported to the police on or around 9 March 2015; the Claimant was suspended by Mr Leigh Kellaway, the Chair of the Governing Body of Llanfechain (who said he was acting with the authorisation of the Chair of the Respondent) from both roles on 11 March 2015. It is accepted that the suspension was not correctly carried out, though the Respondent's explanation is that all involved believed at the time that the Claimant was in fact employed by both schools. The Tribunal noted that Mr Kellaway's evidence to Servoca was that Social Services told him to suspend the Claimant.

20. On 15 March 2015, the Claimant was arrested. This was at the end of the weekend where the Claimant on the day before (Saturday 14 March 2015) met up with Miss X and pupils A and B, and travelled alone with one of the children in a car, despite Ms X being advised by the police not to allow the Claimant to be alone with any of the children and telling the Claimant this during the course of the meeting. The Claimant accepts that this occurred as described.

21. On or around 12 February 2016, the police handed the matter back to the local authority, having decided to take no further action. Servoca was engaged by each school on or around 2 March 2016 to investigate. There is some confusion about the precise instruction date as there are slight discrepancies by a day or two within the documents but nothing fundamental turns on this. The Tribunal finds that it is more likely that the engagement was on 4 March 2016 due to the dates on contemporaneous documents, rather than 2 March, but both dates have been quoted in various documents. At that time, the Welsh Government had awarded Servoca the contract to carry out child protection investigations on behalf of schools. On or around 30 July 2016 its reports were produced. The governing bodies of both schools felt that the investigation was defective in that it had not considered the broader issues raised by the alleged conduct of the Claimant – their position was that Servoca had dealt with the child protection issue in respect of whether any child had to come to harm, but not whether there was evidence of misconduct and a breach of the relevant policies identified by Servoca.

22. Servoca's conclusions in respect of the Claimant's conduct when working for the Respondent were that:

    (1) Mr Kellaway suspended the Claimant on behalf of the Governing Bodies of both schools after receipt of information from Social Services about the allegations against the Claimant, without taking advice from the local authority/human resources and without giving the Claimant an opportunity to be accompanied by his union representative;
    (2) Various policies and procedures existed regarding child protection, safeguarding and related matters, including the Code of Practice for employees whose work brings them into contact with children and young people;
    (3) The Claimant was the child protection/safeguarding designated teacher for the Respondent and had been trained;
    (4) Sensitive information in respect of Pupils A, B and their sibling had been known to Social Services since 2006 and the Claimant would have been aware of this due to his role. His deputy was aware that Pupil B was subject to a Team Around the Family due to allegations of sexual abuse and the Claimant had confirmed Miss X had shared with him her concerns about Pupil B;
    (5) The Claimant refused to allow access to his police interview;
    (6) The Claimant spent more time with Pupil A than the others;
    (7) There was sufficient evidence to support all allegations made against the Claimant, but he had been in a secret relationship with Ms X and did not see himself as the headteacher when outside of the school day with her family. It was for the governing body to consider the wider points raised;
    (8) The Claimant was married.

23. Servoca made findings in respect of the Claimant's conduct when working at Llanfechain, including the same findings above regarding items 1, 2, 3, and 4 above. It made additional findings regarding:

    (i) A pupil and the Claimant were messaging each other through ipads, and the social media policy was relevant. The same pupil was present in the school after the school day had ended and after he had left the school as a pupil, including periods where he was alone with the Claimant;
    (ii) The Claimant took four children alone to Blackpool, where one child became ill and had to be collected by their parent;
    (iii) No child suffered emotional abuse, but the governing body should decide if the Claimant's behaviour was akin to that who holds a position of trust.

24. On 24 January 2017, Mr Jonathan Walters, an employment law barrister with substantial experience in this field, was appointed as the independent investigator by the governing bodies of both the Respondent and Llanfechain.

He rephrased the allegations in respect of the Respondent school, which as the Claimant accepted in his oral evidence effectively rephrased the allegations set out by Servoca, which the exception of the first allegation set out by Mr Walters which says - "*In 2014 you formed and, thereafter, continued a relationship with the vulnerable mother of children who attended Llansantffriad school with a view to having inappropriate contact with her children."*

25. Mr Walters' report produced on 25 May 2017 concluded that there was a case to answer, and the matter should go to a disciplinary panel. During his investigation process, Mr Walters discussed the allegations he had set out with the Claimant on the basis of the evidence from Servoca and observations received from Mr Mitson (School Effectiveness Officer and School Service Lead for Child Protection and Safeguarding) in respect of both schools. Mr Walters' conclusions became the allegations of which the Claimant was notified by Mr Pinney, acting on behalf of the Respondent, on 20 September 2017 [1445 – 1450 main bundle] and these were the allegations considered at the disciplinary hearing:

    1. Between 2011 and 15 March 2015 you breached or failed to have any or any sufficient regard to the Code of Practice referred to below and/or child protection policies and the safeguarding policies of the said schools and/or the educational visits policy of Llanfechain school;
    2. Between 2014 and 15 March 2015 you formed an inappropriate relationship with a vulnerable person in order to groom her for access to her children who attended at Llansantffraid School;
    3. Between 2011_and 15 March 2015 you emotionally abused children who attended Llansantffraid and Llanfechain schools;
    4. Between 2011 and 15 March 2015 you formed inappropriate relationships with children attending the said schools;
    5. Between 2011 and 15 March 2015 you conducted yourself inappropriately towards children who attended at the said schools;
    6. Between 2011 and 15 March 2015 you conducted yourself in such a way as to render you unfit to be in a position of professional responsibility for children;
    7. Between 2011 and 15 March 2015 you conducted yourself in such a way as to render you unfit to be a teacher and in particular, the head teacher of the said schools;
    8. Between 2011 and 15 March 2015 you conducted yourself in such a way as to fall below the standards of behaviour expected of a headteacher;
    9. Between 2011 and 15 March 2015 you conducted yourself in such a way as was likely to bring the said schools and/or your employers into disrepute;
    10. Between 2011 and 15 March 2015 you conducted yourself in such a way that you were likely to damage public confidence in your profession and/or your employers;

11. Between 2011 and 15 March 2015 your conduct has destroyed trust and confidence in you as an employee.

26. There was no free-standing allegation about "*risk of emotional abuse*".

27. A decision to proceed to a disciplinary hearing was issued on 20 June 2017 by the Respondent, and there followed a number of abortive attempts to have the disciplinary hearing. It was pointed out by the Claimant's second representative, Ms Watson, that he was only employed by Llansantffraid, and therefore its governing body alone should deal with allegations which by this stage included some additional issues about the Claimant's conduct at Llanfechain following the Walters investigation. On a number of occasions, the Claimant's representative said that she was unable to attend the planned disciplinary hearing, causing the Respondent to re-arrange the hearing each time. The Claimant's representative suggested in her written submissions that the March 2018 hearing was not rearranged due to her unavailability, but the contemporaneous evidence disproves this suggestion.

28. The disciplinary hearing took place before the disciplinary panel on 14 and 15 May 2018. The chair was Mr Gareth Hopkins. The 11 allegations were considered, and it was confirmed that no finding had been made that the Claimant had sexually abused children. The disciplinary panel was equally clear that there was no truth to allegations that the Claimant had groomed Miss X, a vulnerable person, in order to gain access to the children, and there was no evidence to suggest that the Claimant at any point intended to abuse children.

29. The panel did find one allegation in respect of the Claimant's conduct at Llanfechain well-founded, in that his messaging to an 11-year-old child who had left the school as a pupil through an iPad that had been sold to his family by the Claimant was a breach of policy and created a risk that the child could have been emotionally abused (albeit that this did not happen). The panel also found that the risk to children from Llanfechain taken alone by the Claimant on a trip to Blackpool created the risk of emotional abuse, but again no actual emotional abuse took place. The panel's view of the Llanfechain allegations that it upheld was that they comprised lesser misconduct – they did not lead to the dismissal of the Claimant.

30. The panel's views of the upheld allegations in respect of Llansantffraid were more serious. The panel was struck by the "*reckless*" disregard of the Claimant of the relevant policies and procedures; it found that he was unfit to be either a head teacher or the child protection and safeguarding lead of a primary school. It said that his actions in relation to pupils A and B created the risk of emotional abuse, though it accepted that the Claimant had not intended to do so. In its dismissal letter of 22 May 2018, the panel said that the Claimant's actions were gross misconduct. In a document of 8 November 2018, created to assist the appeal panel, Mr Hopkins recorded more detail about the findings of the panel.

He repeated that it was the Claimant's actions at Llansantffraid that was of most concern due to the inappropriate relationship formed between the Claimant and pupils A and B in secret. Allegations 1 - 4 had been the focus of his findings but Mr Hopkins recorded that "*the committee focused mainly on Allegations 1- 4, as we found that the remaining allegations were different ways of describing the impact of allegations 1—4 and therefore I have concentrated again responding to those allegations in this response*." In his oral evidence, Mr Hopkins said allegations 1-4 were the main focus.

31. On 1 June 2018, the Claimant attempted to resign and also appealed against his dismissal. There were seven grounds of appeal, but none were about the finding of "*risk of emotional abuse*" in the sense of complaining that this specific point had not been put to him; the appeal notice simply said that the findings were perverse. Due to the relevant Welsh regulations, the appeal had the effect of delaying the effective date of termination. The appeal was heard on 26 November 2018 and deliberated by the appeal panel chaired by Councillor Lucy Roberts on the following day.

32. On 30 November 2018, the appeal was dismissed. The appeal panel found that the conduct of the Claimant had breached key policies. It concluded that the Claimant had breached these policies by taking two pupils on overnight stays in hotels alone with just the Claimant, the failure to disclose his secret relationship with Miss X and the pupils to another professional or the Chair of Governors, the numerous occasions where he had been alone on school premises with pupils A and B, and the messaging of pupils outside the social media policy.

33. The appeal panel considered the Claimant's oral position was that it was a sick and perverted interpretation of events to accuse him of having created a risk of emotional abuse for children. It did not uphold this aspect of the appeal. It pointed out that the Claimant was both the head teacher and the child protection lead, it noted the evidence that he was aware of the vulnerability of the family, and that he chose to have a secret relationship with the mother, despite the concerns raised by the Deputy Head Teacher. The appeal panel concluded that it was not perverse to find there was a risk in acting in the way the Claimant had, albeit that no physical or sexual harm had been done; the conclusion that he was unfit for his role was likewise not perverse.

34. The appeal panel also dealt with the Claimant's complaint that the presenting officer was a qualified barrister specialising in child protection issues, that the wider allegations of abuse had tainted the disciplinary panel's decision; it did not consider those complaints well-founded. The appeal panel did not identify any breaches of procedure at the disciplinary stage and concluded that the disciplinary panel had given proper consideration to all facts and policies. It was of the view that dismissal was proportionate to the allegations found proved and it had considered the Claimant's mitigation arguments.

35. It is worth reiterating that even at the hearing before this Tribunal, the Claimant did not challenge the underlying facts regarding his conduct. It is also part of the Claimant's case was that Powys County Council officers were in essence instructing the Respondent what to do and had an agenda to ensure his dismissal as he was perceived as a "*risk*". The Claimant in his oral evidence accepted that he had carried out blameworthy conduct, which breached the relevant policies and warranted a sanction (though not dismissal); this was in contrast to his position at the disciplinary and appeal hearings and the submissions of his own representative at the end of this hearing.

The law

36. There is no dispute between the parties regarding the applicable law, which is well-settled in this area.

37. The starting point of such claims is sections 94 and 98 of the Employment Rights Act 1996:

> *"94 The right*
> *(1) An employee has the right not to be unfairly dismissed by his employer.*
> *…*
> *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— …*
> *(b) relates to the conduct of the employee,*
> *…*
> *(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…."*

38. In order to decide whether the Respondent has shown that conduct was the reason for the dismissal of the Claimant, the Tribunal is required to consider the evidence available to the Respondent at the time of dismissal. It is not

permitted to substitute its view as to whether it personally thinks the Claimant's actions constituted gross misconduct or what it personally would have done in the circumstances if it had been the employer.

39. The well-known case of ***British Home Stores Ltd v Burchell*** [1978] IRLR 379 sets out the points to be considered when dealing with a conduct dismissal (there is a neutral burden of proof for these questions):

    a. Did the Respondent genuinely believe in the misconduct of the Claimant?
    b. Was that belief based on reasonable grounds?
    c. Was a reasonable investigation carried out in the circumstances? The cases of ***Sainsbury v Hitt*** **[2002] EWCA Civ 1588** and ***RSPB v Croucher*** **[1984] 3 WLUK 152** are relevant in this situation. *Sainsbury v Hitt* requires that the Respondent carries out an investigation which would be within the range of reasonable responses carried out by a reasonable employer. This can mean that less or no investigation is required if the employee accepts some or all of the facts alleged (*Croucher*).
    d. Was summary dismissal within the band of reasonable responses open to a reasonable employer in all the circumstances?

40. The Tribunal also needs to consider whether the procedure adopted by the Respondent was fair, reasonable and complied with the ACAS Code of Practice for Disciplinary and Grievance Procedures or the relevant procedure operated by the Respondent. If it finds that part of the *Burchell* test has been answered in the Claimant's favour or there is an issue with the procedure adopted to dismiss the Claimant, the Tribunal is required to consider the percentage chance that the defect made no difference and the Claimant would have been dismissed anyway (***Polkey v AE Dayton Services Ltd*** [1987] UKHL 8, [1988] ICR 142). The Respondent in its submissions said it did not raise any points in relation to either *Polkey* or contributory conduct, but as these are points arising from the legislative framework, where relevant the Tribunal must still consider them.

41. In relation to the evidence about the Claimant's conduct, as stated previously the Tribunal cannot substitute its view or assessment for that of the Respondent's. The point of any review of evidence is to assess whether the Respondent's conclusions and analysis of that evidence was fair and reasonable. However, in this case there is little or no dispute about the conduct of the Claimant; in essence, the dispute is whether having a secret relationship with the mother of two pupils and being alone (in the absence of their mother) with one or both of the children outside of school hours at school, on trips taken away from the local area to avoid detection (e.g. swimming in Wrexham) or being alone in a hotel room with only the children could expose those children to a risk of emotional abuse. The Claimant takes the view that all was innocent,

and he has a right to a family life (though in his case, it would a second secret family life); the Respondent points out the issue is risk – being alone with children in these circumstances it says is a risk and a conclusion that the disciplinary and appeal panels were plainly entitled to reach. When combined with the Claimant's role as headteacher and child protection/safeguarding lead, the Respondent says the panel reasonably concluded his reckless breaches of various polices was gross misconduct.

42. As stated earlier the Tribunal noted that the Respondent in its Response did plead SOSR as a reason for dismissal, though no detail was given and no submission on this point was made (this may be because the claim was originally pleaded as constructive dismissal). The Tribunal did not consider it fair to consider this potentially fair reason, given the complete failure of either party to address it on this point, either within the evidence or in their submissions.

Other

43. The Tribunal wishes to record that it is aware that child protection and safeguarding are terms often used in conjunction with each other, but they do not mean the same thing. Safeguarding is general action taken to protect children (or other vulnerable persons) from harm; child protection focuses on particular children.

Findings

44. The Tribunal was satisfied that the reason for dismissal of the Claimant by the Respondent was conduct, a potentially fair reason. The dismissal letter, the evidence before the panel, the oral evidence of Mr Hopkins, the Claimant's own admissions as to what he had done, and the evidence gathered by Servoca, the police and Mr Walters all support that finding.

45. The Tribunal moved on to consider whether the Respondent had a genuine belief in the misconduct of the Claimant. The findings of gross misconduct and the decision to dismiss the Claimant all arose from allegations relating to the Respondent school, not Llanfechain. Even the Claimant's written submissions accepted that "*possibly*" there was a genuine belief. Given the admitted conduct by the Claimant, and the supporting evidence, the Tribunal was satisfied that the disciplinary panel genuinely believed in the Claimant's misconduct as confirmed by the evidence of Mr Hopkins.

46. In addition, the evidence of Mr Hopkins was that the disciplinary panel had found breaches of several relevant codes and policies by the Claimant. The social media policy of the school, which points out at paragraphs 9.1 and 9.2 if breached can lead to disciplinary proceedings, says at paragraphs 5.1 and 6.2.1 teachers must keep their personal and professional life separate and not

put themselves in a position where there is a conflict between their work for the school and their personal interests. It states unequivocally staff members must not have any contact through any personal social medium with any pupil unless the pupils are family members. The Claimant accepted that pupils A and B were not his family members in his oral evidence, and confirmed that he did message those pupils (he says to pass on messages to other family members).

47. Mr Hopkins also confirmed that the panel found a breach of the school's child protection policy, which names the Claimant as the child protection lead, and the panel considered that there had been a breach in respect of sections 1 and 2.1 which talk about ensuring that children are safe from harm and protecting their emotional well-being. Mr Hopkins also pointed to the Code of Conduct of the General Teaching Council for Wales that applied to teachers; in particular the section on professional conduct [968 main bundle]. Mr Hopkins said that this had been breached in relation to communication, having inappropriate professional contact, failing to report incidents that may affect professional boundaries, and ensuring the safety and well-being and welfare of learners.

48. The disciplinary panel said that it considered the Powys County Council Code of Practice, though the Claimant had said he had never seen this document. The Code was referred to in the school's social media policy amongst other documents, but the Claimant under cross examination and when interviewed by Mr Walters confirmed that notwithstanding his position that he had never seen it when working, there was nothing within it to which he objected. The Code does make it clear that there are dangers in being alone with pupils.

49. In light of the evidence regarding the breaches found by the disciplinary panel, the Tribunal had no difficulty in concluding there was a genuine belief in the misconduct of the Claimant.

50. The Tribunal then moved on to consider the investigation. It reminded itself of the legal points cited earlier regarding the applicability of the range of reasonable responses test to investigations and that it can be justified to carry out no or little investigation when the employee, such as the Claimant in this case, admits the facts underlying the allegations. That said, in this case the Claimant complained that too much investigation had been carried out, rather than the more common complaint that too little had occurred.

51. The Tribunal was struck in the written submissions of the Claimant how little was said about Mr Walters and his investigation, given the further and better particulars provided on this point. The Tribunal considered it appropriate to explore all the allegations made over the course of the proceedings from the ET1 onwards in order to ensure that it fully explored this issue.

52. Starting with the reason for the appointment of Mr Walters, the Tribunal was satisfied on the face of the evidence before it, that it was the decision of the

chairs of Governors to instruct an independent investigator. There is no evidence supporting any contention that the local authority officers made the decision. The Tribunal was shown emails from the chairs of Governors for both schools explaining why they felt that issues had not been sufficiently dealt with by Servoca, the original investigator – more investigation about the wider employment issues were required in the view of the chairs. Given that Servoca was specifically instructed to deal with child protection issues only, and the wider evidence that this was the focus of its contract with the Welsh government, in the judgment of the Tribunal it was reasonable for the Respondent to conclude it wanted further investigation to address wider issues. Given the seriousness of the allegations, the Claimant's suggestion that less investigation was required was not tenable.

53. Mr Walters was instructed by the county council, but only through its role under the service level agreement to deal with HR matters connected to employment issues. It was the governing body that made the decision. The Tribunal did not have put before it a copy of any written confirmation from the Claimant's trade union representative of her agreement, but the emails that were put before it during the course of the proceedings demonstrated she did not object to the appointment of a second investigation. The Claimant's oral evidence was that his trade union representative had told him the governing body was entitled to further investigate, and no objection has been raised.

54. Mr Walters phrased the allegations he was investigating against the Claimant differently to how the allegations were set out by Servoca. As the Tribunal will explain later when it deals with the policies dealing with process, the independent investigator was entitled to do this. Through the process of comparison between Servoca's summary of the allegations at pages 81 to 82 of the main bundle and the allegations set out by Mr Walters during the Claimant's cross-examination, the Claimant conceded that with the exception of one, Mr Walter's summary effectively mirrored the Servoca allegations. The one that was not accepted by the Claimant is the first allegation earlier quoted by the Tribunal; in our view this matched allegation 8 on page 82 as set out by Servoca; the only difference was that Mr Walters took the allegation to its logical conclusion, in that the Claimant may have been spending more time with the children as opposed to their mother because he may have been grooming them. It was in the Tribunal's view a good example of the difficulties with the Servoca report - it would set out facts or allegations but not conclude with an explanation as to their relevance or what they may point towards. The Tribunal did not conclude that Mr Walters created new allegations as alleged by the Claimant.

55. The Claimant's complaint about the standing and status of Mr Walters was in the Tribunal's view without foundation. Mr Walters, as was made clear at the start of the hearing, is not Queen's Counsel. He is an experienced employment law practitioner, and a member of the bar. Another way to frame this is that he

is independent of those involved and subject to his own professional responsibilities. He is sufficiently experienced in order to properly investigate and consider the issues he is asked to consider. Far from being a negative in the Tribunal's judgment; it was seen as a positive step - it was less likely that anyone could interfere with Mr Walters, and it demonstrated the seriousness with which the matter was viewed by the Respondent.

56. There was a complaint that the terms of reference given to Mr Walters presumed that there was going to be a disciplinary hearing; given that the Claimant himself agreed that a disciplinary was required and the seriousness of the allegations, the Tribunal did not consider this to be either a fair or a relevant complaint.

57. It was alleged by the Claimant that it was proposed Mr Walters would be the presenting officer. Again, as the Tribunal's later analysis of the policies demonstrate, Mr Walters was entitled to present his report. It also noted that in actuality Mr Walters was not the presenting officer.

58. The Claimant complained that Mr Walters did not have a copy of the disciplinary procedure; in the Tribunal's judgment this was irrelevant as Mr Walters was the independent investigator – he was not conducting the disciplinary process. The Claimant complained that Mr Walters assumed he was a registrant of the Education Workforce Council (the identity of regulators for teachers had changed); the Tribunal could see no force in this criticism. The disciplinary panel considered the General Teaching Council for Wales Code, which is the relevant Code of Conduct (though the two bodies do appear to have similar, if not the same, provisions about professional behaviour from the quotes put before the Tribunal). The Claimant complained that Mr Walters made incorrect assumptions regarding the alleged ratio breach at Llanfechain; given that the disciplinary panel found there had been no breach, the Tribunal considered that this was not a relevant criticism.

59. There were unspecified complaints that Mr Walters had breached Welsh government guidance. The Tribunal considered that the complaints about Mr Walters' findings being based on no evidence or inadequate evidence were not well-founded. It was evident that Mr Walters had considered all of the evidence that was put before him from his report and supporting documents. The complaint that Mr Walters had used his personal judgment in reaching findings in the Tribunal's view overlooked the point that there would always be an element of judgment that would have to be used by an investigator to order to make findings. The suggestion that in some way it was inappropriate for Mr Walters to consider specifically the issue with grooming was fatally undermined by the fact that it was an issue within the Servoca report. The submission that Mr Walters ratcheted up the seriousness of the matter in the Tribunal's view overlooked the reality that the admitted conduct by the Claimant was objectively serious; the Claimant in his cross-examination accepted there were serious

matters that required a disciplinary hearing and a sanction; his position was that dismissal was too harsh.

60. The Tribunal was unpersuaded that there was anything unreasonable in relation to the instruction, actions and report of the independent investigator.

61. The Tribunal moved on to consider the initial referral to Servoca and its understanding that it was rejected. The Claimant suggested this was part of an "*agenda*" against him orchestrated by Mr John Mitson. The Tribunal noted that before the initial reference to Servoca, Mr Mitson had identified particular issues with emotional abuse, and this is echoed in the allegations investigated and as set out at page 82 of the main bundle by Servoca. The Tribunal could see from the contemporaneous evidence that following the initial rejection, Mr Mitson did discuss the matter with Servoca and persuade them that there were issues of child protection in play. However, given the allegations against the Claimant, including conduct that he admitted occurred, the Tribunal did not consider this action by Mr Mitson to be either unreasonable or evidence of an "*agenda*". The child protection issues raised by the Claimant's admitted conduct were obvious (being alone in a hotel room with children from your school who are not family members raises a concern as to why), and the issue of emotional abuse had been identified before the first referral.

62. The Tribunal reminded itself of the extensive evidence before the disciplinary panel, including the Claimant's own admissions and explanations for his conduct. It was satisfied that a reasonable investigation within the range of reasonable responses open to a reasonable employer had been carried out in all the circumstances of the case.

63. The Tribunal then moved on to consider whether there were reasonable grounds for the conclusion of the disciplinary panel that the Claimant had committed misconduct. The Tribunal has already identified the various policies and codes that the disciplinary panel found had been breached by the Claimant's actions. It found that the disciplinary panel had reasonable grounds to find those policies had been breached in light of the Claimant's own admissions and the evidence before it. The panel had two Servoca reports, the independent report of Mr Walters, and listened to an extensive presentation by the Claimant explaining the circumstances as he saw it.

64. The Claimant's position at the disciplinary panel was that he had effectively done nothing wrong. The Claimant's actions while conducting an affair with a parent at the school in secret led him to undertake the following actions - to go on trips alone with a pupil, to message a pupil, to give gifts to pupils, to be alone on school premises outside of the school day and term times with these pupils because of his secret relationship with their mother, and most seriously to go on trips involving overnight stays in hotel rooms with children in the absence of their parent (including a recce for future school visits) – the Claimant's position

was these actions were appropriate professional conduct for a headteacher and child protection/safeguarding lead.

65. The Claimant's lack of insight was compounded, as recently as the submissions to this Tribunal, but was evident in his submissions at the disciplinary panel and the appeal panel by comparisons to teachers and school staff who were known to be the parents or grandparents of pupils in their school or who openly babysit. The Claimant's actions were carried out in secret and without being disclosed even to his deputy, combined with his role as Head Teacher and the child protection lead, were in no way comparable to established public family relationships as the Respondent's witnesses contended. The risk to which Pupils A & B was exposed through the Claimant's conduct, though all accept that the Claimant had no intention of harming the children, was obvious to the disciplinary panel and remains obvious. This is even before consideration of the evidence put before the disciplinary panel regarding the vulnerability of the family involved. The Claimant's experience as a head teacher, combined with his training in child protection and his lead role in that regard, were aggravating factors. The finding by the disciplinary panel that he was unfit to continue in those roles was supported by the extensive evidence before the disciplinary panel, including the Claimant's own admissions and his inability to understand the full seriousness of what he had done. The disciplinary panel in the view of this Tribunal was entitled to reach such conclusions on the basis of the evidence before it.

66. As Ms Watson, the Claimant's representative accepted in her written submissions, if the panel answered the first three *Burchell* questions in the affirmative, it was highly likely that a finding that dismissal was within the range of reasonable responses open to a reasonable employer would be made. That is the finding of this Tribunal based on the seriousness of the allegations upheld, the Claimant's own position and the evidence before the disciplinary panel.

67. The Tribunal also moved on then to consider procedural matters. It considered it needed to closely analyse the policies relating to procedure but while making these findings there will be a measure of cross referral to its earlier findings.

The relevant parts of the policies – process

68. The Tribunal considered that it was evident that the Welsh government guidance on disciplinary and dismissal procedures for school staff dated 2013 was the disciplinary policy adopted by the Respondent from the contemporaneous documents. The Claimant's representative was told this more than once before the disciplinary hearing. The 1998 school disciplinary policy for teachers and the Powys County Council disciplinary policy for head teachers (also dated 1998) were described by both parties as outdated. The point was made in the cross examination of the Claimant that it was his

responsibility to bring to the Respondent's attention the fact that there was no formal policy in place for dealing with the head teacher, but the Tribunal did not consider that a blameworthy matter. The Claimant observed that the governing body did not adopt a policy until 11 months after his suspension (page 17 of the Supplementary bundle – it does appear that the policy of Powys County Council was adopted in February 2016). However, the Tribunal concluded this did not detract from the fact that it was made clear to the Claimant on a number of occasions that the policy that would be followed was the Welsh government guidance, and it was this policy that his own representative at the time referred to and required to be applied. It was not unfair to do so.

69. The Tribunal went through the Welsh government guidance on disciplinary and dismissal procedures and considered it was relevant to the issues it had to determine due to the criticisms made by the Claimant asserting the process was unfair. Uncontroversially, the policy confirms that for the voluntary aided schools the Respondent is the employer (2.11). Paragraph 8.1 confirms that sections 8 and 9 do not apply when dealing with child protection matters (which would exclude para 9.24 about a second investigation). Annex B2 sets out examples of gross misconduct, though none specifically cite policies that the disciplinary panel found to be breached by the Claimant.

70. Dealing first with the suspension, section 12 (particularly 12.2) makes the point that only the chair of the governing body can suspend the head teacher by way of a suspension meeting. In this case, the Claimant was suspended by the chair of a different governing body. This is a breach of the policy. Paragraph 12.4 makes the point that all realistic and reasonable options should be explored before suspension. Paragraph 12.5 says that suspension will only be considered where it is necessary to exclude the member of staff in the school for the protection of pupils other staff/property, for the orderly conduct of the school or the continued presence at work of the member of staff would be an obstacle to proper investigation of allegations made against that member of staff. Paragraph 12.6 confirms it is appropriate to suspend if allegations that could be gross misconduct are made. The Tribunal considered that this was the case here given the very serious allegations faced by the Claimant. Paragraph 12.7 makes the point that the chair of the governing body is to carefully consider whether suspension is necessary and discuss the matter with the local authority before suspending the head teacher (which appears from the evidence before the Tribunal not to have happened), while in paragraph 12.8 it does confirm that suspension should be reviewed at regular intervals by the governing body. The evidence shows that there were reviews of the suspension. The guidance says that trade union representation should be involved if the member of staff is a member of the union when suspended. This did not happen.

71. In the judgment of the Tribunal, section 10 is the process that applied in the Claimant's case due to the nature of the allegations against him involving child

protection issues (paragraph 10.14 sets out the matter should be viewed as a child protection allegation, particularly in the second bullet point "*where the pupil has not suffered and is not likely to suffer significant harm but the allegation relates to inappropriate behaviour or poor safeguarding practice which may constitute gross misconduct*" - this is what applied once the police investigation came to an end and the Respondent was able to commence its internal process).

72. The guidance confirms that while the statutory authorities (usually the police or social services) are dealing with the matter, internal processes must be suspended with the exception of appointing members of the disciplinary panel. Paragraph 10.11 confirms that matters of suspension and disciplinary procedures are for the Respondent to deal with. Paragraph 10.14 as previously stated sets out that where child protection matters are raised, an independent investigation must be carried out prior to any disciplinary hearing. Paragraph 10.18 sets out who cannot be an independent investigator; it does not exclude a qualified lawyer acting in that regard. Paragraph 10.20 states that the independent investigator's contact should be with the governing body; but it is silent about the position when a service level agreement is in place. Paragraph 10.21 sets out the role of the investigator, including the ability to present their report at any disciplinary or appeal hearing. The role in summary is to investigate, define what is to be investigated and the parameters of the investigation, consider the evidence and explore the facts, and produce a report with factual findings based on the evidence provided. Paragraph 10.23 confirms it is the investigator's responsibility to determine the questions to be asked, and confirms that the report should go to the school's governing body, who will have instructed the investigator (though again it is silent about what happens when there is a service level agreement). Paragraph 10.25 says that the investigator should not make comments or express personal opinions on the member of staff, the allegation, the evidence or the Respondent.

73. In terms of the administrative work, paragraphs 11.4 and 11.17 indicate that it is the clerk to the governing body's responsibility to sort out these matters, though again it is silent about the impact of the service level agreement and there appears to be no rule against delegation. Paragraph 11.8 confirms that for voluntary aided schools, the diocesan staff may become involved. Paragraph 11.11 confirms that the adviser to the disciplinary and appeal committee should not remain with them during their deliberations.

74. Paragraph 11.12 states that in the case where there is an allegation against the headteacher, the chair of governors or the local authority officer "*may*" present the case but there is no barrier to a barrister being so instructed. It says that the presenting officer cannot be the investigative officer or a witness. The guidance says that *"the presenting officer arrangements should be agreed by all the parties";* but there is no further information as to what arrangements means – does it mean that the identity of the presenting officer must be agreed

as the Claimant submits? The Respondent points out the model code does not say this. In the Tribunal's industrial experience, it cannot think of an occasion when the identity of the presenting officer, arguably the prosecutor, must be agreed with the employee. There are occasions when specific people are not appropriate and the policy deals with that, but the term "*arrangements*" is vague.

75. The standard hearing procedure of disciplinary hearings is then outlined in the guidance. Paragraph 11.24 confirms that if the outcome is dismissal, the reason for that decision should be confirmed in writing. There is a dispute between the parties in that the Claimant says the deliberations should be minuted and recorded in writing, while the Respondent's position is that the contents of the dismissal letter is sufficient. The appeal process outlined in the guidance requires the Claimant to give grounds of appeal, which could be procedural flaws, inconsistent findings with the evidence produced, inappropriate sanction, bias or new evidence.

76. Paragraph 13.5 to 13.7 confirms that governing bodies may require advice and enter into service level agreements with the local authority to do so. There is no dispute between the parties that the Respondent did have an enhanced service level agreement with Powys County Council entitling it to HR and legal advice in relation to employment matters.

77. The Tribunal then went on to consider the statutory Welsh government guidance on safeguarding children in education dating from 2014. It considers that there are relevant sections here, including section 2 which confirmed that children have a right to be safeguarded and protected from harm. It notes that at various points, the chair of Governors should be consulting with the local authority designated officer for child protection. Paragraph 8.5 reiterates the point that whether or not there is a criminal prosecution, it is for the employer to conduct the staff disciplinary and dismissal process, and it is best practice to gain access to the police interviews if possible. The Claimant refused on more than one occasion access to his police interview and devices to the Respondent and those investigating matters on his behalf.

78. Section 10 deals with the appointment of an independent investigator, and again does not exclude the appointment of a qualified lawyer. Section 11 deals with the support that should be given and reminds employers that they have a duty of care to their employees. Paragraph 11.3 does make the point that "*social contact with colleagues and friends should not be presented unless there is evidence to suggest that such contact is likely to be prejudicial to the gathering and presentation of evidence*."

79. Paragraph 16.1 makes the point that all allegations must be investigated as a priority to avoid any delay and suggests target timescales, none of which were met in the Claimant's case.

80. Paragraph 18 deals with the matter of suspension; paragraphs 18.3 and 18.4 make the point that suspension should not be automatically imposed, and all options should be considered. It confirms that if the case is so serious it might be grounds for dismissal that suspension should specifically be considered. Paragraph 18.5 reiterates the point that social services and the police cannot require the suspension of a member of staff. It has to be said that this second statutory guidance does not add much to the policy guidance also considered by the Tribunal.

Procedural findings

81. Having stepped back and considered these procedural points the Tribunal was not persuaded that the actions of the Respondent breached the overwhelming majority of the Welsh government guidance on disciplinary procedures, which it has already explained was the effective policy used to dismiss the Claimant. The significant breach was regarding suspension. Suspension is often described as a neutral act in the vast majority of cases. It is accepted that the Claimant was not suspended by the right person, the chair of the Respondent. Both the Claimant in his oral evidence and the Respondent in its submissions confirmed that at the time of the suspension, all believed that the Claimant was employed by both the Respondent and Llanfechain. This was not the case, but it was their belief. In addition, there should have been a suspension meeting with the Claimant's union representative involved. This did not happen – there appears to have been a meeting, but not one that fulfils the requirements of the Welsh Government guidance. The Tribunal accepts that Social Services could not lawfully require the suspension of the Claimant, but there is no substantial challenge to the position that the two Chairs of the governing bodies agreed to the suspension due to the serious nature of the allegations made.

82. The suspension was regularly reviewed and approved by the governing bodies, and the reasons given for the suspension was permitted under the policy and supplied to the Claimant in letters. Given the size of the primary school, described to the Tribunal as a small village primary school with approximately 115 pupils, the suspension of the head teacher facing child protection allegations was sensible and appropriate.

83. Given the enhanced service level agreement between the County Council and the school, the Tribunal found nothing unfair or in breach of the guidance in the governing body allowing specialist HR and legal teams to deal with the arrangements for the disciplinary hearing, the sending of correspondence or the instruction of the independent investigator. It did not consider the argument about the status and standing of the presenting officer to have any merit at all; the policy said that the chair of Governors or local authority officer "*may*" be the presenting officer and it does not exclude the appointment of a qualified lawyer. There is nothing within the transcripts in the judgment of the Tribunal that give rise to any concerns about the conduct of the presenting officer. The Claimant

did not raise any concerns about the contact officer assigned to him during the period of suspension as he accepted in his oral evidence. The Claimant did have access to witnesses and the relevant evidence, and given the Claimant admitted the conduct, the relevant evidence he required to defend himself was in reality his explanation as to what he had been doing and why.

84. The Claimant complains of unexplained delays. However, he accepted that the impact on his ability to defend himself was not affected and he was more upset about the process, which is not a matter that renders a dismissal unfair. The Tribunal did not consider the delays to be unexplained, particularly in the context of education where it appears that little is done during school holidays. The Claimant accepted that it was reasonable for nothing to be done while the police was investigating; the investigation by Servoca took time. Upon receipt of these reports, it was reasonable for the two governing bodies, and particularly their chairs, to review and discuss the matter and decide if they were satisfied with the investigation. The Tribunal has already found it was reasonable to instruct the independent investigator, and his investigation does not appear to have taken an unreasonable amount of time, particularly as the Claimant refused to disclose his evidence to the police to the Respondent. Mr Walters' report was received in late May 2017, and as early as 20 June 2017 the Respondent decided to commence the disciplinary process. The issue of the school holidays then arose, and it was proposed to have the disciplinary hearing in October 2017. It was the Claimant who decided to instruct Ms Watson, a new representative and Ms Watson correctly raised the point that the Claimant was not employed by Llanfechain. This took time to resolve, together with the subject access requests she made, but the Tribunal did not consider that the Respondent should be criticised for taking time to deal with the issues raised at a late stage in the process on behalf of the Claimant.

85. The Tribunal was satisfied that the hearings arranged for 2018 were postponed because of the unavailability of the Claimant's representative, who had failed, and she accepts that she failed, to respond to requests to provide her availability dates; she gave away dates offered the Respondent to other people. The Tribunal did not consider there was unreasonable or undue delay by the Respondent and the failure to comply with timescales were wholly explained by the specific events of this case. It did not render the process unfair.

86. The Tribunal did not consider that there was anything unfair about the disciplinary hearing. The Claimant's complaint that the actual deliberations were not recorded was in its view not a fair criticism. As a matter of public policy, the deliberations of disciplinary panels are not revealed or recorded - the dismissal letter stands as the record of the decision of the panel. The dismissal letter in the judgment of the Tribunal has to be read in the context of what was already known and understood by the parties; it clearly separates the conduct undertaken at the two schools involved. The Claimant knew why he was dismissed. He was dismissed because his admitted conduct breached a

number of policies, put children at risk and given his role as Head Teacher and child protection lead, the Claimant was expected to fully comply with child protection and safeguarding.

87. The appeal hearing was also in the judgment of the Tribunal conducted fairly. It accepted the oral evidence of Ms Christoforou that she popped into deliberations to ensure everyone knew what they were doing, and left. The evidence of Councillor Roberts was clear in that it was the decision of the appeal panel not to uphold the appeal; this is accepted by the Tribunal. The appeal letter deals with every ground of appeal raised by the Claimant and gives a detailed response as to why it is not upheld. It cures any alleged deficiencies with the dismissal letter, though none was found by the Tribunal.

88. The Tribunal accepted that parents should have not been told the Claimant had been dismissed after the disciplinary hearing as an appeal could be made and the provisions of the Welsh Regulations extends the period of employment in the event of an appeal. However, it did not consider that this made the process unfair; the decision to dismiss had been made by this point.

89. The Tribunal considered at length the issue that a specific allegation that the Claimant's conduct put the children "*at risk of emotional abuse"* had not been set out in advance. It considered this the most serious potential criticism of the whole process. However, the allegations were more wide-ranging than the Claimant suggests. The allegations included the proposition that the Claimant did cause harm; the obvious corollary of this is that he did not cause harm but there was the risk. More critically, the evidence of Mr Hopkins and the table he created of the disciplinary panel's conclusions in respect of the allegations made it clear that while allegations 1 to 4 were dealt with in detail, that was because allegations 5 to 11 were considered to be aspects of those first four allegations, and the logic that applied to the consideration of the first four allegations applied to the others. Allegations 6 and 7 were found due to the risk that the Claimant exposed children to emotional abuse; that is a reasonable conclusion in light of the evidence before the panel. Those findings were recorded within the dismissal letter. The Claimant was the gatekeeper in his role as Head Teacher and child protection lead; it was even more important that he complied with the policies. The risks the children faced in light of his conduct were obvious to untrained laypeople. The Tribunal did not consider therefore the failure to create a specific separate allegation of "*risk*" to be unfair in the circumstances as it was the finding of risk that led to the finding of the stated allegations as proved.

90. Standing back, the Tribunal therefore has only found in respect of a breach of the policy in respect of the initial suspension. It does not consider that breach to be so significant as to render the employer's conduct to be so unreasonable that the dismissal was unfair, particularly as the initial suspension and its

circumstances were not relevant to the reason for dismissal and did not hinder the Claimant in defending his position.

91. The Tribunal finds that the Claimant's claim of unfair dismissal is not well founded and shall be dismissed.

Costs

92. Two costs application were made by Mr Howells on behalf of the Respondent after the oral decision about the complaint was handed down. There was an application under Rule 76 of the Employment Tribunal Rules of Procedure (as amended) against the Claimant, and an application under Rule 80 for a wasted costs application against Ms Watson, the Claimant's representative.

93. The Tribunal found that in relation to the costs application against the Claimant, only one matter raised by Mr Howells met the threshold and would need to be considered at the next stage (listed to be considered on paper by the Tribunal on 11 February 2022). In relation to the wasted costs application under Rule 80 against Ms Watson, the Tribunal found that the application did not meet the threshold and that application is dismissed.

Rule 76 application

94. Rule 76 states:

"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; …"

95. There were 3 matters relied upon by the Respondent in relation to this application:

a. the issuing of the whistleblowing claims claim by the Claimant was vexatious or unreasonable;
b. continuing with those claims unreasonable until they were withdrawn;
c. the application for an Unless Order or a Strike Out of Response by the Claimant unreasonable and/or disruptive.

96. Dealing with the first matter, the Tribunal considered that there were deficiencies in the statement of in the ET1 as issued. It was not so deficient that it prevented the Tribunal from considering whistleblowing at all, but it required the Tribunal to issue a direction for further and better particulars. The

Tribunal noted Ms Watson said that that was her experience such particulars were required in every case, but that is not a positive point. If the Tribunal directs further and better particulars, it means the case was not properly pleaded. However, this is not evidence of vexatious or unreasonable behaviour. If so, there would be a considerable number of costs orders made.

97. Given the sense of grievance that the Claimant felt as evidenced throughout, the Tribunal could not identify anything that would support a finding of vexatious or unreasonable behaviour in relation to the issuing of the whistleblowing claims.

98. Dealing with the second matter, whether the continuing of the whistleblowing claims was unreasonable, the Tribunal considers this a sensible point to pause and remind itself of the legal issues in play. Firstly, as Ms Watson submitted, the case of ***McPherson -v- BNP Parabas*** [2004] EWCA Civ 569 has much to say on the issue of withdrawals. It is not unreasonable to withdraw a claim. The key question as Ms Watson points out and as indicated in the skeleton argument of Mr Howells on behalf of the Respondent is "*was continuing the proceedings unreasonable?".* The Tribunal also notes that when considering "*unreasonable*", it is the ordinary English meaning of the word that applies, but it does need to consider the nature of, the gravity, and the effect of any identified unreasonable conduct.

99. The Tribunal reminded itself that it had found it was not unreasonable (or vexatious) to issuing the whistleblowing claim. The next key stage was the preparation of the Scott Schedule as further and better particulars. The Tribunal noted at the outset of the hearing that the majority of the alleged protected disclosure had been made by somebody other than the Claimant; most were made either by Ms Watson or by Ms Hovey, his former Union Representative. The preparation of the Scott Schedule was an opportunity for the Claimant and those advising him to carefully consider the framework of the legislation and address the point that there was a potential issue about the identity of the discloser.

100. However, the Tribunal did not consider this point came near to the threshold of "*unreasonable*"; when completing such schedules, the parties are asked to set out what is the disclosure, what information is being disclosed, who was it disclosed to, and the date. Rarely is there any direction to undertake a detailed legal analysis; there was not in this case. That does not mean that a well-advised Claimant should not consider how to establish each requirement to find a protected disclosure, but failure to do so when completing a Scott Schedule is not in itself unreasonable crossing the threshold for a costs order to be considered.

101. The situation changed in the Judgment of the Tribunal during the preparation of the witness statements on behalf of the Claimant.

102. Ms Watson's submission was that the Claimant's witness statement did have things to say about the whistleblowing allegations and referred the Tribunal to relevant paragraphs. The Tribunal considered those paragraphs, but did not agree with Ms Watson. The Claimant's witness statement, Ms Watson's witness statement and that of Ms Hovey, had nothing to say about the whistleblowing allegations. There needs to be, particularly in the Claimant's witness statement, an explanation about his mind and reasonable beliefs in order to establish a whistleblowing claim. The Tribunal needs to understand the Claimant's reasonable belief that the information disclosed tends to show one of the items in Section 43B Employment Rights Act 1996 and his reasonable belief that the disclosure is in the public interest. The witness statements adduced on behalf the Claimant were silent on this point. It is striking that this was the case when the whistleblowing claims were 66% of the claims before the Tribunal and the reason why a full panel was empaneled.

103. Matters, in the Tribunal's view, were made worse when the Tribunal itself made the point to the Claimant's representative that the witness statements were silent when discussing the claims at the outset of the hearing. She did not say, as submitted today, that the claims were addressed in specific paragraphs of the statements; she accepted the point. The Tribunal told Ms Watson that as the witness statements were in the course of being amended (for other reasons) and the ones before it were drafts, there was an opportunity for that issue to be addressed. It was not. The final statements provided remained silent on whistleblowing. The Tribunal also asked the Claimant's representative to look at the Scott Schedule itself overnight, as it noted some minor issues which needed clarifying or correcting. The next day, when Ms Watson was asked about the Schedule, she had nothing to add.

104. The Tribunal then noted that when Mr Hopkins, the first witness of the Respondent and the dismissing officer, gave evidence there were no questions for him about the whistleblowing claims. The Tribunal pointed this out to Ms Watson in a bid to ensure an equality of arms and a fair hearing and was told that there were no questions on this issue for the witness.

105. In the Tribunal's view, while it had expressly asked the parties to be ready to make submissions at the end of the evidence about whether disclosures by Ms Watson and Ms Hovey were protected, this did not explain why the statements on behalf of the Claimant were silent about whistleblowing.

106. The other relevant factor that the Tribunal considered was during the submissions of Ms Watson, she said that the Claimant and his side had concerns about the whistleblowing claims. She described them as "*not brilliant*", and the automatic unfair dismissal claim as being less strong than the detriment claim. Ms Watson confirmed that the Claimant had access to legal advice, which is reflected in the main bundle where there was a reference to the

involvement of a barrister in the proposed injunction proceedings. Ms Watson also said she had discussed the matter with her daughter, a solicitor, but confirmed to the Tribunal was that her daughter was not acting in her capacity as a solicitor in that discussion. It seemed unfair for the Tribunal to make any findings about the involvement of Ms Watson's daughter, but Ms Watson's own submissions confirmed that there were concerns about the whistleblowing claims and legal advice available. The Claimant, notwithstanding the concerns, provided no evidence in his statements about the whistleblowing claims.

107. The Tribunal concluded that it was unreasonable to continue the whistleblowing claims at the stage when the witness statements were being drafted. The Claimant was not prepared to adduce evidence about these claims, despite his reasonable beliefs being fundamental to the claims. The fact that when he was given a chance to put this failure right at the outset of the hearing and did not do so demonstrates that he had no interest in these claims, and it is more likely than not this was why the statements were silent. The Claimant did not withdraw the whistleblowing claims at the point when he, or those advising him, decided not to adduce the necessary evidence. This does not meet the threshold of vexatious in the judgment of the Tribunal. There is no evidence that this failure was an attempt to abuse the process or due to an improper motive or an attempt to harass the Respondent. The nature, the gravity and the effect of the Claimant continuing whistleblowing claims that he appeared to have little or no interest in increased the costs that the Respondent has had to bear as it was preparing to deal with these claims.

108. It is also true that there is an impact on the Employment Tribunal as a full panel sat on the case, believing that whistleblowing was 66% of the claims. It is possible that if the Tribunal had been notified at the point that statements were being drafted that the whistleblowing claims had been withdrawn, it may have been able to shorten the listing in order to offer that time to other parties and would have released the non-legal members. Without the whistleblowing claims, this is not a 10-day case (as shown by how the claim was conducted). The continuing of the claim from the stage that the witness statements were being prepared is unreasonable in the judgment of the Tribunal and passes through the Rule 76 gateway.

109. Dealing with the third matter, which is whether the Claimant's application for an Unless Order or Strike Out was unreasonable and/or disruptive, the Tribunal did not accept that the Unless Order was considered during the 10-day listing of this hearing. It reminded itself that the hearing judge, as part of interlocutory work prior to the hearing commencing, refused to allow the Unless Order to proceed on the basis that it was likely to lead to secondary disputes. It was not a matter that was before the full panel.

110. The Tribunal therefore only considered this issue in relation to the Strike Out application made by the Claimant for the Response. The Tribunal took the

view that there were grounds to justify the making of the application, though it was unsuccessful and a warning had been given by the hearing judge about whether it was a good use of limited resources. There were documents absent from the main bundle that should have been present. The Tribunal when dealing with the Strike Out application did make the observation that both sides were at fault in the sense of "*dropping the ball*", but there was a positive outcome from the application as it resulted in directions from the Tribunal and the preparation of the Supplementary Bundle to be prepared. The Tribunal did not accept the submission of Mr Howells that the application was an act of defiance when the Tribunal refused to issue an Unless Order. There is much judicial commentary that Unless Orders may not be a particularly useful way to progress a case; Strike Outs are potentially a much more useful tool less likely to lead to secondary disputes. The Tribunal was not persuaded that the Claimant's application for a strike out was disruptive or unreasonable and therefore did not pass the Rule 76 gateway.

Rule 80 application

111. Turning to the wasted costs application, Rule 80 states:

"(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs—

(a)as a result of any improper, unreasonable or negligent act or omission on the part of the representative; …
Costs so incurred are described as "wasted costs".

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit."

112. The Tribunal reminded itself that the definitions for some words used within this Rule are different to definitions that it has used hitherto. The definition of "*improper*", as cited in the case of ***Ridehalgh-v-Horsefield*** [1994] 3 All ER 848, is actions that justify disbarment, striking off or serious professional penalty. The definition of "*unreasonable*" is not the ordinary English meaning; it is vexatious conduct, designed to harass rather than advance the resolution of the case. The word "*negligent*" means a failure by a representative to act with the competence reasonably expected of a professional representative.

113. The case law is also clear on the point about advancing a hopeless case – this does not mean that a Wasted Costs Order should be made. The reason for this is obvious and explained in the case of ***Mitchells Solicitors-v-***

Funkwerk Information Technologies York Ltd EAT 0541/07. A representative who is following their client's instructions, even if the quiet advice of that representative to that client is "*I wouldn't do that if I was you",* is not acting in such a way that justifies a costs order, unless it is done improperly, unreasonably or negligently amounting an abuse of the court. While ordinary costs orders are the exception, rather than the rule, Wasted Costs Orders are even more exceptional; the Tribunal should proceed carefully before proceeding to make one.

114. The basis of the Respondent's application under Rule 80 is that Ms Watson raised issues in her submissions about the unfair dismissal claim that were inconsistent with her client's case. Mr Howells points out that what the Claimant did was never in dispute and Ms Watson's submissions were inconsistent with this and the admissions of the Claimant during his oral evidence.

115. In this case, the Tribunal has the benefit of an additional statement from the Claimant who has confirmed that he wholly supports the actions of his representative. There is no suggestion that Ms Watson went off on a frolic of her own.

116. A point that the Tribunal found striking was a comment Ms Watson made when she was making her submissions to the Tribunal. The heart of the Respondent's for a wasted costs application is that Ms Watson's submissions on the merits of the unfair dismissal claim were inconsistent with the Claimant's own case, in particular his cross-examination. During his cross-examination, he accepted that his conduct was inappropriate and was of a nature that should be considered at a disciplinary hearing and subject to a sanction. Ms Watson in her submissions about the wasted costs application was that the Claimant had never said anything like that before he gave evidence to the Tribunal. From a review of the evidence before the Tribunal, this appears to be correct in terms of what the Claimant said to others. At the disciplinary and appeal hearings and in his witness statement, the Claimant did not concede that he had been at fault. The Claimant's evidence orally to this Tribunal could be seen as attempting to show that he had some insight into what he got wrong. It appears from the Claimant's supplemental witness statement, he now resiles from his admissions, which supports Ms Watson's submission that she was doing what her client wanted her to do. It is not her fault if the Claimant did not *"come up to proof".*

117. The obvious answer to that observation is that the cross-examination should be reflected in the submissions; Ms Watson is a paid professional advocate who should be taking into account what has been heard. Her submissions talked about "*an apparent acceptance*"; Ms Watson had not overlooked her client's admissions. The Tribunal concluded that in her submissions Ms Watson had glossed over some of the things that she wished the Claimant had not said in cross-examination. It was not misled.

118. The Tribunal then considered the three requirements to found a wasted costs order. It did not consider that Ms Watson's conduct was improper or unreasonable, using the definitions that applied. The most arguable point was "*negligent*"; a competent professional representative would have dealt with what the Claimant had said in his cross-examination and not attempt to persuade the Tribunal that it did not happen or overlook it. However, the Tribunal took into account that while Ms Watson is an experienced professional representative, she is a lay person. It seemed to the Tribunal from its own observations that Ms Watson pre-writes her submissions or what she plans to say; this can occasionally lead to people not taking into account what has happened after the drafting of such remarks. It also seemed to the Tribunal, that Ms Watson is not "*fast on her feet*"; she likes to pre-plan and read out her prepared statement, even if the Tribunal asks her to answer a question. This does mean that she is potentially less able to deal with the unexpected. The Tribunal concluded that Ms Watson's conduct did not meet the negligent threshold in the circumstances, and dismisses the Rule 80 application. However, the decision was finely balanced and largely due to Ms Watson's lay status. Ms Watson may wish to reflect on her approach to Tribunal proceedings for the future. Mr Howells' criticisms on behalf of his client had justification.

Conclusion

119. The Tribunal understood that the Claimant needed time to make submissions and gather evidence to be considered at the next stage, namely whether to exercise its discretion to make a costs order under Rule 76 against him personally. It noted that the Respondent also needed to gather evidence if the Tribunal did exercise its discretion in its favour. It directed that the remaining costs issues would be considered on the papers on 11 February 2022 and made appropriate directions.

Employment Judge C Sharp
Dated: 20 January 2022

REASONS SENT TO THE PARTIES ON 25 January 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche