



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Kitchener

**Respondent:** The Thinking Schools Academy Trust

**Heard at:** London South via CVP                      **On:** 6-8 December 2022

**Before:** Employment Judge Atkins (sitting alone)

## **Representation**

**Claimant:** Mr J Davies, Counsel, instructed by Bailey Fields Employment Solicitors.

**Respondent:** Mr G Pierce, Counsel, instructed by Browne Jacobson LLP.

1. On 8 December 2022, I gave an oral judgment which found the claim of unfair dismissal to be well founded and succeeded. I made supplementary directions in respect of a remedy hearing which is listed for 17 March 2022.
2. The parties have subsequently requested written reasons. I accordingly set out the reasons for the judgement below.

# REASONS

## Claims and Issues

1. The Claimant claims that he was unfairly dismissed from his employment as an Assistant Principal, based at Goodwin Academy (a school operated by the Respondent, his employer).
2. It was agreed between the parties at the hearing that the Claimant was dismissed from his employment, and that the reason for dismissal was gross misconduct.
3. Dismissal on the basis of conduct is a potentially fair reason for dismissal, as per section 98(2)(b) of the Employment Rights Act 1996.
4. The remaining issue before me on the day was whether the Respondent acted reasonably in all the circumstances in treating the conduct as a sufficient reason to dismiss the Claimant in accordance with section 98(4) of the Employment Rights Act 1996.

5. The agreed list of issues set out the position of the parties as follows:
  - (1) The Claimant asserts that the decision to dismiss was outside of the range of reasonable responses available to the Respondent.
  - (2) The Claimant asserts that the Respondent did not follow a fair procedure in accordance with the ACAS Code of Practice on Disciplinary and Grievance Procedures, and in particular the Claimant asserts:
    - (a) the Respondent failed to conduct a fair investigation;
    - (b) the Respondent pre-judged the investigation outcome;
    - (c) the disciplinary hearing proceeded with allegations that the investigation had not upheld, or only partially upheld;
    - (d) the disciplinary hearing invite letter dated 21 January 2022 did not state that the allegations could amount to gross misconduct, or that a potential outcome was dismissal without notice;
    - (e) the Claimant did not have the opportunity to question Ms Gray, a key witness, at the disciplinary hearing;
    - (f) that the investigating officer did not present the management case at the disciplinary hearing, this was instead presented by the commissioning manager in breach of Appendices 2 and 5 of the Respondent's disciplinary policy and whose evidence was tainted;
    - (g) that the commissioning manager failed to mention at the disciplinary hearing that two sub-allegations were unsubstantiated, and one sub-allegation was only partially substantiated;
    - (h) the Respondent failed to consider whether any sanction short of dismissal was appropriate in all of the circumstances (as detailed in paragraph 40(h)); and
    - (i) that any procedural flaws were not cured by the appeal hearing as this was not a re-hearing.
  - (3) The Respondent's position that the Claimant's dismissal was procedurally fair.
  - (4) Further or in the alternative, it is the Respondent's position that any procedural flaws were corrected on appeal.
6. Questions of remedy we reserved to be addressed at a later hearing, listed for 17 March 2023.

### **Procedure, documents, and evidence heard**

7. A number of preliminary issues were dealt with at the start of the hearing:
  - (a) The Claimant confirmed that he did not seek a recommendation, having not raised a discrimination ground.
  - (b) The parties agreed that the start date of the Claimant's employment was 1 June 2014.
  - (c) The parties agreed that the Claimant was remunerated with a gross salary of £5,038.26 per month.
8. I had before me:
  - (a) A PDF hearing bundle of 1138 pages.
  - (b) Three witness statements from:
    - (i) the Claimant;
    - (ii) Mrs Jody Murphy (the Respondent's Director of Education, who chaired the original disciplinary panel); and

- (iii) Mr Stuart Gardener (the CEO of the Respondent, who heard the appeal).
  - (c) A 64 second clip of CCTV footage.
  - (d) The list of issues.
  - (e) An agreed chronology of events.
9. The parties confirmed that there was no other evidence that I needed to consider.
10. The Claimant gave oral evidence on his own behalf. Mrs Murphy and Mr Gardener gave oral evidence on behalf of the Respondent.
11. I am mindful that the purpose of this written statement of reasons is to explain my decision and the reasons for it. The parties are well aware of the facts and matters, and of the issues. For those reasons it is not necessary to recount every single piece of evidence. I have focused in this written statement of reasons on the key evidence which is most relevant to my decision. I can confirm, for the avoidance of doubt, that in making my decision I have taken account of all of the evidence before me, even if I have not mentioned any specific part of it.

### Guidance and Training

12. The DfE have issued guidance, dated July 2013, and entitled “*Use of Reasonable Force*” (‘the DfE Guidance’), on the use of physical force to restrain children. It states (so far as is relevant):

*“When can reasonable force be used?”*

*Reasonable force can be used to prevent pupils from hurting themselves or others, from damaging property, or from causing disorder.*

*In a school, force is used for two main purposes — to control pupils or to restrain them.*

*The decision on whether or not to physically intervene is down to the professional judgement of the staff member concerned and should always depend on the individual circumstances.*

*The following list is not exhaustive but provides some examples of situations where reasonable force can and cannot be used.*

*Schools can use reasonable force to:*

*remove disruptive children from the classroom where they have refused to follow an instruction to do so;*

*prevent a pupil behaving in a way that disrupts a school event or a school trip or visit;*

*prevent a pupil leaving the classroom where allowing the pupil to leave would risk their safety or lead to behaviour that disrupts the behaviour of others;*

*prevent a pupil from attacking a member of staff or another pupil, or to stop a fight in the playground; and  
restrain a pupil at risk of harming themselves through physical outbursts.*

*Schools cannot:*

*use force as a punishment — it is always unlawful to use force as a punishment.”*

13. The Respondent has a policy ('the Positive Handling Policy') on the use of physical force to restrain children. It states (so far as is relevant):

*“Use of physical restraint*

*Physical restraint should be applied as an act of care and control with the intention of re-establishing verbal control as soon as possible and, at the same time, allows the pupil to regain self-control. It should never take a form which could be seen as punishment.*

*Staff are only authorised to use reasonable force in applying physical restraint, although there is no absolute definition of this. What constitutes reasonable force depends upon the particular situation and the pupil to whom it is being applied. Teachers should apply the training they receive to de-escalate where possible then use the appropriate holds as practised in the training. However, as a general rule, only the force necessary to stop or prevent danger should be used, in accordance with the guidelines below.*

*When physical restraint becomes necessary:*

*Do*

- Tell the pupil what you are doing and why;*
- Use the minimum force necessary;*
- Involve another member of staff if possible;*
- Tell the pupil what s/he must do for you to remove the restraint (this may need frequent repetition);*
- Use simple and clear language;*
- Hold limbs above a major joint if possible e.g. above the elbow;*
- Relax your restraint in response to the pupils compliance.*

*Don't*

- Act in temper (involve another staff member if you fear loss of control);*
- Involve yourself in a prolonged verbal exchange with the pupil;*
- Involve other pupils in the restraint;*
- Touch or hold the pupil in a way that could be viewed as sexually inappropriate conduct*
- Twist or force limbs back against a joint;*
- Bend fingers or pull hair;*
- Hold the pupil in a way which will restrict blood flow or breathing e.g. around the neck:*
- Slap, punch, kick or trip up the pupil;*
- Use physical restraint or intervention as a punishment.*

*Examples of situations where positive handling may be appropriate include:*

- *Child or young person attacks member of staff or another child;*
- *Child or young person is fighting;*
- *Child or young person is engaging in, or on the verge of, committing deliberate damage or vandalism to property;*
- *Child or young person is causing or at risk of causing injury or damage by accident, by rough play or by misuse of dangerous materials or objects.*

*Refusal of a pupil to remain in a particular place is not enough on its own to justify force. It would be justifiable where allowing a pupil to leave would:*

- *entail serious risks to the pupils safety (taking into account age and understanding), to the safety of other pupils or staff, or of damage to property.”*

14. The Respondent's Code of Conduct states, at paragraph 10.2, that “[The Respondent] *will provide training and guidance to all staff who have or are likely to have a duty or need to intervene physically.*”
15. There are a number of other policies in the Respondent's bundle. Where necessary, they are referred to below.
16. The Claimant was asked if he had had training in de-escalation techniques and positive handling techniques. He said that he had received training on the DfE Guidance of reasonable force in a previous role, soon after it was introduced, around 2012, 2013, or 2014. He may have had de-escalation training in a previous role but could not recall. He denied having had positive handling training. He did not feel it was an error of judgement to have handled Student A knowing that he did not have positive handling training, he was following the DfE Guidance which does permit handling. He agreed he used the word ‘handle’ and thought that this might come from hearing Mrs Wright (see below for an explanation of Mrs Wright's role) use it. He was knew the Positive Handling Policy existed but was not familiar with it. He pointed out that the Code of Conduct said that positive handling training would be provided to those who may need to use it, including him, and the Respondent had placed him at risk by failing to do so.

#### The events of 5 October 2021

17. The claim turns around events took place on 5 October 2021 at Goodwin Academy. In short, they are as follows:
  - (a) A student, Student A, was behaving disruptively. She walked out of her lessons and was swearing, wandering around corridors, throwing items into classrooms and at people, and barging past visitors.
  - (b) A decision was made to exclude Student A from school on health and safety grounds by Simon Smith, the Principal.
  - (c) Mr Smith tasked the Claimant with ensuring that Student A left school.
  - (d) The Claimant went to the room of Gina Gray where Student A was located.
  - (e) The Claimant told Student A that she was to go home and that she had not made wise decisions that day. The Claimant accepted in his oral evidence that Student A was calm when he met her in reception and that

he made remarks about Student A having not made wise choices that day.

- (f) Student A took offence at these comments and walked off, declaring that she did not want to leave the school.
  - (g) The Claimant followed student A. By his own admission, he did so closely enough to clip the back of her heels when she made a sudden turn.
  - (h) The Claimant then handed over following Student A to Becky Wright, a colleague.
  - (i) The Claimant returned to the corridor where Student A, still being followed by Mrs Wright turned a corner and walked toward him.
18. There is CCTV footage of what happened next. The clip lasts 64 seconds but the incident itself takes place between the sixth and twenty sixth seconds of the clip. It is necessary to deal with the CCTV in some detail:
- (a) Student A is the same size as an adult. She is not a small child.
  - (b) The Claimant says that Student A told him to fuck off. There is no audio on the clip but at 4 seconds into the clip Student A makes a violent hand gesture upon seeing the Claimant. Nothing turns on this, it is not disputed that Student A was being verbally abusive.
  - (c) The Claimant approaches Student A with his arms held out to his side, to block her passage. The Claimant says, and I have no reason to doubt, that he told Student A that if she did not stop he would have to handle her.
  - (d) Student A moves towards the Claimant's left. The Claimant holds the door frame with his left arm and blocks her path. Student A walks into him and, as a result, the Claimant turns towards her. I do not consider that this was as a result of the conscious decision to turn toward or pin her; this a natural reaction to having pressure put on your left arm and side.
  - (e) The Claimant continues to block Student A's path as the two are pressed together. He keeps his right arm out and away from Student A. Student A is struggling but it is apparent that her weight is being pressed mainly against the Claimant's left arm and shoulder. The Claimant would need to have exerted a counter force to remain in position.
  - (f) At this point two members of staff are also standing behind the Claimant. They too have extended their arms toward Student A and the Claimant. It is not clear whether they are intending to block Student A, or to assist the Claimant, or for another reason.
  - (g) Student A proceeds to hit the Claimant five times around the head. She grabs at his glasses and breaks them.
  - (h) As a result or at the same time it appears that the Claimant loses his grip on the door frame. The pair slide a short distance along the wall. They stop when they reach a short partition, which appears to be part of the frame of a doorway. Student A is now held in place on one side by the partition and on the other by the Claimant's left arm and left side of his body. His right arm is still held out to the side away from Student A.
  - (i) At this point three other staff members are stood behind the Claimant, also extending their arms toward Student A and the Claimant. It is again unclear whether they are intending to block Student A, or to assist the Claimant, or for another reason.

- (j) Student A stops struggling for about a second, then kicks at the Claimant's leg and groin.
  - (k) The Claimant loses his grip and steps back. Student A pushes past him.
  - (l) At this point two female members of staff appear to be reaching toward Student A with their arms, to block her path or for some other reason, and one male member of staff is standing shortly back from the incident but in her way. There appears to be some contact with the male member of staff as Student A appears to shake him off before continuing down the corridor.
19. The Claimant was asked about disruptive behaviour during the period he was following Student A. He said that she swore at him and barged into him. She was walking at pace around the corridors, looking into classrooms and disrupting the lessons that were going on by distracting the other students. He felt that Student A was out of control, the lunch break was approaching, and once the lunch break had started it would be impossible to contain her. The Claimant also felt it was important context that she had self-harmed in anger before.
20. Mrs Murphy confirmed that she was aware Student A had been disruptive prior to the incident, including swearing at staff, throwing things, barging into people. She could not recall whether the panel were aware Student A had been disruptive before. She did not consider that it was necessary to further investigate the ways in which Student A had been disruptive. Mrs Murphy was asked about Student A throwing things on the day. Mrs Murphy said, firmly, that this was only a matter of throwing bean bags into classrooms. Mrs Murphy was taken to evidence that Student A had thrown things at people, but did not feel that this justified handling Student A. Mrs Murphy was aware that Student A had been temporarily excluded for health and safety reasons. Mrs Murphy was taken to evidence of other staff that Student A was agitated and out of control. At least one member of staff felt she posed a high risk. Mrs Murphy agreed, insofar as the risk posed was to Student A herself.
21. Mr Gardner confirmed that the Head had used health and safety issues to justify exclusion. This was fairly standard wording for an exclusion letter. He suggested that it would also have been a health and safety issue if they didn't know where Student A was.
22. The Claimant accepted that there was no evidence that any other member of staff – including Mrs Wright who had said she may need to handle Student A – had actually handled Student A before he did.
23. Mrs Murphy could not recall any evidence which established the Claimant knew following Student A was a trigger for her. She said that she would expect a senior member of staff to follow from a distance. She accepted that the Claimant would not have access to Student A's safeguarding file. The Claimant said that he did know that Student A was in care and he accepted that a child in care may have suffered trauma. The Claimant said that he was following student A and then handed over to Mrs Wright. He may have been following her for around seven minutes. Then Mrs Wright was following her prior to the incident.

24. The Claimant accepted that other members of staff were present. He thought they would assist him. He felt that they did not do so because they were scared of the consequences. He accepted that he did not discuss handling Student A with any other staff member present prior to the incident.
25. The Claimant felt that he acted in accordance with the DfE Guidance on reasonable force. He did not accept that he used excessive force. He used his left arm and body to hold her in place. He denied using force or his body weight to pin her against the wall. He could not recall whether he told Student A what she could do to get him to cease contact or talk to her throughout the incident.
26. Mrs Murphy was taken to the Respondent's Positive Handling Policy. She agreed that this had to be read together with the DfE Guidance. Mrs Murphy agreed that whether or not to handle a student was a matter for the individual judgment of the teacher involved. Mrs Murphy agreed that the Claimant had not done any of the things prohibited by the Respondent's policy (acting in temper, prolonged verbal exchange, involving other students, sexually inappropriate contact, bending or twisting limbs, pulling hair, bending fingers, restricting blood flow or breathing, slap, punch, kick, trip up, or using physical restraint as a punishment). Taking all of this into account, with the CCTV and all of the other evidence, Mrs Murphy still considered that all of the handling was inappropriate. She felt that there was no need to handle in the first place and the way it was done was wrong.
27. Mrs Murphy was taken to Mrs Wright's email of 5 October 2021, in which Mrs Wright said that she had told Student A that if Student A did not stop then Mrs Wright would have to handle her. This was absent from Mrs Wright's statement, and given to the investigation at a later date. Mrs Murphy felt that Mrs Wright's later statement clarified and explained her initial email. She did not agree, despite what Mrs Wright had written, that handling Student A was appropriate. Ms Murphy felt that Mrs Wright had been prepared to handle Student A, was aware handling was a matter of last resort, and on the day did not handle Student A.
28. Mrs Murphy confirmed that some de-escalation techniques had already been used on Student A earlier that day. She confirmed that all of the examples of de-escalation techniques given in the policy had already been used. When asked if this was relevant to the decision to handle Student A, she could only say that handling a student should always be the last resort. She was asked about the de-escalation techniques that the Claimant recorded that he used prior to handling Student A (including the Claimant telling her he was going to handle her). She was again unwilling to engage with this point, simply noting that this was what the Claimant had written on the incident form completed shortly afterwards. Mrs Murphy pointed to the statements of other staff who did not think handling Student A was appropriate. Pressed to justify her decision, she simply said that she and the panel did not think it was appropriate to handle Student A.
29. Mr Gardner did not feel the level of behaviour exhibited by Student A merited a physical intervention. He said that Student A could have spent the whole day at school behaving in that fashion and physical intervention would not have been justified. Throwing things into a classroom was not



justification for a physical intervention. Had there been a change of behaviour, such as Student A having a sharp object or if she had been about to attack somebody, that might have justified a physical intervention.

30. Mr Gardener thought it was important that physical intervention was a last resort. The guidance did not set out a ladder of consequences. If a teacher had tried following all de-escalation techniques, and they did not work, the teacher would not then naturally proceed to physical intervention. He did not feel that Student A was in a last resort situation.
31. Mr Gardner felt that the Claimant should have exercised more caution, as he had not had training and had not discussed what to do with his colleagues.

#### Events leading up to the disciplinary procedure

32. The following day the school began an investigation and (quite properly) referred the incident to the police and the local authority.
33. The nine members of staff who were involved were all asked to give their accounts. The Claimant accepted in his oral evidence that six of the nine witnesses gave initial accounts on the day. He did not challenge the contents of the statements. The Claimant instead took issue with the witness statements not being signed (he said 'objectively verified by the person who was making them') until January 2022. He was asked whether he said that they had been changed in the period between their being made (in October and November 2021) and signature (in January 2022) and said he had 'no way of knowing that'.
34. No decision was made on the day of the incident, the day the investigation began, or any other day after that to retain any CCTV other than the short clip that was available to me.
35. The Claimant says that the failure to collect all CCTV was unfair. It would have shown the wider context in which the incident took place. It would have shown Student A barging into him during the seven minutes he was following her. It would also have shown the clipped heels incidents. It would have shown Student A's behaviour on the day and the de-escalation efforts that were unsuccessful.
36. Mrs Murphy accepted that conduct prior to the incident recorded on CCTV was relevant to some of the allegations. She was taken to evidence which showed it had been collected and available, and that some staff had watched it, but it was deleted rather than saved alongside the short clip that was preserved. She accepted that if it had been available, it may have been part of the evidence considered by the panel.
37. On 15 October 2021 the Claimant was asked to work from home for 3 weeks.
38. On 1 November 2021 the police and local authority confirmed that they would take no further action in respect of the incident. The local authority said that there were no safeguarding issues which required addressing.

This is, and the Claimant accepted in evidence, a different question as to what decisions the Respondent had to make about the Claimant's conduct.

39. On 3 November 2021 the Claimant was informed that disciplinary proceedings had begun.

The investigation

40. On 4 November 2021 Mr Gwynn Bassan, the commissioning manager, asked Ms Debbie Clarke-Basrai, the investigating officer, to investigate the incident. Ms Clarke-Basrai gathered together a volume of information, including witness statements from nine members of staff, which was in the bundle. She did not request that any CCTV be preserved apart from the short clip that I have seen.
41. On 25 November 2021 Mr Smith spoke to the Claimant on the phone. The Claimant alleges that he was told that if he agreed to admit to a mistake, then he could keep his job. I do not consider that anything turns on this. Mr Smith was not a decision maker whose decisions are challenged.
42. During the course of the investigation, Ms Clarke-Basrai was advised and assisted by Ms Roxy Heywood, a HR adviser.
43. In the bundle there is a record of an online chat between Ms Heywood and Ms Clarke-Basrai dated 7 December 2021. In it Ms Heywood tells Ms Clarke-Basrai that she (Ms Heywood) had told Mr Bassan that the decision was straightforward and there was a case to answer.
44. The Claimant said that it was wrong for Ms Heywood to have pre-judged whether there was a case to answer before the second meeting with him. She should know what to do and that this was wrong.
45. Mrs Murphy was asked about the message sent by Ms Heywood on 7 December 2021. Mrs Murphy felt that this was a HR advisor offering her opinion and was not a procedural defect. Mrs Murphy felt that the opinion of a HR advisor would not bind a decision maker because of the HR adviser's relative lack of seniority.
46. Mr Gardner said that he didn't think Ms Heywood's intervention had fundamentally changed the position.
47. On 22 November 2021 and 10 December 2021 the Claimant attended two investigation meetings to give his account of events.
48. On 15 December 2021 Ms Clarke-Basrai concluded that there was a case to answer. There were four allegations made against the Claimant in the investigating officer's report. They were:
- (1) That he had inappropriately managed the behaviour of Student A. There were three sub allegations, relating to:
    - (a) an unnecessary approach to Student A causing her behaviour to escalate;
    - (b) following Student A for an extended period of time and causing her distress; and

- (c) following her so close that the Claimant stood on the back off her heels.
  - (2) That he had made inappropriate physical contact with Student A. There were five sub allegations, relating to:
    - (a) physical restraint against a wall;
    - (b) unreasonable force;
    - (c) restraint over a period of time while Student A became agitated and aggressive;
    - (d) failure to use an appropriate hold; and
    - (e) use of a single handed restraint.
  - (3) That he had behaved unprofessionally and so brought into question the trust and confidence placed in him. There are three sub allegations, relating to:
    - (a) emotional harm to Student A;
    - (b) physical harm to Student A; and
    - (c) bringing into question the Claimant's suitability to work with children.
  - (4) That he breached a number of the Respondent's policies. There are four sub allegations, relating to:
    - (a) the Code of Conduct;
    - (b) the Safeguarding policy;
    - (c) the Positive Handling Policy; and
    - (d) the Teachers Standards 2011.
49. Ms Clarke-Basrai's report found that some of the allegations were not made out. They were 2(d) and 4(c). In addition, allegation 1(b) was only partially upheld.
50. The Claimant was invited to a disciplinary hearing by way of a letter dated 16 December 2021. That letter did not mention gross misconduct or say that a potential consequence of the disciplinary could be dismissal without notice. It was accompanied by an out of date version of the Respondent's disciplinary policy.
51. Mrs Murphy confirmed that the letter inviting the Claimant to a disciplinary hearing did mention gross misconduct or dismissal without notice. She noted that the letter did refer to dismissal. She did not feel that this was a defect in the procedure because the letter also referred to the Respondent's policies which covered gross misconduct and dismissal without notice.
52. During the investigation the Claimant indicated that he wished to challenge the witness statement of Ms Gray. He claimed that he was never given the opportunity to do so.
53. Mrs Murphy said that the Claimant was given an opportunity to put questions in writing which could then be raised with Ms Gray, although there was no guarantee that Ms Gray would engage with them. She said that the Claimant did not take up this opportunity. The Claimant said in reply that two days later he was signed off on sick leave.

54. Mrs Murphy was reminded that the Claimant provided the panel with a list of questions and she said that the panel had gone through them and didn't feel they needed to explore the evidence further.
55. Mrs Murphy accepted that Ms Gray's witness statement was wrong to say that the Claimant has 'grabbed' Student A. On the CCTV it could be seen that he had not. Mr Gardner said the same.
56. A disciplinary hearing was convened and eventually met on 30 March 2022. At that hearing, Mr Bassan rather than Ms Clarke-Basrai spoke to the investigation report. Contrary to the findings in the investigation report, all four allegations were laid against the Claimant as if fully substantiated.
57. Mrs Murphy was aware of the Respondent's policy which said that the management case should be presented by the investigating officer, and confirmed that Ms Clarke-Basrai did not in fact do so at the hearing. Although it was not in line with the Respondent's policy, Mrs Murphy did not agree that Mr Bassan presenting the case was a defective procedure. She noted part of the policy which said that the commissioning manager would present the management case.
58. Mrs Murphy confirmed that when presenting the management case, Mr Bassan did not say that some of the allegations had been found to be unsubstantiated. She was aware of this, having read the report. She did not feel the need to raise this with Mr Bassan as the panel had all seen the report. Mrs Murphy confirmed that the panel's decision letter did not deal with this issue. She did not feel it was necessary to do so as the panel had considered the report.
59. Mr Gardner acknowledged that Mr Bassan had departed from the investigating officer's report. He said Mr Bassan had presented the case he felt was appropriate. Mr Gardner agreed that Mr Bassan probably should have indicated to the panel that he had diverged from Ms Clarke-Basrai's report.
60. The Claimant said that he asked for clarity about the position on dismissal with or without notice at the hearing. He was told that details would be given alongside the outcome. This was recorded in the note of hearing.
61. The panel chaired by Mrs Murphy decided that the Claimant had committed gross misconduct. Mrs Murphy confirmed that the disciplinary panel identified inappropriate physical contact with Student A as the only gross misconduct said to have been committed by the Claimant. Mrs Murphy confirmed that allegation 2 was the most important one. Mrs Murphy felt that allegations 3 and 4 were consequent upon allegation 2. She felt that there was one over-arching allegation and that once it had been proved then all aspects of it were proved. She agreed that there were no other actions said to be gross misconduct. In particular, she confirmed that the disciplinary panel did not dismiss the Claimant due to any breach in trust and confidence.
62. Mrs Murphy confirmed that the disciplinary panel did consider the option of a final written warning (with suitable training), but discarded it as an option.

She confirmed that the panel, once it had identified an act of gross misconduct, felt bound by the Respondent's policy to dismiss without notice. She did not feel that this was an exceptional case where the policy might permit dismissal with notice.

63. Mrs Murphy felt that the Claimant has not expressed remorse, and had consistently said that he was right to have taken the action that he did. The Claimant said he was contacted by the Head Teacher, who said it would all go away if he reflected on it. He did reflect. He did not accept that he should not have physically intervened. He felt Student A would have needed to be stopped at some stage and that a stop at the time was appropriate. Student A was unruly and out of control and no de-escalation techniques were working. He said that he had not intended for the incident to go the way that it did. Upon reflection, he may have done it a different way.
64. Mrs Murphy confirmed that the panel at the disciplinary hearing did not consider the Claimant's unblemished record. Mrs Murphy said that she could not recall any mitigating circumstances and did not refer to any in the outcome letter.
65. Accordingly, on 6 April 2022 the Claimant was dismissed, without notice, for gross misconduct. The reason for dismissal given in the letter of was that all four allegations had been proven to be gross misconduct.

#### The appeal

66. The Claimant appealed. An appeal hearing was convened on 23 May 2022.
67. Mr Gardner was clear that the appeal was not a re-hearing of the matter. This was why he had not invited Mr Smith or Mrs Wright to give evidence.
68. Mr Gardner accepted that Mr Bassan had been selective in the evidence that he relied on. He said that the appeal panel were careful to consider the totality of the evidence. The appeal panel had all of the evidence and considered all of it.
69. Mr Gardener felt that the appeal panel had been open about where they considered there to be defects in procedure. They acknowledged what had happened, but asked what the consequences were. He didn't feel that those defects changed the position.
70. Mr Gardner confirmed that allegation 1 by itself would have resulted in a verbal reprimand and nothing more. It did however have a wider bearing on the Claimant's decision making. Mr Gardner said that a senior leader should have realised this was likely to lead to further escalation.
71. In respect of allegation 2, Mr Gardener confirmed that mere physical contact was not gross misconduct. It had to be viewed in the context of what happened that day. Mr Gardner gave examples of alternative actions such as:
  - (a) passively blocking Student A by standing in place with arms open as a barrier;
  - (b) giving way when contact was made; or

- (c) breaking contact so as not to keep Student A restrained between a body and the wall;  
which he did not consider would be gross misconduct.
72. Mr Gardener said that the appeal panel felt they should change from dismissal without notice to dismissal with notice as they had not upheld all the disciplinary panel's findings. He did not ask HR for advice nor did they object to the change at the time. With hindsight he would have maintained dismissal without notice in light of the gross misconduct the appeal panel found. He confirmed that the appeal panel did discuss all possible options.
73. Mr Gardner was asked about the Claimant's reflection upon the events. Mr Gardner was of the opinion the Claimant thought what he did was right. Mr Gardner did not think the Claimant had learn from it. Mr Garden thought the Claimant's inability to accept his mistakes meant that he could no longer trust the Claimant's judgment in the future.
74. I asked Mr Gardner what difference it would have made if the Claimant had acknowledged mistakes. He said that the Claimant might have been open to "*training and learning and coming back*".
75. On 27 May 2022 the Claimant was informed that the result of his appeal was that he would still be dismissed for gross misconduct, but after the expiry of his notice period. Allegation 2 was found against him. Allegations 1, 3 and 4 were considered not to amount to gross misconduct. The appeal decision confirmed allegation 1 would, by itself, have been dealt with by way of a verbal reprimand, that allegation 4 was misconduct rather than gross misconduct, and that allegations 3 and 4 were aggravating features to allegation 2.
76. His employment came to an end at the end of the notice period, which was 31 August 2022.
77. The Claimant subsequently challenged the decision to dismiss him by way of these proceedings in the Employment Tribunal.

### **Fact findings**

78. It is accepted by the Respondent that the Claimant was dismissed. The reason for his dismissal was gross misconduct attributed to the Claimant for his actions on the day of 5 October 2021.
79. The only conduct which is said to be gross misconduct is allegation 2. The Respondent does not identify any other conduct said to be misconduct. Nor does the Respondent rely on any other substantial reason – for example any loss of trust and confidence in the Claimant.
80. There are no other matters of fact which are in dispute.

### **The law**

81. Section 98(4) of the Employment Rights Act 1996 reads

*“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.”*

82. The leading case on conduct dismissals remains **British Homes Stores v Burchell** [1978] IRLR 379 EAT, which requires that there be a genuine belief in the employee’s guilt, held on reasonable grounds, after reasonable investigation.
83. The Tribunal must assess the reasonableness of the employer’s decision and must not substitute its view of the right course of action. There is a band of reasonable responses within which one employer might take one view and be acting fairly and another quite reasonably another view and still be acting fairly (**Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439). The burden of proof in relation to this aspect is neutral.
84. The approach to be taken to procedural questions is a wide one. A Tribunal should view it if appropriate as part of the overall picture, not as a separate aspect of fairness: **Taylor v OCS Group Ltd** [2006] IRLR 613. The Court of Appeal in **Sainsbury’s Supermarket Ltd v Hitt** [2003] IRLR 23 CA is authority that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss. Again, the burden of proof in relation to this aspect is neutral.

## **Conclusions**

85. The central issue is whether the Respondent acted reasonably in all the circumstances in treating allegation 2 as a sufficient reason to dismiss the Claimant in accordance with section 98(4). In considering the reason for dismissal, the size and administrative resources of the Respondent, equity, and the substantial merits of the case must all be borne in mind.
86. Did the Respondent believe that the Claimant was guilty of misconduct? I consider that they did. They were aware of his actions, which have been documented on CCTV. Both Mrs Murphy and Mr Gardener, the representatives of the decision making panels, were adamant in their personal belief that physical intervention was not justified.
87. If so, was that belief based on reasonable grounds? While I accept that more information could have been provided, I consider that there was sufficient evidence to form reasonable grounds for such a belief. The incident was recorded on CCTV. There was evidence from nine witnesses, six of whom gave contemporaneous accounts. The Claimant was interviewed twice. The panels had access to all of the relevant policies and documentary evidence.

88. Has the employer carried out such investigation as is reasonable? And did the employer follow a reasonable procedure?
89. As there is some overlap between these questions, and the criticisms made by the Claimant, I have taken them together.
90. I remind myself that at this point I am looking at the procedure followed in making decision, not the substantive merits of the decisions themselves.
91. I turn to the list of issues to identify the procedural criticisms made by the Claimant, and I deal with them in turn. They are as follows:

*The Respondent failed to conduct a fair investigation.*

92. There are a number of criticisms. Some are dealt with elsewhere. One was that statements were taken late (a month after the incident). Another is that they were not signed until January (four months after the incident). I do not consider that there is any force in these criticisms. Some accounts were taken at the time, others within a reasonable time (a month or so), and there is no evidence to suggest those accounts changed between being collected and being signed. These criticisms do not disclose any procedural unfairness.
93. More serious is the failure to keep all of the relevant CCTV footage from the day. This had been assembled and only required an instruction to store it. Such instruction was not given and it was deleted, only the 64 second clip I have seen was preserved. The Respondent says that it would simply have confirmed what was in other evidence. That is not quite right. It would have provided an independent and, crucially, accurate confirmation of what actually happened. It could have been used to test accounts given by staff to identify any mistakes. I note one such mistake – an allegation the Claimant ‘grabbed’ Student A – was identified by what footage remains. Further, the footage would have shown exactly what Student A had been doing prior to the incident. The importance of Student A’s conduct, and why this failure may have contributed to another procedural unfairness, I will return to below.

*The Respondent pre-judged the investigation outcome.*

94. This is because Ms Heywood is said to have sent a message confirming she told Mr Bassan that there was a case to answer before the investigation was complete. The Respondent says that, while this was inappropriate, it did not amount to anything as Ms Heywood was not in a position of authority over either Ms Clarke-Basrai or Mr Bassan. This is also not quite right. A specialist HR adviser gives specialist advice, which those who receive it listen to. That is the point of asking a specialist for advice. The specialist does not have to be your line manager or outrank you in the line management chain for you to listen to or even be expected to follow the advice. However, regardless of what Ms Heywood told Mr Bassan or how he reacted to it, it is the case that Mr Bassan did not in fact make the ultimate decisions. There is no evidence that Ms Heywood said anything similar to



the two panels before they made the relevant decisions. I could therefore see no procedural unfairness here.

*The disciplinary hearing proceeded with allegations that the investigation had not upheld, or only partially upheld.*

95. There are two aspects to the criticisms that are made. The first is whether Mr Bassan was entitled to change his mind about the recommendations in Ms Clarke-Basrai's report and put the management case accordingly. The Respondent submits that he was entitled to do so, and the Claimant has no real counter argument. But secondly, and more seriously, the ACAS Code of Practice says that the Claimant should be given time to prepare his case. By changing the nature of the case against the Claimant, and proceeding on the day with allegations that the Claimant did not expect, Mr Bassan unilaterally took away the Claimant's chance to prepare his defence to the allegations he was not expecting to have to answer, or to gather information that might assist him in his defence to them. This was procedurally unfair.

*The disciplinary hearing invite letter did not mention gross misconduct or summary dismissal.*

96. The Claimant has said that it is only fair that he should know what he is being accused of, and pointed out that the provision of a policy document with the letter is not necessarily an answer given that an outdated version was supplied. However, it is a fair point that the Claimant knew that dismissal was an option. He was aware that his job was on the line. Nor has the Claimant argued or established by evidence that the old policy did not contain details of gross misconduct or summary dismissal. It was very poor procedure for Mrs Murphy to dodge the question about dismissal and notice at the start of the disciplinary hearing. She should have been honest and I could see no reason why she would not have been. But that is not enough to constitute a procedural unfairness. The Claimant was well aware of what the stakes were.

*The Claimant did not have the opportunity to question Ms Gray.*

97. Ms Gray was unwilling to participate. Her evidence went to some of the allegations and it was contested. Mrs Murphy said that she offered the Claimant the opportunity to submit written questions. She then said that she and the disciplinary panel looked at these questions and dismissed them. They made no attempt to test or probe the disputed evidence and the offer of submitting written questions did not in the end give the Claimant a chance to do so. The panel closed their mind to the issues. This was not procedurally fair.

*The commissioning manager rather than the investigating officer presented the management case at the disciplinary hearing.*

98. There is some confusion in the policy as to who will do what. It says in one place that the commissioning manager will present the management case. It says in another place that the investigating officer will present the investigation report.

99. Ultimately, I am not convinced that the identity of who spoke to what demonstrates any procedural unfairness. Of more importance is whether the Claimant had sufficient information and sufficient time to prepare his defence, which I have dealt with elsewhere. So this does not of itself demonstrate procedural fairness.

*The commissioning manager failed to mention the sub-allegations that were found to be unsubstantiated or partially substantiated.*

100. I have dealt with this above. It would have been better practice if Mr Bassan had dealt with this or the panel challenged him on it, but that was not what caused procedural unfairness. The fact that the case against the Claimant was unilaterally changed by Mr Bassan at the last minute and without notice was what amounted to a procedural unfairness.

*The Respondent failed to consider any sanction short of dismissal.*

101. Although Mrs Murphy claimed to have considered sanctions short of a dismissal in her witness statement, this was directly contradicted by her own oral evidence. In terms, she said that once gross misconduct had been identified there was no option but to follow the policy and dismiss the Claimant without notice. In doing so she fell into significant error as she failed to consider four important things.

102. First, the scope of the relevant policies. There are strong similarities between the DfE Guidance and the Respondent's Positive Handling Policy. I agree that these need to be read together. The key and common themes are:

- (a) Handling a student should be a last resort.
- (b) De-escalation techniques should be used first.
- (c) Handling a student is a matter of judgement.
- (d) There are ways of physical handling that are always inappropriate, and purposes for which it should not be used (such as for punishment).
- (e) However, handling a student in an appropriate manner can be appropriate in certain circumstances. These include preventing harm to the student or other people, preventing damage to property, and where a student's actions prejudice the maintenance of good order and discipline.

103. Mrs Murphy and Mr Gardener both said that physical handling would only be appropriate if Student A was demonstrating high and imminent risk to herself or others – for example, if she had a sharp object or was about to attack somebody. That is too narrow a reading of both policies. Both policies envisage physical intervention as being legitimate in other circumstances as well. It is relevant to note here that another teacher who was trained in positive handling techniques had identified, shortly before the incident, that handling was an option if Student A continued to behave in the way she was doing.

104. Second, the conduct of Student A leading up to the incident. This is extremely relevant given that both policies envisage physical intervention being used to prevent:

- (a) First, harm to student A or to other people. Student A was felt to be a sufficient health and safety risk that she could be excluded from school. Student A had been throwing objects at people and barging into them. De-escalation techniques had been tried and failed. I accept that the policies do not establish a ladder of consequences but they do envisage physical intervention as a last resort when de-escalation techniques have not worked. Student A was continuing to behave in the same way as she had been all day and showed no signs of stopping. She was assessed as posing a high risk of harm by a teacher immediately before the incident. It was also relevant that Student A had a history of self-harm when angered, and she was angered.
- (b) Second, the maintenance of good order and discipline. Student A was being disruptive and continued to be disruptive. A teacher observing her said that she was 'out of control'. The lunch hour was approaching and soon other pupils would have been exposed to Student A (and may even have been put at risk). Although Mrs Murphy and Mr Gardner may disagree, this is something which the policies explicitly envisage handling may be used for. The panel did not take that into account at all.
105. This is where the missing CCTV footage would have been of great assistance, and why it was unfair not to have obtained it.
106. Third, the implications of the Claimant's lack of training despite his role potentially involving physical intervention. I do not accept that the lack of positive handling training should be held against the Claimant. The Respondent was obliged under their own policies to provide this training and they failed to do it. The Claimant was at the school for three years and the Respondent still didn't provide the training. They exposed the Claimant to risk as a result; he was physically assaulted. He then lost his job because he did not have the tools to handle the situation that the Respondent was supposed to give him, and failed to give him. It does not form any part of a fair procedure for the Respondent to set him up to fail, and then fail to take proper account of their own failures.
107. Fourth, the Claimant's good record and other mitigation. Mrs Murphy confirmed in evidence that the Claimant's unblemished record was ignored by the panel. The panel paid little more than lip service to the other mitigating features, simply offsetting them against the Claimant's perceived lack of remorse. They did not engage with the effects of the incident on the Claimant and his future behaviour at all.
108. All of these four things could have been relevant to the choice of sanction. They could potentially have reduced the sanction to dismissal with notice, or even to a package of a final written warning with training, supervision, and limited contact duty. To fail to consider them was a manifestly unfair procedure.
109. I make it clear that I have not expressed an opinion on whether the physical intervention was justified.

*Any procedural flaws were not cured by the appeal hearing.*

110. It is accepted by the Respondent that this was not a re-hearing, but contended by them that a re-hearing was not required or necessary. The Respondent makes the point that the Claimant could have made any argument he chose and called any witness he wished, but did not do so.
111. I have found above that many of the alleged procedural defects did not amount to procedural unfairness. To that extent there was no need for corrective action to be taken by the panel. I accept that the panel's acknowledgement of them, the ability of the Claimant to properly prepare (this time) for the case against him, and the allegations relating to Ms Gray's evidence no longer being held against the Claimant, may have cured some of the remaining defects. But it did not cure the failure to properly investigate in the first place by failing to obtain the CCTV. Nor could it, that CCTV having been long deleted.
112. However and more importantly, what happened is that the appeal panel fell into the same error as the disciplinary panel. The hyper focus on the incident itself and the narrow reading of the policies meant that they did not take into account, properly or at all, the four relevant factors which they should have, and which may have influenced their choice of sanction. To do so was also procedurally unfair.
113. There is a further defect in the appeal panel's decision. It became apparent when Mr Gardener was questioned that had the Claimant taken a more penitent response to the incident, he may not have been dismissed as they would have more confidence in his judgement. Mr Gardner said that had the Claimant acknowledged his error he could have been "*training and learning and coming back*".
114. But this was not a reason relied upon to justify the Claimant's dismissal. It was not part of allegation 2, which is only about inappropriate physical contact with Student A and does not include any elements of trust and confidence. Allegation 2 was the only aspect of gross misconduct alleged against the Claimant.
115. The Respondent does not rely upon a breach of trust and confidence as another substantial reason establishing gross misconduct and justifying dismissal of the Claimant. It accordingly appears that in making their decision on sanction the appeal panel not only failed to consider relevant factors, but also considered an irrelevant factor. That is also an unfair procedure.
116. As I have concluded that it was not a reasonable investigation or process, it follows that the dismissal was unfair and so I find the claim to be well founded.
117. This means that I did not strictly need, when giving judgment on liability, to go on to consider (while being careful not to substitute my own opinion) whether dismissal was within the band of reasonable responses. I do however accept that the answer to this question may have some relevance to remedy.

118. I was asked by the Respondent to give my views on the extent of the Claimant's contribution to the dismissal and **Polkey** at the point of giving judgement on reliability.
119. The Claimant asked me not to, as he wishes to formulate arguments about these issues based upon the findings that I have made.
120. Given that the Claimant (and indeed the Respondent) would have been denied the opportunity to work my findings into their submissions had I expressed an opinion on this matter while giving judgment on liability, I declined to do so. I considered that it would be better to save adjudication of those issues for the remedy hearing. This will also give both parties the chance to reflect on my findings, formulate arguments based on them and put forward any further information that they feel is relevant.

Employment Judge Atkins  
Date: 03 February 2023

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