EMPLOYMENT TRIBUNALS

Claimant: Mr J Hollywood

Respondent:
1. Governing Body of Northwood Community Primary School
2. Knowsley Metropolitan Borough Council

Heard at: Liverpool **On:** 30 -31 January 2023, 1-3 February 2023

Before: Judge Callan (sitting alone)

REPRESENTATION:

Claimant: Mr. A. Allen KC (counsel)
Respondent: Mr. M. Mensah (counsel)

RESERVED JUDGMENT

JUDGMENT ON LIABILITY

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well-founded. This means the claimant was unfairly dismissed by the first respondent under powers delegated to it by the second respondent, on 10 March 2020 for reasons related to conduct.

2. The second respondent breached the claimant's contract of employment with regard to notice pay when it acted upon the first respondent's notification to

terminate the claimant's contract of employment without notice. The claimant's claim that he was wrongfully dismissed on the above date succeeds.

3. The claimant's claim for unlawful deduction of wages in respect of a shortfall in his salary for the period 11 February 2020 to 10 March 2020 succeeds and the respondent is ordered to pay the claimant the sum of £151.51 (gross).

REASONS

Introduction

4. The claimant was the headteacher of the first respondent's school (the school). He commenced his employment on 01/09/2014 and was dismissed for gross misconduct on 10/03/2020.

5. The events leading up to the dismissal of the claimant concerned the engagement by the claimant of a former music teacher who was the subject of a Prohibition Order issued by the National College for Teaching and Leadership (NCTL) (now the Teaching Regulation Authority (TRA)) to assist the school's music teacher in the period 07/03/2019 to 03/04/2019. The Prohibition Order had been issued following very serious and wholly inappropriate contact by the former teacher with a vulnerable 15 year old female pupil via Facebook, text messages and telephone calls over the period 26 to 29 May 2012. The contact involved sexually motivated matters such as rubbing suncream into her sunburn, looking forward to teaching her a few things, meaning "in the art of how to have a very good time" and that she gave him "the eyes every now and then". He had discussed with her his thoughts of having a relationship with her. The teacher admitted the misconduct but did not satisfy the NCTL that he had accepted full responsibility or shown full insight in respect of his actions. The Prohibition Order was still in place during his engagement at the school. It was set aside in August 2019. As he was not a party in the proceedings and was not giving evidence, counsel requested that initials be used in these proceedings, and I am satisfied it is in the interests of justice to do so. Accordingly, he is referred to as "CXH" below.

6. By a claim form presented on 03/07/2020, the claimant complained that he had been unfairly dismissed, wrongfully dismissed and subjected to an unauthorised deduction of wages.

7. The respondents resisted the claims in their entirety in their response form and maintained the dismissal was by reason of the claimant's misconduct.

Preliminary Matter

8. Counsel for the respondents requested that a video of the music classroom showing CXH in the class be viewed in private. It was not part of the respondents' case that CXH was not supervised at all times and the issues in the case were whether the claimant failed to apply recruitment procedures and/or failed to take into account the reputational risk of engaging CXH. There was extensive documentation in respect of the investigation, disciplinary hearing and appeal, together with witness evidence, so that it was not proportionate or necessary in determining the issues to view the video. I made an order that I would not view the video clips in question.

Issues

9. The issues to be determined were those set out in an agreed List of Issues confirmed at the outset of this hearing (see below):

Unfair Dismissal

1. Which of the Respondents was the Claimant's employer?
2. What was the Reason for dismissal. The employer contends that the reason was conduct. [1]
3. If the reason was conduct[2]:

    a. Did the employer genuinely believe that the Claimant had committed the misconduct in question? Namely:
        i. Failed to apply recruitment procedures that deter, reject or identify people who bring safeguarding risks to schools.
        ii. Failed to take into account the reputational risk to the school and the local authority.
    b. Did the employer have reasonable grounds to sustain that belief?
    c. At the time at which the employer reached that belief, had the employer carried out as much investigation as was reasonable in all the circumstances?

4. Was there a proper and fair disciplinary process?
5. Did the employer have sufficient regard to the employee's disciplinary record and length of service?

[1] *Royal Mail Group Ltd v Jhuti* [2020] ICR 731, SC

[2] *British Home Stores v. Burchell* [1978] IRLR 379*; Foley v Post Office, HSBC Bank plc (formerly Midland Bank plc) v. Madden* [2000] ICR 1283

6. Has the employer been consistent in how it has dealt with genuinely similar cases in the past?
7. Were alternatives to dismissal considered?

8. Did the decision to dismiss fall within the band of reasonable responses of a reasonable employer?[3]
9. If the Claimant was unfairly dismissed, he wishes to be reinstated/re-engaged:

    a. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
    b. Should the Tribunal order re-engagement? The Tribunal consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

10. If the Claimant is re-engaged, what should the terms of the re-engagement order be?
11. If the Tribunal orders re-instatement or re-engagement but there is non-compliance should there be an award for an Additional Award (*Section 117(3) ERA 1996*?
12. If so, should this be 26 or 52 weeks gross pay?
13. If there is a compensatory award, how much should it be? The Tribunal will decide:

    a. What financial losses has the dismissal caused the claimant?
    b. Has the Claimant taken reasonable steps to replace his lost earnings for example, by looking for another job?
    c. If not, for what period of loss should the claimant be compensated?

14. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
15. If so, should the claimant's compensation be reduced? By how much?
16. It is agreed that the ACAS Code of Practice on Disciplinary and Grievance Procedures applied:

[3] *Iceland Frozen Food Ltd v Jones* [1982] ICR 17

a. Did the respondent fail to comply with the following provisions of the ACAS Code:
   i. Paras 4, 5 and 11 (dealing with issues promptly, and without unreasonable delay)
   ii. Para 26 (appears should be heard without unreasonable delay)
b. If so, is it just and equitable to increase or decrease any unfair dismissal compensatory award payable to the claimant? By what proportion, up to 25%?

17. If the claimant was unfairly dismissed, did he cause or contribute to his dismissal by blameworthy conduct?
18. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
19. Does the statutory cap of fifty-two weeks' pay or £86,444 apply?
20. What basic award is payable to the claimant? The Claimant contends for £3,937.50.
21. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Wrongful Dismissal

22. What was the claimant's notice period?
23. Was the claimant paid for some or all of that notice period?
24. If the claimant was not paid for all of that period, was the claimant guilty of gross misconduct in that he did something so serious that the employer was entitled to dismiss without notice?
25. If the Claimant was not guilty of gross misconduct, what amount is due from the employer?
26. It is agreed that the ACAS Code of Practice on Disciplinary and Grievance Procedures applied:

    a. Did the Respondent fail to comply with the following provisions of the ACAS Code:

       i. Paras 4, 5 and 11 (dealing with issues promptly and without unreasonable delay)
       ii. Para 26 (appeals should be heard without unreasonable delay).

b. If so, is it just and equitable to increase or decrease any award payable to the claimant for wrongful dismissal? By what proportion, up to 25%.

Unlawful Deduction of Wages

27. Did the employer pay the Claimant his full salary up to and including the Termination Date?
28. If not, how much is the Claimant owed?

Evidence

10. On behalf of the first respondent, I heard evidence from Mr. E. Sadler (ES), music teacher, Mr. P. Cain (PC), school Governor and chair of the disciplinary panel, Ms. Sarah Murphy (SM), currently headteacher and Safeguarding Lead during the claimant's headship, and Mrs. D.B. Oakford (DO), school Governor and member of the panel which heard the claimant's appeal against dismissal. No witnesses were called specifically by the second respondent. The claimant gave evidence on his own behalf and supporting evidence was given by Ms. K. Tennyson (KT), Chief Executive Officer of The Three Saints Academy Trust who carried out the claimant's appraisals between the years 2016 to 2020, and Mr. T, Kelly (TK) former Chair of Governors of the school. I was also provided with a bundle of 942 pages. I read those documents referred to in the witness statements and in questioning of the witnesses, in addition to the pleadings at pages A54-73 (ET1) and A85-100 (ET3) and key documents at pages B414-429 (disciplinary policy), B253-254 (invitation to disciplinary hearing), B255-.269 (investigation report); B354-357, (disciplinary outcome letters from the Governing Body and the local authority); B358-359 (the claimant's letter of appeal) and B397 and 398 (appeal outcome letters from the Governing Body and the local authority).

11. At the end of hearing the witness evidence, both counsel helpfully provided written closing submissions and addressed me orally on them.

12. The purpose of this statement of reasons is to set out my decision and the reasons for it. The parties are well aware of the facts and issues. It is not necessary, therefore, for me to refer to every piece of evidence. I have paid particular attention to the key evidence which is relevant to my decision. However, I can confirm that in reaching my decision I have taken into account all the evidence to which I have been referred, even if I have not mentioned any specific part of it.

The Facts

13. The first respondent is a community primary school (the school) which is maintained by the second respondent (the local authority, LA). The school has a Governing Body which has delegated powers to appoint and dismiss staff although they are formally employed by the LA. There are over 60

teachers, teaching assistants and auxiliary staff employed at the school. The school has around 500 mainstream pupils and 48 pupils in its Designated Special Provision unit.

14. The school was subject to two Ofsted inspections while the claimant was headteacher, in 2015 and 2019 (although the latter inspection was after the claimant had been suspended). The school was rated "Good" for both inspections.

15. The Chair of the Governing Body in 2018, until around January 2019, was Mr. Paul Stanton, At the end of 2018, Mr. Stanton became seriously ill and the Vice Chair of Governors, Liz Collins (LC), became acting Chair of Governors in January 2019. LC was appointed Chair of Governors in May 2019 and resigned as Chair in April 2021.

16. The claimant qualified as a teacher in 1992. He was appointed as a deputy headteacher in 1996 and after 5 years, he took up various education posts in South East Asia. He returned to the UK in 2007 and took up a post supporting schools in the Knowsley area which were in special measures or requiring improvement. In 2008, he was appointed the deputy headteacher of a primary school in Birkenhead, becoming headteacher of that school in 2009. The claimant was appointed headteacher of R1's school with effect from 1 September 2014. His contract of employment provided for 3 months' notice and in the summer term 4 months' notice terminating at the end of a school term. The school terms were deemed to end on 30 April, 31 August and 31 December [B13].

17. See paragraph 6 above for details of the Prohibition Order imposed upon CXH. CXH was known to the claimant and he contacted the claimant in February 2018. At that time, a permanent Music Specialist teacher post was about to be advertised. CXH met the claimant and Mr. Stanton at the school in February 2018 following which Mr. Stanton emailed the claimant and stated: "The long and short is I don't think I can (hand on heart) say it is a good idea for us to "sponsor" him." "I keep coming back to "how would I feel if a teacher sent those same messages to my 15 year old daughter". The claimant replied by email "I fully expected your response re [CXH]. I'll let him know that we cannot progress with him any further. If I can't get him back into teaching, I can't see it ever happening for him. Such a shame, his skills are remarkable!" [B20-21]. CXH could apply to have the Prohibition Order set aside after 10 March 2018.

18. As headteacher, the claimant had authority to recruit teaching and administrative staff. The Governing Body would be involved in the recruitment of senior staff, such as the headteacher or deputy headteacher.

19. In February 2019, ES, who had commenced as the school's first sole music teacher in September 2018, had a throat problem. (This was diagnosed in early March 2019 as laryngitis.) ES could still attend school, but he could not sing to demonstrate a point. The claimant proposed supporting ES by putting

on an Easter performance and engaging CXH "to be ES's voice". ES accepted the claimant's proposal.

20. The claimant contacted the TRA to clarify whether CXH was permitted to work in schools whilst subject to a Prohibition Order. He spoke to a senior caseworker and described the nature of the work to be undertaken. He was referred to a TRA document entitled "Teacher misconduct: the prohibition of teachers", at page 7 section 4 which set out that a person with a Prohibition Order can work in schools if properly supervised [B510]. The caseworker informed the claimant that CXH could work in the school but had to be supervised and accompanied at all times.

21. Around February 2019, the claimant discussed with SM bringing in a musician who had no Disclosure and Barring Service (DBS) check to be a support to ES and to assist in putting on the Easter show. SM had the impression that ES required urgent help. There was no mention of CXH by name or that he had a Prohibition Order in place. SM advised that he must be supervised in class, not teach and be escorted. She did not mention the need for a written risk assessment and nor was there a policy in place which required a written risk assessment. The claimant conducted a dynamic risk assessment but did not record it in writing.

22. The claimant did not tell ES that CXH was subject to a Prohibition Order. ES was told that CXH did not have a DBS and needed to be supervised and accompanied at all times. There was no requirement for a DBS to be in place for people who were supervised in the school and performing unregulated activities. No DBS was done nor did the claimant instruct anyone that a DBS should not be done.

23. The claimant's solicitor received a letter from the Chief Executive of the TRA dated 07/07/2020 (in time for the claimant's appeal hearing) which stated that "a teacher who is prohibited by the Secretary of State can be employed to undertake specified work in a supervised capacity" and set out the terms of what amounts to teaching activities for the purposes of the Teachers' Disciplinary (England) Regulations 2012, except that those activities are not teaching work for the purposes of the Regulations if the person carrying out the activity does so subject to the direction and supervision of a qualified teacher [B368].

24. CXH was engaged by the claimant to assist ES in the period 07/03/2019 to 03/04/2019 leading up to an Easter music performance put on by the school.

25. ES stated during the disciplinary interview that CXH was accompanied at all times as either he or Gill Green (deputy headteacher) would be present, along with classroom teaching assistants and occasionally class teachers. The claimant regularly attended the music room where the sessions involving CXH took place. ES stated CXH did not present as a risk to children at that time. CXH wore a red lanyard which signified that he was not DBS checked and should be accompanied at all times.

26. CXH was engaged to attend 6 sessions in the period 07/03/2019 to 03/04/2019 and closer to the date of the Easter performance another 3 sessions were added. Children from years 4 and 5 (pupils aged 8-10 years) attended and any behavioural issues were dealt with by the teaching staff/teaching assistants. Nor was CXH responsible for assessing or reporting on the development, progress and attainment of pupils.

27. The Easter performance was a success.

28. In or about October 2019, ES googled CXH and discovered that he had had a Prohibition Order imposed upon him in 2014 in respect of his conduct in May 2012. ES also discovered an article from the local newspaper which gave details of CXH's actions which had led to his being the subject of a Prohibition Order.

29. ES discussed the matter with Sam Battison, a Year 3 teacher, Kerry Croxford, a staff Governor and class teacher, and Carrie Hyland, Assistant Headteacher and member of the school's safeguarding team. The matter was reported to LC by Sam Battison on or about 18/10/2019. The matter was not reported to either the claimant or SM at this stage.

30. The claimant was asked to work from home by LC on 21/10/2019 (confirmed in writing on 30/10/2019). That letter at page B72-3 said that the allegations were serious and could constitute misconduct if proven. No possible penalty was mentioned. The claimant was not suspended but it was in the interest of fairness to all that he remained at home. An investigating officer, Nadine Carroll (NC), had been appointed and the allegations were:

    - Failing to undertake the necessary safeguarding checks prior to the engagement of a worker;

    - Failing to apply recruitment procedures that help deter, reject or identify people who bring safeguarding risks to schools; and

    - Failing to take into account the reputational risk to the school and the local authority.

31. NC interviewed LC on 30/10/2019 (B70-71). LC produced the email string between the claimant and Mr. Stanton which is referred to above at paragraph 17. The interview record also refers to other notes made by LC but these were not provided at the Tribunal hearing.

32. On 05/11/2019, NC interviewed Sam Battison (B83-87). She was asked about coming to know of CXH's Prohibition Order, an email from the claimant on the Sunday after disclosure of the Prohibition Order and safeguarding in the school. ES was interviewed on the same date and was asked about the circumstance of CXH coming into school to assist in the lead up to the Easter performance, his presence in the classroom and the events following discovery of the Prohibition Order in October 2019 (B75-82).

33. Jan Clays, school administrator, was interviewed on 13/11/2019 (B118-120). She was asked about safeguarding arrangements for visitors to the school and those subject to DBS checks, including entering names onto the school's central register. On the same date, Stephen Johnson, the school's business manager, was interviewed and he was asked about the engagement of people at the school, including self-employed contractors, the processes involved, and the safeguarding checks undertaken.

34. On 13/11/2019, the claimant was suspended by letter from LC (pages B124-127). In addition to the charges set out above, two further charges were added:

    - Failing to follow procedures and/or the advice of the former Chair of Governors in relation to the appointment of a worker; and

    - Potential behaviour that could constitute bullying and harassment.

    The letter stated that the allegations were very serious and could constitute gross misconduct under the school's disciplinary procedure and if proven could lead to the termination of the claimant's employment. The letter enclosed a copy of the school's disciplinary policy and procedures (pages B414-429). This document sets out the procedures in some detail. There is a model disciplinary code of conduct attached at Appendix A (pages B424-425) but no definitive set of disciplinary rules within the document.

35. The claimant's contract of employment was provided at pages B11-16 and it stated that his terms and conditions of employment were subject to various documents, including, amongst others, Education (Teachers) Regulations 1993, School Government Regulations and Instruments of Government, the School Standards and Framework Act 1998 and Education Act 2002 and other local arrangements and rules of the LA where adopted by the school's Governing Body.

36. At pages B557-675, I was provided with the Department for Education's statutory guidance for schools and guidance: "Keeping children safe in education". Safer recruitment was covered at Part Three, and at paragraph 115 the guidance states "It is vital that schools and colleges create a culture of safe recruitment and, as part of that, adopt recruitment procedures that help deter, reject or identify people who might abuse children…". This is reflected in the wording of the second allegation set out in paragraph 30 above. The school's safeguarding child protection policy and procedures at B34 provided for the implementation of the guidance by stipulating, along with other matters, that staff would prevent the employment/redeployment of unsuitable individuals and ensure robust and effective safeguarding arrangements and procedures are in operation in school. The policy stated that failure to comply with the policy and procedures would be addressed and may result in dismissal from the school.

37. I was not directed to any policy which expressly stipulates that it is incumbent upon the Headteacher to take into account the reputational risk to the school

and the local authority in actioning the safeguarding provisions. Safeguarding of children is indubitably of the highest importance in school settings and policies and procedures, as noted above, should be strictly enforced. PC at para 92 of his witness statement referred to "wilful ignorance of responsibilities or instructions" and "any actions that intentionally places others in danger" as matters which fall within gross misconduct within the school's policies.

38. On 14/11/2019, NC received by email Mr. Stanton's responses to questions relating to the conversation he had had with the claimant with regard to engaging CXH at the school in February 2018 (B128).

39. By letter dated 15/11/2019 (B130-131) from NC, the claimant was invited to attend a disciplinary investigation meeting on 20/11/2019. The 5 allegations set out above were listed (B130) and he was informed that they were of such a serious nature that it could constitute gross misconduct, which if proven after a full investigation, could lead to dismissal. The claimant was informed he had the right to be represented at the meeting and that his representative had confirmed her availability for the proposed date and time of the meeting. He was informed that the investigation meeting may lead to disciplinary action being taken against him. Notes of the meeting which took place on 19/11/2019 were provided at pages B136-159. In the investigation meeting, the claimant said that he considered adherence to safeguarding procedures within the school were "second to none" and safeguarding was his "bread and butter". He had undertaken safer recruitment training 5 times. Safeguarding was part of the person specification for his role and recruitment was "one of his top things".

40. Carrie Hyland was interviewed on 18/11/2019. The notes were provided at B132-133. She was interviewed again on 12/12/2019 and those notes were at page B198. She was asked about what she knew of CXH and whether she had discussed him with the claimant. She outlined the procedure staff members should follow if they had a safeguarding concern at school.

41. Following the suspension, in November 2019, news that the claimant was not in school and that CXH, a prohibited teacher, had been engaged at the school was covered in the local press. SM gave evidence to the Tribunal (para 7 of her witness statement) about a group of parents attending school in an angry and distressed state, worried that their children had been put at risk. SM was able to reassure them. In oral evidence, she said that the parental reaction took place over the course of a day and there was verbal aggression, shouting and the creation of a very intimidating situation for staff. There was no police involvement and by the following day, emotions had died down.

42. Stephen Johnson was interviewed for a second time on 25/11/2019 (B190-194). He answered questions about engaging CXH. Jan Clays was interviewed for a second time on the same day (B196-197) about obtaining a DBS for CXH. Sam Battison (B205-206) was also interviewed that day about finding out CXH had a Prohibition Order and why she chose to report it to

Kerry Croxford, staff Governor and teacher. Kerry Croxford was interviewed on 25/11/2019 about reporting the engagement of CXH to SM, her discussions with Carrie Hyland and Sam Battison and the meeting she had with the claimant and Carrie Hyland on 18/10/2019. She was also asked about what the claimant allegedly said about having the permission of Mr. Stanton.

43. A further investigation meeting took place with the claimant on 27/11/2019 (B229-243). He was asked about the email from Mr. Stanton in 2018 and his relations with him, as well as the application of Mr. Stanton's views to the engagement of CXH in 2019. He was also questioned about his relationships with his staff, particularly the teaching staff; why he didn't request a DBS to be done for CXH; erasing data from his telephone and iPad; and providing a reference for CXH to TRA in respect of his application to have the Prohibition Order set aside.

44. On 14/12/2019, ES was interviewed for a second time (B199-203). He was asked about his throat condition, supervision of CXH, the teaching in the class, and relations with the claimant. SM was interviewed on 18/12/2019 (B245-251). SM annotated the notes of her interview to reflect that she disputed the order of some of her answers, and the content of some of them. She was answering questions about the engagement of CXH and safeguarding matters, including risk assessments. In her evidence to the Tribunal at para 12 of her witness statement, SM stated that the term "dynamic risk assessment" is not a safeguarding term. In her oral evidence, she resiled somewhat from this and in fact confirmed she had implemented dynamic risk assessments which were not reduced to writing on two occasions – once when the claimant was coming into school with LC and the second when parents had attended school in an angry state (see para 41 above) in November 2019. However, she maintained that it was good practice to complete a written risk assessment and the school had a template for risk assessments. She confirmed that no school policy or procedure required written risk assessments.

45. On 16/01/2020, the claimant was invited to a disciplinary hearing to be held on 03/02/2020 (B253-254). The letter listed the 5 allegations which are those identified in paragraphs 30 and 34 above. He was warned that the allegations, if proved, could lead to his dismissal. He was told which Governors of the school would hear the disciplinary. An HR Advisor would also be present. He was informed of his right to be represented at the hearing. A list of 8 witnesses was given in the letter, two of whom (ES and SM) were witnesses before this Tribunal. A bundle of documents was enclosed, including the respondents' statement of case, copy of the school's disciplinary procedures, all interview notes, email responses to questions from Mr. Stanton, email response to questions from LC and other documents amounting to some 55+ appendices.

46. The investigating officer's report summarised the following points from the claimant's interviews: that he had engaged CXH in the full knowledge that he

was a prohibited teacher; that he knew him over a period 12 years and that he had not declared this as a pecuniary interest. He had not put a written risk assessment in place and could not guarantee that CXH would not engage in similar behaviour again. In contrast, the claimant felt that the assessment he put in place was adequate and protected the school from any risk.

47. In respect of the first allegation (failing to undertake the necessary safeguarding checks prior to the engagement of a worker), the investigating officer stated the claimant had said in his first interview that there was some urgency about the situation because he needed cover as ES had a problem with his throat which was a "career threatening" voice problem. He thought a DBS check would take 4 weeks' so he asked the office to "do what you need to do" and he was not part of dealing with this. He knew that CXH did not have a current DBS (B263).

48. With regard to the second and fourth allegations (failing to apply recruitment procedures which help deter, reject or identify people who bring safeguarding risks to schools and failure to following procedure and/or the advice of the former Chair of Governors in relation to the appointment of a worker), the investigating officer highlighted that the claimant had confirmed that he was aware CXH was subject to a Prohibition Order at the time he engaged him in school but he had contacted the TRA to enquire whether CXH could be engaged in the way he wanted to engage him. Further, the investigating officer stated that the claimant had discussed the appointment of a prohibited teacher the year before with the Chair of Governors, but it was a hypothetical scenario and had no connection to CXH being employed in the school in March 2019. The investigating officer added the comment that the alleged hypothetical scenario closely links to the engagement of CXH albeit that happened some months later (B264).

49. As to the third allegation, the investigating officer recorded that the claimant confirmed in his first interview that he had known CXH for 12 years. CXH had taught the claimant's children music/singing. He confirmed he had not declared a pecuniary interest when CXH was contracted to work at the school and had failed to declare a personal connection to CXH which if it became widely known by the community and parents could have implications for the school. The investigating officer recorded that the claimant had described the amount and nature of safeguarding training and management he had had over a period of years in his first interview. He had attended safer recruitment training on 3 occasions and considered the adherence to safeguarding procedures in the school was second to none. The claimant in his first interview stated that CXH was supervised and that CXH "wasn't plucked out of thin air. I knew and trusted him". The claimant had said that the procedures put in place to ensure CXH was supervised were watertight and at that time he did not feel it was a risk but has since realised it was. He also confirmed that no written risk assessment was in place during the engagement of CXH. The claimant had said in his first interview that if parents were in knowledge of the engagement of a prohibited teacher, then the reaction may be 'mixed'. The claimant had stated that he recognised the engagement of CXH was not

conventional but that he would explain he had checked with the TRA and followed what they said if parents expressed any concern. The investigating officer reported that the claimant confirmed that he provided a reference for CXH to support his application for the set aside process and believed he had provided it in his capacity as headteacher but not on school headed paper. The investigating officer stated the claimant had refused to provide a copy of the reference to the investigation in the first interview. In the second interview, the claimant said he needed access to his emails and eventually provided his password for his IT devices, but the iPad and mobile telephone had been returned to factory settings. The investigating officer recorded the claimant as having said that he did not consider the reputational risk to the school, and he did not intend to engage CXH again in future.

50. In addressing the fifth allegation (potential behaviour that could constitute bullying and harassment) the investigating officer recorded that the claimant denied saying that he had told some members of his staff on Friday 18 October that he “might as well resign”. Following that meeting, the claimant sent emails to Sam Battison and ES which were raised as possible bullying. Four members of staff (Sam Battison, ES, Kerry Croxford and Stephen Johnson) raised concerns that the claimant had a strong leadership style which can cause difficulties. The investigating officer did not record the claimant’s response to this allegation.

51. The investigating officer stated that her role as an independent investigating officer was not to draw conclusions but to present the evidence to the Governors and ask them to decide on the balance of probability if they believe the allegations have been proven.

52. At the disciplinary hearing held on 03/02/2020 and 10/02/2020, the panel was chaired by Mr. Paul Cain who had started as a school Governor in 2018. I was provided with the notes of the disciplinary at B297-319 and B320-349. He gave evidence in the hearing before me.

53. The disciplinary commenced with the investigating officer reading a summary of her report (the investigating officer did not give evidence in these proceedings). She was then questioned by the claimant and his representative, Ms. Bennett. In questioning, the investigating officer agreed that none of the interviewees stated CXH had unsupervised access to children. All knew that he had to be supervised and nor was it said that he had acted inappropriately at the school. Not every visitor to a school has to have a DBS check. She agreed with Ms. Bennett that she had not included in the information before the Governors that a prohibited teacher can work in a school in certain circumstances. Again, she agreed with Ms. Bennett that the claimant was not obliged to obtain guidance of Governors or the LA before writing a reference to be submitted to the TRA but stated it may have been advisable.

54. ES said in his evidence at the disciplinary that he had severe laryngitis and had attended an ENT department for investigation using a camera. He was

advised that his vocal cords had been weakened and he would need speech therapy. He agreed that the claimant insisted that CXH was always accompanied and at the Tribunal hearing, he said he believed the supervision of CXH was adequate. In answer to the question who was responsible in the classroom when CXH was there, ES said he was. In his oral evidence before the Tribunal he agreed that he did not object to the plan to have CXH assist him. He also agreed that he did not mention social media as a risk factor either in the investigation or at the disciplinary hearing.

55. SM said that everyone had had an email to say CXH was not DBS checked and had to be escorted at all times. SM stated that the engagement of CXH was not an appointment. SM said she was aware CXH was in the classroom, with ES leading the teaching and CXH acting as his voice.

56. At the commencement of the reconvened hearing on 10/02/2020, the claimant read out his prepared statement which was before me at B336-349 in which he put his case in respect of the circumstances surrounding bringing CXH into the school; the safeguarding measures he put in place, including checking with the TRA - he maintained he had undertaken a dynamic risk assessment to mitigate the perceived hazards and that CXH was undertaking unregulated activity. He stated he regretted failing to take into account the reputational risk to the school and that he had brought CXH into school to support ES. Around this time, he had suffered some health issues as did his wife. He was exceptionally busy due to challenging the LA in respect of the school's Special Provision and SEND issues. He alleged LC was not responding to his emails and he felt unsupported by her as Chair of Governors. He dealt with allegations of bullying by him of staff in the week of 14 to 18/10/2020 and actions he had taken in the context of spreading rumours, highlighting that the school was overdue an Ofsted visit. In dealing with the issue of discussing the potential engagement of CXH with Paul Stanton in February 2018 and the subsequent emails from Mr. Stanton, the claimant stated that the context of engaging CXH was different in 2019 to that in 2018 when a permanent teaching post was about to be advertised.

57. Having read his statement, the claimant then answered questions from the investigating officer about it being his decision whether to employ someone with a Prohibition Order and that the TRA gave guidance which was up to him to consider. He was asked about the provision of a reference to CXH on school letterhead in support of his application to have the Prohibition Order lifted. The claimant said that the issue of the reference was peripheral to the allegations against him, and he believed that after 7.5 years, CXH should be given another chance.

58. The disciplinary panel asked questions and the issue of why the claimant thought no DBS check was required was raised. The claimant said CXH was fully supervised, was in a non-regulated activity and referred to advice he had received from the TRA. He maintained he said that CXH did not need a DBS, not that one should not be done. He said to the office staff "Do what you need to do" and had believed they would carry out the normal procedure. He said

that a DBS clearance would normally take 6 to 7 weeks, which would have been after CXH would be gone. He believed the children were not at risk and he had complied with statutory requirements. In respect of questions about a risk assessment and sharing that with ES, the claimant said that ES knew what the risk was as the clamant had spelt it out to all staff – the hazard was that CXH was not to be left unsupervised. The claimant believed the arrangements were watertight. The claimant said, with hindsight, he could have briefed SM. He was asked if the reputational risk to the school should have been included in the risk assessment and the claimant agreed with that, but he was busy and had acted naively, In answering questions about his relationship with CXH, the claimant said CXH had taught at his children's school. CXH had contacted the claimant as he wanted to apologise for his actions. Subsequently, the claimant had come across him when attending the Cathedral where CXH was performing in the Messiah, and at two weddings. The claimant denied that CXH was a friend.

59. Following the disciplinary hearing, on 11/02/2020 the claimant was notified through his union representative of the school's decision to dismiss him. He received a letter dated 25/02/2020 confirming the dismissal. In respect of each of the 5 allegations, the letter set out the panel's conclusions. As to each of the allegations:

    (i) In respect of the first allegation, the panel found that the claimant did make safeguarding checks in respect of CXH and did not act illegally in engaging him at the school. They found there was a lack of clarity as to whether a DBS was to be carried out but in its place, the claimant confirmed that CXH must be supervised at all times.

    (ii) The panel found the second allegation proved. They determined there was no written risk assessment and the "dynamic risk assessment" the claimant had described failed to take account of the many risks associated with the engagement of CXH, not least the reaction of parents. The decision letter did not identify any requirement for a written risk assessment in relation to the recruitment of someone to the school as a non-employee, nor did it identify any recruitment procedure which the claimant had failed to apply.

    (iii) The third allegation was found to be proven as the engagement of CXH, given the nature of his Prohibition Order, presented a major reputational risk to both the school and the LA. The letter did not identify the reputational risk specifically in respect of the third allegation, but in context it made clear that the risk was the adverse reaction of parents. The claimant failed to acknowledge this until teachers at the school began raising their concerns about the matter.

    (iv) The fourth allegation was not upheld but the panel expressed the view that there was a contradiction in the claimant following the advice of Paul Stanton in 2018 and not doing so in 2019.

    (v) The fifth allegation was not upheld.

60. In his evidence to the Tribunal, PC stated that he believed the two proven allegations fell within the category of gross misconduct as they amounted to "wilful ignorance of responsibilities or instructions" and/or "any actions that intentionally places others in danger". This had not been stated prior to the Tribunal hearing.

61. The claimant lodged an appeal against dismissal (B358-359). His first ground concerned the allegation he had failed to apply recruitment procedures that help deter, reject or identify people who bring safeguarding risks to schools, in which he challenged findings on the basis that the panel had decided that he had made safeguarding checks in respect of CXH. Its reasons for upholding the allegation was that there was "no written risk assessment and the dynamic risk assessment you described failed to take account of the many risks associated with the engagement of CXH, not least the reaction of parents" (B355) which the claimant submitted was relevant to the reputational damage allegation and not the failure to apply recruitment procedures. His second ground was primarily based on the fact that he was entitled in his capacity of headteacher to decide to employ CXH, having followed safeguarding checks and taken the advice of the TRA. He alleged NC did not conduct her investigation in an impartial manner, and in particular, her investigation was biased against him. She made unnecessary negative points against him in her report, final summary and interviews and failed to provide points in his favour where appropriate. The disciplinary panel passively accepted this without rigorous assessment. It was submitted that it could not be reasonable to consider he had committed misconduct in taking a decision which he was entitled to take as headteacher. He further submitted that if the appeal panel disagreed with that submission, it was not gross misconduct and dismissal was not a reasonable sanction given his length of service, clean disciplinary record and achievements at the school.

62. On 29/06/2020, the school wrote to the claimant arranging two dates for the appeal hearing. He was informed that the appeal panel would comprise of three Governors including Diane Oakford who gave evidence before me. The chair of the panel was Sue Morgan. The documents for the hearing were enclosed with the letter, including a report from Paul Cain as chair of the disciplinary panel and the claimant's appeal notification. The letter stated that the school's disciplinary procedure stipulated that "appeals are not intended to allow for individuals to present the same information to a second panel and as such the grounds of appeal must be clearly stated". The options open to the appeal panel were set out and they were to (1) uphold the appeal, (2) reduce the sanction imposed by the disciplinary panel to a lesser sanction or (3) to reject the appeal and confirm the dismissal. The claimant was informed he had the right to be represented at the hearing.

63. The claimant provided a character statement from Tom Kelly, ex Chair of Governors (B365-366), who gave evidence before me, a letter dated 07/07/2020 from Mr. A. Meyrick, the Chief Executive of TRA setting out

matters relating to the employment of teachers with Prohibition Orders and the restrictions as to work they can do (B367-368), along with his own "Appeal Final Summary Statement" (B369-370).

64. The appeal hearing was a "hybrid" hearing with some participants joining by video (including the chair of the panel and PC as chair of the first panel) and others attending in person (two members of the panel including DO, the claimant and his representative). At the commencement of the hearing on 16/07/2020 a statement of case was presented by the claimant's representative (minuted at pages B371-373) and which made the points contained in the appeal grounds.

65. The panel asked questions relating to undertaking written risk assessments when engaging someone to work at the school. The claimant's response was that usual practice was to follow the safer recruitment procedure and there was no policy on undertaking written risk assessments in recruitment exercises. He was asked if the dynamic risk assessment should have been brought to the attention of other staff supervising CXH, and specifically the Prohibition Order. The claimant stated that it would unnecessarily sensationalise the situation and staff who needed to know were told. The claimant said that he had made it clear to all staff that CXH should be supervised at all times. The claimant was asked about the possibility of a parent approaching CXH to teach a child privately outside of school. The claimant's response was that it had not happened and CXH knew that it should not happen. There were no special arrangements for the recruitment of staff with Prohibition Orders and the same safeguarding checks applied.

66. In his statement of case to the appeal panel, PC said that the disciplinary panel did not confuse or misunderstand the difference between Prohibition Orders and the barred list. The panel had not been convinced that ES was having problems with his voice as suggested by the claimant and ES was adamant he did not have such problems. ES had stated that he believed CXH was being brought in to replace him and the Easter performance was not part of ES's objectives. CXH had been brought in specifically for that event and was leading the event rather than supporting ES. The panel determined that in light of CXH's previous actions, a dynamic risk assessment was inadequate and there needed to be a clear written risk assessment. The panel had believed the claimant had had different levels of engagement with CXH and this should have been declared and recorded. Although safeguarding checks were made, more could and should have been done given the Prohibition Order. As the Prohibition Order was a matter of public record, the panel felt that not enough consideration had been given to the reputational risk to the school. The panel had some issues with the claimant's honesty, in particular with the depth of his relationship with CXH given, they found, he had had a detailed discussion with him at a wedding. In questioning from the claimant's representative, PC agreed that there was no reference in the documents to a written risk assessment. In answer to the question what differentiated the first allegation from the second (see paragraph 30 for the allegations), PC said that the first was the basic minimum required and the second was what

should be expected of a leader. PC was asked what other steps were expected given that arrangements were in place to ensure CXH was never unsupervised. PC stated that more people should have been informed that CXH was a teacher under a Prohibition Order and there should have been discussion within the leadership team as to whether CXH should be brought into the school. PC agreed that the claimant had acted lawfully but it was more a moral issue than a legal one. It was put to PC that the bundle for the disciplinary hearing had information relating to barred people which was irrelevant whereas information from the TRA relating to prohibition orders would have been more helpful. PC said that the document relating to barred people was there for reference and there was a document relating to CXH's specific Prohibition Order. Whereas the letter dated 07/07/2020 from TRA was helpful, PC stated that the decision to engage someone with a Prohibition Oder should be correct and adequate and by that he meant it should have been discussed with the leadership team. When asked to identify the conduct which was appropriate for dismissal, PC said that not taking the reputational risk to the school into account, children's safety, and lack of clarity on the claimant's part were areas of concern. There was some parental reaction once the issue was made known and PC was of the view that there is no end date to the issue of reputational risk. When answering a question about bias on the part of the investigating officer, PC said that some of the challenges by the claimant had been upheld but PC said the role is one "that leads down an accusatory route". In answer to a question from the panel, PC stated that the disciplinary panel considered not enough thought was given to the potential reputational risk. PC said in answer to a question about whether other sanctions such as warnings were considered that the panel took advice from the HR representative but he did not recall specifically discussing warnings. When asked if account was taken of the claimant's previous good conduct and record, PC said the panel was not asked to debate the claimant's overall career but to address the specific allegations.

67. In oral evidence before the Tribunal, PC stated that the length of the claimant's service and clean disciplinary record were irrelevant. He said that it was not unfair for the investigatory officer to go down an accusatory route and it was human nature for her to do so. He didn't think there was any particular bias on her part. He agreed that ES was the teacher in charge of the class and ES and/or Gill Green, teaching assistants and sometimes class teachers were present at all times.

68. At the appeal, there were written submissions produced on behalf of the claimant at B384-389. In closing remarks, the claimant's representative said that the omission to discuss CXH's appointment more broadly with the leadership in the school was an omission which should not be career ending and other sanctions should have been considered. The claimant made some submissions on his own behalf, but it was noted that PC had left the hearing part way through. The hearing was adjourned to 21 July 2020.

69. In his closing statement, PC said that the panel felt there was a substantive difference between the first and second allegations. They felt the claimant

was seeking to avoid scrutiny in relation to the engagement of CXH and that some of his answers were vague and deflections. In particular, the panel felt that the relationship between CXH and the claimant was deeper than he admitted to – he knew CXH through Church, musical circles, had discussed the Prohibition Order at a wedding and had provided a reference in support of the removal of the Prohibition Order. PC stated that there was a clear reputational risk as the details of the circumstances giving rise to it were in the public domain. There could have been a serious reaction from parents were the details to become known. The panel believed the two allegations were clearly proven yet the claimant refused to accept any wrongdoing. On that basis the panel felt the decision to dismiss was the correct one.

70. In response, the claimant's representative stated that the panel's suggestion that the claimant discussed the Prohibition Order at a wedding was not accepted. Further, the reputational risk was perceived rather than actual but even if it had become known that CXH was under a Prohibition Order, the claimant had followed a legitimate and legal process for engaging such persons.

71. The appeal panel rejected the appeal, finding that the decision to engage CXH showed a serious lapse of judgement, and the subsequent safeguarding risks were not well managed. The panel noted that within the disciplinary procedure there was scope to apply the sanction of dismissal. The decision was confirmed by letter dated 22/07/2020 (B397) where it was stated that the panel felt he had engaged a worker where the full safeguarding risks associated with the engagement were not properly managed by him. The LA wrote to the claimant confirming the decision by letter dated 05/08/2020 (B398).

72. No specific findings of what the claimant had failed to do were included in the appeal outcome letter. DO, in her evidence, did not identify the recruitment procedure which the claimant had failed to apply. DO also confirmed that the records of the disciplinary panel hearings were not before the appeal panel.

Further findings of Fact

Unauthorised deductions

73. The claimant's evidence is at para 130 of his statement. He repaid the alleged overpayment of salary for the period 11/02/2020 to 29/02/2020 which amounted to £2,092.75 (net) (£4,461.89 gross) (C10). He was paid £6,658.74 (gross) on 15/02/2022 (C9) for the period 11/02/2020 to 10/03/2020 (although the dates were not on the face of the pay statement). The claimant's normal gross pay per month was £6,810.25 (gross) (see C8).

Wrongful dismissal

74. In addition to the findings above, in respect of recruitment procedures the school's safeguarding child protection policy and procedures at B34 provided that staff would, amongst other matters, ensure robust and effective

safeguarding arrangements and procedures are in operation in school. It was not suggested that it was the claimant's responsibility to ensure such arrangements and procedures were in operation in the sense of formulating such a policy covering recruitment of people with Prohibition Orders.

75. As to the alleged failure to take into account the reputational risk to the school and the local authority of engaging CXH, the second respondent did not give evidence that it had evaluated that risk in context, that being it was lawful to engage CXH with supervision in place.

76. I find there was no evidence to support a finding that the claimant acted intentionally to place others in danger.

Contributory fault

77. With regard to written risk assessments, SM's evidence was the practice was that those who were affected by the risk, that is, the manager filling in the risk assessment and the persons who would be dealing the risk, had to sign the document so that all were aware of the risks and the steps to be taken to manage it.

78. The claimant had consulted Paul Stanton in 2018 about the possibility of CXH applying for a teaching role at the school. I find that the claimant was aware of the "unorthodoxy" of recruiting someone with CXH's history to the school. Mr. Stanton made it clear that in his view, such a person was unsuitable. It was not clear that Mr. Stanton was aware of the provisions relating to prohibited teachers working in schools under supervision at the time of the discussion about CXH with the claimant. The claimant appointed CXH without taking soundings from senior leadership, such as SM, or LC.

79. The relationship between the claimant and CXH appears to have been a social one so that he would converse with CXH when meeting by chance. There was no evidence that he met CXH by prior arrangement, except when he arranged for the meeting with Paul Stanton in 2018. I find that the claimant demonstrated a clear wish to help this individual which clouded his judgment about doing so, and how he went about making those arrangements.

Acas uplift

80. The fact that CXH had a Prohibition Order was reported to LC on or about 17/10/2019 and she asked the claimant to work from home from 21/10/2019. The investigating officer was appointed very soon after and conducted her first interview on 30/10/2019. The claimant was suspended officially on 13/11/2019. The claimant was invited to a disciplinary on 16/01/2020 and the disciplinary hearing took place on 03/02/2020 and 10/02/2020. He was informed of his dismissal by letter on 25/02/2020 by R1 and this was confirmed by the LA on 10/03/2020. The claimant submitted his appeal on 24/03/2020. The appeal hearing took place on 16/07/2020 and 21/07/2020.

81. I note that matters broke around the half term holiday and the claimant worked from home for approximately 3 weeks prior to his being officially suspended. He was invited to a disciplinary hearing approximately three months after being requested to work from home, with the Christmas break intervening and the actual hearing taking place about 2.5 weeks after the letter inviting him to the hearing.

82. There was a delay between the dismissal and the appeal stages. It was the case that the country entered into national lockdown on 23/03/2020 and schools were closed, except for the teaching of children of essential workers.

83. I have not come to an assessment of whether the delays were unreasonable in the circumstances, having been invited to await submissions on such matters (see below).

Relevant Legal Framework

Unfair dismissal

84. Section 98(1) and (2) of the Employment Rights Act 1996 (ERA) provides as follows:

"(1) In determining for the purposes of this Part whether the dismissal 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

85. Section 98(4) of provides as follows:

"Where the employer has fulfilled the requirement of subsection (1), the determination of ERA 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."

86. It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct: this is not a high threshold for a respondent.

87. Mr. Allen relied upon the case of **Royal Mail Group Ltd. V Jhuti** [2020] ICR 731, a whistleblowing case which examined the meaning of "the reason (or if more than one, the principal reason) for the dismissal" in section 103A but which is also applicable to section 98(1). In that case, the Supreme Court held that where the real reason for the dismissal is hidden from the decision-maker behind an invented reason, and the real reason belongs to an individual "in the hierarchy of responsibility above the employee", the tribunal should look beyond the invention and attribute the real reason to the employer.

88. In conduct dismissals it is well-established that there are three aspects which have to be considered: did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? did the employer have a genuine belief at the time of dismissal that the employee was guilty of the misconduct alleged? did the employer have reasonable grounds for that belief? (**British Home Stores v Burchell** [1978] IRLR 379, EAT).

89. The Tribunal must not substitute its judgement for that of the employer, finding in effect what it would have done. The test is one of objectively assessed reasonableness, that is, whether what this employer did was within the band of reasonable responses open to an employer. In assessing that question, it is recognised that one employer might take one view and be acting fairly and another employer might take a different view and still be acting fairly **(Foley v Post Office, Midland Bank v Madden** [2000] IRLR 827; and **Iceland Frozen Foods Ltd v Jones** [1982] ICR 17).

90. If the tribunal find that the respondent had a genuine belief, the band of reasonable responses test applies to each stage of the dismissal process, that is, the investigation, dismissal and appeal (**Sainsbury's Supermarkets Ltd v Hitt** [2003] ICR 111, CA).

91. In respect of fairness, Mr. Allen relied upon **Salford Royal NHS Foundation Trust v Roldan** [2010] ICR 1457 where Elias LJ stated "[I]t is particularly important that employers take seriously their responsibilities to conduct a fair investigation where… the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite." – paragraph 13, at 1462F.

92. Where the dismissal is for alleged gross misconduct, the tribunal must determine whether it was within the range of reasonable responses to treat the conduct as a sufficient reason for dismissing the employee summarily. Mr. Mensah referred me to **Eastlands Homes Partnership Ltd. v Cunningham** UKEAT/0272/13 for the proposition that the Tribunal must have regard to whether the employer had reasonable grounds for its belief that the employee was guilty of gross misconduct. He also referred me to **Sandwell and West Birmingham Hospitals NHS Trust v Westwood**, UKEAT 0032/09

as authority for the question as to what is gross misconduct being one which is a mixed question of law and fact both in the context of reasonableness of the sanction of unfair dismissal or in the context of breach of contract. Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee. Mr. Mensah also relied upon **Mbubaegbu v Homerton University Hospital NHS Foundation Trust** UKEAT/0219/17 where the EAT held that it is possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employee and employer and there is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable.

93. Mr. Mensah also referred to **West London Mental Health NHS Trust v Sarkar** [2009] IRLR 512 where the EAT held that the fact that an employer initially thought the misconduct was less serious did not mean that it could not be fair to change a more serious view, especially if new facts come to light. [It is noted that this decision was reversed on appeal to the Court of Appeal and the ET's decision that it was inconsistent for an employer to use its Fair Blame Policy which indicated that an employee's alleged misconduct was relatively minor, but then increased the charge to one of gross misconduct, was reinstated. In doing so, the Court of Appeal held that the tribunal was entitled, on the evidence, to find that the additional matters which occurred later were of a relatively minor nature**.** It is a useful reminder that much depends on the evidence as to whether such matters take the dismissal outside the range of reasonable responses or not.]

94. Mr. Allen and Mr. Mensah referred me to 20 cases, many of which are long-standing authorities relating to the application of various aspects of sections 98(1), 98(2) and 98(4), and some are referred to above, for example, **BHS v Burchell** [1978] ICR 303 and **Sainsbury's v Hitt** [2003] ICR 111. They are noted.

<u>Wrongful dismissal</u>

95. Cases referred to by Mr. Allen included, with regard to the test to be applied to wrongful dismissal claims, **Wilson v Racher** [1974] ICR 428, CA, which reiterated the test is whether the conduct is such that makes the continuance of the contract impossible. He also referred to **Laws v London Chronicle (Indicator Newspapers) Ltd.** [1959] 1 WLR 698, CA and **Sandwell and West Birmingham Hospitals NHS Trust v Westwood**, EAT 0032/09 (the latter also being an authority referred to by Mr. Mensah) for the proposition the conduct must be a deliberate and wilful contradiction of the contractual terms, or a very considerable negligence amounting to gross negligence. Mr. Allen also cited **Adesokan v Sainsbury's Supermarkets Ltd.** [2017] IRLR 346, EWCA in support of the proposition that tribunals should be very cautious about finding that a failure to act where there was no intentional decision to act contrary to or to undermine the employer's policies constitutes gross misconduct, justifying summary dismissal.

Unlawful deduction of wages

96. Section 13 ERA 1996 provides that it is unlawful for an employer to make a deduction from a worker's wages unless it is authorised by statute or a provision in the worker's contract, or the worker has given their prior consent to the deduction.

97. The issue in this case involved what was properly payable to the claimant for the period 11/02/2020 to 10/03/2020 and was he paid that sum.

Discussion and Findings

98. Both counsel provided written submissions which were supplemented by oral argument. They are not repeated here but have been taken into account, along with my findings of fact, in determining the issues. I have considered the cases relied upon by both counsel above.

Issue 1 – which respondent is the correct respondent for each of the claims

99. The first matter I had to decide was who was the appropriate respondent in respect of the various claims. The school is a maintained school, that is, it is maintained by the LA and operates within delegated powers in respect of staffing matters, such as appointment and dismissal of school based staff, including teaching staff. As such, it is the governing body which is responsible for the dismissal of its staff whereas the LA remains the formal employer. Therefore, in respect of the unfair dismissal claim, the school was the correct respondent and for the wrongful dismissal and unauthorised deduction from wages claims, it was the LA.

Issue 2 – reason for the dismissal

100. The respondents contended the dismissal was by reason of the claimant's misconduct. It is for the respondent to show what was the reason for the dismissal – the threshold is not a high one.

101. The claimant relied upon the case of **Royal Mail Group Ltd v Jhuti [2020] ICR 731** in respect of the possibility that there was another reason of LC's (the real reason) which was hidden behind an invented reason adopted by the decision-maker. Although the claimant contended he had a difficult relationship with Liz Collins and she undermined him at times which was supported by the evidence of SM, KT and TK, there was little evidence to support the theory that she actively manipulated matters so as to ensure that he was dismissed and that it was for a malign reason of hers (that she wished to remove him from his post and have Nadine Carroll, the investigating officer, installed as the school's headteacher in his stead) which was the real reason for his dismissal. In short, cases such as Jhuti are extremely rare and nor was there cogent evidence to show there was manipulation or invention by LC to support a finding that this case fell within the Jhuti category. Such evidence as there was showed that the claimant had a difficult relationship with LC, she was the Chair of Governors and she undermined him at times.

In her capacity as Chair of Governors, she instructed the claimant to work from home and appointed the Investigating Officer. This falls far short of showing that the reason for the claimant's dismissal was her's rather than the decision-makers' reason in respect of the engagement of CXH.

102. I am satisfied that the reason for the dismissal was related to the conduct of the claimant, that is, he recruited CXH allegedly in breach of the school's recruitment procedures and failed to take into account the reputational risk to the respondents.

Issue 3 a – did the employer genuinely believe that the claimant committed the misconduct

103. The respondent genuinely believed the claimant was guilty of both charges but they did so on the basis of a flawed report.

Issue 3 b – did the employer have reasonable grounds to sustain that belief

104. The issue is whether, applying the range of reasonable responses, the employer had reasonable grounds to form the belief the claimant had committed the misconduct alleged on the basis of the material available to them at the time. Save for the criticisms of the investigation, and the panels' unreasonable acceptance of it without proper scrutiny, the procedure was otherwise fair and reasonable. Dismissal would have fallen within the range of reasonable responses of a reasonable employer but for those deficiencies mentioned (see below).

Issue 3 c – had the employer carried out as much investigation as was reasonable in all the circumstances

105. I have to consider whether, looking at the process overall, the procedure was fair and within the range of reasonable responses. This is in the context of the allegations against the claimant being particularly serious in that they were that he failed in his safeguarding responsibilities in not rejecting CXH who was a prohibited teacher following very serious misconduct involving a 15 years old vulnerable pupil, or taking into account the reputational risk to the respondents by engaging him. This was potentially career-ending for the claimant. In my assessment, this fell within the principle established in **Roldan** and therefore it was particularly important for the investigation to be fair. I find it was not: the investigation was flawed as the investigating officer did not act even-handedly and was "accusatorial" in her approach. This was plain in the notes of interviews she conducted. Nor did she seek exculpatory evidence such as the . The respondents chose not to call her so my findings have to be restricted to the documentary evidence before me. The flaws were not minor in my judgement: the investigating officer for example, introduced responses which she attributed to SM which SM said she had not made, and changed the order of her responses in places. There were other instances, for example, in the interviews of ES and Stephen Johnson where the investigating officer was leading the interviewee and suggesting answers which were prejudicial to the claimant. Nor did she

consider how the Regulations relating to the engagement of teachers with Prohibition Orders amends the definition of teaching duties, that is regulated activities, where the individual is under the direction and supervision of a qualified teacher.

Issue 4 – was there a proper and fair procedure

106. Basic procedural steps were in place, such as the claimant knowing that he was at risk of dismissal, following an investigation, and disciplinary and appeal hearings took place which he had the opportunity to address, assisted by his representatives.

107. Considering the process overall, but for the flaws identified in paragraph 105 above and the panels' treatment of the claimant's defences at the disciplinary and appeal stages, I find that the procedure would have fallen within the range of reasonable responses of a reasonable employer.

Issue 5 – did the employer pay sufficient regard to the claimant's employment record

108. It is clear that the disciplinary panel did not regard the claimant's employment record as relevant to their decision to dismiss. PC stated the panel had taken advice from HR but did not record what that advice was. He could not specifically recall, for example, whether a warning as an alternative to dismissal was discussed. PC said at the appeal that the disciplinary panel was not asked to debate the claimant's overall career but address the specific allegations.

109. The appeal was a review and not a rehearing so it relied upon the investigation conducted by NC, the disciplinary panel's outcome letter, the statement of case by PC, the submissions by the claimant and his representative as well as the documents in support identified at para 62 above. The appeal panel did not have the notes of the disciplinary hearings which impeded their ability to review the disciplinary process and outcome as they did not have the material to consider the basis of the disciplinary panel's decisions.

Issue 6 - has the employer been consistent in how it dealt with similar cases

110. This issue was not pursued and no evidence was given of similarly situated employees being treated more leniently.

Issue 7 – were alternatives to dismissal considered

111. The claimant's representative specifically put before the appeal panel that the omission to discuss CXH's appointment with the safeguarding leadership in the school should not be career-ending and other sanctions should have been considered. The claimant had followed a legitimate and legal process for engaging someone with a Prohibition Order and had acted

within the authority he had as head teacher to engage staff to work at the school. For the reasons given above, I find that other penalties were not considered by the disciplinary panel.

112. The appeal panel in rejecting the appeal found the decision to engage CXH was a serious lapse of judgement and the subsequent safeguarding risks were not well managed. In considering the penalty, the appeal panel was recorded as noting that dismissal was within scope of the possible outcomes but does not appear to have grappled with whether it was the correct sanction in the circumstances.

113. I remind myself that I must not substitute my judgment for that of the employer in finding in effect what I would have done had I been the employer. The test is that established in **Sainsbury's Ltd v Hitt**. In my judgment, the respondent acted outside the band of reasonable responses in the circumstances (despite the great importance of the safeguarding of pupils), as a hypothetical reasonable employer in these circumstances would nonetheless have considered alternatives to the sanction of summary dismissal given the claimant's clean employment record, his contribution to the achievements of the school, and the potentially career-ending consequences of summary dismissal.

Issue 8 – was dismissal within the band of reasonable responses

114. For the reasons given above, it was not.

AT THE REQUEST OF THE PARTIES, ISSUES 9 TO 21 ARE HELD OVER TO THE HEARING ON REMEDY.

Wrongful Dismissal

Issue 22 – what was the claimant's notice period?

115. The claimant enjoyed the terms and conditions of teaching staff, and under his contract of employment, notice given on 10/03/2020 would expire on 31/08/2020.

Issue 23 – was the claimant paid for some or all of that period?

116. He was dismissed without notice on 10/03/2020 and received no pay after that date.

Issue 24 – was the claimant guilty of gross misconduct by doing something so serious as to entitle the employer to dismiss him without notice

117. For the purposes of the wrongful dismissal claim, I am not primarily concerned with reasonableness but must determine whether the claimant's conduct did in fact breach the contract in such a way as to entitle the LA to dismiss without notice.

118. I heard no direct evidence from the LA as to their rationale for dismissing without notice. Mr. Mensah, in effect, relies upon the matters he submits entitled the first respondent to dismiss the claimant for gross misconduct.

119. In respect of the two allegations said to amount to repudiatory conduct was, first, failing to apply recruitment procedures that help deter, reject or identify people who bring safeguarding risks to schools and secondly, failing to take into account the reputational risk to the school and the local authority.

120. As found in para 72 above, there was no recruitment procedure identified by the respondents which the claimant was said to have failed to apply. Undoubtedly, PC thought there should have been such a policy covering the recruitment of people with Prohibition Orders.

121. With regard to the school's safeguarding child protection policy, see paragraphs 74 to 75 above. On one reading, this could be interpreted as being the claimant's responsibility to ensure such arrangements and procedures were in operation in the sense of formulating such a policy covering recruitment of people with Prohibition Orders as PC thought there should have been. However, in my view, that is not a proper interpretation of the provision as it is directed at all staff in respect of ensuring the policies and arrangements were operated robustly and effectively. It was not setting out the responsibility of the head teacher to formulate such policies and whereas PC thought there should be such a policy, he was not laying responsibility for that omission at the door of the claimant.

122. A further reason for not finding that matter amounted to a repudiatory breach of contract is that the respondents found that the claimant did not fail to undertake the necessary safeguarding checks prior to the engagement of CXH.

123. As to the failure to take into account the reputational risk to the school and the local authority of engaging CXH whose misconduct was very serious (see paragraph 5 above), it was nevertheless important to put the risk into context, that being it was lawful to engage CXH with supervision in place along with the other factors identified above (including the limited period of the engagement and the claimant's authority to engage staff without a requirement to seek guidance or advice). Taking all the relevant matters into account in an evaluation of the risk to the respondents' reputation, it did not cause the matter to fall into the category of repudiatory conduct on the part of the claimant.

124. Taking both allegations into account, they did not in my view amount to repudiatory conduct by acting in "wilful ignorance of responsibilities or instructions" and/or taking "any actions that intentionally places others in danger". There was no evidence from the second respondent to support, for example, a finding that the claimant acted intentionally to place others in danger.

Issues 27 and 28 – had the claimant been paid his full salary up to and including the termination of his employment. If not, how much is he owed.

125. Counsel told me at the end of proceedings that they were hopeful of dealing with this matter and would correspond with the Tribunal if they achieved an agreed outcome, otherwise it would be a matter for me. I have not been notified of any agreed position.

126. The claimant's evidence is at para 130 of his statement. He repaid the alleged overpayment of salary for the period 11/02/2020 to 29/02/2020 which amounted to £2,092.75 (net) (£4,461.89 gross) (C10). He was paid £6,658.74 (gross) on 15/02/2022 (C9). The claimant's normal gross pay per month was £6,810.25 (gross) paid on or about the 14th of the month (see C8). I find that the payment on 15/02/2022 should have been £6,810.25 gross for the month of 11/02/2020 to 10/03/2020 and therefore there was a shortfall of £151.51 (gross).

Conclusions

127. The claimant was both unfairly and wrongfully dismissed. He suffered an unauthorised deduction from his salary. His claims succeed. Remedy is yet to be considered.

128. I was asked by the parties to leave assessments on the basis of **Polkey,** contributory fault and breach of the Acas Code for the remedy hearing. This will give both parties the opportunity on the basis of my findings to formulate submissions and to put forward any further relevant information.

129. The parties are to write to the tribunal with their joint estimated length of remedy hearing and their non-available dates for the period May to October 2023.

Judge J. Callan

Date: 31 March 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
24 April 2023

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2408746/2020**

Name of case: **Mr J Hollywood** v **1. The Governing Body Of Northwood Community Primary School**
2. Knowsley Metropolitan Borough Council

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 24 April 2023

the calculation day in this case is: 25 April 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.