EMPLOYMENT TRIBUNALS

Claimant: Mr E Adams

Respondent: Better Futures Multi-Academy Trust

Heard at: Nottingham

On: 1st, 2nd and 17th March 2023

Before: Employment Judge Ayre

Appearances
For the claimant: Mr A Watson, counsel
For the respondent: Ms A Pitt, counsel

JUDGMENT

1. The claim for unfair dismissal fails and is dismissed.

2. The claim for wrongful dismissal succeeds. The respondent breached the claimant's contract by dismissing him without notice.

ANONYMISATION ORDER

Pursuant to rules 50(1) and (3)(b) of the Employment Tribunals Rules of Procedure 2013, it being in the interests of justice to do so, it is ORDERED that there shall be omitted or deleted from any document entered on the Register, or which otherwise forms part of the public record, any identifying matter which is likely to lead members of the public to know the real identity of Persons A, B and C.

REASONS

Background

1. The claimant was employed by the respondent as a teacher from 26 August 2014 until 13 June 2022 when he was summarily dismissed. On 29 September 2022, following a period of early conciliation that started on 23 August 2022 and ended on 6 September 2022, the claimant issued a claim for unfair and wrongful dismissal in the Employment Tribunal.

The hearing

2. There was an agreed bundle of documents running to 393 pages.

3. I heard evidence from the claimant and, on behalf of the respondent, from:

   3.1 Ruth Knight, Director of Human Resources;
   3.2 David Shaw, Principal; and
   3.3 Nicola Harrold; Governor.

4. At the start of the hearing the claimant and the respondent made a joint application for an Order under Rule 50 of Schedule 1 to the Employment Tribunal (Constitution & Rules of Procedure) Regulations ("**the ET Rules**") to prevent the publication of the names of a student and former student of the respondent and of the parent of one of those pupils.

5. Having heard submissions from the parties, and adjourned to consider the issue, I made an Order under Rule 50(3)(b) of the ET Rules that the identities of two former students and a parent should not be disclosed to the public, by replacing their names with references to Persons A, B and C.

6. It is my view that it is necessary in the interests of justice to make such an Order. In reaching this conclusion I have considered the importance of the principle of open justice, and that derogations from that principle should be no more than are strictly necessary to secure the proper administration of justice. I am satisfied in this case that the exact identity of the individuals concerned has no relevance to the issues in this case. I am also satisfied that the individuals' right to privacy may be compromised by disclosing their names. There is no public interest in the disclosure of their names.

7. The case was listed for a two-day hearing. It became apparent on the second day of the hearing that it would not be possible to conclude the evidence and submissions within two days, and that a third day would be required.

8. When discussing possible dates for a third day, Ms Pitt disclosed that she sits as a Fee Paid Employment Judge in the North East region and was aware that I would be transferring to that region in April 2023. Until Ms Pitt's disclosure, I was not aware that Ms Pitt sits as a Fee Paid Employment Judge.

9. Mr Watson did not raise any objection to my continuing to hear the case, and to the contrary commented that he did not think there were any grounds for recusal.

10. I notified and took advice from the Regional Employment Judges for both the North East and Midlands (East) regions, and they were, in the circumstances, comfortable that I continue to hear the case. I informed the parties of this at the start of the third day of the hearing. Both parties confirmed that they were happy for me to continue to hear the case.

The Issues

11. The respondent admits that the claimant was an employee with more than two years' continuous employment and that it dismissed him.

12. The issues that fell to be determined at the hearing were as follows:

Unfair dismissal

12.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct.

12.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? This requires considering, in particular, whether:

12.2.1 The respondent held a genuine belief that the claimant was guilty of misconduct;

12.2.2 there were reasonable grounds for that belief;

12.2.3 at the time the belief was formed the respondent had carried out a reasonable investigation;

12.2.4 the respondent acted in a procedurally fair manner; and

12.2.5 dismissal was within the range of reasonable responses.

Wrongful dismissal / Notice pay

12.3 What was the claimant's notice period?

12.4 Was the claimant paid for that notice period?

12.5 If not, was the claimant guilty of gross misconduct such that the respondent was entitled to dismiss without notice?

Findings of fact

13. The respondent is a multi-academy trust which operates a number of colleges in Nottinghamshire, Leicestershire and Warwickshire. One of the colleges

operated by the respondent is Bilborough College, where the claimant was employed as a teacher.

14. The claimant's employment with the respondent began on 26 August 2014 and on 1 September 2018 he became the Course Leader for Ethics and Philosophy. The claimant's contract of employment contained the following relevant clauses:

"*1.4 You will be expected to comply with any rules and regulations which the College may from time to time issue to ensure the efficient operation of its business and the welfare and interests of its students and employees…*

9.1 You are entitled to receive, or required to give, two months' notice of termination of employment and in the Summer term three months', terminating at the end of term as defined below for this purpose:

the Summer term ends on	*31st August*
the Autumn term ends on	*31st December*
the Spring term ends on	*30th April*

9.2 The corporation may terminate your employment without notice or without compensation in lieu of notice if you are guilty of gross or serious misconduct, gross negligence or gross incompetence…

16.1 During your employment you are expected to act in the best interest of the college at all times and maintain conduct of the highest standard. You are obliged at all times to act in accordance with the provisions of the College Staff Code of Conduct…"

15. The respondent has a Disciplinary Procedure for staff which includes the following:

"*8.1 Gross or serious misconduct is misconduct at work or outside work serious enough to destroy the employment contract and make any further working relationship and trust impossible…*

8.5 The following are examples of breaches of disciplinary rules which will normally be considered as gross or serious misconduct. This is not, however, an exhaustive list.

- *Issues relating Safeguarding or inappropriate behaviour towards students…*"

16. The respondent also issued guidance to staff on safeguarding matters. This guidance, headed "Guidance for safer working practice for those working with children and young people in education settings", is referred to throughout this judgment as the "**GSWP**". The GSWP is provided to all staff, and they are expected to comply with it. It was provided to the claimant, and he was familiar with it.

17. The purpose of the GSWP is to provide advice and guidance to those working with children in educational establishments about what constitutes illegal

behaviour and what may be considered as misconduct. It aims to help staff to monitor their own behaviour, to reduce the risk of allegations being made against them, and to support employers in giving a clear message that unacceptable behaviour will not be tolerated and may lead to disciplinary or legal action.

18. The GSWP sets out a number of underpinning principles when working with children. These principles include the following:

    - "*Staff should understand their responsibilities to safeguard and promote the welfare of pupils*
    - *Staff are responsible for their own actions and behaviour and should avoid any conduct which would lead any reasonable person to question their motivation and intentions*
    - *Staff should work, and be seen to work, in an open and transparent way ….*
    - *Staff should discuss and/or take advice promptly from their line manager if they have acted in a way which may give rise to concern….*"

19. The GSWP states clearly that failure to take reasonable steps to ensure the safety and well-being of pupils may be regarded as professional misconduct. It recognises that it cannot provide a complete checklist of what is and what is not appropriate behaviour for staff, and that at times individuals will have to make their own decisions. It makes clear that "*These judgments should always be recorded and shared with a manager*" so that where no specific guidance exists staff must discuss the circumstances with their line manager or the school's designated safeguarding lead ("**DSL**") and a record should be made of the discussion and any action taken.

20. There is a section dealing with 'Social contact outside of the workplace' and another headed 'Home Visits'. That section states that: "*All work with pupils and parents should usually be undertaken in the school or setting or other recognised workplace….A risk assessment should be undertaken prior to any planned home visit taking place*". It also provides that staff should "*agree the purpose for any home visit with their manager…always make detailed records including times of arrival and departure…ensure that all visits are justified and recorded…*"

21. On 5 March 2020 one of the claimant's colleagues raised a concern that the claimant was crossing professional boundaries in relation to a female student, person B. The colleague told the respondent that the claimant was crossing professional boundaries with students by spending every lunchtime in his room with person B and other students, and that B had told her that the claimant had put clips in her hair.

22. The concerns were discussed with the claimant, and he denied them, although he recognised that he needed to change his behaviour to ensure that he was not perceived to be socialising with students. The claimant was reminded of the importance of maintaining professional boundaries with students in line with safeguarding requirements and was told that he must seek advice if he was not clear on any aspect of professional boundaries with students. The claimant

revisited the GSWP after receiving this advice. The matter was dealt with on an informal basis and no disciplinary action was taken.

23. Later in March 2020 the college closed due to Covid. It re-opened in July 2020 and remained open until the following January.

24. B left the college in the summer of 2020. Shortly after doing so she contacted the claimant and asked him if he would be willing to give her some guidance on her transition to university. She told the claimant that her relationship her parents was very poor and that she would not receive any support at all from them. B was at the time 18 years old and was living with her boyfriend, Person C, and his mother, Person A. C was at the time still a pupil at the college, although he was also aged 18.

25. The claimant agreed to provide help and support to B, and that this would be provided at the house where B was then living with A and C. He was aware that this would involve visiting the home of a current student of the college, namely C, and that this raised potential safeguarding issues. He spoke to A (who is C's mother) and agreed with her a number of ground rules. These ground rules included that:

    25.1 The claimant would not have any unsupervised contact with C, and that A would be present whenever he visited the house;
    25.2 He would only visit when necessary;
    25.3 C was not to expect and would not receive any preferential treatment at college;
    25.4 C was not to be provided with the claimant's personal contact details;
    25.5 The claimant would not provide any financial assistance; and
    25.6 A and B were free to call off the arrangement at any time.

26. The ground rules were not written down, recorded or discussed with the respondent. The claimant did not make the respondent aware at all of the arrangements in place or that he was visiting the home of a current student at the college.

27. It is well known amongst teachers that visits should not normally be made to pupils' homes. The claimant knew this also, as on another occasion, when he was invited to a band practice at the home of a person whose daughter was a student at the college, he took safeguarding advice from his line manager. He was advised not to go to the house as there was a risk that he might come into unsupervised contact with the daughter, and he followed that advice.

28. It is not unusual for former students to approach members of staff for support after they leave the college, or for staff to provide support. Support is always provided on college premises however, and not at an individual's home.

29. The claimant accepted in evidence that it would have been better not to have provided the support to B at her home. He said that he was not sure if B had the technology available to attend meetings via Microsoft Teams although did not appear to have discussed that with her. He also said that there were limited other places such as cafes and libraries where they could meet, due to Covid

restrictions. By the time the claimant was visiting B's home however the college had re-opened after the first Covid lockdown.

30. Between August and October 2020 the claimant visited A, B and C's home on approximately ten occasions. He did not inform the respondent about any of these visits, nor did he record his arrival and departure times. No risk assessment was carried out in relation to his visits.

31. On one occasion whilst he was at the house A became ill and needed urgent medical attention. She was unable to drive herself to hospital, so the claimant took her in his car. B travelled with them. A has hearing difficulties and wanted B to go to hospital with her to help with communication.

32. When they arrived at hospital, B was not allowed to accompany A due to Covid restrictions. The claimant took B back to his house where they waited for several hours until A was discharged from hospital late in the evening. They then went back to the hospital, picked A up and drove her home.

33. When they arrived at A, B and C's house, the claimant went into the living room and sat down on the sofa. It was late at night and he inadvertently fell asleep. He woke up the following morning and messaged B to let her know that he was downstairs, and asked to speak to A. Having spoken to A he then left the house. There was no contact between the claimant and C whilst he was at the house.

34. The claimant did not inform the respondent that he had spent the night at a pupil's home when the pupil was present, albeit in a different room.

35. On another occasion in or around December 2020, A, B and C drove to the claimant's house to drop B off. B got out of the car and cane into the house. The claimant spoke to A and C at the end of his driveway.

36. It is clear that the claimant and B had a close relationship, although there is no evidence, nor indeed any suggestion, that the relationship was inappropriate, or that the claimant was motivated by anything other than a desire to help B out. B was estranged from her parents and decided to change her surname to Adams, which is the claimant's surname.

37. On 27 April 2022 the respondent received an anonymous complaint by email. The email was sent to David Shaw, the college's Principal. In the email the writer wrote that they were emailing to report a breach of the code of professional conduct by the claimant. The email referred to the claimant welcoming B into his home and offering help with her personal issues. It also said that the claimant had been to C's home and suggested that these events had taken place whilst both B and C were students at the college. The writer said that they did not want any contact about the issue and were in possession of this information because they were a close friend to one of the individuals concerned.

38. After receiving the email Mr Shaw took advice from the respondent's DSL and notified Ruth Knight, the college's HR Director. An initial meeting took place the following day between the claimant, his trade union representative, the DSL and Ruth Knight. During the meeting the claimant said that B had approached him

for help after leaving the college and that he had gone to the house she lived in with C, whilst C was still a student at the college.

39. The claimant said that he had taken A to hospital on one occasion and that she had invited him to stay at the house. He also said that he had told A that there had been an allegation about him previously. He also said that he wanted to help B out because she was having a difficult time and worked to get her to a point where she was ready for university. He was asked if B and C had been to his house and said that B had been after she let college, but that C had not been on his own. He also said that he was still in contact with A and B.

40. The claimant was asked not to contact the students, or anyone connected to them until it was determined whether an investigation was required. At the end of the meeting the claimant said "*I know it's a mistake of my own making and I accept responsibility*". The claimant was upset after the meeting and took the rest of the day off.

41. The following day Mr Shaw met with the claimant and suspended him on full pay. The suspension was confirmed in a letter which included the following wording:

"*you are suspended on full pay pending an investigation into allegations made against you which are as follows:*

- *That you have breached guidance for safer working practice for those working with children and young people in education settings;*
- *That you have failed to maintain appropriate professional boundaries with a student and former student;*
- *That you spent the night at a student's house which has the potential to seriously damage the public confidence in the College.*

This suspension is in order to allow us to conduct the investigation impartially and fairly…and does not indicate guilt in any way….

During the period of your suspension from duty, unless you have my prior written consent, you should not, at this stage, access the workplace nor contact any of the College's students, suppliers, contractors or your work colleagues [save for your union representative for the purpose of obtaining advice]. In addition, you should have no contact with former students or parents of the College who may be contacted as part of the investigation…."

42. Ruth Knight was appointed to carry out an investigation. As the investigation involved potential safeguarding issues, she contacted the Local Authority Designated Officer ("**LADO**") on 29 April 2022 to inform them of the situation. The LADO advised that the college should carry out its own investigation, and that there was no role for the local authority's social care team to play, as all those involved were adults.

43. The LADO also advised against interviewing A, B and C as part of the investigation. The reasons given by the LADO were that B and C were no longer students at the college, and that interviewing A, B and C could be seen as 'fishing for information;' given that none of them had made any reports regarding

safeguarding. The claimant had been told not to contact A, B or C either, so none of them were approached for their version of events.

44. The claimant's version of events was accepted by the respondent both during the investigation and at the disciplinary hearing. There was no dispute of facts as to what had happened, his account was accepted.

45. Mrs Knight carried out a formal investigation into the allegations and produced a detailed investigation report. On 5 May 2022 she interviewed the claimant. The meeting took place via Microsoft Teams, at the claimant's request, and the claimant's union representative was present during the interview. The claimant was asked in detail about the allegations. Notes were taken of the meeting and sent to the claimant for his review and comment.

46. The claimant was asked at the end of the interview whether there was anyone that he thought Mrs Knight should interview as part of the investigation. His response was to ask whether he had to give an answer immediately, to which Mrs Knight replied that he did not, and that he could let her know in the next couple of days or so. Neither the claimant nor his trade union representative suggested that A, B or C should be interviewed.

47. On 13 May, the claimant sent in a detailed written statement to Mrs Knight. The statement contained in some detail the claimant's responses to each of the allegations and his reflections and conclusions on them. He recognised in the statement that: "*I do acknowledge that, under these circumstances and with the benefit of hindsight, I exercised my judgement in a way that has subsequently been deemed to be out of line with college expectations. I apologise unreservedly for this, and I am keen to develop my practice and hone my judgement in order to avoid future issues from arising."*

48. As part of her investigation, Mrs Knight also interviewed Simon Holland, the claimant's current line manager, Jill Hay, the claimant's former line manager and Michelle Harvey, the DSL. Michelle Harvey was asked if she thought there were any safeguarding risks in the claimant having contact with B from August 2020. She replied 'yes' because B "*had only left college several weeks before and I would still consider her to be a vulnerable young adult based on the fact that she had issues with her family and on account of some disclosures she made whilst at College.*"

49. Michelle Harvey also said that she thought having a lot of contact with a young person outside of college soon after they left could leave a staff member open to all sorts of allegations, that the claimant should have liaised with her or with his line manager before having any contact with a student at his house, and that he should have avoided being in a situation where he fell asleep at a student's house. Her view was that the claimant should immediately have reported falling asleep at the house to the DSL.

50. Mrs Knight concluded her investigation by 23 May and sent her report to Mr Shaw. Mrs Knight's conclusions were that there was a case to answer at a disciplinary hearing. Mr Shaw agreed and on 24 May he wrote to the claimant inviting him to a disciplinary hearing on 13 June. The invite letter set out the allegations against the claimant, which were the same as in the suspension

letter. It also warned the claimant that the allegations were considered to be potential gross misconduct which could result in immediate dismissal. The claimant was advised of his right to be accompanied at the meeting, and that he could call witnesses to the hearing in support of his case. A copy of the investigation report was sent to the claimant with the letter.

51. On 10 June the claimant wrote to Mr Shaw stating that he did not intend to call any witnesses at the hearing. In advance of the hearing taking place Mr Shaw provided the claimant with a document headed 'Disciplinary Hearing Programme' which set out the format that the hearing would follow.

52. The disciplinary hearing took place on 13 June. Present at the meeting were the claimant, his trade union representative, Mrs Knight as investigating officer, Mr Shaw as hearing manager and Hannah Reeves who provided HR advice. Claire Bailey also attended and took minutes.

53. The meeting started at 10 am and finished at 14.22. There was an adjournment from 13.35 to 14.15 during which Mr Shaw considered what action to take. At the start of the hearing the claimant confirmed that he did not intend to call any witnesses. Mrs Knight then presented the management case and she was asked a number of questions by the claimant, his union representative and Mr Shaw.

54. The claimant was then given the opportunity to put forward his case and, when doing so, he circulated a document headed 'Overview Statement'. Mr Shaw asked the claimant a number of questions, and both Mrs Knight and the claimant then summed up.

55. After the summing up Mr Shaw adjourned to consider his decision. He concluded that the claimant's actions amounted to gross misconduct and that the appropriate sanction was summary dismissal. He reconvened the meeting and told the claimant and his representative of his decision.

56. Mr Shaw acknowledged that the claimant had volunteered information about spending the night at the house and also that there had been no allegation of actual harm made to the college by those involved. He that the claimant had breached the GWSP through his actions, and had failed to tell his line manager or the DSL about events. This prevented the college from undertaking risk assessments.

57. Mr Shaw recognised that the claimant had said that with hindsight he should have acted differently but was concerned that throughout the process the claimant had continued to try and justify his behaviour through the wording of the GSWP and his discussion about the verbal ground rules. In Mr Shaw it was not clear that the claimant accepted that what he had done was wrong. Mr Shaw was also influenced by the fact that the claimant knew the GSWP and had taken advice about a home visit on another occasion.

58. Mr Shaw concluded that the claimant understood the rules regarding safeguarding, that by visiting the home of a student he had caused the potential for others to misunderstand the situation, and that a reasonable person could have interpreted the visits to the house as visits to C. He took account of the fat that the claimant did not appear to have appreciated the risk when he had said

that no harm had been done, and that the claimant had been told in March 2020 to seek advice from the college regarding professional boundaries.

59. Mr Shaw told the claimant that he was being dismissed with immediate effect, and of his right of appeal. On 16 June Mr Shaw wrote to the claimant confirming the decision to dismiss him. In the letter Mr Shaw commented that:

"*…I consider your actions, when considered both individually and jointly, amount to gross misconduct…*

I have now, however, upheld these allegations insofar as they relate to your dealings with B. I consider that the GSWP does not refer to, and therefore arguably does not cover, ex-pupils. I acknowledge and agree with the comments made by Michelle Harvey during the investigation process in respect of these matters, and consider that you should have used your professional judgment to determine that your contact with B immediately after she left the College could have raised concerns from others regarding your professional boundaries with B when she was a student.

Therefore, the reasons for your dismissal are:

- *That you have breached GSWP for those working with children and young people in education settings by visiting the home of C, a current student, on several occasions.*

- *That you failed to advise your line manager, the DSL or the College about your visits to C's home, related to your planned involvement with B. This prevented the College from considering the risks of this arrangement which I consider would have led to alternative meeting arrangment6s being made and/or directing B to support at College instead.*

- *That you failed to maintain appropriate boundaries with C by visiting his home. Despite being advised in March 2020 that you should seek advice from the College regarding professional boundaries with students if you were unclear, you sought to establish your own ground rules…*

- *That despite your representations at the hearing that in retrospect you consider that you should have notified the college of this arrangement, throughout this process I am concerned that you continue to justify your behaviour through the wording of the GSWP and the verbal ground rules you agreed…In addition, I am concerned about a lack of awareness on your part as to the reputational risks t the College of you visiting a home of a current student…*

- *It is clear that you were familiar with the provisions of the GSWP at the time of the events in question and that you felt confident in your knowledge of safeguarding requirements at that time…you presented examples of good practice in reporting safeguarding incidents and seeking advice, but this did not prompt you to report the prior arrangement of you visiting C's home, albeit retrospectively, until the anonymous complaint was received by the College…*

- *That you have spent the night at a student's house which has the potential to seriously damage the public confidence in the College…this incident could have been prevented through discussing your arrangement…*

- *At the hearing the potential for reputational damage was discussed. I do not accept your representations through the process that no uninvolved "reasonable person" would question your motivations, intentions or actions. In my view, there are potentially considerable reputational risks to the College in respect of these matters and the potential for others to misunderstand the situation were not considered at the time…"*

60. It was clear from his evidence to the Tribunal that Mr Shaw did not take the decision to dismiss lightly. He considered alternatives to dismissal, in particular the possibility of issuing the claimant with a final written warning. He decided not to issue such a warning for two reasons. Firstly because of the gravity of the situation, specifically that the claimant had spent the night at a student's house and not reported it. The second reason was that he was not persuaded that the claimant would not put himself in a similar situation in the future. The claimant had received an informal warning about professional boundaries and the need to take advice just a few months before the incidents for which he was dismissed. He had not followed that advice.

61. The claimant appealed against the decision to dismiss him. He sent in detailed grounds of appeal running to 8 pages. The grounds of appeal included that:

61.1 The college had tried, wrongly, to apply the GSWP to a former student;
61.2 There was a lack of objectivity;
61.3 He believed that by setting ground rules the situation was regulated and transparent and did not give rise to any concerns;
61.4 He believed the GSWP had been followed in relation to C, and therefore did not think that it needed to be reported;
61.5 The GSWP are open to interpretation and provide for discretion to be exercised. He considered his analysis to be a reasonable interpretation of the rules;
61.6 He did not cross any professional boundaries in relation to C as he had nothing to do with him;
61.7 No harm was suffered by C or his mother, A;
61.8 The college was not likely to suffer any reputational damage and had not in fact suffered any;
61.9 The allegation made in March 2020 had not been upheld. It was therefore misleading and prejudicial to refer to it in the current disciplinary process;
61.10 The circumstances in which the claimant had sought safeguarding advice from his line manager were completely different;
61.11 It was unreasonable and irrational to conclude that there was a fear of repetition; and
61.12 The sanction was too severe. Dismissal was unreasonable, inappropriate, disproportionate and manifestly unfair;

62. In the grounds of appeal, as on other occasions during the disciplinary process, the claimant went through the GSWP in detail, setting out why he considered

they did not apply to the situation he had found himself in, and why he believed he had not breached them. He did not however complain about the fact that the respondent had not interviewed A, B or C.

63. An appeal hearing was arranged for 13 July 2022 and a panel was convened to hear the appeal. The panel included two members of the college's Local Governing Body, the respondent's CEO and an independent HR representative from Coventry University. Nicola Harrold, who is the Chair of the Local Governing Body, also chaired the appeal panel.

64. Ruth Knight and David Shaw were present at the appeal hearing, Mrs Knight to give the background to the case and Mr Shaw to explain why he took the decision to dismiss. The claimant was accompanied at the hearing by a trade union representative.

65. It was explained to the claimant at the start of the hearing that the hearing would be by way of a complete re-hearing of the case. The hearing started at 10 am and lasted for approximately 3 hours.

66. During the hearing Ruth Knight presented the findings from the investigation that she had carried out. David Shaw was asked to outline the reasons for his decision to dismiss, and the claimant had the opportunity to ask questions and put forward the grounds of his appeal.

67. Minutes were taken of the appeal hearing and sent to the claimant afterwards for his comment. At the end of the hearing the panel adjourned to consider their decision. The claimant thanked the panel for giving his case due consideration and said that he was 'very satisfied'.

68. The panel then made their decision. They considered each of the three allegations that had been the subject of the disciplinary process. The first allegation was that the claimant had breached the GSWP. The panel concluded that the GSWP applied to the claimant and to C, who was a pupil at the college at the relevant time. The claimant had admitted that he had not told anyone at the college about his inadvertent 'sleep over' at C's house. They found the claimant's account of what had happened to be lacking in detail and that the claimant had not taken responsibility for what had happened

69. The panel were also concerned that the claimant had not sought advice on the incident and had serious concerns about his professional judgment making abilities. This caused them to question whether he would be able to make a more sensible decision in the future.

70. The panel concluded that the claimant had not complied with the GSWP, including in relation to home visits, because he had not agreed the purpose for any of the home visits with his manager, had not adhered to agreed risk management strategies and had not made detailed records including of times of arrival and departure.

71. The second allegation was that the claimant had failed to maintain appropriate professional boundaries with a student and former student. The appeal panel recognised that the claimant had referred to ground rules agreed with A, but was concerned that these rules had not been put in writing, particularly given A's

hearing difficulties. The panel believed that the claimant had not acted in the best interest of C when entering his home on multiple occasions, albeit for the purpose of visiting B. The claimant had, they concluded made a serious error of judgment by deciding to visit B, a vulnerable young person, in her home, when there were more viable alternatives for providing support, such as using Microsoft Teams, meeting in a public place or meeting at the college which was open at the time.

72. The panel formed the view that any reasonable person would have questioned the claimant's motives and intentions, in particular the depth of the claimant's relationship with B who was a recent ex-student of the college, someone who the claimant had taught, and who had changed her name and taken the claimant's surname. The claimant had, they concluded failed to maintain appropriate professional boundaries and his actions in respect of B called into question his ability to make sound professional decisions regarding boundaries.

73. The third allegation was that the claimant spent the night at a student's house, which had the potential to seriously damage public confidence in the college. The panel recognised that the claimant had acknowledged during the appeal hearing that this incident had the potential to tarnish the reputation of the college and bring the teaching profession and the college into disrepute. The panel also recognised that the claimant had reflected on his actions, apologised and said that he would behave differently now. However, this did not in the panel's view mitigate the serious nature of the incident, particularly since the claimant had been spoken to in March 2020 and had said that he would seek advice in the future, but had failed to do so.

74. The appeal panel considered whether dismissal was the appropriate sanction and reached the same conclusion as Mr Shaw. The appeal was therefore not upheld. The claimant was informed of the appeal panel's decision in a letter dated 18 July 2022.

The law

Unfair dismissal

75. In an unfair dismissal case, such as this one, where the respondent admits that it dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in sections 98(1) or (2) of the Employment Rights Act 1996.

76. Section 98(1) provides that: "*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*"

77. Section 98(2) states as follows:

"*(2) a reason falls within this subsection if it –*

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

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

78. The burden of establishing a fair reason for dismissal lies with the respondent. The reason for dismissal has been held to be the factor or factors operating on the mind of the decision maker which causes them to make the decision to dismiss (***Croydon Health Services NHS Trust v Beatt [2017] ICR 420***.

79. Section 98(4) states as follows:

> *"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. "*

80. Where conduct is established as the reason for dismissal, the starting point for the Tribunal when considering whether the dismissal was fair is the test in ***British Home Stores Ltd v Burchell [1980] ICR 303***, namely:

80.1 Did the respondent have a genuine belief that the claimant was guilty of the misconduct?
80.2 Did the respondent have reasonable grounds for holding that belief; and
80.3 At the time it formed that belief, had it carried out as much investigation as was reasonable ?

81. One of the considerations under section 98(4) is whether dismissal was within the range of reasonable responses, ie was it an option that a reasonable employer could have adopted in all the circumstances. The Tribunal must not substitute its view of the appropriate disciplinary sanction for that of the employer (***Iceland Frozen Foods v Jones [1983] ICR 17***). The range of reasonable responses test is not a perversity test, and it applies also to the procedure followed by the respondent including the investigation (***Sainsbury's Stores Ltd v Hitt [2003] IRLR 23***)

82. Where a Tribunal finds that a claimant has been unfairly dismissed, the respondent can be ordered to pay a basic award and a compensatory award to the claimant. Sections 119 to 122 of the ERA contain the rules governing the

calculation of a basic award and include, at section 122(2) the power to reduce a basic award to take account of contributory conduct on the part of a claimant:-

> "*Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*. "

83. The rules on compensatory awards are set out in sections 123 and 124 of the ERA and include, at section 123(6) the following:-

> "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*."

84. The leading case on contributory conduct is ***Nelson v BBC (No.2) 1980 ICR 110*** in which the Court of Appeal held that, for a Tribunal to make a finding of contributory conduct, three factors must be present:-
    84.1 There must be conduct which is culpable or blameworthy;
    84.2 The conduct in question must have caused or contributed to the dismissal; and
    84.3 It must be just and equitable to reduce the award by the proportion specified.

85. 'Culpable or blameworthy' conduct can include conduct which is 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances' (***Nelson v BBC (No.2)***).

86. In ***Hollier v Plysu Ltd [1983] IRLR 260*** the EAT said that contribution should be assessed broadly and should generally fall within the following categories: employee wholly to blame (100%); employee largely to blame (75%); employer and employee equally to blame (50%) and employee slightly to blame (25%).

87. In ***Polkey v AE Dayton Services Ltd 1988 ICR 142*** the House of Lords held that it is, in most cases, not open to an employer to argue where there are clear procedural failings, that following a different procedure would have made no difference to the outcome (ie the employee would still have been dismissed) and that accordingly the dismissal is fair. Their Lordships did however find that when deciding the amount of compensation to be awarded to an employee who has been unfairly dismissed, a deduction can be made if the Tribunal concludes that there is a chance that the employee would have been dismissed anyway had a fair procedure been followed.

<u>Wrongful dismissal</u>

88. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 gives Tribunals the power to hear claims for breach of a contract of employment or other contract connected with employment where the claim arises or is outstanding on the termination of the claimant's employment.

89. In a wrongful dismissal claim, where it is admitted that the claimant was not given or paid for his notice period, the question is whether the claimant was in repudiatory breach of his contract of employment such that the employer was entitled to dismiss him without notice.

90. In a wrongful dismissal case questions of reasonableness do not arise, and the issue is whether the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract (***Enable Care and Home Support Ltd v Pearson EAT 0366/09***).

Submissions

Claimant

91. This is a case, Mr Watson submits, in which the claimant was giving up his free time to help a former student. It was a commendable thing for him to do. Despite this, he has been summarily dismissed and his teaching career is in difficulty.

92. Mr Watson submitted that, during the course of his evidence, Mr Shaw had added a new allegation to the reasons for dismissal, namely that the claimant had wilfully hidden the visits to the house and the overnight incident from the respondent. This allegation had not been put to the claimant during the disciplinary process.

93. Mr Watson further submitted that, contrary to what had been written in the dismissal letter, Mr Shaw did take into account the claimant's relationship with B when reaching his decision to dismiss.

94. The Tribunal should, Mr Watson submits, consider in detail what the reason for dismissal was, and it is not sufficient to say 'it is safeguarding issues'. This could equally be classed as a capability case.

95. The claimant does not take issue with the genuineness of the respondent's belief. Rather, he says that the respondent did not have reasonable grounds for holding that belief, and no reasonable employer would have concluded that the claimant did anything wrong by helping B.

96. The claimant accepts that the respondent had reasonable grounds for concluding that he did not tell the college about his visits to B at C's home, or about the overnight incident. The claimant admitted these matters. The claimant also accepts that the respondent had reasonable grounds 'at a high level' for believing that the overnight incident had the potential to damage the public's confidence in the respondent. However, it is submitted that once the full facts were known, no reasonable person would have any cause to doubt the claimant's motives and that there was therefore no reasonable basis for concluding that public confidence in the college would be damaged.

97. In Mr Watson's submission, the respondent did not have reasonable grounds for believing that the claimant's behaviour with B was in poor judgment. The

claimant had not broken any college policies or guidance and did not act against his training. How the claimant went wrong was to form a view in relation to the GSWP that was different to the respondent's view.

98. In relation to the investigation carried out by the respondent, the claimant raised just one criticism, that Mrs Knight failed to interview A, B and C. The claimant had been told not to speak to them and Mrs Knight's failure to interview them was insufficient because:

98.1 Mr Shaw and Mrs Harrold did not take the same approach as Mrs Knight because both said that they only had the claimant's word for the content of the ground rules; and

98.2 The respondent would have been able to find out who A and C had told about the claimant's visits, which was relevant to the question of reputational risk.

99. Mr Watson submits that dismissal was outside the range of reasonable responses because:

99.1 Mr Shaw wrongly took into account his views about how the claimant had helped B, despite claiming not to, and the claimant had breached no policies or guidance in relation to B;

99.2 The respondent had failed to give sufficiently clear guidance that the breaches of the GSWP committed by the claimant would amount to gross misconduct;

99.3 The claimant had admitted making errors of judgment which were a result of a genuine difference of interpretation of the GSWP;

99.4 The claimant had been given insufficient training on the application and interpretation of the GSWP;

99.5 The evidence showed that the claimant identified the safeguarding risks and put in place ground rules to address those risks;

99.6 No harm came to C;

99.7 There was no wilful wrongdoing by the claimant;

99.8 The claims of a risk of reputational damage were entirely hypothetical, if not fanciful;

99.9 By the time of the disciplinary hearing the claimant had recognised what he should have done differently and had a good understanding of the GSWP;

99.10 The claimant was engaged in a highly commendable task at the time of the events for which he was dismissed, namely helping B (who was estranged from her own parents) to transition to university life;

99.11 The claimant had a clean disciplinary record;

99.12 The events occurred during Covid 19 when the claimant was facing unparalleled stresses; and

99.13 At no point did Mr Shaw express the view that he had lost trust and confidence in the claimant or that the employment relationship was unsalvageable.

100. The appeal stage did not, in Mr Watson's view, remedy the unreasonable decision taken by Mr Shaw, but rather introduced further errors, namely:

100.1 The panel wrongly criticised the claimant for his account of the overnight incident lacking in detail;

100.2 Their criticisms of the judgment exercised by the claimant were entirely unreasonable;

100.3 It emerged in cross-examination that the appeal outcome letter did not reflect all of the reasons relied upon by the appeal panel for reaching their decision;

100.4 The appeal panel wrongly based its decision on unreasonable conclusions reached about the claimant's relationship with B;

100.5 The panel wrongly concluded that the claimant's actions in relation to B called into question his ability to make sound professional decisions about professional boundaries; and

100.6 The panel wrongly relied on the potential reputational risk to the college.

101. In relation to the wrongful dismissal claim, Mr Watson submitted the burden was on the respondent to establish on the balance of probabilities that the claimant is guilty of a repudiatory breach of contract (***Hovis Ltd v Louton EA-2020-000972***). He also referred me to the comments of HHF Hand QC in ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09***) that, as a matter of common law, gross misconduct requires either a "*deliberate and wilful contradiction of the contractual terms*" or gross negligence.

102. Mr Watson also submitted that the respondent had not articulated what term of the claimant's contract it is alleged that he breached. There is no express term of the claimant's contract relating to safeguarding and it cannot be said that the claimant acted without reasonable and proper cause to undermine trust and confidence.

<u>Respondent</u>

103. Ms Pitt submitted that the reason for dismissal was conduct, although she accepted that it was open to the Tribunal to consider what the real reason for dismissal was and whether the facts relied upon have the right label attached to them (***Abernethy v Mott [1974] ICR 323***).

104. In relation to procedural fairness, Ms Pitt submitted that not every procedural defect renders a dismissal unfair. The Tribunal should she said consider what

the consequence was of not interviewing A, B and C. She referred me to the case of ***Sharkey v Lloyds Bank plc EAT 0005/15*** in which the EAT held that the procedure followed by an employer does not sit within a vacuum but is an integral part of the fairness of a dismissal. Many cases, she says, involve some procedural flaw, and the role of the Tribunal is to evaluate whether the defect is so significant as to render the dismissal unfair.

105. Ms Pitt also submitted that the case against the claimant was based entirely on what he told the respondent, and that interviewing A, B and C would not have helped the respondent to reach its decision. What could they have said of significance? Mrs Knight had not just disregarded them, but had taken advice on whether to interview them and followed that advice.

106. Ms Pitt says that no suggestion had been made that Mr Shaw had an underlying motive for dismissing the claimant, and that he had presented as a professional who diligently examined the evidence before him. She invited me to find that he did not take into account any contact between the claimant and B, and that the case revolved around safeguarding issues involving C.

107. In unfair dismissal claims, Ms Pitt says, the Tribunal is looking for reasonableness not perfection. The range of reasonable responses test can be summarised as 'if no reasonable employer would have dismissed, the dismissal was unfair'.

108. In Ms Pitt's submission, the facts in this case are largely undisputed. Where there is a dispute, she invited the Tribunal to prefer the evidence of the respondent. For example, the claimant had suggested that he was told early in the process that he could not bring witnesses, yet the disciplinary invite specifically said that he was entitled to do so.

109. On the question of whether the claimant knew that he could be dismissed for the behaviour in question, Ms Pitt referred me to the disciplinary policy which made clear that safeguarding issues were potential gross misconduct. It is not possible to identify every single issue that will lead to dismissal, but it is clear that the GSWP is important as it relates to the welfare of children and the protection of staff. The fact that safeguarding forms part of teacher training from the outset is an indication of the importance of the subject.

110. Ms Pitt says that the claimant knew full well that his behaviour could amount to gross misconduct. He put the ground rules in place because he knew that visiting C's home raised safeguarding issues. Safeguarding is an important and serious issue and breach of safeguarding rules is capable of amounting to gross misconduct.

111. The claimant's behaviour had the potential to cause reputational damage to the respondent in Ms Pitt's submission, as evidenced by the fact that it had been raised anonymously.

112. On the question of wrongful dismissal, Ms Pitt submitted that the claimant had made a number of errors in breach of his contract of employment, and that therefore the respondent was entitled to summarily dismiss him. She referred specifically to paragraphs 1.4 (the obligation to comply with the respondent's

rules and regulations) and to paragraph 16.1 (the obligation to act in the best interest of the college and maintain conduct of the highest standard).

Conclusions

Unfair dismissal

113. Having considered carefully the evidence of Mr Shaw, and reviewed the documents, in particular the letter of dismissal, I am satisfied that the reason Mr Shaw dismissed the claimant was that he believed the claimant to have committed gross misconduct. The allegations against the claimant were set out in the suspension letter and the letter inviting the claimant to the disciplinary hearing. The reasons for dismissal are clearly set out in the dismissal letter. It has not been suggested by the claimant that there were in fact alternative reasons for dismissal.

114. Mr Watson suggested that I should consider carefully the reasons for dismissal. I have done so. I accept Mr Shaw's evidence that the reasons for dismissal were those set out in the dismissal letter. They are not just generic safeguarding issues, but are detailed in the dismissal letter.

115. The actions for which the claimant were dismissed were actions which the claimant had admitted, albeit that he did not admit that they amounted to gross misconduct. The question however is not whether the claimant considered his behaviour to amount to misconduct, but whether his employer did. I am satisfied on the evidence before me that the reason for dismissal was the claimant's conduct.

116. Conduct does not have to be culpable, blameworthy or reprehensible in order to amount to a fair reason for dismissal, although this can be a factor when deciding the fairness of the dismissal (***Jury v ECC Quarries Ltd [1980] WLUK 116*** and ***JP Morgan Securities Plc v Ktorza [2017] 5 WLUK 237***). In the latter case the EAT held that the Tribunal was wrong to find that in order for an employee to be fairly dismissed for conduct that conduct had to be culpable, and that sections 98(1) and (2) of the ERA did not require that an employee was aware that their employer would not approve of their behaviour.

117. Misconduct can be either deliberate or inadvertent (***Philander v Leonard Cheshire Disability [2018] 11 WLUK 4***) and can include gross negligence as well as deliberate wrongdoing, even where the behaviour is neither blameworthy or wilful. In ***Burdis v Dorset County Council [2018] 8 WLUK 322*** the EAT upheld the findings of an Employment Tribunal that misconduct may encompass serious neglect, omission or carelessness. That case involved the dismissal of a director for failing to put in place rigorous financial management systems and the EAT accepted that the Tribunal was entitled to conclude that the reason for dismissal was conduct rather than capability or some other substantial reason.

118. I therefore find that the reason for dismissal was misconduct, and that the respondent has discharged the burden of establishing a fair reason for dismissal.

119. Turning now to the ***Burchell*** test, it is not disputed by the claimant that Mr Shaw genuinely believed that the claimant was guilty of misconduct. Having heard the

evidence of Mr Shaw, I found him to be a considered and credible witness. I accept his evidence and find that, at the time he made the decision to dismiss, he had a genuine belief that the claimant was guilty of gross misconduct.

120. I also find that Mr Shaw had reasonable grounds for believing the claimant to be guilty of gross misconduct. The acts for which the claimant was dismissed were all ones which were admitted by the claimant, and indeed it was the claimant himself who provided the respondent with the information it relied upon when dismissing him. To his credit, the claimant was open with the respondent during the investigation and disciplinary process.

121. The key facts and evidence relied upon were not in dispute. The claimant had volunteered to the respondent, when asked, that he had repeatedly visited C's home, that he had not told or sought advice from his line manager or indeed anyone at the college about the visits, that he had inadvertently slept over at the house on one occasion and that he had not reported this incident after the event. The claimant also admitted that he was aware of the GSWP and the importance of safeguarding, and that he had been reminded in March 2020 of the importance of maintaining appropriate professional boundaries and of seeking advice if he was unclear.

122. I have then considered whether it was reasonable of Mr Shaw, and of the respondent generally, to classify the claimant's actions as gross misconduct. The respondent has accepted throughout that there was no inappropriate relationship between the claimant and B, and that the claimant's motivation was to try and help B. That however is not a 'get out of jail free' card for the claimant when it comes to unfair dismissal.

123. The respondent is a multi-academy trust whose purpose is the education of young people. Safeguarding is, understandably, very important to it. That is reinforced by its Disciplinary Procedure which includes, as the very first example of gross misconduct in the non-exhaustive list of potential gross misconduct, issues relating to safeguarding or inappropriate behaviour towards students.

124. The importance of safeguarding is further reinforced by the GSWP, which makes clear disciplinary or even action may follow if there is inappropriate conduct and which is provided to all staff. The GSWP is detailed and clear. It recognises that it cannot cover every possible scenario, and for that reason it specifically states that when professional judgments are made in situations not covered by the document, staff must always advise their senior colleagues of the justification for their action. The claimant did not do that. This was despite the fact that he accepted that he was familiar with the GSWP and had been reminded just a few months before the acts for which he was dismissed of the importance of maintaining appropriate professional boundaries and of seeking advice.

125. In light of this, Mr Shaw had reasonable grounds for believing that the claimant was guilty of gross misconduct. It was not unreasonable for the respondent to categorise the issues as ones relating to conduct rather than capability, given the content and nature of the GSWP and the Disciplinary Procedure, and all the circumstances of the case.

126. The investigation conducted by the respondent was, in my view, a reasonable one. The report prepared by Mrs Knight was detailed and thorough. It covered all of the allegations and set out the evidence and her conclusions in relation to each of them. Mrs Knight interviewed the claimant at length, as well as the DSL and the claimant's current and former line managers. The claimant had the opportunity to submit a detailed written statement, which was considered by Mrs Knight and included as an appendix to her report.

127. The claimant was asked whether he wanted Mrs Knight to interview anyone else and given time to consider the position. Neither the claimant nor his trade union representative suggested that anyone else should be questioned. They did not ask Mrs Knight to interview A, B or C.

128. The reason Mrs Knight did not interview A, B or C was because she was advised by the LADO not to do so. This was, in my view, entirely reasonable. The evidence before me demonstrated that Mrs Knight considered whether they should be interviewed and took advice on the question. Having received that advice she followed it. Neither the claimant nor his trade union representative suggested otherwise at the time.

129. This is not a case in which the key facts are in dispute. They are largely agreed, and the respondent appears to have largely accepted the claimant's version of events. Even if A, B and C had been asked about the ground rules and who they had discussed the claimant's visits with, it is difficult to see what difference that would have made to the outcome. The respondent accepted that the claimant had agreed some ground rules with A, and it was ultimately for the respondent to decide the potential risk to its reputation. The decision to dismiss was not based upon actual damage to reputation but rather on the potential for such damage.

130. I have reminded myself that the range of reasonable responses test applies to the investigation conducted by the respondent and have no hesitation in finding that the investigation conducted by the respondent was within that range.

131. I have then gone on to consider the procedure followed by the respondent. The claimant makes no allegations of procedural unfairness, other than the failure to interview A, B and C. I have set out my findings on that above.

132. I am satisfied, on the evidence before me, that the procedure followed by the respondent was a reasonable and fair one, and that it complied with the relevant ACAS Code of Practice. The allegations were set out in writing to the claimant at the time of his suspension, and in the invite to the disciplinary hearing. A thorough investigation was carried out and the evidence relied upon by the respondent was presented to the claimant.

133. The claimant had the opportunity to consider the evidence and the allegations, and to provide his side of the case at every stage of the procedure. The investigation, disciplinary and appeal meetings were all thorough, as was demonstrated by the length of those meetings. The claimant was warned, in advance of the disciplinary hearing, that one of the potential outcomes was his dismissal.

134. The claimant was represented by his trade union throughout the proceedings, including at the initial meeting on 28 April 2022. Separate managers were involved in the investigation and disciplinary hearing stages, and there was an appeal to a separate and more senior appeal panel.

135. The key issue in this case in many ways is whether dismissal was within the range of reasonable responses. The claimant says that dismissal was too harsh and makes a number of criticisms of the decision. I have reminded myself when considering this issue that the test I have to apply is not whether I would have dismissed or not, but whether dismissal was within the range of reasonable responses.

136. This is a case involving a teacher who held a position of trust and responsibility in relation to young people. He was familiar with his safeguarding responsibilities and with the GSWP. The GSWP themselves make clear that inappropriate behaviour can lead to legal and disciplinary action. They are reinforced by the Disciplinary Procedure which lists safeguarding issues as potential gross misconduct. It also involved a teacher who had, just a few months before the incidents for which he was dismissed, been specifically reminded of the importance of maintaining appropriate professional boundaries and of taking advice if he was in any doubt.

137. Despite this, the claimant entered into an arrangement, albeit with the best of intentions, which involved him regularly and repeatedly visiting the house of a student of the college. The claimant clearly understood that safeguarding was an issue in relation to visits to students' homes because:

    137.1 He felt the need to put in place ground rules to protect both C and himself; and
    137.2 He approached a colleague for advice on whether to visit another student's home on another occasion.

138. It was therefore reasonable for the respondent to conclude that the claimant was familiar with safeguarding requirements and the GSWP. This was not a case in which it can be said that there was insufficient training on the application or interpretation of the GSWP.

139. It was also reasonable for the respondent to conclude that the claimant had breached GSWP by visiting C's home on several occasions without notifying the college, even after he spent the night at the house. The GSWP make clear that a risk assessment should be carried out before any home visit, that staff should agree the purpose of any home visit with their line manager and must always make detailed records of such visits including times of arrival and departure.

140. The claimant failed to do any of this, over a period of several months during which time he visited C's house approximately ten times. This was a clear and repeated breach of the GSWP. The claimant's suggestion that the rules on home visits did not apply because he was not visiting the house for the purpose of visiting C is not credible, given that he took advice on another occasion on visiting a student's home for the purpose of a band practice.

141. Mr Watson suggested that the claimant's actions were errors of judgment which were due to a genuine difference of interpretation of the GSWP. I do not accept that submission. The GSWP clearly recognises that individuals will have to exercise judgment on occasion, as no guidance can cover every situation that will arise. It specifically states however that judgments should be recorded and shared with a manager. The claimant did not do that. If he had done, he may very well not have been in the situation he found himself in.

142. The respondent's DSL, who takes the lead on safeguarding at the college, was clear in her evidence to the investigation that the claimant should have liaised with her or with his line manager and should immediately have reported spending the night at C's house. It was not unreasonable of the respondent to take the views of its DSL into account.

143. Mr Watson also suggested that Mr Shaw wrongly took into account his views about how the claimant had helped B, despite claiming not to, and had added an allegation that had not been put to the claimant, namely that the claimant wilfully hid the visits to the house. This submission was based upon answers that Mr Shaw gave in response to lengthy and skilful cross-examination by Mr Watson during the course of the Tribunal hearing. I place more reliance upon the contemporaneous evidence, in particular the invite and the dismissal letters, which set out clearly the allegations and the conclusions.

144. Mr Watson asked Mr Shaw a direct question 'Did you form the view that the claimant had chosen to hide his visits to B and the inadvertent sleep over?' It was in response to that question that Mr Shaw said that it was possible the claimant was deliberately hiding the visits because it may have been embarrassing to him to admit that he'd made so many visits to B's house so soon after she finished being a student. It was clear that the claimant was asked during the disciplinary process in some detail about why he had not told the respondent about the visits or the sleep over.

145. It cannot be said that it was unreasonable of the respondent to view the claimant, a teacher, spending the night at the house of a current student, as a very serious matter which could put the reputation of the college at risk. The respondent was not suggesting that its reputation had actually been damaged, but rather that there was a risk that it would be. That was in my view a reasonable conclusion for it to reach.

146. I accept Mr Shaw's evidence that he took account of the fact that the claimant had a clean disciplinary record, and that he considered alternatives to dismissal such as a final written warning. He concluded however that the severity of the incidents warranted dismissal and that he did not have confidence that the claimant would not have put himself in another situation in the future, given that he had previously been advised about professional boundaries and taking advice and had not followed that advice.

147. In these circumstances it cannot be said that dismissal was outside the range of reasonable responses.

148. Nor can it, in my view, be said that the appeal introduced further errors into the dismissal process. The appeal was a re-hearing, and with any re-hearing it is

highly likely that slightly different conclusions may be reached with a slightly different emphasis. If that were not the case then it could be suggested that the appeal was merely a rubber stamping exercise. The appeal panel comprised three individuals, none of whom had been involved in the original decision made by Mr Shaw, and who collectively made their own decision. The slight differences in emphasis, if anything, demonstrate the independence of the appeal process.

149. It is not necessary for an appeal letter to set out each and every reason relied upon by the decision makers in order for a dismissal to be fair. The appeal letter is in my view reasonably detailed and sets out clearly the main conclusions reached.

150. For the above reasons, I find that dismissal was within the range of reasonable responses and that the dismissal was both procedurally and substantively fair. The claim for unfair dismissal therefore fails and is dismissed.

151. In light of my conclusions that the dismissal was fair, it is not necessary for me to make findings on the questions of contributory conduct or ***Polkey***.

Wrongful dismissal

152. The test that I have to apply in a wrongful dismissal case is different to that in an unfair dismissal case. It is not a question of belief or reasonableness, but rather whether the claimant's behaviour amounts to a fundamental breach of his contract of employment.

153. The respondent relies upon two contractual terms which it says that the respondent breached. The first is clause 1.4 of the contract, a requirement to comply with any rules and regulations of the respondent to ensure the welfare and interests of its students and employees. The second is clause 16.1 which requires the claimant to act in the best interests of the college at all times and maintain conduct of the highest standard. That clause also obliges the claimant to act in accordance with the respondent's staff Code of Conduct. The Code of Conduct was not in evidence before the Tribunal and there was no evidence that it had been relied upon during the disciplinary process.

154. There is no general rule of law that sets out what degree of misconduct that will justify summary dismissal. In cases involving disobedience, the Court of Appeal has held that disobedience must be wilful (ie a deliberate flouting of the contractual term) in order to amount to a repudiatory breach of contract. In ***Laws v London Chronicle Ltd [1959] 2 All ER 285*** Lord Evershed MR said that "*It follows that the question must be – if summary dismissal is claimed to be justified – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service*."

155. In ***Mbubaegbu v Homerton University Hospital NHS Foundation Trust UKEAT/0218/17***, a case involving the summary dismissal of a hospital consultant for failure to comply with rules and procedures, leading to concerns over patient safety, Choudhury J held that to justify summary dismissal misconduct must be such as to undermine the relationship of trust and

confidence between employer and employee. In paragraph 32 of the judgment he found that:

"*Whether or not the label of gross misconduct is applied to such conduct is not determinative….As stated in* ***Neary*** *conduct amounting to gross misconduct is conduct such as to undermine the trust and confidence inherent in the relationship of employment. Such conduct could comprise a single act or several acts over a period of time….it may be, as it was in this case, that upon examination of a series of acts, which the employer believes put patients at risk, the employer finds that it has lost confidence that the employee will not act in that way again. I see no reason why an employer would be acting outside the range of reasonable responses were it to dismiss an employee in whom it has lost trust and confidence in this way.*"

156. In the case of ***Neary v Dean of Westminster [1999] ILR 288***, Lord Jauncey stated that to amount to gross misconduct the behaviour musts 'so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be requited to retain the servant in his employment'.

157. More recently in ***Palmeri v Charles Stanley & Co Ltd [2021] IRLR 563***, the test was expressed as "*whether objectively and from the perspective of a reasonable person in the position of* [the respondent]***,*** [the claimant] *had "clearly shown an intention to abandon and altogether refuse to perform the contract""*.

158. When deciding whether the conduct is sufficiently serious as to amount to a repudiatory breach of contract the Tribunal can take account of all of the circumstances including the role held by the employee and the nature of the employer's organisation. The test to be applied is an objective one, and it is for the respondent to prove that the claimant committed gross misconduct.

159. I find, on balance, that the respondent has not discharged the burden of proving that, looked at objectively, the conduct of the claimant clearly showed an intention to abandon and altogether refuse to perform the contract. It is clear that the claimant valued his position and his employment with the respondent very much, and I accept that he did not deliberately set out to damage that. He was seriously misguided in his actions, but his intentions were good – he wanted to help B out during what was a difficult time.

160. Even the respondent accepted that there was no inappropriate relationship between the claimant and B, and there was no evidence to suggest that the claimant deliberately set out to breach the GSWP.

161. In the circumstances his misconduct was not sufficiently serious to amount to a repudiatory breach of contract, applying normal principles of contract law. Whilst I find that the claimant did breach paragraphs 1.4 and 16.1 of his contract, because he did not comply with all of the respondent's rules and regulations, and did not maintain conduct of the highest standard, I find that the breaches were not fundamental. As a result the respondent was not entitled to dismiss the claimant without notice.

162. The claim for wrongful dismissal therefore succeeds. The claimant is entitled to notice of termination of his employment in accordance with the terms of his contract. The respondent did not pay him in lieu of notice and the claimant was not guilty of conduct so serious that the respondent was entitled to dismiss without notice.

163. The respondent breached the claimant's employment by failing to give him notice or pay him in lieu of notice.

Employment Judge Ayre

25 April 2023