EMPLOYMENT TRIBUNALS

Claimant: Teacher X
Respondent: Rainbow Education Multi Academy Trust

HELD AT: Liverpool (in person) **ON:** 3,4,5 July 2023, 5 September 2023 (in chambers) & 6 October 2023

BEFORE: Employment Judge Shotter

Members: Mr G Pennie
Mr R Alldritt

REPRESENTATION:

Claimant: Mr A Faux, barrister
Respondent: Ms T Ahari, Counsel

JUDGMENT having been sent to the parties on 18 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Preamble

1. In a claim form received on the 12 October 2021 following ACAS early conciliation between 7 to 19 September 2021, the claimant brings complaints of unfair dismissal, wrongful dismissal (notice pay) and sex discrimination under section 13 of the Equality Act 2010 ("the EqA"). The claimant has withdrawn his complaint of sex discrimination and this Tribunal has dealt with the unfair dismissal and wrongful dismissal complaints, all other complaints having fallen away during the course of this litigation.

2. An anonymisation and restricted reporting order was made on the 23 June 2023 and sent to the parties on the 30 June 2023. At the final hearing an anonymisation sheet was agreed between the parties by which the 5 female complainants alleging sexual harassment were referred as "A", "B," "C", "D" and "E."

In addition, witnesses were referenced by letter only, for example, F and N, whose signed witness statements were before the Tribunal on the basis that the name of the claimant could be discovered when linked to the witnesses, particularly F, the former head teacher. In total the lettering covers A to U in the sheet of names agreed in the revised anonymisation sheet plus "V".

3. Following the claimant's request for written reasons and the Tribunal sending to the parties a copy of the written reasons before promulgation, the Tribunal received a request from the claimant's witness "F" to amend paragraph 8 by deleting the reference to his name, which the Tribunal has done. Further, the Tribunal has been asked to delete all references to the name of the headteacher given the possible ramifications to F given the fact that he had been accused of sexual harassment and for this to become public knowledge could adversely affect his professional teaching career. The claimant has agreed to this course of action to which the respondent has not objected. Accordingly, in view of the possibility that the claimant's witness F(who has no interest in these proceedings apart from agreeing to give evidence at the final hearing) will suffer reputational damage as a result of giving evidence, it is in the interests of justice taking into account the principle of open justice set out in rule 50 of the Employment Tribunal of Procedure, the Presidential Guidance and the right to privacy under Article 8 of the European Convention on Human Rights given that harm will be done (by reporting) to the privacy rights of F so as to make it necessary to derogate from the principle of open justice. The harm of making the history of the sexual harassment allegations made against F could prejudice him in the future if he was associated with the allegations given there is no reference to them in the public domain other than in this judgment. On behalf of the claimant the point was made that naming the current headteacher within the judgement will enable anyone to identify the school and thereafter identify F as the former headteacher. That fear is both genuine and reasonable: a google search of the headteacher identifies the school and anyone who then chooses to review the previous OFSTED reports will establish that F was the headteacher.

4. The code given to the existing headteacher is "V" who did not give evidence at the final hearing.

Evidence

5. The Tribunal heard oral evidence from the claimant on his own behalf and from F who provided a witness statement dated 15 May 2023. He also relies on the statements of Q and N signed and dated 15 May and 16 April 2023 respectively, who were not called to give evidence. The claimant confirmed paragraph 4 of N's statement and paragraph 19 of Q's statement were relevant to the issues. The Tribunal noted that paragraph 4 of N's statement was largely undisputed, concluding the respondent had a "hugging culture", and it took the view that Q's allegations made against an individual female teacher of workplace sexual harassment could not be tested by cross-examination and no weight was given to it.

6. The claimant could not recall much when it came to the alleged sexual harassment, and the Tribunal was concerned that he may have been evasive at times, but not misleading, recognising that a number of the allegations had taken place many years ago and he had a medical issue (blood pressure) that may result

in problems recollecting what was said and done at the various hearings, for example, his surprise at being faced with questions on numerous allegations at the suspension meeting by Caroline Prosser, who he knew was an employment lawyer, following a capability challenge two days before by the headteacher.

7. F was found to be an honest and credible witness who gave straight-forward evidence supported in part by contemporary documentation. The Tribunal accepted F had relied on CCTV evidence when he investigated B''s allegation of sexual harassment made against the claimant in February 2018 before concluding the claimant could not have committed the act as alleged. F and the claimant are the only people at this hearing who has seen the relevant CCTV evidence and were directly involved in the investigation.

8. On behalf of the respondent the Tribunal heard from Caroline Prosser, the investigating officer, Nigel Court, dismissing officer and Andrea Shillinglaw, appeals officer. The Tribunal concluded on the evidence before it that Caroline Prosser's intention at the suspension meeting was to catch the claimant out, obtain an admission and gather information that could give rise to credibility issues during the investigation process making sure that F could not give evidence as to what transpired throughout the time when he was headmaster and his decision making process when it came to the first allegation that is before the Tribunal, namely A's complaint in February 2018 that the claimant had crawled over and placed his hand on lower part of her bottom, and B's allegation that in June 2019 the claimant pressed his erect penis into her back.

9. In written closing submissions Ms Ahari at paragraph 2 submitted Caroline Prosser "could not say if she knew the outcome of the TRA" [the Teaching Regulation Agency referred to as "TRA"] relating to F. The Tribunal revisited its notes taken of Caroline Prosser's oral evidence given in cross-examination and it was clear from that evidence Caroline Prosser had initially stated she was not sure when the result of the TRA hearing had come out and then confirmed she was aware of the outcome.

10. In direct contrast Caroline Prosser in her written statement dated 10 March 2023 (the TRA decision having come out in 2020) explained she did not speak with F because "he was himself dismissed as a result of discrimination and harassment and therefore was not a reliable witness." Caroline Prosser confirmed that the allegation for which F was dismissed "was found proved." The TRA outcome was exhibited in F's additional witness statement. Caroline Prosser made no mention of the fact that the initial findings had in part been overturned on appeal by Nigel Court, and the TRA subsequently found in F's favour. Reference was made in the February 2020 TRA decision to F having initially accepting an allegation put to him at the disciplinary hearing before retracting his acceptance on the basis that after investigating the metadata he could not have committed the act, and this was accepted by the TRA and the charge was found not to be proven. Caroline Prosser made no reference to the appeal outcome or the TRA's findings including the inference that someone within the respondent organisation had tampered with metadata in order to get F dismissed on sexual harassment allegations. Caroline Prosser's lack of transparency undermined both her credibility and the position she

had adopted at investigation stage when refusing to question F on the earlier allegations raised against the claimant which he had found not proven.

11. Caroline Prosser described to the Tribunal her expertise in education and employment/HR matters. It is accepted between the parties that the respondent was aware of and valued her expertise in employment law and human resources. Given the fact that she was aware of the TRA findings her area of expertise would have been such that she knew F's position had changed and yet made no mention of this in her witness statement thus ensuring the Tribunal was in possession of all the relevant facts even if it went against the case the respondent was advancing. Caroline Posser's position that she did not ask questions of F because he was not a reliable witness in the knowledge that F had made the decision concerning the 2018 allegation soon after the alleged event as opposed to some 3 years after the alleged event when Caroline Prosser was investigating. For this reason Caroline Prosser's evidence brings into question whether the Tribunal was given the full picture when it came to the interviews involving the complainants A to E, particularly when there is no reference to the questions put to them as part of the investigation and no indication as to whether they were open, closed or leading questions aimed at building a case which would result to an inevitable dismissal. The Tribunal has dealt with this further below in its findings of facts.

12. Turning to the dismissing officer, Nigel Court, despite his protestations to the contrary, the Tribunal was surprised that given his lack of knowledge about the respondent's "hugging culture" he failed to investigate it. Nigel Court was told about the hugging culture, and he was the first witness to challenge the existence of that culture, Caroline Prosser accepted that there was "hugging culture" and yet Nigel Court after 14 years as a governor and attending meetings at the school "refuted that characterisation of the school." Even if the Tribunal accepts Nigel Court was correct in his personal understanding, it had no reason to find Nigel Court was being dishonest in any way. The Tribunal concluded on the balance of probabilities that during the disciplinary hearing Nigel Court ignored the possibility of there being a hugging culture, as did the appeals officer Andrea Shillinglaw, despite Caroline Prosser's knowledge and the written evidence brought to the appeal by the claimant that there was.

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<u>Agreed issues.</u>

13. The issues were agreed as follows:

1. What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s.98(2) of the Employment Rights Act 1996.

2. Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstance?

3. Was the decision to dismissal a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with those facts?

4. Did the Respondent adopt a fair procedure? The Claimant challenges fairness of the procedure in the following respects:

    a. The investigation was not fair, independent or thorough:

    b. The disciplinary hearing was not conducted fairly;

    c. There was a preordained outcome;

    d. The appeal process did not cure, and could not cure, the unfairness of the dismissal;

    e. Mr Faux confirmed the grievance procedure was not in question and did not go to the issue of unfairness.

14. The parties agreed that if the claimant succeeded in his claim of unfair dismissal the remedy hearing would be adjourned to another date. If relevant, at that hearing the issues will include those normally considered at liability stage after the TRA hearing which is due to take place, namely, if it did not adopt a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when? If the dismissal was unfair did the Claimant contribute to the dismissal by culpable conduct? It was agreed that the Tribunal would not make findings at this stage as to whether the claimant had committed an alleged act of gross misconduct which entitled the respondent to summarily dismiss and/or contributed towards his dismissal.

15. The Tribunal was referred to an agreed bundle of documents consisting of 343 pages together with additional documents marked “C1” and “R1” and witness statements. Having considered the oral and written evidence and written and oral submissions presented by the parties. The Tribunal does not intend to repeat all of the oral submissions, it has attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts.

Facts

16. The respondent is a primary school and one of a number of schools in the Rainbow Academy Trust. It transferred into the Trust in September 2021. Caroline Prosser was and remained the chair of the governing body. F was the former headteacher dismissed on 2 November 2018 for sexual harassment and sending inappropriate messages to a staff member. In February 2020 the TRA found F who produced evidence relating to a log of meta-data, concluded there was no evidence F had used the language alleged and the three allegations of sexual harassment brought against him unproven. F gave evidence that the WhatsApp messages relied on to dismiss him had been falsified by someone in the respondent and this was accepted by the TRA, with the conclusion that F has now successfully re-entered the teaching profession as a headteacher

17. The Tribunal concluded that the TRA outcome was known to Caroline Prosser before the disciplinary investigation against the claimant, and this was relevant to her investigations, not least, the February 2018 complaint made by A.

18. Nigel Court, the dismissing officer, had been in the position of a parent governor since 2006, and trustee and chair of the trust audit committee since September 2021 to July 2022.

19. Andrea Shillinglaw was vice chair of the board of trustees from September 2020, and she chaired the Standards and Curriculum Committee.

20. V was the head teacher appointed in January 2020 and she has remained in this position to date.

21. The claimant has worked for the respondent for 20 years, and spent his entire teaching career in the school. The claimant held a number of senior roles, including acting deputy headteacher from September 2018, a position in which he remained until termination of employment.

22. Up until 2018 the claimant had a clean employment record and there was no suggestion of sexual harassment or formal conduct issues. His employment commenced in September 2000. In February 2018 a complaint was made via a third party that the claimant had commented to complainant A about her footwear/appearance and F dealt with it informally, advising the claimant to keep away from complainant A.

<u>The allegations</u>

<u>In February 2018 complainant A alleged X had crawled over and placed his hand on lower part of bottom.</u>

23. The allegation was investigated by F former headteacher and during the investigation he accessed HR advice and legal advice from the solicitors practice in which Caroline Prosser was and remains a partner. The solicitors practice was on a retainer and Caroline Prosser confirmed in oral evidence that she had asked the solicitors who dealt with the respondent in 2018 onwards whether they had advised F former headteacher and the response was that there was no paper trail and nobody could recall advising him. The Tribunal considered whether this factor, if correct, undermined F's evidence and concluded that it did not given the passage of time and the fact that the solicitors practice, a large nationwide firm, would not doubt have dealt with numerous matters on a retainer over the years and there is no reason why anyone would recall advising F back in February 2018. It is also notable that with the agreement of complainant A the matter was informally dealt with, F having viewed the CCTV evidence which showed the claimant could not have acted as alleged and until the re-investigation carried out by Caroline Prosser complainant A remained silent on this issue.

24. The respondent does not dispute paragraphs 24 and 25 of F's witness statement and the Tribunal finds that the account given to Caroline Prosser by complainant A in 2021 was different to the account given to F 4 years earlier in 2018. Had Caroline Prosser interviewed F as part of her investigation she would have discovered these differences and the outcome may have been completely different

at disciplinary stage, as an allegation raised years before a second attempt at investigating it may not have reached a disciplinary hearing.

25. The CCTV footage showed teacher X walking past complainant A who was speaking to a parent. Teacher X was in full view the whole time, it did not show him on his hands and knees and his hands could be seen. F took the view that he could not have committed the offence as alleged. In order to do so teacher X would have to dip below the view of the CCTV camera and would not have been visible during this time. The evidence of F was critical to Caroline Prosser's investigation for a number of reasons, not least it brought into question why an alleged act of sexual harassment in 2018 was being reinvestigated in 2021 when the key CCTV evidence was no longer available, overturning F's investigation and outcome which was that the incident as newly alleged by A could not have taken place. F confirmed in evidence that teacher X was visible at all times and complainant A had jumped after teacher X had waked past her oblivious to her response as she was talking to a parent at the time.

26. Secondly, F confirmed in his capacity as the headteacher until the 2 November 2018 when he was dismissed for sexual harassment, that the staff at the school routinely hugged each other, Teacher X being both an instigator and recipient and there was a culture of physically touching. This was a key issue not investigated by Caroline Prosser, who was aware of the existence of a hugging culture, and there were other references by staff to the culture of touching and hugging.

27. On the 23 April 2019 G and another male teacher met with the claimant making him aware of an informal complaint by an anonymous staff member "about his behaviour…unhappy in the way teacher X hugged her and that **this at times** was unnecessary. She was also unhappy about the way he invaded her personal space" [the Tribunal's emphasis].

28. The claimant was sent a copy of the anti-harassment policy and instructed by F that "given the difficulties in knowing whether physical contact is wanted or not, that to protect himself,[teacher X] should not initiate physical contact with anyone at work." By the 23 April 2019 the claimant, who had taken part in equal opportunities training, was aware that a female teacher referred to in these proceedings as G had complained about him hugging her and that he should not initiate physical contact with "anyone" at work. He understood this to mean that he should not hug the teacher in question but continued in his practice of hugging teachers who were long-standing friends and had not complained about this behaviour. It is notable that no employee complained after this date that the claimant had initiated hugging contact, however, as recorded below a number of other complaints followed including the claimant massaging B at B's request in June 2019. No person raised any allegations or complaints against the claimant from the 23 April 2019 about hugging until an unknown date in March 2021, a period of 2 years and so the Tribunal found. The complaint raised by G is described within this litigation as having taken place in April 2019 as follows: "met with X in April 2019 regarding an **informal complaint** of hugging" [the Tribunal's emphasis].

29. V, who had taken over as headteacher when F was summarily dismissed, was unhappy with the claimant's performance. In March 2021 a number of teachers

discussed the claimant which result in complaints of sexual harassment being made by the deputy head who reported them to V.

30. The claimant was sent a letter dated 17 March 2021 from V criticising the claimant's performance as assistant headteacher, offering weekly support with the threat of an informal capability procedure.

31. On the same day V contacted Caroline Prosser on 17 March 2021 and verbally asked her to conduct an investigation following a report by the deputy head AD regarding past allegations of sexual harassment described as "serious concerns" in an email sent on 18 and 19 May 2021 and referencing the "penis in the knee thing."

32. The claimant was suspended on the 19 March 2021 facing a total of nine allegations including "deliberately walking around the school with your flies undone despite being told" and "invading personal space and/or sitting inappropriately close to female members of staff…" V made reference to F former headteacher in the following terms; "you were spoken to…following the sexual assault on [A and G] following the "hugging incident. **Which is evidence that this is a conscious pattern of behaviour you are engaging in.**" [the Tribunal's emphasis]. It is clear from the 19 March 2021 letter that V had made up her mind the claimant was guilty of misconduct for allegations going back 3 years prior when F, who was the investigating headteacher at the time, had found in 2018 the claimant not guilty of the first alleged act of harassment. The suspension letter is a strong indicator of the bias in which the subsequent investigation took place and so the Tribunal found.

33. In the suspension letter the claimant was informed that he could not make contact with employees and trustees without the approval of V, and "not…discuss your suspension other than with your immediate family, your union representative or any professional advisor." The claimant was not informed that were he to do so he would be facing disciplinary sanctions, and this is what happened when the claimant approached F. In short, the claimant was prevented from preparing his defence without V approving how he should go about this in advance. Given Caroline Prosser's refusal to speak with F at the claimant's request, this had implications on the fairness of the investigation as F was a key witness who was unable to give evidence on behalf of the claimant at investigation stage, disciplinary hearing and the appeal hearing. .

34. On the 7 May 2021 the claimant raised a grievance relying on 5 grounds. Caroline Prosser investigated and dealt with the first ground of appeal (described by the claimant as a vendetta issue concerning V) which was not upheld as recorded below. The claimant believed V was building a case against him with the objective of engineering a dismissal on the grounds of misconduct if not capability. This allegation was never investigated.

<u>Investigation by Caroline Prosser and 20 May 2021 Report ("the Report").</u>

35. Caroline Prosser was asked to take on the duties of an investigating officer by V and confirmed to the Tribunal that it was "due to my experience in investigations including sexual harassment, I was asked to be the investigating officer."

36. In Caroline Prosser's report two additional allegations were raised; (1) that following the meeting 19 March 2021 [teacher X] breached confidentiality by informing persons other than those specifically permitted on his suspension letter, and (2) that on 3 May 2021 teacher X called…a witness to the investigation. "

37. Given the claimant held the position of deputy headteacher the Disciplinary Policy provided the investigating manager was to be the headteacher, the chair of trustees or a non-staff trustee nominated by the chair of trustee was to be the disciplinary manager and appeal manager trustee appeal panel appointed by the chair of trustees. Within the respondent's Disciplinary Procedure a table set out the normal course of action to be carried out during the disciplinary process, which "may be subject to change depending on the circumstances of the individual case." The written internal disciplinary procedure was not followed because of Caroline Prosser's experience in investigating, her expertise as a solicitor "with specialism in education and a niche in investigations including those involving harassment" and the likelihood that the claimant would end up at TRA and the allegations "could have DBS issues". The respondent also deviated from the table at appeal stage as this was conducted by one person and not a full panel for no good reason.

38. The allegations totalled eleven including the two additional allegation raised within the body of the Report. It referred to teacher X raising allegations of conflicts of interest in Caroline Prosser investigating given she was a partner in the firm that represented the school, which was not accepted by Caroline Prosser or V. Reference was also made to the claimant's allegation that V had approached people to build a case against the claimant with a view to him being removed from the school which was also not investigated.

39. The following findings were made and confirmed in the report;

<u>In February 2018 complainant A alleged X had crawled over and placed his hand on lower part of bottom.</u>

40. Turning to the individual allegations, Caroline Prosser referred to minutes of a meeting with complainant A on 19 April 2021, approximately 3 years after the alleged incident. Complainant A described how she was speaking to a parent at the counter and the claimant "got down on his hands and knees, crawled over and cupped her undercarriage in a slow moving motion at which point…she said she shot up…[F] said he had CCTV footage and he could see that [teacher X] was on the floor at the door and then on his hands and knees and he could see that [A] bolted up…[A] agreed to have it dealt with informally…" There was no reference to any other allegations of harassment, and complainant A confirmed HR was involved in the original investigation. This was corroborated by F during this liability hearing and the Tribunal found that both HR and solicitors were involved in advising F in 2018, despite Caroline Prosser's best endeavours to introduce hearsay evidence from her firm to the effect that solicitors/HR professionals did not support F at the time.

41. Caroline Prosser set out Teacher X's response that "[F] had looked at the CCTV footage and investigated and the allegation was unsubstantiated. [Complainant A] did not want to take it any further."

42. There are two different versions of the event, and the only person who could cast light on what had been found 3 years previously was F given there were no notes of investigation and outcome, and the CCTV evidence had not been retained. Caroline Prosser explained that she did not question F due to her belief that he would be biased given F had been dismissed by the respondent. Caroline Prosser attempted to shore up the bias allegation against F, building up a picture that justified a refusal to interview him, and referenced F as being the likely destroyer of the email and CCTV evidence, suggesting he was covering up the offence. There was no evidence to this effect, the allegation took place 3 years previously, HR and solicitors were involved and a more independent investigator would not have referenced F as deliberately destroying evidence, a serious allegation in the context of sexual harassment allegations.

43. Caroline Prosser found that the February 2018 allegation had taken place. Caroline Prosser concluded the claimant was guilty and expressed this in the report in no uncertain terms. Such a conclusion should only have been reached by the dismissing officer after he explored all the evidence. There was a failure to investigate reasonably, fairly and equitably by an experienced lawyer with a specialism in the field, which the disciplinary officer did not have. In effect, the hands of Nigel Court were tied by the report. He failed to step back from the investigation report and look at the evidence objectively, sufficiently satisfied that the expert word of Caroline Prosser should be relied on. Nigel Court did not consider calling any witnesses as he felt the investigation report presented the facts. As a consequence of these deficiencies the dismissal was procedurally and substantively unfair and a reasonable employer would have treated the investigation and the investigation report in a more even-handed and open way, looking for evidence that could point to the claimant's innocence rather than the reverse.

<u>Made a staff member uncomfortable because you hugged her on 23 April 2019.</u>

44. An anonymous member of HR staff complaint about an alleged incident that had taken place approximately 2 years previously. There was no record of the interview with HR and no record of the complaint made by G in April 2019, which is unsurprising given the respondent described it as an "informal complaint of hugging."

45. In the meeting with Caroline Prosser's and G on the 19 April 2021, 12 months after the allegation was raised, G confirmed the claimant "hugged her **and it had not upset her**…[G] said that she had not seen him hugging any other members of staff after the advice she had given" [the Tribunal's evidence].

46. Caroline Prosser made a finding of fact that the claimant had received training from "my firm" in equality and diversity in May 2019 and "it can be concluded that at the latest [teacher X] had full knowledge of what sexual harassment was and that it included banter and unwanted physical contact." The clear implication was that the incident amounted to sexual harassment and it had taken place against a background of hugging. In her meeting with Caroline Prosser G did not complaint that she had been sexually harassed, and reported that his hugging her had not upset her and yet it was included in the list of allegations on the basis that Caroline

Prosser believed (without witnessing the alleged incident or being involved in the informal discussion) that it was sexual harassment. A investigating officer acting within the bands of reasonable responses would not have drawn this conclusion.

47. The Tribunal found resurrecting two historical allegations that had been dealt with by the headmaster F years after the event did not fall within the band of reasonable responses in this particular case given the loss of key evidence through the passage of time, and it was indicative of a respondent seeking to rely on as many allegations as possible to build up a case of multiple allegations and ensure the claimant's dismissal, the inference being if the claimant was guilty of crawling to A and placing his hand on her bottom, and hugging G against her will then it must follow that he was guilty of the other alleged instances of sexual harassment involving pressing his erect penis into B's back and his groin against C's knee.

<u>In June 2019 complainant B alleged X had pressed his erect penis into her back.</u>

48. Complainant B alleged on the 19 April 2021, approximately 2-years after the event, that she was in a room with possibly 1 or 3 other people as she could not say for sure, when the claimant put his hands om her shoulders standing behind her and she said "**Oh, I thought I was getting a massage then**!...she told [teacher X] **she liked her massage harder than that**…" [the Tribunal's emphasis]. After the massage B alleged the claimant with his hands "firmly on her shoulders, she felt something press in between her shoulders…**her thought was that it was [teacher X's] penis that had pressed between her shoulders and that it was deliberate"** [the Tribunal's emphasis]. Complainant B went on to describe why she did not report it at the time referring to not wanting to get teacher X into trouble, and the fact he was her daughter's teacher. She explained how she came to report the incident some 2 years on after discussions with other members of staff who were complaining about the claimant, when she came to the conclusion that it was a safeguarding issue. Complainant B confirmed to Caroline Prosser that the claimant "has never done anything of the sort since." There was no evidence before the Tribunal to the effect that Caroline Prosser had tested or questioned B's evidence, for example, what made her think it was the claimant's erect penis and whether she could have been mistaken at the time of the alleged incident and then later with the passage of time after discussions taking place with her colleagues about the claimant.

49. The claimant denied the allegation, maintaining complainant B "continued to send me messages with kisses on them. She sends me birthday cards and birthday wishes with hearts on them." This was not investigated and nor was it raised with B when it should have been.

50. It is notable that in the suspension letter of 19 March 2021 the allegation from complainant A was pressing an erect penis "in the small of her back" in contrast to Complainant B's evidence which was the claimant's penis was "pressed between her shoulders." The claimant requested the male employee present during the alleged incident should be questioned as part of the investigation, which was refused at investigation and disciplinary stage. The Tribunal found that that failing to discuss the alleged incident with the male employee J who was present and could have commented on the situation, including whether the claimant had moved away from

Complainant B embarrassed standing behind a box the implication being to hide his erect penis as alleged, was a failure on the part of the investigation taken as a whole. Given the seriousness of the allegation every possible opportunity to get clarification should have been exhausted and it was not. Neither Caroline Prosser, Nigel Court or Andrea Shillinglaw questioned the validity of B's evidence despite the contradictions, passage of time and did not subject the evidence before them with critical scrutiny and whether her recollection of events which occurred several years ago was reliable.

51. At the suspension meeting attended by Caroline Prosser and V on the 19 March 2019, V instructed the claimant that if there was a need to speak to other employees and "if you consider that there are any relevant witnesses I should speak to, or any documents or other evidence that I should consider, please tell me about them at the investigation meeting." At the investigation meeting reference was made to F and the minutes record the claimant's trade union representative stating "it was one sided not approaching [F] in this investigation" to which Caroline Prosser responded "there are other witnesses and that it would not be appropriate to contact [F]. The Tribunal was surprised at V's comment given Caroline Prosser's evidence that it was she and not the headteacher who was in charge of the investigation evidenced by her refusal to approach F.

52. In relation to the June 2019 alleged incident reference was made to a male employee J. The claimant accepted he had given complainant B a massage, which she indisputably consented to, but denied he had placed his penis between or on her shoulders. In her findings of fact Caroline Prosser confirmed the claimant had "pressed his erect penis" into B 's back without consent whilst giving her a shoulder massage. This was within 2 months of being told that he must not make physical contact with other staff. " Caroline Prosser came to this view without carrying out a further investigation into whether complainant B had sent him notes and cards with kisses and hearts since the alleged incident, she failed to interview the male employee J allegedly present at the time (or indeed whether there were a further 2 employees present at the time) satisfied that the claimant was guilty of sexual harassment in respect of B. Nigel Court and Andrea Shillinglaw accepted Caroline Prosser's conclusions without question.

<u>In March 2020 complainant C alleged X had pushed his groin area against her knee.</u>

53. Caroline Prosser spoke with complainant C who described an event that had allegedly taken place on an unknown prior to March 2020 when the claimant "**put his groin area against her knees**, **and it could have happened on more than one occasion**…it was too close for comfort and she did not say anything at the time because she felt she was fussing" [the Tribunal's emphasis.] It is notable that there was no investigation into C's allegation that "it could have happened on more than one occasion," and why C described the incident as she had taking into account the fallibility of memory especially after the passage of time when the allegations was raised for the first time after discussions with colleagues about the claimant.

54. At the investigation meeting with the claimant on the 23 April 2021 C described the alleged incident as follows; the claimant was alleged to have "put his penis on the knee" which then changed to "placed his penis between complainant

C's knees and that it's happened on a couple of occasions." When and what transpired at the "coupled of occasions was unmentioned and the Tribunal can only infer that this was not investigated. Caroline Prosser demonstrated the incident using the notetaker, despite there being no evidence that complaint C acted out the incident before Caroline Prosser showing how the claimant had stood between C's legs and pressed his groin area into her knees "on the inside." There was no record of a demonstration from C, and nor did Caroline Prosser explore with C and the claimant how it could have happened.

55. On the 4 May 2021 at 16.32 complainant C wrote to Caroline Prosser "I've amended the statement slightly – **I hope this is how you meant it to be done!**" and Caroline Prosser responded "**just how I meant it to be done. I have accepted all your amendments and attach a clean copy for your records**." At 17.06 complainant C wrote "I wasn't sure whether I should have amended this or not, but in response to your question about how many times the knee incident occurred, **thinking about it I'm pretty sure it was only once**…" The notes of the investigation meeting was not amended to reflect C's change of evidence that the claimant put his groin area against her knees on one occasion when it should have been. The Tribunal concluded from the exchange between C and Caroline Prosser that there had been a discussion about her evidence and what she should put in her statement with Caroline Prosser taking an active part in advising her in order to set in place the evidence pointing to the claimant's guilt.

56. Caroline Prosser took the view that complainant C changing her story did not affect her credibility because she had been given no notice of the investigation meeting and recalled a fortnight later than in fact there only once incident. This was an assessment that should have been made by the dismissing officer when considering the effect of the changes in the evidence, and so the Tribunal finds. It brought into question the accuracy of C's recollection when on the one hand she described the claimant as pressing his groin into her knee more than once, then on the one occasion only, and an employer acting reasonably would have questioned this exploring objectively how the claimant could have physically pressed his groin either into her knee or on the inside of her knee, where he was standing and she was sitting for this to happen taking into account their respective heights and so on. The Tribunal took the view that as the allegation was so serious and could bring the claimant's teaching career to end, it was not unreasonable for the respondent to have questioned the evidence objectively.

57. Caroline Prosser also linked this incident with the allegation made by complainant B making a finding of fact that the claimant had pressed his erect penis into B's back on the basis that if he was guilty of one allegation then he must be guilty of the other. Caroline Prosser came to this view without carrying out a further investigation into whether complainant C agreed with the logistics of whether it was possible for the claimant to line his groin with her legs, the furniture she was sitting on including whether complainant C agreed with Caroline Prosser's theory that the claimant could have bent his knees, a conclusion reached by Caroline Prosser without any investigation whatsoever.

In February/March 2021 complainant D alleged X had lifted her on and off the table.

58. Complainant D was annoyed that the incident had been reported as there was no issue for her, it was normal behaviour of the claimant to help her down, and he had "put his arm around her shoulder and had patted her on the back on different occasions in a supportive manner." The complaint together with the allegation that the claimant had deliberately walked around the school with his flies undone (for which there was no evidence that it was deliberate) were not relied on as a reason for dismissal. However, they were put forward by Caroline Prosser as alleged acts of sexual harassment when on any reading they were not, Caroline Prosser was well aware of the statutory definition of sexual harassment and what D was describing did not come anywhere near. The Tribunal was satisfied that D's allegation was included to bolster up the evidence against the claimant in order to make it more likely than not that he committed the other allegations of sexual harassment in the same way that Caroline Prosser linked the complaints made by B and C to strengthen the case against the claimant.

On more than one occasion from May 2019 complainant E alleged X had made number of inappropriate and unwanted comments about her appearance.

59. In September 2020 complainant E referred to a historical allegation that took place in May 2019 when the claimant made complementary comments about her appearance, in September 2020 complementing about her dress on a dress down Friday, describing it as "stunning, you are a jeans kind of girl" and in October 2020 alleging the claimant had said to her "you sure know how to add a touch of glamour." At no stage did complainant E say she had asked the claimant to stop complementing her, and nor did she raise any complaint until the events leading to the claimant's dismissal. There were no complaints about hugging.

60. At the investigation meeting the claimant made reference to his female colleague M who accompanied him to investigation interviews verifying that he complemented people and not just women, trying to raise their self-esteem. The claimant explained he would not intentionally use the words "stunning" and "lovely" to make complainant E feel uncomfortable. He had tried to make complainant E feel better when she was "down" after her Father's car crash, and M confirmed that this was the case and she was party to "many conversations….Teacher X would say you look lovely today…" Companion M confirmed the claimant complemented a number of people, including male employees. This was not investigated.

61. In her findings of fact Caroline Prosser found the claimant had made comments about complainant E's appearance, they were unsolicited and made her feel uncomfortable. Caroline Prosser reached this view without a full investigation. It is notable that one of the names she was given was the male employee J who Caroline Prosser had failed to interview concerning the earlier June 2019 allegation relating to the penis in the back of B. The Tribunal found that it would have been a straightforward matter for Caroline Prosser to have questioned the employees named by teacher X including the male employee J to ascertain whether it was his habit to complement individuals whatever their sex in order to make them feel good and not as an act of sexual harassment. Further, the findings of fact do not mention whether complainant E was asked whether she told the claimant that his comments

about her appearance were unwelcome and this appears not to have been investigated. If the claimant was in the habit of complementing people to make them feel good, he would not know that complainant E was uncomfortable and considered herself to be sexually harassed unless he was told. In his written response the claimant made reference to people within the respondent school who said nice things to each other, and this was also a further area of investigation that was ignored.

62. It was submitted on behalf of the respondent that the claimant failed to apologise for his behaviour and this points to the claimant's insensitivity when it came to other people's feelings, so convinced was he that giving complements to women trumped their experience. Ms Ahari argued that at the very least the claimant could have apologised and none were forthcoming. The Tribunal has taken this into account against the general background of this case and the claimant's apology referenced below, which Ms T Ahari omitted to mention.

<u>Invading personal space and/or sitting inappropriately close with female members of staff.</u>

63. In relating to this allegation Caroline Prosser used the evidence of complainant D who had no issue with the claimant. D alleged the claimant lifted her on and off a table. In the respondent's description of this allegation D alleged in February/March 2021, the claimant lifted the "victim" on and off the table. The description of D as a victim was a misnomer given the undisputed evidence that D had no issue with this. The terminology reflects the general attitude towards the claimant, who in the view of Caroline Prosser and others, was a serial sexual harasser of women, his "victims" who had suffered over a number of years. The more serious complaints were historical, and it appears that Caroline Prosser did not investigate and test the recollections of the complainants, nor did she explore if A had consented to the behaviour and the legal definition of harassment could not be met, and whether it could have been something other than the claimant's erect penis on A's back, for example, car keys in his pocket, when he was massaging A having been asked by A to do so. There was no acknowledgment of the fallibility of memory over time, especially when people get together and discuss and compare their experiences years after the event.

64. Caroline Prosser's recommendation was that there was a case to answer in relation to 7 allegations, including an alleged breach of confidentiality when the claimant attempted to obtain evidence by which to defend himself, and no case to answer in connection with the 23 April 2019 hugging allegation, engaged in unwanted touching by D in relation to lifting her on and off the table and deliberately walking around the school with flies undone.

65. Finally, in relation to the claimant's grievance that "…the current and extremely serious allegations…were not raised by individuals, but instead that, following her hearing of the incident where I helped D down from the table, [V] actively went seeking an approaching people to make statements to build a case against me….as an attempt to remove me from the school." Caroline Prosser found "in line with my findings above, and the evidence contained in this report, this point of the grievance is not upheld."

66. On 24 May at 15.34 the claimant emailed V requesting an adjournment "given the depth, volume and detail of the document I received on Friday, and also that some of the allegations appear to have been amended, it would not seem reasonable for me to review the investigation documents and prepare for the meeting in such a short time. You are also aware of me being covered by a doctor's note because of the severe impact this is having on my health. I therefore request a postponement of this meeting until after half term."

67. Despite the fact V was not conducting the disciplinary hearing she chose to refuse the claimant's request for a postponement stating "the allegations have not changed since the ones put to you on the meeting 23 April 2021 and will have seven days to read…Your health situation will not improve whilst these matters remain outstanding…the meeting will take place on Friday and should you choose not to attend, then it will be heard in your absence." V did not refer the matter to Nigel Court the disciplinary officer, and nor did she task occupational health with establishing whether the claimant was well enough to attend a disciplinary or not. There was no evidence before her that the claimant's health would not improve. V was also incorrect in her statement that the allegations had not changed, they had as Caroline Prosser had added the additional allegations of the claimant breaching the suspension requirement of confidentiality. The Tribunal finds it surprising that V was actively involved in the disciplinary process, she appeared to be aware of the contents of the investigation report when she was neither the investigating officer or the disciplinary officer. On receipt of the email the claimant's request would have been forwarded to the disciplinary officer by a reasonable employer acting within the band of reasonable responses, and the disciplinary officer would have considered adjourning the hearing on the grounds of ill health concluding that it should be adjourned and occupational health involved..

68. The claimant had submitted sick notes from 12 April 2021 to 31 May 2021 recording him as unfit for work citing stress at work.

69. If V had any doubt as to the seriousness of the claimant's health, by the time she received the claimant's email in response sent at 10.35 the position was clear; "I was suspended on 19 March, following which it has taken 9 weeks to conclude the investigation…you have given me 7 days to prepare for this meeting…and sent me documents running to 177 pages…I am currently deemed unfit for work…because of extreme stress…I have an appointment with the Cardiology Department of Victoria Central…I therefore against request a postponement."

70. V responded 20 minutes later stating "the meeting will go ahead with or without you. I'm sure coming to some sort of resolution will help you with your health."

71. The final email in the chain was sent by the claimant the same day 25 May 2021at 13.49 "I feel that you are putting me under undue pressure…I have explained the extreme stress this situation has brought about…and how fragile my mental and physical health both are…" The claimant indicated he would be attending not having had the opportunity to prepare properly. A reasonable employer would have taken medical advice at the very least and agreed a postponement. The fact is that this did

not happen because V wanted a decision before half term with the financial implications that brings, prioritising financial concerns over fairness, in other words the decision to dismiss had already been made and V did not want to give the claimant any more contractual notice than necessary.

Disciplinary hearing 28 May 2021

72. The disciplinary hearing before Nigel Court took place on the 28 May 2021. Caroline Prosser was at that hearing and the claimant at the outset raised his concern with her attendance, his belief that there was a conflict of interest as the firm in which she was a partner advised the respondent and his grievance was that there "is a premeditated attempt to remove me by V."

73. The claimant also raised the issue of his health as follows" I was given a 177 page bundle in a language that is not everyday language on Friday 21 May and a letter inviting me to a hearing today. I asked for it to be rescheduled twice due to my poor mental health which can be supported by sick notes and heart problems that have been brought on by the stress. My requests for the meeting to be postponed were rejected twice and I was informed that the meeting would go ahead in my absence. I felt I was left with no choice but to come here today but I couldn't prepare fully due to the amount of information given to me…I have only ever tried to show kindness and compassion to my colleagues and the vast majority of the school would say that. My words and actions have been taken out of true context…**I am sorry if this is how they have been taken but that was never how it was intended"** [the Tribunal's emphasis].

74. Caroline Prosser responded that 7 days in advance of the meeting was enough time, her firm did advise the respondent but did not give employment advice and "there was no conflict of interest referring to the Solicitors Regulation Authority…I have been careful to understand how the allegations have come out…"

75. In response to the claimant referred to his grievance; "I have read your response and I was very surprised that you didn't ask me how I would substantiate it…I know for a fact that people outside of the meeting have approached [named teacher] a member of the SLT looking for evidence of my conduct and behaviour" Caroline Prosser said "why was this not mentioned earlier." The claimant indicated that he wanted his grievance "dealt with separately…linked to my concern…"

76. It is not disputed by the respondent that the claimant sought an adjournment on two occasions which were rejected, despite his health concerns and the lack of time in which he had to prepare. Nigel Court did not attempt to explore the claimant's health issues and referred it to Caroline Prosser, who conducted the disciplinary meeting and was asked at one point by Nigel Court to "please proceed". The Tribunal found it most unusual for an investigating officer to conduct a disciplinary hearing in this manner, taking control and overstepping the mark, for example, when the claimant referred to the passage of time and its effect on memory. The claimant pointed out "if that B thought it was my penis digging in her. I always carry a lot of things in my pockets. Jill nags me about having too much stuff in my pocket, it could have been something else. If I did give her a massage it comes across that this was encouraged. It sounds like I took my hand off her shoulder and didn't intend to give

her a massage. How could I interpret that as being unwanted." The claimant put forward an alternative plausible explanation that was not given credence by Nigel Court, and in response Caroline Prosser warned the claimant and his companion that they needed to be **"mindful that you are not victim blaming…I must caution you against victim blaming.** It is Nigel's decision whether he accepts the findings of the investigation" [the Tribunal's emphasis]. The trade union representative M referred to B and a male employee J being in the room at the same time, and "she would not, not have said something. She is a strong person." A disciplinary officer acting reasonable would have appreciated that further investigation was needed, not least whether the male employee J who was mentioned could provide information relating to the allegation, whether it could have been something other than a erect penis in B's back, whether B afterwards sent the claimant love heart emoji's and the effect of B's evidence that she had invited him to massage her in the first place, referencing to preferring massages "much firmer than that." In short, an open minded objective exploration with the claimant and B into whether recollections could be relied on and alternative explanations pointing away from the claimant's guilt.

77. Caroline Prosser's explained she had not spoken to J "because he wouldn't have seen the act itself due to the position you were behind Cath's back." and the claimant complained that a judgment had been made "before you spoke to him. He was in the same room.." It is notable that the claimant made the following admission during the disciplinary hearing "I have admitted to the things I do, I am possibly a little too tactile and have been unwise following the training and I continued with the culture of hugging…" During this exchange it is clear that Caroline Prosser had taken over, effectively attempting to reinterview the claimant and conduct the disciplinary hearing by taking over from Nigel Court including accusing the claimant and his colleague of "victim blaming" when he attempted to defend the allegations, in effect threatening him and closing down his defence.

78. The claimant dealt with complainant D's allegations alleging D's "statement had changed. You said it happened twice. D said it happened on more than one occasion. Then this changed to once. You will have been instrumental in the emails she asked if what she sent you was correct suggests you asked her to change things." Caroline Prosser responded "that was in relation to track changes…**Be very careful saying things in respect of my independence and integrity without evidence"** [the Tribunal's emphasis]. The claimant was not happy believing he was being threatened by Caroline Prosser for a second time which he was and so the Tribunal found.

79. The claimant was concerned that Caroline Prosser was directing the statement D was to attest to, and putting pressure on the witnesses to make the statements they did by taking control of content. Nigel Court did not take this concern seriously, and without asking Caroline Prosser or exploring with D why she made the changes and whether the passage of time had adversely affected memory he responded "I read that Jane wanted to correct her original interview having thought of it and she wanted to ask if the format was correct."

80. The claimant also raised the issue as to whether the incident as described by D could physically have taken place due to disparity in height, and when asked whether it could have been accidental by Nigel Court his response was "logistically it

couldn't have happened" the claimant stating "maybe if I leant over. But they are saying things that didn't happened.". A reasonable disciplinary investigator would have explored the logistics and the changes made by D and so found the Tribunal on the balance of probabilities. A reasonable disciplinary officer had a responsibility to consider motives, logistics and the passage of time on recall and this did not happen.

81. With reference to the final allegation the claimant admitted "**I accept I may have said something to E making her feel uncomfortable, but I try to be kind**" and he accepted Nigel Court's suggestion that his perception of being kind "**could well be seen as being condescending to others…I have to accept that my hugs are prolonged.** I don't know what the right length of hug is and I have to accept if my hug had made someone uncomfortable and no one has ever said 'I don't want to be hugged…I hug both men and women…**I didn't hug anyone I didn't know, only those people who had reciprocated for years, my friends in the school**" [the Tribunal's emphasis]. Nigel Court's view at the time was that there was no hugging ethos in the school, and yet Caroline Prosser was aware there was a hugging ethos and said nothing about it. Caroline Prosser and Nigel Court ignored the context within which these allegations are asserted. This is an important point in relation to all of the allegations, and a reasonable disciplinary officer would have considered the allegations individually and cumulatively with an understanding of the school ethos and how teachers behaved at that school towards each other, for example, whether certain individuals were affectionate and tactile towards each other including massaging shoulders and hugging. To have an expectation that training would stop long-serving friends and teachers from hugging each other was unrealistic, given the lengthy long-term friendships and history of affectionate reciprocity. A reasonable disciplinary officer would realise that the school ethos would not negate improper behaviour or any type of harassment, if for example, if the hugging was inappropriate then it is right the employee should be held to account and challenged. It does mean that if an employee is in danger of losing their career and livelihood, the investigation should be comprehensive and as thorough as was possible especially against a background of historical allegations and gossip.

82. The claimant's dismissal was confirmed in a letter dated 9 June 2021, the effective date of termination.

83. The claimant appealed through his solicitors in a letter which ran to 10-pages that included criticisms of Caroline Prosser's investigation, maintaining she was not "fair and objective…controlled the investigation and called the witnesses she wanted rather than the investigation required" and the Tribunal agreed with this analysis. With reference to Nigel Court reference was made to his failure to challenge and test evidence, reinterview and re-investigate "where there is an uncertainty or gaps in their testimony…" The Tribunal agreed.

84. The appeal was carried out by Andrea Shillinglaw and not an appeal panel as required under the respondent's own procedure, on the 29 July 2021 with the outcome dated 30 August 2021 did not put right the procedural and substantive failures. Andrea Shillinglaw accepted the investigation report and disciplinary outcome without question.

Law

85. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

86. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

87. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

88. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: "If no reasonable employer would have dismissed him then the dismissal was fair. But is a reasonable employer might reasonably have dismissed him, then the dismissal was fair…in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view.

89. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

90. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed,

including whether the dismissal of an employee was reasonable in all the circumstances of the case.

91. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

Conclusion

92. It was agreed the Tribunal would not make any findings as to whether the alleged sexual harassment happened or not. It is not disputed that the claimant was dismissed for misconduct entailing allegations of sexual harassment.

93. The Tribunal must be careful not to substitute its own decision for that of the employer when it comes to the issue of whether a dismissal is fair or not. The Tribunal had this principle in mind throughout its deliberations. This has been a difficult case which on the face of it pointed to the claimant being fairly dismissed following six female teachers bringing complaints of sexual harassment. However, given the fact that the allegations were career ending it was vital and in the interests of justice to scrutinise the processes and procedures in great depth to discover how they had come about, including the delays in reporting, the effect of the delay on recollections and memory and whether the entire disciplinary process, taken as a whole, fell within the band of reasonable responses open to an objective employer: J Sainsbury v Hitt above.

94. With reference to the first issue, namely, can the respondent establish that the sole or principal reason for the dismissal was the claimant's conduct, a potentially fair one in accordance with sections 98(1) and (2) of the ERA, the Tribunal found that the sole reason was conduct.

95. With reference to the second issue, namely, did the respondent hold a genuine belief in the claimant's misconduct, the Tribunal found that it did. However that belief was not based on reasonable grounds and did not follow as reasonable an investigation as was warranted in the circumstance of this case, which is the claimant's teaching career ended after twenty years in the profession. The Tribunal found Nigel Court and Caroline Prosser, (who was also a decision maker according to her report) held a genuine belief but this was not based on a full and fair investigation. The disciplinary hearing was not conducted fairly. Caroline Prosser investigated with the pre-ordained outcome in mind and the conclusion reached was self-fulfilling in the full knowledge that this was career ending for the claimant. The appeal process did not cure the unfairness of the dismissal. It was always open to the appeal officer to re-investigate and cover the points raised by the claimant in his grounds of appeal and had Andrea Shillinglaw taken this step it may have resulted in a fairer process and outcome.

96. The refusal to adjourn the disciplinary hearing and give the claimant more time in view of the seriousness of the allegations, the new allegation and serious consequences to his teaching career if proven, gave rise to a procedurally and substantively unfairness. The respondent failed to follow the Guidance set out in the ACAS Code. The Tribunal accepts Ms Ahari, that under the ACAS Code the claimant was not entitled to cross-examine the complainants at a hearing given the serous nature of their complaints involving sexual harassment, however does not negate the responsibility of the investigating manager, the disciplinary manager and the appeal manager to test the allegations, which was not done in this case for the reasons set out by the Tribunal in its findings of fact.

97. Mr Faux confirmed the grievance procedure was not in question and did not go to the issue of unfairness. Objectively assessed, the Tribunal found it surprising that Caroline Prosser investigated and found grievance allegation 1 “in line with my findings above, and the evidence contained in this report, this point of the grievance is not upheld.” The grievance was then dealt with Nigel Court separately and this does go to the procedure adopted.

98. In conclusion, the Tribunal found Nigel Court and Andrea Shillinglaw adopted the report of Caroline Prosser unquestioningly because of her standing, experience and qualifications. Both took the view that Caroline Prosser (who described her conclusion as making a finding of facts within the report) had proven the seven allegations described as “found to be proven by Caroline Prosser.” Caroline Prosser determined the interpretation of the facts and drew conclusions from these, which should have been left to the dismissing officer. including alleged breaches of confidentiality following the meeting on the 19 March 2021, a new allegation included within in the investigation report. A reasonable employer would have adjourned the hearing, investigated the claimant’s medical condition and whether he was well enough to attend a disciplinary and appeal hearing, possibly through occupational health or claimant’s own GP, and allowed the claimant time to prepare his defence to the additional two allegations.

99. With reference to the issue, namely, was the decision to dismissal a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with those facts, the Tribunal found it was not. The Tribunal found the investigation was not fair, independent or thorough for the reasons already stated above, and the decision to dismiss did not fall within the bands of reasonable responses on the basis that the investigation was outside the band of reasonable responses and insufficient, balanced against career ending consequences, to enable Nigel Court to reach the decision he did.

100. In conclusion, the claim of direct sex discrimination is dismissed on withdrawal. The claimant was unfairly dismissed and his claim for unfair dismissal well-founded and adjourned to remedy hearing.

101. It was agreed that the parties would write to the Tribunal and agree a remedy hearing date. A schedule and counter-schedule of loss will be exchanged, evidence relating to mitigation if the respondent relies on a failure to mitigate will be dealt with in witness statements with the respondent sending to the claimant its evidence and after 14-days of the date it is sent, the claimant responding in writing. Both parties will also deal with the issues relating to contribution and wrongful dismissal in writing.

102. The parties will agree between themselves the date for these case management orders after the date for a remedy hearing has been agreed.

12.2.24

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Employment Judge Shotter

REASONS SENT TO THE PARTIES ON

27 February 2024

FOR THE SECRETARY OF THE TRIBUNALS