



EMPLOYMENT TRIBUNALS

Claimant: Mr P Prescott

Respondents: 1. The Governing Body of Brookdale Primary School
2. Wirral Borough Council

HELD AT: Liverpool **ON:** 16, 30 & 31 January
1 February 2017
& 10 February 2017
(in chambers)

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr P Youle-Grayling
Respondents: Mr P Jewell, solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant was not unfairly dismissed and his claim for unfair dismissal is not well founded and is dismissed.

REASONS

Preamble

1. By a claim form received 12 September 2016 (early conciliation certificate dated 14 August 2016) the claimant claimed unfair dismissal maintaining the investigation had not been conducted thoroughly or in line with ACAS guidance, other members of staff had admitted to gross misconduct and they were not suspended or dismissed, and adequate training and induction was not provided to him.

2. The respondent disputed the claimant's claims maintaining the claimant was dismissed for gross misconduct, a reasonable investigation had been conducted, a fair and reasonable procedure had been followed, there was sufficient evidence for it to reasonably form a view that the claimant had committed the alleged act of gross

misconduct, and the decision to dismiss fell within the band of reasonable responses, which was fair pursuant to section 98 of the Employment Rights Act 1996.

Evidence

3. On behalf of the claimant the Tribunal heard evidence from the claimant on his own behalf and it took into account a written statement dated 12 December 2016 and the documents referred to therein. The Tribunal also heard on behalf of the claimant evidence from Kirk Stuart John Ashcroft, a retired Police Officer, who prepared an investigation during the disciplinary process and produced a witness statement. The Tribunal has taken both witness statements into account. On behalf of the claimant it heard evidence from Graham Peter Wilson, an IT consultant and parent governor who sat as a member of the disciplinary committee, and it has taken into account his written statement, oral evidence and the documents referred to, including Appendix 1. The Tribunal also heard oral evidence from Dean Alec Stobbart, Deputy Head Teacher at the respondent until his resignation in December 2014, which was taken into account, and finally, the evidence of Sean Ian Williams, the current caretaker employed by the respondent who gave oral evidence and produced a written statement taken into account.

4. On behalf of the respondents the Tribunal heard from Tracy Baxter PhD, a governor of the respondent and investigating officer, and took into account her witness statement together with the documents referred to therein. It heard oral evidence from David Johnson PhD, governor of the respondent and Chair of the Staff Dismissal Committee who gave oral evidence and provided a witness statement which referred to a number of documents, also taken into account. Finally, the Tribunal heard from Emma Darley, governor of the respondent and Chair of the Staff Appeal committee who heard the appeal and it took into account her oral evidence, written witness statement and documents referred to.

5. The Tribunal considered the chronology prepared on behalf of the respondent, which was not an agreed chronology, and it took into account the additional documents produced by the parties throughout the hearing and duly marked C1-C3 and R1-R9.

6. Turning to credibility issues, the Tribunal found all of the witnesses to be credible with the exception of the claimant, who on one occasion gave less than satisfactory replies on cross-examination concerning whether or not he had made a false declaration. The cross-examination covered the guidance issued in Key Stage 2 tests setting out head teacher's responsibilities, and referred to maladministration, security and the head teacher's declaration form. Further details in relation to this guidance have been set out below in the findings of fact. The Key Stage 2 tests are important to the school, and the guidance clearly sets out how the school could be subject to an investigation of maladministration and the requirement for a head teacher to declare in a declaration form that the tests have been administered according to the published guidance or that issues have been raised with the Standards and Testing Agency, and it was clear the claimant had made a false declaration; it was not credible he did not know this at the relevant time given the written guidance. It was also not credible the claimant required training and an induction in order to understand the clear terms of the Guidance and his

responsibilities under it, given his position as headmaster and earlier experience in taking part in and carrying out Key Stage tests.

7. The claimant's evidence was that he had "overlooked" part of the guidance, which he had "scanned" through. He ticked the declaration confirming the guidance had been followed, when it had not, and it was later he realised an "oversight or omission" had had made. The claimant accepted he had signed the declaration when the guidance had not been followed. He had acknowledged this fact to Di Hollis and yet in a document dated 29 November 2015 sent by the claimant to the STA Maladministration Team on 24 November 2015 when providing information as requested, the claimant typed into a box entitled "additional information" that "STA guidance was followed at all times". The claimant's attempts during cross examination at explaining why he had provided an incorrect declaration a second time were less than credible and on occasion nonsensical. He attempted to blame Di Hollis for not pulling him up on his discrepancy alleging she was there to guide him and had not done a good job. When asked to confirm on cross-examination whether he had in fact made a false declaration, the claimant's response was "on reflection now". The Tribunal did not accept as credible the claimant's explanation or his attempt to deflect criticism and blame that it was only on reflection at the liability hearing he accepted the false declaration had been made. The claimant's false declarations are a key consideration in this case, and were taken into account by the respondent during the disciplinary process (as they were entitled to do) and the fact the claimant made a false declaration on two occasions in relation to a matter that resulted in part in his dismissal only served to undermine his credibility in relation to other evidence given.

Issues

8. The issues in this case are straightforward, although the facts are not so, and are as follows –

- (1) Was the claimant dismissed for a potentially fair reason?
- (2) Was a fair procedure followed, and did the procedure comply with the ACAS Code of Practice on Disciplinary and Grievance Procedure? In particular –
 - (i) Was the appointment of Tracy Baxter reasonable?
 - (ii) Was the claimant told to stay off site because Tracy Baxter had been authorised to act as investigating officer and instruct him? Had Tracy Baxter instructed the claimant to stay off site before an extraordinary meeting of governors had taken place, and before her appointment as investigating officer? If so, did this result in unfairness? Should the Chairman of Governors have suspended the claimant according to the Authority's own disciplinary rules of procedure?
 - (iii) Julie Brown allegedly committed a similar offence to the claimant in that she carried papers from the exam room without being accompanied, she was not instructed to stay off site, and nor was she disciplined. Did this reveal that Tracy Baxter and/or the respondent

had prejudged the position? Did the fact Chloe Brown was treated differently result in an unfairness?

- (iv) Was the investigation flawed from day one and did it fall outside the band of reasonable responses?
- (v) Was there an unreasonable delay in the process?
- (vi) Did the disciplinary and appeal committee members hold a genuine belief that the claimant had committed the act of misconduct, and was that belief based on a reasonable investigation?
- (vii) Did the decision to dismiss the claimant fall within the band of reasonable responses open to a reasonable employer?

9. In short, the issues were those typical of British Home Stores v Burchell [1980] ICR 303 EAT, and if the Tribunal were to find in the claimant's favour the "no difference rule" under the well known case of Polkey v AE Dayton Services Limited [1988] ICR 142, HL, in contribution were issues to be decided upon and on which the Tribunal heard oral submissions.

10. The Tribunal was referred to an agreed bundle of documents together with additional documents referred to above, oral submissions and written submissions presented by the parties which the Tribunal does not intend to repeat, but has attempted to incorporate the points made within the body of this Judgment with Reasons, we have made the following findings of the relevant facts.

The Facts

11. Brookdale Primary School is a Community School maintained by Wirral Borough Council. Section 35 of the Education Act 2002 provides that, "any teacher appointed to work under a contract of employment at a Community School is to be employed by the Local Authority", and dismissal can only be by the Local Authority although the decision to dismiss is made by the Board of Governors of Brookdale Primary School.

12. The Education (Modification of Enactments relating to Employment) (England) Order 2003 sets out at Regulation 6: "If any claim is made to an Employment Tribunal by an employee of Brookdale Primary School, the claim must be made against the Governing Body of the school as the Governing Body is to be treated as if it were the employer." It is under these regulations that Wirral Borough Council is entitled to take part in the proceedings as second respondent.

13. The School Staffing (England) Regulations 2009 sets out the following relevant provisions;

13.1 Regulation 14(1) provides, "a representative of authority (Wirral Borough Council) may attend and offer advice at all proceedings relating to the selection or dismissal of a teacher" and at regulation 14(2) "the Governing Body must consider any advice offered by the Authority pursuant to paragraph (1)". It is under this Regulation HR supported the investigating officer, and attended both

the disciplinary and appeal hearings together with the second respondent's nominated legal officer when such advice was given.

13.2 Regulation 20 deals with the dismissal of staff, and provides, "Subject to regulation 21, where the Governing Body determines that any person employed or engaged by the Authority to work at the school should cease to work there, it must notify the Authority in writing of its determination and the reasons for it".

13.3 Regulation 20(2) provides, "If the person concerned is employed to work solely at the school and does not resign, the Authority must... (b) terminate such contract without notice if the circumstances are such that it is entitled to do so by reason of the person's conduct".

The claimant's employment

14. The claimant was employed as Head Teacher at Brookdale Primary School at Greasby on the Wirral from 1 September 2012 until his dismissal by Wirral Borough Council following confirmation from the Governing Body that a decision had been made by the Staff Appeal committee the claimant should be dismissed without notice. The effective date of termination is 19 July 2016.

The Disciplinary Procedure

15. The claimant was issued with the respondent's disciplinary procedure dated September 2012. The relevant provisions are as follows:

15.1 In the introduction of the disciplinary procedure reference was made to ACAS and the revised Code of Practice. It was confirmed Governing Bodies with a delegated budget remained responsible for the appointment, dismissal and suspension of school staff. It provided that Governing Bodies should ensure that at the first meeting of the academic year the full Governing Body appoints a Staff Dismissal Committee and a Staff Dismissal Appeal Committee which are properly constituted and has appropriate powers delegated to them. In the academic year 2015/2016 the Governing Body had not appointed a Staff Dismissal Committee and Appeal Committee at the first meeting of the academic year but nothing hangs on this as far as the fairness of the claimant's dismissal is concerned.

15.2 At paragraph 6.2 the role of the investigation officer was set out, which "is to gather information and/or take statements to establish the facts surrounding any allegations, produce a fair, balanced and objective report with recommendations as to suitable action. If required, they will present or support the presentation of any disciplinary case to an appropriate person/committee...The investigating officer should undertake the investigation without any unreasonable delay".

15.3 At paragraph 6.9 the disciplinary process provided for a suspension pending an investigation and where the employee to be suspended was the Head Teacher, the Chair of Governors "should suspend...The suspension should be viewed by all parties as a neutral act without prejudice to any further action".

- 15.4 Paragraph 6.9.1 provided the investigation must be carried out “as speedily as possible” and the employee should be told clearly “he or she is being suspended for as short a period as possible”.
- 15.5 Paragraph 6.9.2 set out the procedure for investigating allegations of misconduct. There is a reference to the person responsible for hearing a complaint ensuring that a “preliminary investigation” has been conducted to establish the facts of the case, and that this should be done without “any unreasonable delay”. Under the heading “Investigation into alleged misconduct by the Head Teacher” the following is set out; “In an investigation into conduct of the Head Teacher the Chair of Governors may, at the request of the Governing Body, be accompanied by, or appoint, a member of the LA or another governor without substantial prior knowledge, to carry out the investigation. This officer shall be known as the investigating officer. If on completion of the investigation it is considered by the Chair of Governors and the Director of Children’s Services or his nominee in the case of Community Schools that, on the balance of probabilities, a complaint of misconduct is justified, a disciplinary hearing will be held by the Staff Dismissal Committee”.
- 15.6 At Appendix 3 guidance is provided to the Staff Dismissal Committee at a disciplinary hearing which provides that the members of the Staff Dismissal Committee can ask questions of the Head Teacher, and the investigating officer can ask questions of the employee and/or his/her representative and witnesses – paragraphs (3) and (7).
- 15.7 At paragraph (11) it is provided the Director of Children’s Services or his nominated officer should remain during the Staff Dismissal Committee’s deliberations.
- 15.8 At Appendix 4 the disciplinary appeals procedure sets out the steps to be taken on appeal and in the case of a Community School the Director of Children’s Services or nominated representative “should be invited to give advice and/or attend the hearing”. The procedure refers to the ACAS Code.
16. The Governing Body consists of parents, teachers and local councillors who take part in the management of the school in their own time and on a voluntary basis. The Chair of Governors is Mr Ruth Doig; the Vice Chair of the Governing Body Tracy Baxter, who at the time of the liability hearing had taken the role of Chair. Tracey Baxter took on the role of investigating officer on a voluntary basis, despite her total lack of experience in disciplinary matters and disciplinary investigations.
17. The claimant maintains there was a conflict of interest in Tracey Baxter taking on the role of investigating officer. Tracy Baxter had previously been employed by Wirral Borough Council as a teacher, although during the relevant period she was a self-employed teaching and learning consultant providing support and CPD for science teachers, departmental leaders and senior leaders, and involved in science writing from primary level to Key Stage 5. She had previously contracted with the second respondent as a science consultant, although there was no evidence before the Tribunal that any contract existed between Tracy Baxter and either respondent during the relevant period covered in these proceedings. The Tribunal accepted Tracy Baxter’s evidence that she contracted with individual schools and not directly

with the Local Authority and it accepted there was no conflict of interest in her holding the position as Vice Chair of the Governing Body, and on request of Ruth Doig, investigate into allegations involving the claimant and so the Tribunal finds.

18. On behalf of the claimant it was argued Tracy Baxter's husband was involved in her consultancy business and her mother-in-law was a councillor representing the second respondent, that this was also a conflict a conflict of interest. The Tribunal did not agree, and there was no evidence before it she had a personal or prejudicial interest in connection with either respondents to their advantage and to the advantage of the claimant in relation to her business interests and previous dealings with the second respondent when she was employed as a science teacher.

19. Tracy Baxter had a child in the relevant cohort of children at Brookdale Primary School who took a mental mathematics Key Stage 2 SATs test in May 2015, and her child's paper formed part of the investigation into maladministration of the 2015 Key Stage 2 Mental Maths test papers. Looking at the matter objectively, this relationship had the potential to undermine the impartiality of Tracy Baxter; there was a possible clash between her self interest involving her child, and the status of his Key Stage 2 Mental Maths test and an independent objective investigation into the claimant and the allegations of maladministration. In short, no reasonable employer would have accepted Tracy Baxter's offer to act as investigator for this reason, even had she the experience to investigate serious allegations that could bring a professional career to an end if they were found to have been proven, which she did not. Tracy Baxter had no experience of investigating serious allegations of gross misconduct within the workplace, or indeed of carrying out any investigation in contrast to David Johnson, the Chair of Staff Dismissal Committee, who was a governor at the relevant time and an experienced investigator.

20. The Staff Dismissal Committee consisted of Councillor Wendy Clements and Graham Wilson, the latter having held the position of parent governor for a period of six years. It was argued on behalf of the claimant that Councillor Wendy Clements was conflicted and should not have been part of the Staff Dismissal Committee. There was no satisfactory evidence before the Tribunal to this effect, and the fact that there may be a tenuous link between councillors, Tracy Baxter and the respondents did not raise an inference of conflict of interest, and the Tribunal finds that there was not a conflict.

21. The Staff Appeal committee consisted of Peter Smith, Julian Fisher and Emma Darley who acted in the capacity of Chair.

The incident

22. On 13 May 2015 children aged between 10 & 11 sat the 2013 Key Stage 2 Mental Mathematics SAT test ("the mental maths test").

23. The claimant was experiencing in administering such tests for which he was solely responsible. The tests were important to the respondents, particularly the first respondent, as they determined success or failure in comparison with other schools in the area, and whether it was improving or required improvement. Key Stage test results were one of the means by which a parent could select a school, and successful Key Stage result reflected well on the claimant and teachers he

managed. The reverse applied if the Key Stage results indicated the students were falling below the required standard.

Key Stage 2 Guidance for Heads of School

24. Guidance was published by the Testing and Standards Agency on how to administer the tests. Under the guidance head teachers were responsible for ensuring all test administrators were familiar with and complied with all of the test administration guidance and “schools that do not comply could be subject to a maladministration investigation. After the tests have taken place, you must complete and submit the head teacher’s declaration form. This is to confirm that either – your school has administered the test according to the published guidance or the statements in the form can’t be confirmed and that you’ve raised any issues with us”.

25. The Guidance was issued by the Standards and Testing Agency (“the STA”) to avoid accusations of maladministration and guidance at Key Stage 2 tests specifically for head teachers referred to their “specific responsibilities”. The Guidance clearly set out the school could be subject to an investigation for maladministration if it “doesn’t comply with our test administration guidance”. The following was provided for the claimant to follow and then confirm in a declaration that he had done so;

25.1 Under the heading “Test administrators” it is provided; “Everyone involved in administering tests must be thoroughly trained and familiar with the Standards and Testing Agency’s guidance”. A number of documents are listed including “anyone administering a test on their own is more vulnerable to allegations of maladministration as they don’t have another adult to verify the test administration process and procedures. We recommend having at least two test administrators in each test”.

25.2 Under the heading “security” it is provided that the head teacher “must ensure...test materials are kept securely from when they are delivered to your school until the end of the test period...Store test materials in a secure locked cupboard”.

25.3 Under the heading “packing test scripts for marking” it is provided, “You are responsible for making sure your school’s tests scripts are collated, packed and sealed correctly, as soon as possible on the day of each test. We advise you are personally involved in packing your school’s scripts...Any individual left alone with test materials is vulnerable to allegations of maladministration. Make sure that test scripts are collated and collected by more than one person and aren’t left with an individual at any point...You are responsible for ensuring that pupils’ answers are their own and that they are not amended after the test”.

25.4 Under the heading “head teacher’s declaration form” the head teacher must declare after the school has completed the tests that he/she has administered the test according to the published guidance or has raised issues. The form must only be completed after all the tests have been collected for marking.

The Key Stage 2 mental maths test

26. It is undisputed evidence that the mental maths test took place in three rooms. The majority of the children were tested in the hall with the claimant and Mrs Madeley, a teacher, supervising. A smaller number of children took the test in classroom 6M supervised by Mrs Brown (a teacher's assistant) and Mrs Hampton, and in 6G supervised by Mrs Grey and Mrs Langley. 6M and 6G were on the first floor of the building, the hall on the ground floor.

27. The mental maths test consisted of one sheet of paper, with the children's name on one side and the answers on the other. The claimant collected and collated in alphabetical order the papers from the hall which he took to his room. He was not accompanied or observed. Julie Brown collected the papers from room 6M, which she did not collate into alphabetical order. She handed the papers to the claimant when he was either in the hall but more likely than not in his room. Mrs Grey and Mrs Langley "usually" handed the papers to the claimant for him to collate together, but neither could recall how and when precisely due to the passage of time. The claimant was the only teacher immediately following the mental maths test who had access to all of the completed tests. This was key undisputed evidence within the disciplinary hearing.

The Standards Agency letter dated 17 November 2015

28. On 17 November 2015, some six months after the Key Stage 2 tests had been submitted, a conversation took place between the claimant and a member of the maladministration team at the Standards and Testing Agency. The claimant was informed irregularities had been detected on the mental maths test papers and that some papers had been amended after the tests had been completed by the children with "push through" having been identified on children's test papers. Push through was a reference to marks left on the test paper lying beneath the amended test evidencing that amendments had been made. The position was then confirmed in a letter dated 17 November 2015 from the Standards and Testing Agency.

29. In a letter dated 17 November 2015 to the claimant from the Standards Testing Agency he was informed that Key Stage 2 National Curriculum Tests had been reviewed and changes to answers identified which the Standards and Testing Agency were concerned had not been made during the test by the pupil. Further information was sought in an attached document with a view to the maladministration investigation continuing.

30. The claimant completed the request for information confirming where the tests were carried out, who the supervising staff were. He confirmed "all test papers were stored in a locked store room next to the main office and I am confident that they were safe and secure", with access only by himself and school administrator. The claimant confirmed the tests were collected by the teachers and passed to him, collated with the register and placed into sealed plastic bags. He confirmed in writing; "The test papers were checked, registers completed and bag sealed as soon as the last papers were received from the other test rooms. All test papers were kept with me at all times before being sealed in the plastic bags" and the sealed bags were stored in the locked store room. He also confirmed, "All staff had been through the guidance on test administration" and "there were two members of staff present

during the tests at all times”, an referred to a proposed a review in the 2016 training for another independent person to be present throughout the process plus updated staff training. The claimant did not say Julie Brown had possession of the tests without another person present when she handed them to him, or that he did not have another person present throughout the time they were collated in his office and thus the STA Guidance had not been complied with. Despite the reference to the safe and secure locked store room there was no reference to the fact the claimant was aware 6 keys had been issued to various members of staff.

31. In the box inviting further information the claimant would like the STA to take into account, he confirmed “STA guidance was followed at all times”. Staff interviews of Lisa Madeley, Tammy Grey, Julie Langley, Julie Brown and Karen Hampson were attached. The form was dated 19 November 2015, but sent to the STA on 24 November 2015 after the claimant had provided a draft to the Local Authority officer, Diane Hollis.

32. The claimant contacted the second respondent and Diane Hollis, and he informed Ruth Doig in her capacity as Chair of Governors, of the situation. A discussion took place on 19 November 2015 between the claimant and Diane Hollis as to whether or not he should go down and examine the test papers at STA in Coventry, which he did. The claimant raised in his evidence before the Tribunal this conversation with Diane Hollis when she questioned why he would want to go down to Coventry, and there was an issue as to whether or not she had initially told him not to and then changed her mind. Nothing hangs on this evidence, as it is undisputed the claimant did attend at Coventry and examined some of the test papers. There was no satisfactory evidence Diane Hollis was conspired with either respondent to keep the claimant away from the test papers held by the STA, and it was difficult for the Tribunal to understand what could be gained from such a conspiracy. It was in everybody’s best interests to prove maladministration had not taken place.

33. Lisa Madeley, Tammy Grey, Julie Langley, Julie Brown and Karen Hampson were interviewed by Diane Hollis following the 17 November 2015 letter from the STA and a written document setting out their evidence was produced. Julie Brown confirmed that the papers were taken “immediately” to the claimant in the hall. All staff confirmed other people were in the test rooms. Mrs Grey was leading the test, Julie Langley as independent observer; Karen Hampson and Mrs Brown; Lisa Madeley in the hall with the claimant. Lisa Madeley confirmed no changes were made to the pupils’ answers following the tests, as did the other teachers.

34. The claimant attended the STA in Coventry on 24 November 2015, where he was shown a sample of the amended papers and marks on other papers which had been pushed through with the amendments. It was accepted by the claimant that as the mental maths test was a single sheet and it had taken place on a hard table, push through should not have occurred on to other children’s papers during the test itself, and as a matter of logic it must have occurred after the test had been completed and papers gathered.

The STA letter dated 8 December 2015

35. In a second letter from the Standards and Testing Agency dated 8 December 2015 the claimant was advised that 11 mental maths test out of a cohort of 47 had been annulled due to evidence of amendment. The letter confirmed: "As discussed during your visit to STA to see the scripts, the nature of the amendments can only have occurred after the tests had been completed."

36. As a result of the paper annulments, the children affected did not receive an overall SAT level for mathematics. It was confirmed; "the STA will process the annulment of the results and this will be reflected in the published school performance data".

37. As a result of the annulments the claimant was advised the first respondent should immediately take action, including informing the secondary schools so that the "transition of any pupils has not been affected", and for parents to be informed of the maladministration, including those of the children affected. The claimant was advised action should immediately be taken by the school's Governing Body who "has a duty to investigate the cause of this maladministration and must consider if any referral to the National College of Teaching and Leadership is required...the School's Governing Body must ensure that future processes employed by the school during administration of National Curriculum assessments are tightened. STA will check this through future monitoring visits". The position was serious with consequences for the School and its pupils, and the Tribunal found the claimant underplayed this with reference to the minimum advantage to the school as a result of the amendments made, the inference being that the gain was not worth the risk.

38. In the penultimate paragraph it was confirmed that the case was closed and no appeal allowed. A copy was sent to Ruth Doig, Chair of Governors, and Diane Hollis of the second respondent.

14 December 2015 Tracy Baxter's instruction to the claimant to stay off site

39. In her capacity as Vice Chair of Governors Tracy Baxter informed the claimant on 14 December 2015 he was to stay off site on 15 December whilst preliminary investigations took place. On behalf of the claimant much was made of Tracy Baxter instruction on the basis that it should have been Ruth Doig, the Chair of Governors. The Tribunal did not find Tracy Baxter's instruction to the claimant amounted to unfairness in the process and nor did it raise an inference of bias. Tracy Baxter was merely following Ruth Doig's instructions acting on the advice of HR and it cannot be said she had made up her mind the claimant was guilty of maladministration by the act of suspension, which under the respondent's procedures was a neutral act.

The extraordinary governors' meeting held on 15 December 2015

40. An extraordinary governors' meeting was held on 15 December 2015 at 5.30pm with Tracy Baxter, Ms Darley, Mr Wilson, Mr Johnson, Mrs Knapton, J Fisher and Mrs Denny, and mintued. It was confirmed on the advice from Julie Hassall, Director of Education, and HR that "Mr Prescott has been asked to stay off site tomorrow (Wednesday 15 December 2015) while preliminary investigations take place".

41. The minutes of the extraordinary governors' meeting record Mrs Doig had been asked not to attend the meeting. Much has been made of this on behalf of the claimant, and the Tribunal accept the explanation given by Tracy Baxter to the effect that as Mrs Doig had been involved in discussions with the claimant and as she was aware of the Standard and Testing Agency's communications she may not be independent.

42. In the minutes reference was made to a preliminary investigation being conducted by one governor plus Local Authority HR representative, and to the fact "governors also need to bear in mind that we may need a disciplinary committee and appeal committee later, made up of different governors to any investigation committees". Tracy Baxter put herself forward as investigator, and it was agreed she, together with the Local Authority HR representative, would carry out the "preliminary" investigation, and a review panel "will need to review information and to decide what will happen next".

43. It can be seen from the minutes that the matter was treated seriously and there is a reference to "school performance tables currently display any results linked with maths at Brookdale...it is vital as a Governing Body we are discrete. This information is highly confidential".

44. The Tribunal notes there is a discrepancy between the evidence of Tracy Baxter at paragraph 7 of her written statement, where she states immediately prior to 15 December 2015 meeting she informed the claimant he was to stay off site, and the minutes of the meeting which confirm that claimant had been asked to stay off site on 14 December 2015. The Tribunal accepted the unamended minute was correct as corroborated by the claimant who at paragraph 17 of his written statement confirmed he was told by Tracy Baxter that he should remain off site for the next day as an investigation was due to start the following day.

45. It is the Tribunal's view that Tracy Baxter believed as early as 14 December 2015 when she effectively suspended the claimant that an investigation would take place, and she would be the investigator pending the approval of governors at the extraordinary governors' meeting.

46. Tracy Baxter visited the STA in Coventry on 17 January 2016 and met the maladministration Project Manager to discuss the papers and for a demonstration of push through as part of her investigation. It was reasonable for her to take this step before meeting up with the claimant. That meeting was delayed as a result of Christmas and Tracy Baxter being unavailable.

19 January 2016 interview with the claimant

47. On 19 January 2016 Tracy Baxter interviewed the claimant, who was accompanied by a colleague. Tracy Baxter, as in all the interviews she took part in, was supported by Audrey Houghton, HR representative of the second respondent. Without HR support it is the Tribunal's view Tracy Baxter would have been unable to conduct a proper investigation into the complex allegations raised against the claimant that complied with the respondent's procedures and ACAS Code. Audrey Houghton provided objective and independent advice, thus mitigating any possible adverse effect on the investigation that may have resulted from Tracy Baxter being

conflicted due to the fact her child's test results formed part of the investigation. For the avoidance of doubt, there was no satisfactory evidence before the Tribunal that Tracey Baxter's investigation had been adversely affected by any possible conflict of interest, although theoretically there could have been a conflict for the reasons already set out.

48. On behalf of the claimant much has been made of the fact the claimant's interview was substantially longer in length in comparison to the teachers and teacher assistants interviewed earlier, the suggestion being that Tracy Baxter was not concerned with investigating anyone other than the claimant. The evidence did not support such an inference. It is clear from the investigation meeting notes the claimant as headmaster in charge of the mental maths SAT test and had a great deal more knowledge about the process than others involved in invigilating. The claimant was solely responsible for all of the completed papers from the three rooms, which he collated and put into a small see through bag, sealed and locked away, before later being placed into a large grey bag with the test from paper A, in direct contrast to the teachers.

49. During his interview the claimant described the process he had carried out in relation to mental maths SAT test, how he had checked and gone through them 2-3 times to make sure they were in alphabetical order, how he was alone when the papers were collated but "there was always people around and the door was open" as the claimant had an open door policy. He explained how the papers were stored in the secure electrical cupboard on Wednesday 13 May ready for collection on 14 May 2015 the next day.

50. It is remarkable that when discussing the storage and security of the papers in the electrical storage cupboard, no reference was made by the claimant to the fact that there were six keys including his own to the storage cupboard given the open questions asked by Tracy Baxter, in particular, whether he had any explanation, to which the claimant responded he believed "that it happened after the test – but does not know how or when – "there is no concrete evidence of any theory. PP has spoken to staff, they have theories, but nothing to substantiate them".

51. When he was asked whether or not there was anything he wanted to add, the claimant's response was that he "obviously feels vulnerable to the allegation, when considering the maladministration terminology. With regards to the mental maths paper, PP came into the room with no secondary witnesses in the room so is open to the maladministration allegation. In hindsight, PP wishes he had someone with him. PP is confident that while the papers were in his possession nothing happened. PP said that at most he had 10 minutes with the papers altogether prior to them going into the sealed envelope...Knows he is vulnerable in terms of allegations...believes he was a little bit naïve regarding maladministration and leaving himself open".

52. At the investigation interview meeting on 19 January 2016 the information before Tracy Baxter was that keys to the secure cupboard were held by the claimant and school administrator only. The claimant said nothing to suggest he and the school administrator were aware that there were six keys and not two to the electrical cupboard. Much has been made by the claimant of Tracy Baxter's failure to investigate the number of keys. The Tribunal concluded on the evidence before it Tracy Baxter cannot be criticised for taking the evidence of Karen Dodd and the

claimant on face value. It was not reasonable to expect her to conduct further investigation into the whereabouts of keys given the evidence that the claimant and Karen Dodd were the sole key holders.

53. The fact the claimant did not mention the existence of six keys and their whereabouts at the investigation meeting. During this liability hearing he sought to undermine the investigation carried out by Tracy Baxter on the basis that she had failed to discover their existence; this goes to the heart of the claimant's credibility, and there was never any satisfactory explanation by the claimant why he omitted such important evidence at an early stage of the investigatory process only to bring it up last minute at the disciplinary hearing.

54. There was no written evidence before the Tribunal that the preliminary investigation (which turned out to be the full investigation) was reviewed by a review panel in accordance with the minutes dated 15 December 2015 referred to earlier, a matter raised by the claimant. The Tribunal formed a view, on the balance of probabilities, that some sort of review must have taken place not necessarily by a review committee given the claimant's ensuing suspension and there was no unfairness in the process taken as a whole.

The claimant's further suspension

55. In a letter dated 20 January 2016 from Ruth Doig the claimant was suspended on full pay. Reference was made to the respondent's disciplinary procedure at paragraph 6.4(c). The allegations were set out and its nature described as "serious." It is not disputed by the claimant the allegations were indeed serious.

56. A letter was sent to parents informing them of the annulment of 11 students' Key Stage 2 maths exam results and the investigation by the Governing Body as to the cause of the maladministration.

29 January 2016 second investigatory meeting

57. A second investigatory meeting took place with the claimant, who was accompanied, on 29 January 2016. A discussion took place to the effect that 15 papers of amendments had been made to the correct answers, and one amendment was not the right answer but done post test. It was accepted that 15 papers were affected and the amendments had been made post test by the claimant. Reference was made to the STA analysis of the papers, and the further investigation carried out which indicated that it was not possible for the amendments to have taken place after the papers were collated alphabetically. The claimant was provided with a document analysing which paper had pushed through to which paper. Within this analysis the maths paper of Tracy Baxter's child had been pushed through.

58. The meeting was adjourned in order that the claimant and his colleague could consider the further investigation. When the meeting was reconvened, the claimant was asked for an explanation. He confirmed he had placed the papers in alphabetical order and could not explain what had happened. The claimant did not indicate at that stage of the investigation six keys were available to open the cupboard in which the test results were stored. The evidence for the claimant, which was also put forward at the disciplinary hearing, showed the amendments to the Key

Stage 2 mental mathematics papers were likely to have been made before the papers of the whole cohort were collated alphabetically. The claimant was the only person to have collected the whole cohort alphabetically and thus the number and whereabouts of keys was vital evidence withheld by the claimant.

59. Tracy Baxter completed her investigation report on 21 February 2016 in the knowledge that her child was not adversely affected by changes made to the score. It is the Tribunal's view a more experienced investigator would at the very least have informed the respondent of this fact with a view to a discussion taking place as to whether Tracy Baxter was too closely connected with the investigation. This did not happen and Tracy Baxter continued in her role as investigator with a certain amount of zeal, evidenced by the manner in which the disciplinary hearing was conducted, the number of questions asked by her and the manner in which they were asked, as indicated below.

The investigation report

60. The investigation report is comprehensive, setting out a chronology of events, the background to the case and the evidence Tracy Baxter had obtained. It described the maladministration as a push through, an indentation made onto paper as it is written on, which causes a physical distortion of the paper on the underside when writing is done on the upper side. She confirmed that when a single sheet of paper was written on using a hard surface push through is not caused; but on a soft surface an indentation can be seen on the underside of the paper written on. She confirmed push through was possible to detect because answers were written on a single sheet of paper in contrast to other SATs tests when answers were written in booklets. Tracy Baxter's analysis of push through and how it applied to the mental maths test was not disputed by the claimant, and so the Tribunal finds.

61. In a document marked "detailed findings" Tracy Baxter confirmed that prior to the extraordinary governors' meeting held on 15 December 2016 the claimant was informed by her he should remain off site whilst a preliminary investigation took place "by governors" on 16 December. She described the effect of the amendments to the Key Stage 2 mathematics test as follows: "As these affected children do not have a maths KS2 score, they cannot be included in the secondary school official Progress 8 measure". She described how she had visited the STA in Coventry on 17 January 2016 and met the maladministration Project Manager to discuss the papers and for a demonstration of push through.

62. There has been a criticism made on behalf of the claimant as to the investigation by the respondent into the STA and whether or not the push through could have taken place there as opposed to on the first respondent's premises. The Tribunal is of the view Tracy Baxter's visit and the respondent's acceptance of assurances she received from the STA fell within the bands of a reasonable investigation, and there was no requirement that she explore whether the STA and/or a subcontractor could have themselves made the push through evidenced on the children's papers. The Tribunal were of the view it was sufficient that Tracy Baxter visit the STA, given the seriousness of the allegations and potential impact on the claimant's career, to explore how the test papers could have been amended and following this visit, to carry out a formal investigation by interviewing the first

respondent's witnesses and understanding how the tests were administered. It was reasonable for her to conclude the following –

- (1) The teachers administering the tests (including the claimant) highlighted no issues with procedures during the tests and the statutory test guidance 'appears' to have been followed.
- (2) After the test was complete the statutory test guidance was not adhered to during collation of the papers.

63. She refers to the claimant being handed the scripts from each room, and taking them to his office where he worked alone, arranging them alphabetically and packing them into a sealed envelope before storing in the locked electrical cupboard. The report confirms "HT acknowledges that he was the only person that was on his own with the mental maths SATs papers following the tests and before the papers were sealed and stored securely, none of the teachers or teaching assistants involved in administering the mental maths tests were alone with the test papers". This conclusion has not been disputed by the claimant who did not raise the issue at this stage of the six keys.

64. Reference was made to the claimant's visit to the STA, and communications made by Tracy Baxter concerning the procedures used by the STA and sub-contractors, including the process of scanning, "people scanning papers stand shoulder to shoulder with no opportunity to no opportunity to amend papers without being seen, prior to scanning papers being removed if suspect that won't scan well and these papers are marked as hard copies. The timeframe for all papers to be scanned is extremely tight (scanners are operating 24 hours day during this stage) and it would not be possible to meet deadlines if time was taken to amend papers at that stage. Scanning papers do not have access to answer sheets or to transcript of the mental maths test. STA are confident that these processes are robust and provide no opportunity for amendment of papers at the scanning stage". Reference was made to a statement provided by STA attached as appendix 17, and the Tribunal finds it was reasonable for Tracy Baxter to have taken the view expressed by the STA at face value and it was not reasonable for there to be any further investigation into the STA or its processes as maintained by the claimant. In short,

65. Tracy Baxter found the STA had stressed the security measures in place and "they feel it would be virtually impossible for amendments to be made once papers were in their possession. STA also raised the question of what motive they would have in making amendments". Tracy Baxter was entitled to conclude on the evidence before her the STA securely managed the scanning process and there was no evidence the tests could have been amended at scanning stage, and it fell within the bands of reasonable responses for the disciplinary committee to accept this evidence.

66. The investigation report provided a detailed analysis of which papers had been amended and where these amendments were found to push through as provided by the STA, and this analysis was set out and has not been disputed by the claimant, who accepted the majority of the amendments took place on question 9, a multiple choice question.

67. The conclusion of Tracy Baxter was; “there is no doubt that there was maladministration of mental maths papers...this is not disputed by the HT [the claimant]...it was detected that every amendment to papers, with the exception of one, led to a correct answer. Of a total of 20 amendments, 19 led to correct answers. The other amendment was a cross (x) that was added to a box left empty during the test”.

68. The report confirmed there was no issue with administration of the mental maths SAT test during the test. The room plans to the rooms in which the test took place were attached as appendices. There was a reference to mental maths test papers being amended across the three rooms for the administration of the test, and that the amendments could only have been made after the papers were collated from all rooms. It was confirmed the claimant acknowledged the amendments must have been made after the test was complete, and so the Tribunal found. Tracy Baxter concluded on analysis of the amendments and push through that the majority of amendments could not have been made after the test papers of the whole cohort had been arranged alphabetically by the claimant. She concluded the evidence showed the majority of the amendments must have been made after the test papers were delivered to the claimant for collation following the test and before they were sealed and stored securely.

69. She concluded there was evidence of deliberate falsification of documents, improper disclosure of information and misconduct in relation to official documents when the claimant signed the official STA declaration form after completing the SATs test confirming the tests were administered according to published guidance. As the guidance provides, staff should not be left alone and she found: “This constitutes improper disclosure of information”. She confirmed there was evidence of neglect of duty by the claimant, who on his own admission did not follow the procedures, particularly failing to ensure he was accompanied, and there was a failure to uphold public trust and maintain high standards of ethics and behaviour within and outside the school. She concluded the claimant admitted in both his statements, and so the Tribunal found, that he did not follow the expected procedures for the administration of SATs tests and papers, had left himself vulnerable and “suggested that he, and staff, have theories about how this happened but there is no concrete evidence of any theory. Unfortunately, despite several opportunities being provided [to] do so, the theory was not shared and so cannot form part of this report”.

70. On 25 February 2016 the maladministration project manager from the STA confirmed to Tracy Baxter by email, “In relation to your query about the test papers after they leave the school...test scripts are sent securely by your school direct to our supplier’s central processing warehouse which manages all the KS2 test papers annually. This is a large operation which operates under strict security. Each test paper is scanned before being stored in a central library. If STA require to see the test scripts, these are pulled and sent securely to STA in Coventry. Once they reach us, we store them securely in the room that you viewed the test scripts. Throughout this process access to scripts is securely managed and only accessible to those with a clear business need”.

71. in a letter dated 22 March 2016 Philip William Youle Grayling (who represented the claimant at this liability hearing) provided an abbreviated curriculum vitae giving the outcome of his interviews with the claimant on 22, 23 and 26 March

2016 which took ten hours of “interrogation” at the claimant's request, and he concluded “whilst I am unable to resolve for you who altered the paper one...I am absolutely certain that it is not Mr Prescott. There are many reasons for this conclusion which I believe Mr Prescott will make clear during the hearing...I was concerned that the LA had not discharged its duty of care to Mr Prescott as a newly appointed head teacher by providing induction training in general and in particular the SATs process. Especially of concern since Mr Prescott has not worked for the Wirral LA before”. This letter was before the disciplinary committee and the Tribunal finds it was taken into account. Mr Youle Grayling did not raise with the clear conflict between the claimant's evidence concerning the number of keys and the untrue declarations given to the STA.

72. The staff disciplinary committee consisted of the Chair, David Johnson, Wendy Clements and Graham Wilson. The claimant was invited to a disciplinary hearing before the panel to be held on 26 April 2016 regarding the following allegations: deliberately falsification of documentation, improper disclosure of information and misconduct in relation to official documents, neglect of duty, failure to uphold public trust and maintain high standards of ethics and behaviour within and outside the school and failure to maintain proper and professional regard for the ethos, policies and practices of the school. The claimant was aware of the seriousness of the allegations, and if he was found to have committed an act of gross misconduct, this could lead to his dismissal. The Tribunal found that ACAS Code of Practice was complied with in connection with invite letter, the claimant being informed he could be represented by a recognised trade union or work colleague, and call witnesses.

Second interview with Karen Dodd by TRACY Baxter and HR

73. Prior to the hearing taking place Tracy Baxter re-interviewed Karen Dodd who provided a supplemental statement dated 19 April 2016 seeking clarification around the security arrangements regarding the SATs papers. Karen Dodd confirmed the claimant, herself and the caretaker (there was no caretaker at the school at the time), had access to the electrical cupboard. She confirmed the door was never left unlocked and “no-one else has any cause to go into the cupboard...the key is on my keyring...the keys are taken home at night. They may be on the desk during the day but the keys are not labelled, so no-one would know which key was for the cupboard. HT also had a set of keys”. She confirmed the test papers were counted and put in alphabetical order by the claimant, placed into a sealed bag and then into the electrical cupboard. She described how the test papers were sealed, how she took the packages out of the cupboard and “they don't look like that had been opened and re-sealed” and she would have noticed if they had when the papers were collected for delivery. She confirmed the papers were “already sealed, they were definitely in the cupboard sealed and no-one else had access. The cupboard is never left unlocked”. This document was provided to the disciplinary panel and the claimant, the latter did not query why Karen Dodd confirmed only two sets of keys when he was aware from a previous conversation with her there were six, a fact remained hidden from the investigation.

The disciplinary hearing on 26 April 2016

74. The disciplinary hearing took place on 26 April 2016. Present on behalf of the respondent were eight people, including Tracy Baxter, the disciplinary committee; three HR representatives including a minute taker and a solicitor from an external law firm. Minutes were taken, and these do not record the claimant raising any concerns regarding the number of people present at the disciplinary hearing, an issue now raised before the Tribunal. The Tribunal conclude no such complaint was made and it does not accept the claimant's evidence that he felt disadvantaged being faced with so many people at a disciplinary hearing.

75. The disciplinary hearing had before it a statement from Diane Hollis dated 25 January 2016 confirming the claimant had indicated to her "there had been weaknesses in his statutory assessment procedures for 2015 SATs as he had been alone with packing up the papers. Mr Prescott also asked me if there could be any possibility that the papers could have been amended after leaving Brookdale. I replied that this was highly unlikely as STA have very stringent procedures to ensure the security of SAT papers is maintained at all times. At the school visit Mr Prescott was open about his statutory assessment procedures and self identified weaknesses in his procedure, for example he had not followed STA good guidance procedures involving governors in monitoring SATs week".

76. It is particularly notable that Tracy Baxter, who presented the case in her capacity as investigating officer, proceeded throughout parts of the hearing to question the claimant somewhat forcefully. In presenting her case, she was asked questions by the claimant including what was the claimant's motive, to which she responded "this is not part of the investigation". She was asked "did you ask anyone you had contact with about access to the locked cupboard?" to which Tracy Baxter responded "yes", and did she question all staff with keys to the cupboard, to which Tracy Baxter answered "yes, only you and Karen had keys at access". At this stage the claimant did not indicate there were six sets of keys.

77. The governors also asked questions of Tracy Baxter, including why the claimant was instructed to remain off site, to which she replied "to protect Paul as well as the investigation. We could have said all staff involved to remain off site but Paul is ultimately responsible for the school". She accepted staff were treated "slightly differently" to the claimant, but he was responsible and was asked to remain off site to avoid collusion. She explained the gap of over a month from interviewing staff to interviewing the claimant by reference to her attending the STA, Christmas holidays and work commitments. There was a discussion, and questions were put to Tracy Baxter by Graham Wilson, concerning the claimant being left alone with the papers with the door "always" left open for a ten minute period, and the comment from HR concerning the difficulty encountered by staff in giving statements who could not remember clearly what had happened i.e. whether or not the claimant's door was open or closed on that day. It is the Tribunal's view that the recollection of staff due to the passage of time had diminished, which is unsurprising given the fact the respondent was aware of the maladministration allegation until 6 months after the event.

78. It is clear from the minutes the claimant had sufficient opportunity to put forward his case, including a reference to the ten hours' interrogation and written

character reference from Mr Grayling. It was at this stage the claimant introduced the six keys for the first time, maintaining he had received the statement from Karen Dodd regarding security of SATs papers and “she has a key, no caretaker on site, but Sean Connor has a key. Steve Lamb, the cook, also has a key and there are an additional two sets of keys on site...I performed due diligence **but it now occurs** [my emphasis] there are at least six sets of keys”.

79. It is notable that the claimant uses the language “it now occurs” as if the information relating to the keys has come to his notice only recently, when in fact he was aware of their existence when the STA had been provided with the signed completed request for information that all test papers were stored in a locked storeroom next to the main office and he confirmed; “I’m confident that they were safe and secure”. At the disciplinary hearing the minute records the claimant stating “I have doubts about the school” in relation to the keys. The claimant also introduced new evidence alleging for the very first time “there is the opportunity for at least three people to access keys and the cupboard. I have also been told there is another key available in the main office. I remember there were other envelopes available in the storeroom...two additional see through bags...this shows the opportunity to break into the bag, make the amendments and re-seal...the caretaker, he stores keys, they were hooked onto a screw...this shows opportunity unknown to me, the keys were left unattended. Other people used the keys for other things, the opportunity is there”. It is notable the claimant made no such allegations previously, despite being invited to put forward his theory as to how the maladministration could have taken place.

80. The claimant conceded the amendments to the tests had been made, and he was vulnerable; “I can’t prove I didn’t do it, I can’t prove anyone in the school did it, and I can’t prove STA didn’t do it. I have no concrete evidence”. The claimant indicated, “I still believe the STA...I was naïve regarding the guidance, there was no full-time caretaker of deputy head on site at the time and I was busy doing other things...I have left myself wide open with allegations due to being left alone...I am accountable at the end of the day”.

81. The claimant raised, correctly, the issue that he was not the only person left with the papers and in this regard Tracy Baxter’s report was incorrect and so the Tribunal find, as it is clear from the witness statement of Julie Brown she was alone when she handed the completed test papers to the claimant. Nothing hangs on this evidence save for the fact the claimant was aware from that moment Julie Brown was in breach of the guidance. It is not disputed Julie Brown did not have access to the cohort of test papers immediately following the exam.

82. Tracy Baxter questioned the claimant comprehensively concerning his training, and sought an explanation as to why he did not originally take up the offer to visit the STA. Understandably, the claimant was asked “How do you know about the additional keys now and not beforehand?” to which the claimant responded, “After the STA report I spoke to people just to double check, asked them ‘is there other keys?’ well actually...”. Tracy Baxter intervened and cut the claimant short with a further question, and the claimant confirmed Karen Dodd informed him of the extra keys, and he informed Ruth Doig. He confirmed there were six sets. When asked by HR why he had submitted the STA report, and why he had not thought it relevant to mention about the extra keys the claimant agreed that he had not thought it relevant

to mention the extra keys. Tracy Baxter's questioning continued and she asked the claimant to suggest a motive by other (despite having earlier indicated motive was not relevant to her investigation) and in response to her questions the claimant confirmed Key Stage 1 and Key Stage 2 had dipped. The committee explored with the claimant the layout of the school, who passed his office, the open door policy, and the events following the Key Stage 2 maths test.

83. The claimant indicated during the disciplinary hearing he was unhappy with the process, other staff had the opportunity to collude, and there had been a delay. He also questioned why staff were asked 4 or 6 questions, and he 21. When asked who could have done it, the claimant's response was he was unable to answer that question, he did not know, "it's unfair to point the finger at anyone else". Training was discussed, with the claimant indicating that he had received hard copies of the Guidance only and missed the point about being alone. Times were discussed and at the end of the hearing Tracy Baxter summed up followed by the claimant.

84. Following the conclusion of the disciplinary hearing the committee deliberated in the presence of Sue Blevins and Peter Jewell acting in the capacity of advisers. The Tribunal is satisfied the committee properly considered the evidence before it and were not unanimous in its view of that evidence. David Johnson and Wendy Clements concluded the evidence demonstrated, on a balance of probabilities, (the burden of proof having been explained to them by Peter Jewell) the claimant had amended the mental maths paper, and he had signed a declaration that he had administered the tests in accordance with the Guidance. Graham Wilson, who was understandably concerned with the long-term effect on the claimant's career of the disciplinary allegations, took the view that David Johnston and Wendy Clements were incorrect. He believed Wendy Clements was not impartial but did not say so at the time, and partly based this on the fact she was a Local Authority employee and prior to the hearing had made a reference to the fact that this was the first disciplinary hearing she had been involved in where a headmaster had not taken "severance". It is the Tribunal's view that this comment and the status of Wendy Clements did not point to impartiality without additional evidence of her bias, and there was none within the minutes of the disciplinary hearing and deliberations.

85. Graham Wilson also took the view Tracy Baxter was an inexperienced investigator, and Audrey Houghton, a senior HR officer with the second respondent, had influenced the investigation. He did not accept Tracy Baxter's investigation report was a fair, balanced and objective one. It focussed upon the claimant, and should have considered who else, apart from the claimant, had the opportunity amend the papers. He took a view that one of the aspects of the investigation that was lacking was a failure to consider who else had a key or access to his cupboard. The Tribunal fails to understand why Graham Wilson held a belief that Tracy Baxter should have carried out an investigation into the keys, when she had properly asked the question during the investigation process, the claimant had said nothing, and the report correctly reflected the position known to Tracy Baxter at the relevant time. It was not until the disciplinary hearing that the claimant raised the issue of six keys, and for this Tracy Baxter cannot be criticised when the claimant can. It is incomprehensible to the Tribunal why the claimant, who was aware of the number of keys prior to his suspension, kept silent for so long before bringing up the issue last minute at a disciplinary hearing, despite having been "interrogated" by Mr Youle Grayling for 10 hours.

86. In his witness statement Graham Wilson criticised Ms Blevin and Mr Jewell for going beyond their roles relating to cross-examination of the claimant by both which, in his opinion, was “unacceptable and inappropriate”. This was not one of the claimant's criticisms. The claimant's criticism of Mr Jewell and Ms Blevin was that they affected the outcome by continuing to advise during the adjourned deliberations hearing. There was no satisfactory evidence before the Tribunal on the balance of probabilities that Mr Jewell and Ms Blevin, who were entitled to be present according to the respondent's procedure, affected the outcome in any way. It fell entirely within the band of reasonable responses for Mr Jewell, when asked the question, to give an explanation of the relevant burden of proof.

87. It was to Graham Wilson's credit he was reluctant to dismiss the claimant in relation to the allegation that he had amended the test papers, in the knowledge that the claimant's career would most likely be destroyed. David Johnson and Wendy Clements were under no such constraints. They held a genuine belief that as the claimant was the only person who had been in possession of all of the papers when they were handed to him by other staff who was invigilating, he had collated the papers into alphabetical order before sealing them in sealed envelopes and locking them in the electric cupboard. All but one of the amendments was made to question 9, a multiple choice question which suggested to them the person who amended the papers knew the questions and the answers, and that person was likely to be the claimant. A view was taken that the claimant did, on the balance of probabilities, amend the papers as he was the only person who would have known the test questions and he was the only person in possession of all of the papers before they were sorted alphabetically and sealed for collection.

88. With reference to the fresh evidence as to keys, Graham Wilson believed further investigation was necessary. The Tribunal took the view that Graham Wilson's analysis was the correct one, and a reasonable employer, given the seriousness of the allegations and its impact upon the claimant's future career as a headmaster, would have carried out further investigation into the keys and whether or not anyone had access to the papers using the keys.

The disciplinary outcome

89. In a letter dated 29 April 2016 sent by David Johnson on behalf of the disciplinary committee to the claimant, the outcome was confirmed and the claimant was dismissed without notice on the ground of gross misconduct. A list of undisputed facts were set out, the history of the matter in relation to communications with the STA and the claimant's submissions, including his suggestion that there was opportunity for other people to have amended the papers, and he was not the only person who had a key to the store/electrical cupboard.

90. The majority findings based on the investigation and the disciplinary hearing were as follows:

- (1) The mental maths papers had been amended.
- (2) They had been amended after they had been collated together and prior to the papers having been sorted in alphabetical order, as some

of the papers which had corresponding indentation were not in alphabetical sequence.

- (3) The claimant was alone in his office when the papers from all of the rooms had been handed to him, he put the papers in alphabetical order before they were placed in a sealed envelope and stored in the cupboard.
- (4) The amendments must have been made by someone who knew both the test questions on the paper and the correct answers, which were known to the claimant.
- (5) The mental maths paper finished at 10.10am, the next test did not start until 10.45am (also invigilated by the claimant), the children who took the tests were allowed to go out on their break whilst other children were either in the classroom or allowed to go out on a break at the same time, and “in those circumstances it is not evident that the corridor outside your room would have been especially busy at that time, as to rule out the possibility that you would have been able to amend the papers without being seen”.
- (6) It did not consider on the balance of probabilities that another person, also aware of the questions on the paper and the correct answers, had obtained a key to the cupboard (aware of which key opened the cupboard), removed the papers from the cupboard which was in a corridor, removed the papers from two sealed envelopes, re-arranged the test papers, amended the test papers, placed the papers back into alphabetical order and re-sealed them in fresh envelopes, all without being noticed.
- (7) It did not consider the claimant's suggestion that a person at the STA would have amended the papers upon receipt and prior to them being scanned, taking into account their working conditions and lack of access to a test paper. It concluded it would not have been possible that the papers were amended after that time as the papers had been scanned.
- (8) With reference to motive the view was taken that the claimant's explanation that he had no motive to amend was not reasonable, given that there was some benefit to the claimant if the outcome of the tests demonstrated better educational outcomes and progress for the school. It was not accepted that the amendments would make little difference as they would make some difference to the test outcomes, and whilst raising the possibility that other individuals might have had the opportunity to amend the papers, the claimant did not put forward an alternative explanation or view as to who, how and when and motive.

91. The majority of the committee concluded on the balance of probabilities that the claimant had sufficient access and time and did amend the KS 2 mental maths papers. By his own admission he did not follow the published guidance regarding the

administration of SATs, and had acknowledged that he had signed a declaration to confirm that he had administered the tests in accordance with the guidance, and failure to administer “these statutory national tests correctly was considered by the committee to be an extremely serious failure of duty on your part”.

92. In connection with the allegation relating to improper disclosure of information and misconduct in relation to official documents, Graham Wilson was in agreement with his two committee colleagues but he disagreed the determination that the claimant had deliberately falsified documents. It was unanimously accepted that the claimant improperly disclosed information in relation to official documents, neglected his duty, failed to uphold public trust to maintain high standards of ethics of and behaviour, and failed to maintain proper and professional regard for ethos, policies and practices of the school. Graham Wilson did not accept these allegations alone should have resulted in the termination of the claimant's employment.

12 May 2016 appeal

93. In a letter dated 12 May 2016 the claimant appealed the decision to dismiss requesting that the appeal should be by way of a re-hearing and not simply by way of review and this was granted by the respondent. As a result of the appeal the claimant's employment continued until the appeal outcome.

94. In his grounds of appeal the claimant criticised Sue Blevins and Peter Jewell for refusing to leave the staff dismissal committee during its deliberations, alleging “that is a serious flaw in the reasonableness and fairness of the process. The panel were heavily influenced by the presence of HR and legal during the course of the period of deliberations which led to the conclusion that I should be dismissed”. This is also one of the allegations raised by the claimant within these proceedings, and on the balance of probabilities the Tribunal finds, for reasons already stated, there is no satisfactory evidence before it that:

- “(a) The disciplinary committee panel were ‘heavily influenced’ by the presence of Sue Blevins and Peter Jewell. They provided advice on matters such as the burden of proof; and
- (b) Sue Blevins and Peter Jewell influenced the decision to dismiss.”

95. At paragraph 2 of his grounds of appeal, the claimant referred to having taken legal advice throughout the process. Paragraph 3 set out reasons why insufficient weight was given to his “complete lack of motive” when any effect was “negligible” and had he intended to alter, then alterations would have been made to paper A and B where much higher weighting to the overall maths mark was available. He disputed there was any benefit to him, accepting the amendments “would have made some difference but it is negligible. A reasonable committee would then have properly weighed the limited and very limited effect of those alterations against the devastating risk that I was taking to both my personal and professional reputation and to my income and to my job”.

96. At paragraph (f) the claimant referred to the “overall performance of the school in the test result for maths had actually gone down in comparison to the

previous year's results and in comparison to the 2015 national data" which he could never have predicted in advance.

7 June 2016 – third statement taken from Alison Dodd.

97. On 7 June 2016 Tracy Baxter with the support of Audrey Houghton took a statement from Karen Dodd dated 9 June 2016 all three having visited the secure cupboard and when asked whether or not she was aware of more keys her response was, "I am now. This only came to light when Steve's keys (catering manager) were taken off him around Christmas, when he was suspended". She confirmed that she informed the claimant and they had a conversation regarding the keys. He asked who had the keys, and she had responded "him, me and the caretaker". She denied that there were six sets of keys. She confirmed around SATs time there was no other reason for anyone else to go into the cupboard so it would be "just me and PP [the claimant]. I would have got the bags out to give to the postman; the bags were sealed so that must have gone into the cupboard sealed". The 7 June 2016 statement was provided to the claimant prior to the appeal hearing. The claimant was aware Alison Dodd was not telling the truth and he said nothing.

Appeal hearing 15 June & 7 July 2016

98. The Chair of the Staff Appeal committee comprised of Emma Darley, Peter Smith and Julian Fisher.

99. Following an invite which complied with the ACAS Code of Practice the appeal hearing was held on 15 June 2016, and it reconvened on 7 July 2016. The claimant was accompanied by a friend. Tracy Baxter attended the hearing. She was supported by Audrey Houghton. Following the claimant's representations concerning HR and Mr Jewell, Tony Wilson from the second respondent's HR department, and Colin Hughes, solicitor at the Council, were present to advise the appeal committee. A HR assistant attended as note taker.

100. The claimant supplied a number of documents marked "supporting information regarding the dismissal of Paul Prescott" referring to the evidence taken from Kirk Ashcroft, a retired Detective Sergeant, who had submitted a statement from an expert witness point of view, highlighting the failures in the investigation carried out, and he dealt with opportunities and motives of others and access to the storeroom. The Tribunal notes in relation to access, reference was made to Karen Dodd and that up until 18 April 2016 she insisted there were only two keys available, but by 7 June 2016 it was "discovered" that three people had a key access to the electric cupboard where the papers were stored. A subsequent enquiry with the current caretaker revealed six keys. He alleged the "fact this number of available keys was not uncovered by the investigating officer indicates the lack of rigour in this matter". What the claimant or the statement does not point out is that he was aware of the existence of these keys and said nothing up until the disciplinary hearing.

101. The claimant listed a number of people in possession of the keys with access and their motive, pointing out that the cupboard can be accessed during the day and once the children have left by staff and those involved in extracurricular activities working until 5.30pm and beyond. The question "what time did you leave on the evening of 13 May 2015?" was never asked by the investigating officer, and Tracy

Baxter was criticised for this. The Tribunal found that this question would not have been forefront in the mind of Tracy Baxter until the disciplinary hearing. The evidence before her, which was not disputed by the claimant, was only he and Karen Dodd had a key to the cupboard. As a matter of logic no-one else had access to it. Had the claimant divulged to Tracy Baxter during the investigation the fact that there were additional keys to those he and Ms Dodd held, then the question “what time did you leave on the evening on 13 May 2015?” could have been more relevant.

102. A number of issues were raised including grey postal bags, key fobs and whether the investigating officer should have recovered maths papers A and B and examined them thoroughly, instigating a freedom of information request for SATs maladministration and access to past papers as part of her investigation. The claimant alleged the disciplinary hearing was unfair and biased, and the investigation was not balanced, fair or sufficiently in-depth.

103. The claimant also submitted statements prepared by Dean Stobart, the former deputy head teacher, in which he referred to investigating the cause of why Key Stage 1 pupils were outperforming the Key Stage 2 pupils and whether there was an issue of quality and accuracy of assessment in Key Stage 1. Dean Stobart confirmed that he was not aware of any amendments to “actual” SAT tests, and there was “talk” that teachers’ pay may be affected by performance related pay in the academic year 2015, and this could have been an incentive to alter children’s SATs papers if teachers were worried that children would fail to reach their targets set by the claimant. He also referred to “obvious opposition” towards the claimant, and a lack of professionalism amongst staff, citing Jill Knapton, a Key Stage 1 leader. He referred to administering SAT tests with the claimant, maintaining there would be an opportunity to amend answers before the test papers left the examination room.

104. The witness statement of Sean Williams, the current caretaker, was also produced and he confirmed a set of keys was handed to him by Tammy Grey and maintained Karen Dodd, Jill Knapton and himself had keys. He confirmed that teachers still worked in the school when he locked up at 5.30pm and internal doors within the school remained unlocked. Graham Wilson also provided a witness statement in the same format as the statement before the Tribunal (as indeed were the other witness statements produced by the claimant at the appeal hearing) and Kirk Ashcroft.

105. It is not disputed the appeal was conducted as a re-hearing of the allegations of misconduct. Tracy Baxter put forward the details of her investigation, explaining STA had carried out an investigation, and the evidence suggested the amendments must have been made after the papers were collected from all three of the rooms, but before the papers had been collated alphabetically and only the claimant had the opportunity to amend the papers. Emma Darley interpreted the thrust of Tracy Baxter’s explanation to suggest that it was not possible for other staff to have altered the papers. Graham Wilson gave evidence and in accordance with his witness statement confirmed his view that the staff dismissal committee had been led by the Human Resources adviser and solicitor who had attended the disciplinary and had not acted impartially. Dean Stobart gave evidence in the terms of his witness statement that the case put forward by the claimant was the staff dismissal committee was put under pressure by the second respondent’s HR and legal adviser to dismiss him. He put forward the proposition that the claimant did not have the

opportunity to amend the papers, and did not have the motive. There were other keys to the cupboard and Tammy Grey, for example, may have wanted to increase pupil performance.

106. The claimant raised the issue of spare bags, and taking into account his representations and the supporting documents provided prior to the hearing taking place, the appeal committee's decision was to adjourn the appeal hearing and instruct Tracy Baxter to obtain further information from other employees in the school. It is the Tribunal's view the adjournment and ensuing investigation fell into the band of reasonable responses.

107. The hearing adjourned AT 17:35, having commenced at 9:50. The appeal committee had heard from all of the claimant's witnesses who had been questioned, as had Dave Johnson and Wendy Clements; the former confirming after the disciplinary hearing was adjourned Peter Jewell and Sue Blevins "remained in the room for clarity" during the deliberations, and there was a difference of opinion. Dave Johnson stated HR and the solicitor were there for advice and clarification of points and "they didn't go to any point to lead me. I work in enforcement. I have to work through a process to arrive at a result". David Johnson denied he was led in the process or put under pressure and confirmed HR and the Borough solicitor acting impartially, saying "I wouldn't allow them to influence my decision making".

108. Wendy Clements confirmed the panel had weighed up the evidence and comments and come to a conclusion; "we didn't agree. We asked the question as to the impact of the decision we might make". She confirmed the role of the solicitor and HR were as expert advisers and denied that they had placed added pressure to make a decision. She confirmed they were impartial and "once or twice they asked questions but just for clarity". The Tribunal finds it fell within the band of reasonable responses for the appeal committee to accept what was said by Dave Johnson and Wendy Clements, and no concrete evidence was given to the contrary to make them think otherwise.

Tracy Baxter's further investigation

109. Following the adjournment Tracy Baxter re-interviewed Karen Dodd, Tammy Grey, Jill Knapton and Lisa Madeley.

Karen Dodd fourth statement dated 30 June 2016

110. In the statement of Karen Dodd dated 30 June 2016 she was asked about her working relationship with the claimant, whether there were any conflicts, and most importantly the different accounts she had given as to the identities of the people who had access to the key to the electric cupboard. Karen Dodd responded that when it first came to light she had answered honestly, and was not aware that anyone else had keys. She confirmed:

"In my first interview I said three sets, but to be honest I had a conversation with PP [claimant] who had said I should not let on there could be more keys because he had told someone the cupboard was a secure and no-one else had access. I was being loyal to PP. I had forgotten about Steve's [catering manager] keys. I had put them in the safe..."

111. When asked whether at the first interview she suspected others might have keys, her response was, “No, but then in the spring term Sean (the caretaker) appeared to have more; that took the tally to six”. She confirmed she could hear and see anyone going into the electric cupboard. The claimant put the sealed bags in the cupboard ready to be collected, she would have seen spare clear bags, and had no involvement with SATs. It was notable the claimant did not dispute at the appeal hearing Karen Dodd’s version of events, nor her statement that he had told her “not to let on” about the keys.

112. Tammy Grey provided a statement dated 30 June 2016 and signed 4 July 2016 dealing with her relationship with the claimant, targets and performance and the fact the claimant was unhappy with Year 6 results. She confirmed that she was not accountable for the performance of the listed pupils in the mental mathematics test, and in connection with keys was asked whether she had a key to the electric cupboard, to which she responded “I wouldn’t know. I had a big bunch of keys that I inherited from Mr Fisher. Mr Williams had taken the keys off me and I was given four back. I never opened the electric cupboard”. She was asked about the timing of what she did after the mental maths was completed on 13 May, and whether she invigilated the second paper. Tammy Grey confirmed she normally went home at 5.30pm and there was nothing she could remember particularly about that night. She confirmed “Everyone uses the corridor which is quiet during lessons”. She also confirmed there were no performance targets for Year 6 pupils 2014/2015, and her pay did not depend to any extent on the performance of the Key Stage 2 pupils. She had been at the top of her scale for a while.

113. During the hearing before the Tribunal there was a suggestion made by the claimant that teachers could suffer a wage decrease had they not met set targets. There was no evidence of this possibility before the Tribunal, who concluded teacher’s pay was not linked to performance. There was no reference to any contractual right on the part of the first respondent to decrease an individual’s pay for non-performance, and it appears that such a provision had not been adopted by the first respondent and this would have been known to the claimant. There was no prospect of teachers’ pay being reduced due to lack of performance.

114. In Jill Knapton’s statement dated 30 June 2016 signed 4 July 2016 she confirmed she had no keys in May 2015, evidence which was accepted by the claimant. She confirmed the only time she went into the cupboard was in June 2015, and would normally leave school between 4.30pm and 5.30pm. Jill Knapton described how she rated the claimant as a headmaster, hence her agreement to act as his deputy, and denied Key Stage 1 scores had been inflated. She was asked about the fob system used in May 2015 to which she responded that everyone used the same fob code and this evidence was not disputed by the claimant.

115. Lisa Madeley in her statement dated 30 June 2016 signed 4 July 2016 maintained she had no key and had no reason to go into the electric cupboard. She confirmed she had invigilated Paper A test in the hall and would have need to be in the hall to set it up. She confirmed there were no performance management targets and that she was at the top of her pay scale that would not have depended on performance even if it were a lower pay scale. She stated to Key Stage maths progress was down, and related a discussion she had had with the claimant concerning this prior to the maladministration.

116. In the statement of Diane Hollis dated 28 June 2016 signed 5 July 2016 she was asked to describe the meeting with the claimant on 19 November 2015, which she did. She expressed her concern that he had been on his own with the papers, and confirmed he had shared a draft statement for the STA but she had not seen a completed copy – “she was not the person asked to carry out the investigation, so would not write the report/statement”. She also dealt with the claimant's intention to visit the STA, saying they had talked about the pros and cons of not going. The claimant had suggested at the appeal hearing Diane Hollis advised him not to attend the STA offices to view the altered test papers and Diane Hollis confirmed that this was not the case.

Reconvened appeal hearing 7 July 2016

117. The appeal hearing was reconvened on 7 July 2016 commencing 9.30am and adjourning at 11.00am. Representations were made by Tracy Baxter arising from the interviews with witnesses. The claimant was given the opportunity to ask questions. There were no questions asked. It is clear to the Tribunal that by this stage the investigation had covered the points raised by the claimant during the disciplinary hearing, including evidence concerning additional keys. The claimant referred to a prepared statement he had written in light of the further interview questions, and made reference to Karen Dodd whose evidence he agreed was “...disturbing. Access to keys is fundamental to opportunity...her answers must be disregarded. She is in the cupboard day in day out”. As indicated earlier, what he did not point out was Karen Dodd's comment that she remained silent as to the existence of the keys at his request, and this statement was undisputed by him.

118. The claimant dealt with the additional evidence produced, and made a closing speech in which reference was made to the recognition by the Educational Minister for his contribution to SEN children, his successful performance appraisal after the STA report when he was recommended for a pay increase, his leadership role and good ratings from Ofsted, pointing out he had admitted administrative oversights not neglected duties, and had never done or nor would he amend the SAT papers in 2015. He referred to the fact Tracy Baxter's investigation was civil not criminal, and it was “the easy route to make me the scapegoat”. He questioned motive given the negligible impact on scores, and whether the papers had arrived at STA in alphabetical order. He also questioned why Ruth Doig had not been interviewed during the process, but did not clarify in what capacity she should have been interviewed, as she had taken no part in it. He accused Karen Dodd's statement of being inaccurate “...Unlike me, Karen was asked about the keys alleging the investigator officer should have asked me about the keys. I was promised a balanced investigation...”

119. During the adjournment, the appeal committee decided unanimously on the balance of probabilities the claimant had amended the test papers and that he had made a false declaration to the STA. In those circumstances it was decided to uphold the claimant's dismissal. It did not take into account the staff dismissal committee letter sent to the claimant confirming his dismissal and the Tribunal accepted Emma Darley's evidence on this point.

120. The appeal committee held a genuine belief the claimant was guilty of gross misconduct based on a reasonable investigation conducted by Tracy Baxter with the

support of HR, an investigation that had been much improved following the claimant's dismissal when more detailed questions were asked of the witnesses concerning their whereabouts, whether they had access to the cupboard and so on, following the information proffered by the claimant concerning the six keys to the storage cupboard. The committee decided there was no need to obtain other maths papers as suggested by the claimant, and the Tribunal agreed that such a step would not have fallen within the band of a reasonable investigation as it would not have assisted the disciplinary committee to determine who had amended the mental maths papers in the first place.

121. The appeal committee found the claimant had collated the test papers in his room whilst he was on his own; he put them in alphabetical order before placing them in a clear sealed plastic bag and then locked them in the electric cupboard located in the corridor. They found Diane Hollis had not advised the claimant not to attend the STA offices and that the investigation had shown the papers were amended after they had been collected together as there were indentations on papers of alterations made to test papers which had been completed by pupils sitting in different rooms, referred to by the STA as "push through". Some the alterations were made before the papers were collated into alphabetical order, and the "push through" could only have occurred whilst the single sheet test paper was on a soft surface and not on a hard desk. It is notable all other maths papers were not on a single sheet, but in booklet form, and thus push through could not have taken place.

122. A key finding by the appeal panel, which was one they were entitled to reach given the evidence before them, was if a member of staff other than the claimant had altered the test papers they would have to have a key to the cupboard, open the cupboard in view of anyone using the corridor, remove the papers, shuffle and re-arrange them so they were in alphabetical order according to the room which the pupils were sat in; amendments would have had to have been made when the papers were arranged in room order and when they were arranged in alphabetical order for the whole cohort of pupils who took the test. The papers would then have to be placed into a plastic bag and sealed. This did not seem plausible.

123. At the liability hearing there was a discussion as to whether the plastic bag was marked "mental maths" or not. It appears to the Tribunal that there was no satisfactory evidence one way or another. Tracy Baxter referred to an email she had received from the STA which she argued clarified the position. The Tribunal, on any interpretation of that email, found that it had not and in any event, the email was irrelevant as it was not before the appeal committee at the relevant time, and nor was it disclosed to the claimant beforehand. The evidence before the Tribunal is that Tracy Baxter produced the 25 February 2016 email referred to above at the end of the appeal hearing and Emma Darley refused to accept it on the basis that its production was too late. For the avoidance of doubt, had Emma Darley accepted the email and taken it into account with her colleagues, and had the email not previously been disclosed to the claimant, this would have affected the fairness of the appeal hearing, and it fell entirely within the band of reasonable for late evidence which ostensibly supported Tracy Baxter's conclusion to be rejected. There was no explanation why this evidence was not disclosed earlier and shared with the claimant.

124. The appeal committee concluded the claimant did have a motive for amending the papers and that was the improved progress of the pupils. They concluded the risk of detection was relatively small and it would be unlikely for the claimant to have known the STA would be forensically examining test papers. The appeal committee also considered the motive and opportunity of other employees to amend the test papers, discounting Karen Dodd (despite her lack of credibility), as she had no motive. They found Lisa Madeley had motive to improve Key Stage 2 results as a Key Stage 2 teacher, but her pay did not depend upon pupil performance, she had a good working relationship with the claimant and did not have a key. They accepted Jill Knapton, who did not teach Key Stage 2, did not have a key to the electric cupboard nor had she had altered the test papers to disguise the alleged inflating Key Stage 1 results. Tammy Grey, who taught Key Stage 2, had no motive to improve test results. Her pay did not depend upon the pupils' performance and it was accepted she did not know which one of the keys was for the electric cupboard lay within the bunch of keys she held. The Tribunal is of the view that the appeal committee was entitled to reach this decision, having considered the evidence of witnesses, including Tammy Grey, and their decision in this regard fell within the band of reasonable responses.

125. The appeal committee concluded there was no evidence of malice towards the claimant and there was no evidence that any person had whistle-blown to the STA, which suggested the SAT tests, had not been amended with a view to damaging the claimant and his career. With reference to the part played by the STA and whether or not it could have amended the papers, it accepted Tracy Baxter's investigation results that the STA employees who scan work shoulder to shoulder, and would not have knowledge of the test questions. The appeal committee queried whether an employee of the STA would have a motive to amend papers.

126. The appeal committee were also satisfied, and held a genuine belief based upon the claimant's admission and the investigation, that he had on two occasions knowingly made false declarations to the STA. The first false declaration was when he returned the completed test papers, and the second when he submitted information to the STA in November 2015, confirming he had followed guidance produced by the STA as to the administration of Key Stage 2 tests when he was aware that he had not done so. The appeal committee took this finding into account when it arrived at its decision to dismiss the claimant on the ground of gross misconduct.

The outcome letter

127. The outcome letter sent to the claimant ran to 16 pages. Under paragraph 7 marked "Conclusions" reference was made to the claimant knowingly making two false declarations to the STA, when the guidance "was not a long complicated document and you did not need, as a relatively experienced head teacher, training from the Local Authority to make you understand the simple requirement in the guidance that papers should not be left alone with any person."

128. At paragraph 7(c) the appeal committee found: "It is implausible that you were not aware of this requirement when you submitted your first declaration to the STA in May 2015. You certainly knew of it when you submitted your second declaration in

November 2015 because you had by then admitted to Mrs Hollis that you had failed to comply with the guidance in this respect.”

129. With reference to the claimant’s opportunity to alter the test answers of the Key Stage 2 mental maths paper, it was found that he had done so, that other staff did have the opportunity or motive, but there was no evidence anyone other than the claimant “was left alone with the papers in circumstances which enabled the answers to be altered”.

130. At paragraph 7(e) the appeal committee found it was improbable that anyone altered the papers after removing them from the electric cupboard. They would have to have had a key, had carried out the operation without being detected by Karen Dodd from her officer next door and by people walking down the corridor. Reference was made to the shuffling of the papers, and finding a new bag labelled “mental maths papers” in which to put the altered papers back.

131. It was confirmed that no-one named by the claimant had sufficient motive in terms of ill will to perform the alterations with a view to destroying the claimant’s career, and had a member of staff behaved in that way “one would have expected the STA to have been informed by...a whistle-blower shortly after the exams were held. The tampering with the papers was however only discovered by STA in November 2015, several months after the examinations were held and not as a result of any whistle-blowing”.

132. With reference to the decision concerning the claimant knowingly making false declarations to the STA and altering papers of pupils, it was found he had committed acts of gross misconduct which “singly and cumulatively merited your dismissal. The Governing Body can have no trust and confidence in a head teacher who attempts to deceive the STA and who deliberately attempts to falsify important examination results”.

133. Reference was made to the fact that the appeal committee took into account the claimant’s mitigation, his unblemished excellent record and considered a lesser sanction, and they concluded that the claimant’s attempts to conceal his misconduct and insinuate that other members of staff may have been guilty aggravated and did not mitigate. This is one aspect of the appeal committee’s decision criticised by the claimant (in addition to the dismissal itself) on the basis that he had been invited and indeed criticised at the disciplinary hearing for not naming other members of staff who may have been guilty of altering the test results, and yet at the appeal hearing he was criticised for it. It is the Tribunal’s view that nothing hangs on this, and objectively, given the evidence before it the appeal committee was entitled to reach the findings it did, which fell well within the band of reasonable responses.

134. A copy of the letter was sent to the second respondent under regulation 20 of the School Staffing (England) Regulations 2009 referred to as the claimant’s employer. In accordance with those Regulations, in a letter dated 18 July 2016, the claimant was dismissed for gross misconduct, and the date the claimant received the letter, 19 July 2016, the effective date of termination.

The law

135. 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.

136. Section 98(4) provides that 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 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.

137. 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.

138. 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 if 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.

139. 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 particular misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

140. 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.

141. 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 is 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 unreasonably 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, applying the law to the facts

142. This is an unfortunate case. The Tribunal has thought long and hard given the serious consequences to the claimant and his career as a headmaster. It has not been an easy case for it to decide. It is undisputed between the parties the more serious the allegations the more thorough the investigation ought to be, especially if there is a possibility that the employee may never work again in his chosen career, which may be the case for Mr Prescott given the seriousness of the allegations either taken individually or cumulatively. The Tribunal has taken some time over this matter, and scrutinised the first respondent's processes, both at investigating stage and during the disciplinary and appeal hearing, mindful of the requirement that it should not substitute its own view for that of the first respondent.

143. With reference to the first issue, namely, was the claimant dismissed for a potentially fair reason, the Tribunal found he was having been dismissed for gross misconduct.

144. With reference to the second issue, namely, was a fair procedure followed, and did the procedure comply with the ACAS Code of Practice on Disciplinary and Grievance Procedure, the Tribunal found it was on the balance of probabilities.

145. It is clear to the Tribunal that Tracy Baxter's investigation was incomplete as at the disciplinary hearing. The questions first put to witnesses should have been robust, even if she were to upset the teachers with whom she worked in her capacity as governor and then as a parent. Tracy Baxter was required to gather all of the available evidence before the disciplinary committee could decide whether a dismissal was a reasonable response in the circumstances. It must have a genuine belief, which the disciplinary committee did possess, that the claimant was guilty. That belief must be based on reasonable grounds, after having carried out as much investigation into the matter as was reasonable in all the circumstances. Following the disciplinary hearing stage further investigation was required, and the disciplinary committee should have adjourned pending those further investigations and a failure to do so fell outside the band of reasonable responses.

146. Paragraph 23 of the ACAS Code states that, "a fair disciplinary process should always be followed before dismissing for gross misconduct", and this is particularly relevant in the claimant's case given the seriousness of the allegations and the potential effect on him and his profession. The ACAS guide emphasises that

the more serious the allegations against the employee the more thorough the investigation conducted by the employer ought to be. Given the potential consequences of an adverse finding to the claimant, the fact that if dismissed he may never be able to work again as a headmaster, was fundamental. Tracy Baxter should have carefully investigated and put as much focus on evidence that may point towards innocence as on that which points towards guilt, which means that she should have closely questioned the witnesses and explored with Karen Dodd and the claimant why the changes in her evidence had taken place.

147. Given the potentially serious consequences that the dismissal would have on the claimant, the Tribunal is satisfied, on the balance of probabilities, had it not been for the appeal hearing the dismissal would have remained unfair. The Tribunal points to the investigation at disciplinary hearing stage when the evidence concerning keys was first adduced, the manner in which the disciplinary hearing was conducted with Tracy Baxter taking upon herself to robustly question the claimant in an attempt to prove her report; an investigator acting reasonably would have been more objective, looking for evidence that may point away from the claimant's guilt.

148. The Tribunal considered whether or not there had been a delay that affected the reasonableness of the dismissal. It is unfortunate the matter came to the claimant's and respondent's attention some six months after May 2015, delay for which no party can be blamed. It is notable the ACAS Code emphasises the importance of establishing facts and putting allegations to employees promptly before recollections fade. It was unsatisfactory that Tracy Baxter took over a month between investigating and taking witness statements before she took the first witness statement from the claimant in January 2016 bearing in mind she accepted the responsibility of acting as an investigator, despite her inexperience when there were more experienced governors available, on the basis that she had the time to do so. However, there is no evidence before the Tribunal this delay has resulted in the claimant's recollection fading. There was, however, a suggestion in the witness statements of the claimant's colleagues that their recollections had faded by the time Tracy Baxter came to taking the second witness statements before the appeal hearing. On balance, bearing in mind six months had lapsed since the SAT test, the Tribunal's view is that it was unlikely a teacher could reasonable be expected to remember if papers were handed to the claimant in the hall or in his room, the time she left school that day and whether the door to the claimant's room was opened or close. Any further delay occurring between 17 November/8 December 2015 and 19 January 2015 did not undermine the fairness of the process on balance, given the particular facts of the case. It is notable that Diane Hollis, whilst she was not the investigating officer, took relevant statements from teachers concerned 2 days after the 17 November 2015 letter, and these formed part of the investigation pack taken into account by the disciplinary and appeal committee.

149. Tracy Baxter as investigating officer was required to act impartially. She was required to keep an open mind. Her task was to look for evidence that supports and weakens the claimant's case, a task she eventually fulfilled prior to the appeal hearing. By the time of the appeal hearing, the Tribunal finds a reasonable investigation had been conducted into the claimant's conduct and a fair and reasonable procedure was followed before the decision taken not to uphold the appeal against dismissal. The ACAS Code of Practice was complied with. The claimant was aware of his right to be accompanied (and was accompanied at both

the disciplinary and appeal hearings). He was given the opportunity to ask questions and to state his case, call witnesses, raised questions and put forward an explanation as to why he had not committed the misconduct. It was open to the disciplinary and appeal committee to prefer the evidence of other witnesses in preference to that of the claimant, who had for some unaccountable reason kept vital information hidden and on Karen Dodd's account, had instructed her to do so.

150. The Tribunal determines, on the facts of this particular case and having regard to the nature of the allegations made, the manner of the investigation including that which took place before the appeal hearing, the size and capacity of the first respondent's undertaking (which is not considerable as it is a small school, but has access to HR and legal support via the second respondent), and all relevant circumstances including the seriousness of the offences, the requirement that a head teacher with responsibilities for school and staff, should not tamper with exam papers and knowingly make false declarations, that the decision to dismiss the claimant was both substantively and procedurally fair and fell within the band of reasonable responses. In arriving at the decision to dismiss mitigation was taken into account, and it fell within the bands of reasonable responses for the appeal committee to have held the allegations, cumulatively and singly merited dismissal on the grounds of gross misconduct and to reject the claimant's contention that further training was necessary for him to understand his responsibilities under the STA Guidance.

151. On the balance of probabilities, the Tribunal accepts there was sufficient evidence before the appeal committee of the Governing Body who were able to reasonably form a view that claimant had altered the test papers and make false declarations. In short, the appeal committee held a genuine belief based upon a reasonable investigation, and given the seriousness of the allegations, the decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer would be entitled to take in the circumstances.

152. The appeal committee were entitled to prefer the evidence of two members of the disciplinary committee that there had been no undue influence by HR or the Local Authority solicitor during deliberations and prior to the decision being made to dismiss the claimant. In accordance with the respondent's procedures, it is legitimate for HR and the Local Authority solicitor to assist at the disciplinary and appeal hearings, and for HR to assist an investigator, especially when that investigator is inexperienced, in order to ensure all necessary matters have been addressed and to achieve clarity, but not to go beyond that. There is no evidence that the second respondent went beyond advising, assisting and clarifying.

153. During this liability hearing on behalf of the claimant Tracy Baxter was taken to task concerning her input into the disciplinary hearing, and this has been dealt with by the Tribunal above. The ACAS Code of Practice on Disciplinary and Grievance Procedures dated 2015 conducting workplace investigations provides once the investigation is complete the role of the investigator concludes and "they will usually not be involved in any further action other than discussing the report in person, attending the disciplinary hearing in a 'fact giving capacity'. They should not be there to give their opinion or present the case against the employee...If an investigator does continue to be involved in the process for any other reason there may be a perception that the investigation was biased and this should be avoided

wherever possible". The respondent can be criticised for the manner in which Tracy Baxter took part in the disciplinary hearing and the questions she put to the claimant; this was the role of the committee and not the investigating officer who was clearly at pains to substantiate the conclusions set out within the investigation report. Nevertheless, during that hearing it is apparent the claimant was given the opportunity to have his say, and took that opportunity up. The claimant, as headmaster of a school, was well equipped to deal with Tracy Baxter's questioning, another more junior employee in different circumstances may not have been so able. Despite the Tribunal's criticisms of the respondent in this regard, it does not undermine the fact that by appeal stage any unfairness that may have been caused to the claimant was put right by a full re-hearing by personnel not previously involved with the support of legal advice and HR also not previously involved.

154. Turning to the allegation of improper influence, it is well-recognised that where a third party, such as human resources or a lawyer influences the decision making process, this could compromise fairness and make any subsequent dismissal unfair. The appeal committee having gathered evidence concerning the allegation of pressure being placed on the disciplinary panel was entitled to conclude that the decision to dismiss had not been influenced by HR and/or Mr Jewel. There was no satisfactory evidence before the Tribunal of undue influence, and nothing on which the Tribunal could infer that this had taken place. Under the respondents' procedures HR and Mr Jewel were entitled to be present at the deliberation stage following the disciplinary hearing providing advice on questions of law, procedure and process. The disciplinary committee were entitled to seek such advice, and there was no evidence HR and/or Mr Jewel strayed into issues involving culpability and sanction. It was not inappropriate for guidance to be sought on the burden of proof, and when given, acted upon.

155. Taking the claimant's individual allegations as set out above in paragraphs 9(i) to (v) the Tribunal found as follows:

- (i) The appointment of Tracy Baxter was not at first blush reasonable given her total lack of experience and the fact her child was involved in the SAT examination that formed the basis of the investigation. However, Tracy Baxter was supported by HR throughout the investigation process, and by the time the appeal committee insisted on a number of additional investigations taking place, the issues in the investigation were put right as indicated above. Tracy Baxter was not responsible for an incomplete investigation into the existence of 6 keys; this lay at the door of the claimant who presented evidence for the first time at his disciplinary hearing despite having known of their existence and importance to his defence, well before he made the second untrue declaration to the STA.
- (ii) The Tribunal found the claimant was told to stay off site not because Tracy Baxter had been authorised to act as investigating officer, but on the basis that an investigation was due to take place and it was in everyone's interests, including the claimant, not to be at school so as to avoid allegations of collusion and the like. She had instructed the claimant to stay off site before the extraordinary meeting of the governors, but nothing hangs on this and there was no unfairness as

a result. Tracy Baxter instructed the claimant to stay off site on the authority of head of governors following HR advice. In short, the Tribunal found Tracy Baxter had instructed the claimant to stay off site before an extraordinary meeting of governors had taken place, and before her appointment as investigating officer, but nothing hangs on this as far as the fairness of the process is concerned, and the objectivity with which Tracy Baxter carried out her investigation. It is notable the Chair of Governors did suspend the claimant according to the Authority's own disciplinary rules of procedure.

- (iii) Julie Brown did commit a similar offence to the claimant when she carried papers from the exam room without being accompanied. She was not instructed to stay off site, and nor was she disciplined. This did not reveal Tracy Baxter and/or the respondents had prejudged the position, and nor was Julie Brown treated more favourably than the claimant. Their positions are incomparable. Julie Brown did not have access to or responsibility for all of the examination test papers, unlike the claimant and thus there was no prima facie evidence she had committed a similar offence to the claimant, and unfairness did not result.
- (iv) The investigation was not flawed from day one and whilst it did fall outside the band of reasonable responses at the disciplinary hearing stage, partly as a result of the claimant divulging the existence of additional keys, this was put right at appeal stage. An investigative process is important, it enables the employer to discover the relevant facts to enable it to reach a decision as to whether or not an offence has been committed; it provides a bedrock for fairness by enabling an employee to respond to or defend the allegations raised and if misconduct is established, provides an opportunity for any factors to be put forward which might mitigate the offence, and affect the appropriate sanction. An investigation is not solely the responsibility of an investigation officer; it is the responsibility of those taking part in the disciplinary and appeals hearings, and the manner in which the appeal committee conducted the appeal was procedurally and substantively fair, complying with the ACAS Code.
- (v) Given the particular facts in this case, and the 6 months that passed between the mental maths SAT being sat and the STA investigation, it cannot be said there was a delay in the investigation that commenced immediately by Di Hollings prior to a response being sent, and then conducted by Tracy Baxter and HR. Tracy Baxter, having accepted the role of investigator on the basis that she had more time than other governors, delayed the process over the Christmas period. It would have been better had she not have delayed, but nothing hangs on it and there was no ensuing unfairness. At no stage during the liability hearing has the claimant proven he was prejudiced by the fact his interview took place in January 2016. It is notable this followed Tracy Baxter's investigation and her visit to the STA offices, which were reasonable steps to take before interviewing the claimant. Paras 5 to 7 of the ACAS Code of

Practice highlights the following elements of disciplinary procedures which are relevant to investigations carried out by employers: It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

156. Having found the claimant was unfairly dismissed, there is no requirement for the Tribunal to consider the remaining issues involving Polkey and contribution.

157. In conclusion, on the facts of the case and taking into account the nature of the allegations made, the manner of the investigation throughout the entire disciplinary process, the size and capacity of the first respondent's undertaking and all relevant circumstances, the claimant was not unfairly dismissed and his claim for unfair dismissal is not well-founded.

Employment Judge Shotter

20 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 March 2017

FOR THE TRIBUNAL OFFICE