



EMPLOYMENT TRIBUNALS

Claimant

Respondent

P

v

E

Heard at: Bury St Edmunds

On: 6, 7, 8 and 9 November 2023

Before: Employment Judge K J Palmer (Sitting alone)

Appearances

For the Claimant: Oliver Fuller (Counsel)

For the Respondent: Edmund Beaver (Counsel)

RESERVED JUDGMENT Pursuant to an in-person hearing

Judgment

1. It is the judgment of this Tribunal that the Claimant's claim for unfair dismissal succeeds. A one day Remedy Hearing will be listed before the same Tribunal.

Reasons

2. This matter came before me listed for a four day hearing on 6, 7, 8 and 9 November 2023.
3. The Claimant presented a claim to this Tribunal in an ET1 on 28 April 2022. In it he pursues a claim for unfair dismissal pursuant to his dismissal on 5 January 2022.
4. In an Order dated 13 April 2023, EJ Ord, pursuant to an application by the Claimant, made an Anonymisation Order pursuant to Rules 50(1) and(3)(b) of the Employment Tribunal Rules of Procedure 2013. The nature of that Anonymisation Order was that the Claimant and the Respondent be referred to by the initial P and E respectively and that all witnesses should be referred to by their initials only.

5. The Claimant, who was a teacher at the Respondent school, was employed as a teacher between 23 April 2019 and 5 January 2022 when he was dismissed, purportedly by reason of gross misconduct.
6. The only issue before me is the Claimant's claim for unfair dismissal as a result of that dismissal.

The Anonymisation Order

7. At the outset of this hearing the Respondents wished to raise a preliminary point and challenge the Anonymisation Order which was made by EJ Ord. The Respondents wished that order to be lifted for the purposes of the hearing and any subsequent judgment.
8. I heard submissions from both Counsel, which I will not repeat. I am, however, persuaded by Mr Fuller, that for at least the currency of the hearing I should not interfere with the Order currently in place made by my colleague, EJ Ord. I resolved, therefore, that the Anonymisation Order should remain in place for at least the currency of this hearing and that I will consider the submissions made to me again in detail at the point that I give judgment.
9. Judgment was reserved and this is that Reserved Judgment. I deal with the anonymisation issue at the end of this Judgment.

Findings of fact

10. I make the following findings of fact on the balance of probability, such facts being those relevant to the issue before me.
11. The Claimant, who had pursued a career in the pharmaceutical industry for many years, went into teaching in the latter part of his career. Having taught as a science teacher at a number of academies, the Claimant was offered a position to teach science at key stage 3 and 4 to pupils aged 11-16 years, at the Respondent school. He commenced his employment on 23 April 2019.
12. I had before me a detailed bundle, extending to some 380 pages. During the course of this hearing I heard evidence from the Claimant, from the Respondent's Deputy Head, K, from the Respondent's Head, D, from the Respondent Trust CEO, C and from a witness on behalf of the Claimant, CH. CH was the subject of a Witness Order issued by my colleague, EJ Ord on 9 August 2023.
13. In September 2019, the Claimant was the subject of a complaint. It is the Claimant's evidence that this complaint followed a falling out with a teaching assistant, Mrs L-B, due to the fact that the Claimant had disciplined Mrs L-B's child who was a year 8 pupil at the school, for non-completion of homework. The Claimant considers that the complaints against him had been motivated by influences brought to bear by Mrs L-B.

the basis of the complaint was that two female students had said that the Claimant sometimes got too close to them and invaded their personal space during teaching time and that they felt uncomfortable with this. This was supported by a teaching colleague who, the Tribunal understands was, in fact, Mrs L-B.

14. The Head asked the Deputy Head, Mr K, to investigate the matter. The upshot was that the Claimant received a letter of professional advice and guidance from the Head. That was dated 14 October 2019. The Claimant responded on 29 October 2019, refuting such suggestions and expressing his concern that anyone might feel uncomfortable in his presence. He explained that he had raised the allegations with reaching assistants who attended his classes, who were supportive, save for Mrs L-B who, he said had indicated to him that he was too lenient on some girls in one particular class. He reassured the Head that he would be very wary of both his proximity to class members and contact on a one-to-one basis.
15. There was then a further complaint made by Mrs L-B which led to the Head Teacher writing a letter which was apparently never sent to the Claimant. The Head Teacher, D, failed to send this letter to the Claimant and in evidence had no explanation as to why she had not done so. That letter was before the Tribunal as it had emerged during the disclosure process. It was an invitation to a meeting but it was never sent.
16. In February 2020, allegations were raised by students and supported by a member of staff against the Claimant. Once again, Mr K was the investigating officer. These were different pupils from the earlier complaint, albeit that the member of staff was the same, Mrs L-B. There was a disciplinary hearing chaired by the Head Teacher, D, and the outcome was a first written warning. The Claimant gave evidence to the effect that at the end of the disciplinary hearing, when the written warning was confirmed, the Claimant was offered support to deal with difficult classes. This is detailed on page 283. It is the Claimant's evidence that no such support was ever forthcoming. A written warning was specified to last for nine months.
17. That written warning was dated 17 July 2020.
18. In September 2020, the Claimant raised a complaint against K. In fact that highlights that the written warning, albeit that it was dated on 17 July, was not received by the Claimant until 7 September.
19. The Claimant's letter of 21 September raised a complaint about K and the way in which he had conducted both investigations in October 2019 and February 2020. That complaint was never followed up by the Respondents.
20. There then followed a resignation by the Claimant, for personal reasons which was withdrawn by the Claimant in March 2021.

21. The events which led to the Claimant's dismissal commenced in November 2021 following a bout of covid suffered by the Claimant. On 23 November, prior to returning to the school after covid, the Claimant was informed that he was suspended, pending an investigation of a complaint made by a student.
22. The Claimant gave evidence that he was still suffering the effects of a heavy bout of covid and was suffering continuing symptoms of coughing, insomnia, lethargy and weight loss. He said he was persuaded by his daughter to attend a GP as he was incapable of holding a coherent conversation.
23. He was initially required to attend the disciplinary hearing pursuant to an investigation, once again conducted by K, on 15 December 2021.
24. As part of the investigation he was interviewed by K on 2 December, albeit still unwell.
25. K conducted the investigatory process and was also part of the panel at the disciplinary hearing.
26. The allegations against P were:
 1. That he touched a female student, rubbing his hand down her arm.
 2. That he repeated this behaviour on numerous occasions since September 2021.
 3. The third allegation arose during the investigation that he smiled at a student in form time in a manner that made her feel uncomfortable.
27. It is a significant limb of the Claimant's case that K, not only was an inappropriate officer to investigate these allegations having been twice previously involved in investigating allegations, but that K was partial and prejudiced against the Claimant due to these prior allegations. Further, it is the Claimant's case that there were significant deficiencies in the process adopted by K during this investigation.
28. Having considered the evidence on the balance of probabilities, I do consider that K did bring a degree of prejudice to the investigation which led to the Claimant's dismissal and that investigation contained significant deficiencies. I set out my reasoning and those deficiencies below.
29. K, pursuant to his investigation and as part of his opening remarks when on the panel at the disciplinary hearing said:

"Is it part of an increasing pattern of behaviour? : It is.
Has he done something? : He has.
Has he had a letter? : He has.
Has he done something else?: He has.

Has he had a process and another letter issued?: and beyond the nine months he believes is long enough not to be held to account before he did something else?

This is how it could be interpreted”.

30. K also, during the investigatory meeting with the Claimant on 2 December, referred to the school having to deal with claims previously made by students about the Claimant’s conduct.
31. K, in his investigation, interviewed student A, who was the student making the allegation which led to the Claimant’s dismissal. This interview took place on 19 November 2021 and there was a follow-up interview on 2 December 2021. Student B, who was a close friend of student A was also interviewed on two occasions. There was a marked contrast between the nature of those interviews, their length, how they were conducted and how they were recorded to the interview with the Claimant on 2 December. The Tribunal had before it notes running to some 11 pages of the interview with the Claimant which was conducted in some detail. The interviews with the students can best be described as perfunctory. Student A had indicated that she and student B were often the first ones to the Claimant’s form. This was because they would go to the toilet in the science block before the time of the start of the lesson and would therefore be in the block and near to the lesson at the time the lesson started. She said that this happened pretty much everyday and that every day the Claimant would stroke her arm from the top to the bottom. She said it had been happening since the beginning of term in September 2020 and said it had happened about 80 times. She also went on to say that there was an incident at the school gates when she went to talk to the Claimant about the fact that she felt that she needed to speak to him about him asking her to come to the front of the class to guess a word at the end of the lesson. She said he touched her arm and was smiling at her and kept holding her arm for about 15 seconds. She said year 8 students were there and student B.
32. The complaint was initiated by student A in an email. The initial contact had been made with Mr K by student B who told him that student A wished to raise an issue about the Claimant with him. That email was sent on 17 November 2021. The interview with student A descends into little detail, certainly not the level of detail one would usually expect to see in a disciplinary investigation. Mr K explained this in his evidence by saying that his experience in such matters was that if students were forensically examined, they are more likely to feel they need to say something more rather than necessarily sticking to the facts. He also admitted that the format of the interview was entirely different in that there was no-one present to take a note or record those interviews. The Respondents confirm that they have since amended this process to include a process where in interviewing students in such circumstances a notetaker would be present.

33. The follow up interviews with student A and student B were extremely short. Mr K said that he had conducted the follow up to confirm what they had said in the first interview.
34. There was a deficiency in the recording of some of the interviews conducted by Mr K. Only the interview with the Claimant was properly minuted. Only the accounts of student A and student J provided details of questions posed and answers provided. Other interviews were recorded by a two or three line record and was summaries only. Mr K, however, argued that this difference did not affect the fair, consistent and objective procedure that he says he conducted.
35. There were certainly gaps in the evidence obtained by Mr K, mainly due to the perfunctory nature of the interviews with the students he interviewed. In particular, student A, who was the student making the allegations, was not questioned in any detail as to precisely where the alleged touching took place in terms of where precisely she was standing and facing and where the Claimant was alleged to have been standing.
36. There was a failure to speak to student J prior to the disciplinary hearing which initiated the Claimant's dismissal. Student J gave evidence which cast doubt upon the evidence of students A and B.
37. Pursuant to Mr K's investigation, he recommended that the matter proceed to a disciplinary hearing. In summary, Mr K had interviewed student A, student B, student C, student D, student F and student G. He had also interviewed three teachers, Mrs L, Mrs CA and Mr CH from whom we heard evidence for the Claimant. Mr K recommended that matters proceed to a disciplinary hearing in his investigation report. His report is dated 6 December 2021.
38. The Claimant was asked to attend a disciplinary hearing on 15 December but requested a postponement because he was still suffering from ill health. Accordingly, the disciplinary hearing was postponed until 5 January 2022. The Claimant's ill health continued throughout the Christmas period and he requested a further postponement of the hearing on 5 January. That request was refused by the Head D and the Claimant was told that the hearing would proceed in his absence. The hearing did proceed in his absence. The panel consisted of Mr K, who presented the results of his investigation to the Panel, Dr J T, another Head Teacher, RF, Chair of Governors and D, the Head Teacher of the Respondent. There was a Representative from HR and a notetaker. The hearing took place on 5 January at 11.30 am without the Claimant.
39. As the allegations against the Claimant were of a safeguarding nature involving children, the Respondents had to contact the Local Authority Designated Officer (LADO). They had done this in December during the process of the investigation. There had been a meeting with the designated officer AS, attended by D and Mr K. I had the notes of that meeting in front of me. It was on 14 December 2021.

40. Pursuant to the meeting on 5 January, a decision was arrived at that the three allegations against the Claimant were substantiated. There was an agreement between the Panel Members D, RF, Dr JT, that the allegations were substantiated.
41. Pursuant to that on 10 January, D wrote to the Claimant informing him that the three allegations had been found to be substantiated and dismissed him summarily by reason of gross misconduct. The dismissal was said to be effective from 5 January.
42. In her evidence the Head Teacher, D, said that the Panel had carefully considered all the evidence provided including Mr K's investigation report, the statements and evidence from witnesses interviewed and the opinion of LADO. She said that the Panel listened carefully to Mr K's account and the key points that he drew out. She accepted that no statement had been obtained from student J. She said that the Panel had questioned Mr K rigorously. She said that they took into account a possible pattern of behaviour including the 2020 investigation and any similarity. She explained why they took that into account despite the fact that on the face of it, the warning should have expired after 9 months. She said, in accordance with the Keeping Children Safe in Education, statutory provisions, a warning which included, in essence, a safeguarding issue involving children, was never expunged.
43. She mentioned that the Panel had taken into account the contention by LADO that there rarely is concrete proof in cases of this nature but the children rarely make allegations of this type up.
44. She commented on the Claimant's issue with Mrs L-B and said that she was aware that the Claimant felt that he was being victimised by this TA but that others had also, in the past, expressed concerns about the Claimant's interaction with students. She said that the reason the Claimant gave about why Mrs LB might have a grievance against him did not stand scrutiny.

Issues of fact relevant to tests to be applied in this case.

45. There are a number of issues of importance which I must take into account in arriving at my decision. These are matters of fact which have emerged during the course of this hearing, many of which have been brought to my attention in submissions.
46. When student J was eventually interviewed, after the decision to dismiss had been taken, but prior to the appeal hearing, she was not supportive of A's evidence. This lack of support was dismissed by K in his comments to the appeal as being of no relevance.
47. Student E recalled that sometimes student A and B were there in class (where the alleged touching is alleged to have taken place) but normally

there are other people there before them. K said this neither proves nor disproves the original account of student A.

48. Student C gave an account which was at variance with student A. Student C saying that the Claimant had tried to hug student A. This was never something that student A alleged.
49. The remaining CCTV footage which was available, showed that on two of the four occasions student A and student B may have reached the Claimant's classroom first but this does not accord with student A's original account that it happens pretty much every day.
50. Student A, as part of her allegations when questioned, alleged that the touching occurred "about 80 times". K and the disciplinary panel accepted, however, that this could not possibly have been the case.
51. Evidence from the Claimant in respect of how many times student A and student B could have attended the Claimant's class first in conjunction with the CCTV suggests that students A and B might, on a small number of occasions arrive first at class but that it is unlikely that they would have done so much before other girls arriving. The Claimant's evidence is that student A, student B and him could only have been in form time together first on a maximum of nine occasions. This contrasts greatly with student A's account that the touching in class happened on 80 occasions and pretty much every day.
52. Mr K failed to seek corroboration of the instance of alleged inappropriate touching near the school gate. There were year 8 students there and lots of other people. No attempt was made to interview any of those.
53. The teachers who were interviewed made it clear that they did not observe any misconduct in his classroom. Mrs L indicated she had an excellent view into the Claimant's classroom.
54. In his report Mr K dismisses the difficulty with student A's evidence that the touching happened 80 times. He does not consider the fact that this clearly could not have happened as being significant. He focuses on whether touching happened or not rather than the credibility of student A's account of how many times it happened.
55. Mr K also forms his own opinion as to whether the touching took place or not in his submissions to the disciplinary hearing. He opines that on the balance of probability the touching did take place. His input at that hearing was significant albeit he was not one of the decision makers.
56. It is a fact that, at the time of the allegations, student A was facing permanent exclusion for setting fire to toilet paper in the female toilets. She was not at school in January 2021 and did not return.

57. In a disciplinary hearing, D makes the comment that she accepts that the touching could not have happened 80 times and says it might have happened 9 times or 29 times, we don't know how many times, but it happened more than once. It appears that D has reached a conclusion early in the process.
58. There were considerable inconsistencies ranging across the limited evidence sought from student A, and student B. As mentioned above, student C's account does also not accord with student A.
59. No attempt is made to seek evidence from the person mentioned by student A in her email of complaint. She says she told a friend in year 11 and they said it had happened to them as well. Mr K said he honestly didn't think to pursue that as a line of enquiry.
60. The Claimant admitted that he had failed, when instructed to confirm that he had read, and had a practicing knowledge of the school safeguarding policy and had updated EMAT code of conduct. When questioned, he accepted that this was part of his professional responsibility. He said that he had had difficulty accessing the policy from time to time but accepted that it was his responsibility to make sure he did access it, read it and confirm that he had done so. He accepted that he hadn't done that.
61. The Head Teacher, D, had attended a JEM meeting with LADO on 14 December 2021 prior to the disciplinary hearing.
62. The Claimant appealed the decision to dismiss. The appeal was heard by JC, Trust CEO on 21 Feb 2022. The appeal hearing purportedly took the form of a complete re-hearing which is in breach of the Respondent's own policy. It did not, however, appear to take the form of such a re-hearing as no questions were asked by the Panel Members and there is no evidence that those panel members revisited the issues other than on a review basis.
63. They confirmed the original decision to dismiss.
64. It is true that the appeal did have the benefit of the interview with student J before it which the original disciplinary panel had not. Mr K, once again, plays a significant part in the appeal process. Head Teacher D and RF attended as witnesses. Whilst K was not a Decision Maker, many of the notes of the disciplinary process were Mr K giving detailed reports of events. The process took the form of K essentially being questioned by the Panel and supporting the Respondent's decision to dismiss.
65. The Tribunal also heard evidence from CH, who was the subject of a witness order. He remains a teacher at the Respondents. He gave evidence that it would have been very difficult for the Claimant to have perpetuated the touching, at the beginning of his classes that he was accused of, as he said, that the classroom was very exposed. He said that an entire wall extending along the length of the classroom was made

of glass. He gave evidence that he had, during his working life, been involved in assisting a teacher's union in dealing with allegations of impropriety against teachers. He said, within his experience, it is often the case that pupils make entirely malicious unfounded allegations against teachers.

66. It is also worth noting with respect to the appeal that it was adjourned several times to accommodate the Claimant whereas the original disciplinary hearing, which determined his dismissal, was not.
67. It is notable that in their analysis at the end of the disciplinary hearing, the panel, and in particular the Head Teacher D, who was instrumental in the panel's decision, analysed the allegations raised by student A and opined that it would be unlikely that a student making up allegations would invent allegations which were of the nature of the allegations put, namely, the touching or stroking of the arm. Another panel member stated that, if they wanted to cause trouble, thus intimating that if they wanted to invent a story, they would say that the teacher touched them in more intimate place. The Head Teacher then agrees and says, "yes, it would be the bum or the breast". There was therefore some careful analysis of what was before them by the panel and in particular D.
68. I am bound to comment on the nature of the evidence I heard from the parties. I found all witnesses to be credible and to give their evidence honestly, clearly and without obfuscation or any attempts to mislead.
69. Mr K was very careful in the giving of his evidence and was prepared to admit that certain aspects had not occurred to him during the investigation and that on balance, his investigation might have been done differently. I found his openness to be indicative of his approach to the giving of evidence.
70. I was also impressed by the evidence of the Claimant who gave his evidence calmly and clearly and, of course, was very adamant in his denials of the allegations against him.
71. The evidence of Head Teacher D could also not be faulted and I had no reason to treat her evidence with caution or suspicion.
72. Much the same can be said of the other witnesses I heard from.

The Law

Unfair dismissal

73. Claims for unfair dismissal are pursued under s.111 of the Employment Rights Act and are presented to an Employment Tribunal. In assessing the fairness of a dismissal, where the dismissal is admitted, a Tribunal must have regard to the provisions of s.98 of the ERA.

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

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

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

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

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

74. Where a dismissal is admitted, the burden of proof is on the Respondent to show what was the reason for the dismissal. In this case it is common ground that the reason was conduct and that is not disputed by the Claimant. Conduct is a potentially fair reason for dismissal under s.98(2)(b).

75. Whether a dismissal by reason of conduct is fair, depends on whether a Tribunal considers it is so, applying s.98(4).

76. The Tribunal is assisted by a number of authorities in such cases. When determining the fairness of conduct dismissals, the case of British Home Stores v Burchell [1980] ICR303 is relevant. The Tribunal must apply a three fold test:
1. The employer must show that he believed that the employee was guilty of misconduct.
 2. The employer must show that he had, in his mind, reasonable grounds upon which to sustain that belief; and
 3. That the stage at which the employer formed that belief, he had carried out as much investigation into the matter as was reasonable in the circumstances.
77. The key decision for the Tribunal is to determine whether the decision of the employer fell within the range of reasonable responses open to the employer, judged against the objective standards of a hypothetical and reasonable employer. It is very important for the Tribunal not to stand in the shoes of the employer and decide what it would have done if it were the employer.
78. This approach was approved by the Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91CA, where Lord Denning, then Master of the Rolls, stated:
- “The correct test is :
- Was it reasonable for the employer to dismiss him?
If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases, there is a band of reasonableness, within which one employer might reasonably take one view and another, quite reasonably, might take a different view”.
79. This test was also applied in the case of Iceland Frozen Foods Ltd v Jones [1983] ICR 17 EAT, where a Tribunal had phrased its finding of unfair dismissal as follows:
- “In our view, neither of the applicant’s faults, either singly or taken together, came anywhere near being sufficiently serious to make it reasonable to dismiss him, applying the provisions of section 98(4). The EAT held that the Tribunal had misdirected itself by substituting its own opinion for the objective test of the band of reasonable responses. Mr Justice Brown-Wilkinson summarised the law concisely in his summary and is frequently quoted and applied by tribunals:

“We consider that the authorities establish that in law the correct approach for the Tribunal to adopt in answering the question posed by s.98(4) is as follows:

1. The starting point should always be the words of s.98(4) themselves;
2. In applying the section (a) Tribunal must consider the reasonableness of the employer’s conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair;
3. In judging the reasonableness of the employer’s conduct, a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
4. In many, but not all cases, there is a band of reasonable responses to the employees conduct within which one employer might reasonably take one view, and another, quite reasonably, take another view. The function of the Tribunal as an industrial jury is to determine whether, in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair”.

Fairness of an employer’s procedure

80. The interpretation given to wording of s.98(4) of the ERA 1996, had the effect of introducing the concept of a procedurally unfair dismissal, that is a dismissal that is unfair because the employer has failed to follow a fair procedure. There was then formulated what was known as the “No Difference Rule”, first formulated in the case of British Labour Pump Company Ltd v Byrne [1979] ICR 347 EAT. This rule basically meant that where there was a prudent procedural irregularity in an otherwise fair dismissal, that it could be shown that the carrying out of a proper procedure would have made no difference then the dismissal would be fair.
81. The House of Lords rejected the no difference rule in the case of Polkey v AE Dayton Services Ltd [1988] ICR 142. The House of Lords said that the s.98(4) simply directs tribunals to consider whether the employer had acted reasonably when dismissing. Therefore, the employer’s actions in dispensing with the fair procedure were highly relevant to the question of whether a dismissal was fair. That principle was interrupted for a time when the statutory dispute resolution procedures came in in 2004 but, since their demise, has reverted to the Polkey position.

Submissions

82. I have before me erudite and well constructed written submissions from both Counsel. I do not propose to repeat them here.

Conclusions

83. There were a significant number of failures on behalf of the employers in the process they adopted and in the approach they took in determining to dismiss the Claimant. I have made findings of fact in respect of these. I will not repeat all of those failures again. There is evidence before me that both K and D, the latter who was instrumental in arriving at the decision to dismiss, had prejudged the outcome of the disciplinary hearing.
84. K was significantly involved in both the disciplinary hearing and the appeal hearing. He had previously been involved in investigating complaints against the Claimant and the Claimant had raised a personal complaint against K which the Respondent failed to pursue. K, in his remarks to the disciplinary hearing, evinced a prejudgment against the Claimant based upon his previous interaction not helped by the inadequacy of his investigation into the incidents which led to the Claimant's dismissal. K should not have been involved as investigating officer. The fact that he was meant that he brought prejudgment and prejudice to the disciplinary hearing which, in turn, heavily influenced the outcome.
85. The Head Teacher D also, perhaps unknowingly, appears to have formed a view about the Claimant's guilt.
86. There were myriad failures in the process conducted by K. K admitted these failures though I have highlighted these in the findings of fact. K failed to interview a number of students whose evidence might well have been highly relevant. He also conducted the interviews of those students to whom he did talk in an inadequate fashion. He failed to secure an interview with student J prior to the disciplinary hearing.
87. He failed to sufficiently take into account aspects of the evidence from student A and student B of which he should have been suspicious. For example, he dismissed the importance of the obvious inaccuracy of student A's testimony that the touching happened pretty much every day and about 80 times. Also he failed to properly consider the credibility of student A in light of her suspension and possible expulsion. As a result of this his report and his involvement in the disciplinary procedure, this led to the panel making a decision which also failed to give adequate consideration to these issues.
88. Head Teacher D had also formed an opinion about the Claimant which was in her mind at the very beginning of the disciplinary hearing. This is evidenced by the comments she made at the JEM meeting on 14 December 2021.
89. I am persuaded by Mr Fuller, on behalf of the Claimant, that the disciplinary hearing worked backwards from the implication of a pattern of behaviour to justify finding the allegations had been substantiated.

90. I have highlighted deficiencies in the investigatory process of Mr K.
91. It is also arguable whether Head Teacher D should have been part of the decision making process as a result of her previous involvement in other issues.
92. The failure to adjourn the disciplinary hearing and the decision to proceed in the Claimant's absence may also be criticised. There seems no good reason why it was necessary to press ahead on 5 January. The Claimant had been away and had been genuinely ill. The disciplinary hearing had been postponed on one occasion but D refused to postpone it and proceeded in his absence. Student A was not at school at that time and so it is difficult to see what the rationale was for, or the necessity for proceeding with the hearing in such haste. This contrasts with the fact that the appeal hearing was adjourned on more than one occasion to accommodate the Claimant. The deficiencies that I set out in my findings of fact, in my judgment, are significant.
93. Mr Fuller points out that the framing of the competing evidence and the comment in the disciplinary hearing that there was "no concrete proof available to dispute the allegation", supports the proposition that unless and until the Claimant was, himself, able to uncover a "silver bullet" which demonstrated beyond doubt that student A was acting untruthfully, the allegations were bound to be found to have been substantiated. I agree with Mr Fuller's assertion that this proves unrealistic, unassailable and ultimately an unfair burden upon the Claimant in having to prove his innocence. There was clearly therefore, in my judgment, a failure of procedure.
94. The more telling question is whether the failure is more substantive. Applying the Burchell tests, it is clear that the Respondent held a genuine belief that the Claimant was guilty of the allegations put.
95. However, that belief is rendered unreasonable in my Judgment in light of the many myriad failures of Mr K in investigating the process, his tainted pre-judged presentation to the disciplinary panel based upon his flawed analysis of the evidence and his previous interactions with the Claimant and the deficiencies of D having already formed an opinion about the Claimant's guilt. The belief was also reached after a flawed investigation and whilst no investigation is a counsel of perfection, much more could have been done to ascertain the truth or otherwise of student A's allegations.
96. I therefore find that the Respondents have failed the Burchell test and that their belief in the Claimant's guilt was unreasonably held pursuant to an inadequate and flawed investigation.
97. I do not therefore believe that any reasonable employer would have dismissed, in the circumstances which were before the Respondents. The

decision did not fall within a band of reasonable responses to the evidence that was in front of them.

98. I understand and accept that that band is relatively wide but the failures here, in my judgment, are so serious that they were not entitled to reach the conclusion that they did. In arriving at that judgment I am not, in any way, substituting my own view as to what I would have done in those circumstances. It is a question of whether any reasonable employer would have dismissed in those circumstances. I think they would not and for those reasons the dismissal is both procedurally and substantively unfair.
99. The unfair dismissal claim is well founded and succeeds. A one day Remedy will be listed.

The Anonymisation Order

100. The Anonymisation Order under Rule 50 was put in place by my colleague, EJ Ord on 13 April 2023 pursuant to an application from those acting for the Claimant made on 2 April 2023. That application was opposed in a letter dated 5 April by those acting for the Respondent.
101. As discussed at the outset of this hearing I resolved to revisit this issue once I had arrived at a judgment and I now propose to do so.
102. Questions of anonymity in the Employment Tribunal are governed by Rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1.

50.—(1) A Tribunal may at any stage of the proceedings, or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include—

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;

(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.

(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

(5) Where an order is made under paragraph (3)(d) above—

(a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;

(b) it shall specify the duration of the order;

(c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and

(d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.

(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998 .

103. The original application on behalf of the Claimant, as put in the letter of application of 2 April 2023, drew to the Tribunal's attention that the nature of the allegations against the Claimant were very serious, essentially being allegations of sexual misconduct by the Claimant towards a female student in the course of his employment as a teacher. It drew to the attention of the Tribunal that the Claimant occupies a high profile position in governing bodies of a particular sport and that he has been an active instructor in that sport to adults and children. It reminds the Tribunal that irrespective of the outcome of his claim for unfair dismissal, publicising his name in conjunction with the case before this Tribunal, airing the nature of the allegations in question, would substantially prejudice the Claimant's ability to obtain future employment as a teacher or any role in a teaching establishment should he choose to seek such employment.
104. Those acting for the Claimant invoke the wording of section 50 and argue that it is in the interests of justice in order to protect Claimant's convention rights under the European Convention on Human Rights, in particular article 8. That is right to respect for private and family life.
105. Those acting for the Respondents resisted that application and drew to the Tribunal's attention the fact that the Claimant's convention rights under article 8 are not unconditional and that article 8(2) permits interference with a right to private life to the extent that it is justified, in a sense of being necessary and proportionate.

106. They correctly refer me to the principal authorities in this area, most particularly, the case of British Broadcasting Corporation v Roden [2015] IRLR 627(EAT) and in the subsequent case of Fallows and Ors v News Group Newspapers Ltd [2016] ICR 801. They remind the Tribunal that an Order under Rule 15 interferes both with the principle of open justice and the right to freedom of expression. They refer to paragraphs of the Roden case and highlight in particular the comments that the principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice. They counter the reference to article 8 of the convention with a reference to article 6 and article 10. They say that as a result of the Claimant's dismissal in this case, the Claimant has been referred to the Teacher Regulation Agency (TRA) following his dismissal appeal hearing and such matters are public hearings. They say that TRA will determine whether the Claimant can continue to work as a teacher and conduct their own investigation and findings of fact and will determine if the teacher standards have been breached. They point out that such hearings are not given anonymity unless there are exceptional circumstances. They say this case does not meet those requirements. They refer the Tribunal to statutory guidance from the Department of Education, issued under s.175 of the Education Act 2002 as amended, the Education (Independent School Standards) Regulations 2014 and a Non Maintained Special Schools (England) Regulations 2015. They say the guidance confirms that the schools and colleges in England must have regard to the statutory guidance when carrying out their duties to safeguard and promote the welfare of children. they refer the Tribunal to schools obligations under the statutory requirements to conduct due diligence in recruitment.
107. They say that an order under Rule 50 will prohibit and obstruct those statutory requirements.
108. Those arguments were rejected by EJ Ord and an Anonymisation Order was made.
109. Before me those arguments were revisited and refreshed to assist me in revisiting the Anonymisation Order that is in place currently at the end of these proceedings.
110. I have carefully considered those arguments and have had taken due note of the authorities to which I have been referred. It is certainly a case that the authorities make it clear that only in exceptional circumstances should a Tribunal derogate from the principle of open justice. The embarrassment is unlikely to suffice.
111. The application before me does not extend to a request to make an order that this judgment does not appear on the register. It is an application to continue the Anonymisation Order made by EJ Ord on 13 April 2023, no more.

112. The Claimant has been successful in these proceedings and the dismissal has been found to be unfair. A Remedy Hearing will now be listed.
113. The Claimant earns his living as a teacher. He is also a high profile figure in a nationally recognised sport and is a significant administrator and protagonist in that sport.
114. Identifying the Claimant and the Respondent in these proceedings will certainly, in my judgment, have an effect on the Claimant and his ability to seek work elsewhere. It will also, in my judgment, significantly affect his position in the sporting bodies with whom he is now associated.
115. I am also minded to consider the fact that if the school Respondent were to be identified, it is conceivable that those pupils involved in the incidents which led to the disciplinary hearing and the dismissal of the Claimant, may also be at risk of identification. That may be a remote possibility but that possibility seems to me to exist.
116. I am therefore persuaded that this is one of those rare occasions where exceptional circumstances do exist and that it is therefore appropriate to derogate from the principle of open justice. The fact that there may be a separate TRA investigation is a matter not for me.
117. I do not make this decision lightly. I have weighed the competing interests and determined that, in the circumstances, it is appropriate to continue the Anonymisation Order originally made by my colleague EJ Ord on 13 April 2023. That Anonymisation Order should continue in perpetuity.

Employment Judge K L Palmer

Date: 8 February 2024

Sent to the parties on: 9 February 2024

For the Tribunal Office

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