RA

EMPLOYMENT TRIBUNALS

Claimant: **Mr C Bailey**

Respondent: **St Agnes Roman Catholic Primary School**

Heard at: **East London Hearing Centre**

On: **Thursday 24 and 25 January 2019**

Before: **Employment Judge C Lewis**

Members: **Ms J Hartland and Mrs S Jeary**

Representation

Claimant: Mr M Arnold (Consultant)

Respondent: Mr L Upton (HR advisor)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

1. The Claimant's claim for less favourable treatment as a fixed term worker is dismissed upon withdrawal.

2. The Claimant's claim for less favourable treatment as a part-time worker contrary to the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 fails and is dismissed.

3. The Claimant's claim for unfair dismissal succeeds.

4. The Claimant's claim for wrongful dismissal succeeds.

5. A remedy hearing has been listed for the 22 March 2019.

REASONS

1. The parties had agreed a list of issues which was handed to the Tribunal on the first day of the hearing. Following discussion with the Employment Judge the agreed list of issues was amended to reflect the following, but otherwise it was agreed would stand as the List of Issues:

2. The standard investigation expected of the Respondent is that of a reasonable employer. However, what is reasonable in the circumstances ought to reflect the potential career ending impact of the allegation (*A v B* [2003] IRLR 405 EAT).

3. Under the heading Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000:
(i) The Claimant does not rely on an actual comparator but seeks to compare himself to a hypothetical comparator.
(ii) The Claimant alleges that the Respondent would have responded to his grievance had he been a full-time worker and failure to do so amounted to less favourable treatment of him as a part-time worker.
(iii) The Claimant also alleges that the decision to dismiss him was less favourable treatment than that of a full-time worker, who, he says, would not have been dismissed in the same circumstances.
(iv) In response, the Respondent disputes that the Claimant was a part-time worker and maintain that they would have treated anyone else in the same circumstances in the same way they treated the Claimant.
(v) The Claimant was employed in three different roles with different sets of terms and conditions attached to each role but his combined hours amounted to 35 plus hours per a week and that was considered to be a full-time contract for support staff.
(vi) The Respondent's position in respect of the grievance was that it was received after the Claimant's dismissal and was almost 100 percent concerned with the dismissal thus it was included in the pack that went to the appeal panel.

Evidence and procedural matters

4. The following witnesses gave evidence to the Tribunal: the Claimant, Brid McDaid, the Head Teacher and Alexandra Ploussard, a Governor at the school, for the Respondent. The parties redacted any names so that the children were not identified in the statements, nor in their evidence. The misconduct allegation relied upon by the Respondent being that the Claimant had used excessive physical force on an 8 year old boy during a P.E lesson.

5. The Tribunal heard evidence from the Respondent on the first day of the hearing. At the end of the day one of the Claimant's representative, Mr Arnold, handed a revised or updated schedule of loss together with some supporting documents. The Tribunal noted that the schedule of loss included damages for wrongful dismissal whereas wrongful dismissal had not formed any part of the list of issues agreed at the outset of the hearing. This issue was addressed with the parties at the beginning of day two of the hearing. The Claimant pointed to his claim form and the content of the particulars of claim attached at Section 8.2 of that form; specifically, paragraph 24 which sets out that the Claimant "seeks compensation for unfair and wrongful dismissal on the basis that

the act of dismissal within all the circumstances is not within the band of reasonable responses given the facts of the case."

6. Mr Upton, on behalf of the Respondent, conceded that the wrongful dismissal claim did not involve the introduction of any further or new evidence and the factual basis considerably overlapped that of the evidence heard for the unfair dismissal claim. Mr Upton left it to the Tribunal to decide whether to allow the claim for wrongful dismissal to proceed.

7. The Tribunal heard evidence from the Claimant and at the end of the evidence heard further submissions from both parties before adjourning to deliberate.

8. The Tribunal considered whether to allow the claim for wrongful dismissal to proceed. Having considered the claim form, the factual basis of the claim contained in the claim form, the evidence it had heard, the submission from Mr Arnold in respect of the prejudice to the Claimant and the submission from Mr Upton in which it was conceded that there was no prejudice to the Respondent in allowing that claim to go ahead, the Tribunal accepted that the reference in the claim form to wrongful dismissal had at least put the Respondent on notice that this was a claim the Claimant was seeking to bring and that it was based on the and arising from the facts that had already been pleaded and decided that the prejudice to the Claimant in not allowing the wrongful dismissal claim to go ahead outweighed that to the Respondent and that it would decide the claim.

Findings of facts

Part-time worker

9. The Claimant was employed by St Agnes Roman Catholic Primary School from 1 September 2013 until his dismissal on 24 May 2018. At the time of his dismissal the Claimant had three roles. He was an unqualified teacher teaching P.E at point 3, full time equivalent contract which was 6 hours per week, consisting of 3 afternoon sessions of two hours, set out in his timetable (at page 59 of the bundle), this included a one-hour planning time slot. The Claimant also had a teaching assistant contract for 23.5 hours per week and a contract of 2.5 hours for midday meal cover which was half an hour per day, of the school week. The Claimant also had a further contract to assist with the breakfast club in the mornings which the Tribunal was informed amounted to 9 hours a week.

10. The Claimant was employed on a series of fixed terms contracts starting in 2013, varying his part-time hours with the addition of the teaching assistant SEN post in September 2014 and the unqualified teacher post in June 2016.

11. St Agnes Roman Catholic Primary School is a voluntary aided school and the governing body is the employer. The school has pupils from ages 4 to 11 and also retains a nursery with 26 children. The school employs 33 staff in total including teachers, teaching assistants, nursery nurses, midday meal supervisors, office staff and a caretaker.

12. The Tribunal accepted Ms McDaid's evidence that 35 hours per week equates to a full-time contract for support staff. For qualified teachers the annual hours are 1265 hours over a period of 195 days i.e. 6.5 hours per day.

13. The Claimant received training which included child protection and safeguarding. The Tribunal was referred to documents in the bundle [page 55-56]. The Claimant most recently took part in training on 5 September 2017, this included training on restraint and safeguarding. Mr Bailey had received a certificate in safeguarding and child protection as a result of training completed in March 2017. The Tribunal was also referred to the school's child protection policy which is at page 74-100 of the bundle.

14. The Claimant was appointed as an unqualified teacher by Ms McDaid to teach P.E. After an initial period of having a teaching assistant in class with him and once the school was satisfied in his ability to lead a class on his own, he was left to lead classes on his own. The Claimant was happy to do so and felt confident and able to take the classes on his own.

Unfair dismissal

Incident of 26 February 2016

15. On 26 February 2018 the Claimant took a Year 3 class for P.E. The Year 3 class consisted of 7 and 8 year olds. The intended learning outcome for this class was to develop the ability to control a ball whilst moving i.e. throwing and catching it.

16. On 1 March Ms McDaid opened an email from the mother of MD, one of the children in Year 3, which described an incident alleged to have taken place during the PE class on 26 February. We were not provided with a copy of that email but were taken to the words used to describe it that were quoted to the local authority designated officer (LADO), which were as follows "M told me that during his P.E classes he was dreaming and wasn't exactly placed where he needed to be. Charles [the Claimant] arrived suddenly and grabbed him violently by the neck, he dragged him while holding him by the neck to the right spot. This awful incident left red marks all over M's neck (I've been told). Charles "shouted to his face in an aggressive manner, pointing his finger towards him say" you should be listening" [at page 114 of the bundle]. The email was read by Ms McDaid between 8:00am and 8.30am on 1 March 2018. The school had been shut due to snow on 28 February 2018.

17. On receiving the allegation Ms McDaid rightly considered it to be very serious and decided to investigate. She also decided that she needed to suspend the Claimant that day. A copy of the suspension letter had been provided [page 115 and 116 of the bundle]. The suspension letter refers to "an allegation that had been made in relation to an incident with a pupil on 26 February 2018". The letter does not state what the allegation was.

18. Ms McDaid spoke to the Deputy Head, Mrs Kemp, and asked her to carry out an investigation.

19. Mrs Kemp immediately commenced her investigation by speaking to the child MD who was at Breakfast Club and to L who was also at the Breakfast Club. Mrs Kemp also

took an account from a teaching assistant, Mrs Flores, dated 1 March 2018. In the meantime, Ms McDaid tried to get hold of her HR advisor Mr Upton. She had not had any previous incidents like this in school and wanted his advice. She managed to speak to him between 9.30am and 10:00am and he advised her that she must report the incident to the Local Authority Designated Officer (LADO) straightaway.

20. Ms McDaid followed Mr Upton's advice and immediately contacted the LADO and reported the incident. The LADO sent her a referral form to fill in and told Ms McDaid to stop any investigation immediately as the LADO and police would want to investigate it themselves. Following that conversation Ms McDaid told Mrs Kemp to stop her investigation and she completed the referral form and sent it back to LADO straightaway.

21. The Claimant remained on suspension whilst the investigation was conducted by the LADO and the police. The Claimant did not speak to the LADO nor did he see copies of any statements provided to the LADO.

22. The Claimant was interviewed by the police on 26 March 2018. A copy of the record of the Pre-Interview Briefing i.e. the information provided to the Claimant and his solicitor in advance of his interview by the police was at page 119 of the bundle. The allegation was recorded as ABH, the information provided was "Mr Charles Bailey is a teacher at St Agnes School. It is alleged that during a P.E lesson he has grabbed around the neck and pulled him into a circle. He has then pointed at him".

23. There is no record of the police interview in the papers before the Tribunal and the interview is not referred to by the LADO in her report. The Tribunal has a letter in the bundle provided by the Claimant which was addressed to the Claimant from his solicitor who was appointed at the police station namely; Stokoe Partnership Solicitors. The letter records the instructions that the Claimant gave to the solicitor at the time and their advice, which was to put forward his account in the interview at the first available opportunity: this is what the Claimant did and he answered all the questions in the interview.

24. The account given to the solicitors was as follows "you explained that you have been teaching a Year 3 class P.E lesson, the learning objective of which was sending and receiving (i.e. throwing and catching) a ball. You had gathered the children and were talking to them about how to send and receive a ball and then move on into the next position. M was standing side onto you, talking to someone behind him. You put your hand on his shoulder and moved him to another place, demonstrating to the children how to move to the next position. As you did so you carried on talking about the learning objective. You tried to demonstrate the lesson as well as stopping M from talking without getting him in trouble. You explained that you had simply placed your hand on his shoulder to move him. You told me there were between 25-27 children present but no other adults as you were the only teacher. You said that your actions must have been taken out of context by M. You deny that you pointed at him afterwards as was alleged. You said that if you had known that he would have felt that way you would have spoken to him afterward. You were not even aware there had been an issue at the time". We accept that this is the account the Claimant gave to the police.

25. The LADO concluded her investigation and sent her report to the school on 4

May 2018 [page 136]. Ms McDaid wrote to the Claimant on 12 May notifying him of the outcome of the investigation and inviting him to a disciplinary meeting, she enclosed the LADO's report together with the statements obtained by Ms Kemp and a copy of the disciplinary policy [page124].

26. The LADO report [page 131] records the outcome of the Section 47 enquiry as follows:

> "On 4 May 2018 Detective Constable Eden-Ronan confirmed that there would be no further action by the police. The decision was made on the 1 May 2018 by DS Turner. Victim of mother did not want to provide statement or video interview, that would be required for the CPS to review to take the matter to the court. Mr Bailey has been interviewed by police and denied the allegation that he had touched the child".

The outcome box underneath has a number of options and the option unsubstantiated is ticked.

27. The Tribunal noted that the LADO's account of the police interview was not accurate, Mr Bailey confirmed he had touched the child but that he had not been violent. It was accepted in evidence by Ms McDaid that the Claimant would in the normal course of a P.E lesson expect to touch the children and guide them and position them to show them how to carry out various exercises or movements in P.E. The allegation was not that he had placed his hand upon the child when he ought not to have done so but that he did so violently or with excessive force.

28. The LADO report [at page 132 of the bundle] sets out the guidance from the London Child Protection Procedures and the LADO's conclusion that the allegations had not been substantiated, which meant that "there is insufficient evidence to either prove or disprove the allegation. The term, therefore, does not imply guilt or innocent".

29. The LADO records,

> "There are concerns that M had an unpleasant experience with Mr Bailey, and according to M he accepts that he may have been daydreaming or not paying attention in class. In response to M's behaviour there are suspicions that Mr Bailey's response may have been disproportionate. There is a lack of evidence to support the allegation, however it does not mean that the event did not occur. Mr Bailey has also failed to report M's distress to staff. Neither did he record M's alleged poor behaviour to staff. The impact of the incident had a negative impact on M emotionally, however the school had been supportive of M… [the] school can proceed with following through their internal disciplinary process.
> Should Mr Bailey return to work it is my view at the very least, a risk assessment and training should be considered."

30. Mr Bailey was sent a letter dated 11 May 2018, informing him of the outcome of the investigation and inviting him to a disciplinary meeting. It is not specified in that letter what the precise allegations are that he has to meet. The letter refers generally to the report from the LADO and the enclosed documents which Mr Bailey was informed set out the allegation in detail. The letter informed the Claimant that a possible outcome was dismissal. Ms McDaid's evidence was that it was not just the incident with the child

or the alleged disproportionate response but also the failure to report the incident to the headteacher that was relied upon as misconduct. Those are the matters in respect of which she found the Claimant to be guilty of misconduct.

31. Mr Bailey's told the tribunal that from what had been written in the LADO report he understood he might have to have a conversation about training.

32. The Claimant attended the disciplinary meeting on 21 May 2018 [the notes are at pages 138-139]. This was the first opportunity that he had to give his account to the school. Ms McDaid maintained that his account was inconsistent with that given to the police and the social worker by the child. It was not contested however that the only statement given to the police was by the Claimant. The police recorded that the mother and the child did not want to give a statement. There is no record of any statement taken from the Claimant by the social worker although she did speak to the child in the presence of Mrs Kemp.

33. Mr Bailey was asked to respond to the allegations made in the documents that he had been sent. Ms McDaid informed him that another concern was the he had not reported the incident to her. The Claimant pointed out that one of the parents of the child who had given a statement was someone he had, had an issue with in the past and they had not spoken with one another for over a year. He felt that the statements were not consistent and they did not clearly say that he had grabbed M by the neck. The Claimant was concerned that there had been parent's collusion and that the incident had been blown out of proportionate by the parents talking on the playground. Ms McDaid said that she did not listen to playground gossip but that when a 7 year old says they were shocked it was something that she could not ignore.

34. Mr Bailey concluded by saying he was sorry for so much work caused and the trouble for the school and that he would never hurt a child and he repeated that he held M's shoulder and not his neck.

35. Following the meeting the Claimant was concerned about how it had gone and it was not what he had expected. He decided to write a letter to Ms McDaid and handed it to her on 23 May 2018 stating that he wished to lodge a formal grievance. Before writing his grievance, the Claimant had contacted Ms McDaid with a view to discussing the way forward. He explained that he did not want to have bad feelings and that they had always got on very well. He was concerned about the effect on his two children who were at the school. However, having discussed the matter with his wife he wished to reiterate his innocence of the allegation.

36. He further set out in his grievances his account of events in more detail. He also headed his letter as "formal grievance". The Claimant started his letter stating, "I would like to lodge a formal grievance". The Claimant pointed out the errors in the LADO's report.

37. Ms McDaid gave evidence was that by the time she received the Claimant's grievance she had already decided to dismiss him. She therefore did not consider the points he raised in his letter. She decided that they amounted to an appeal against her decision and should be considered by the appeal panel. However the Claimant had not been notified of her decision and had not issued an appeal at this stage.

38. Ms McDaid wrote to the Claimant on 24 May 2018 with her decision [page 143]. She found that the following allegations had been proven:

(1) The Claimant had used unreasonable force in restraining a Year 3; and
(2) The Claimant had failed to report the incident in line with the safeguarding policy.

39. This was the first time that the allegation stated that there was 'unreasonable force in restraining' and the word "restraint" had been used.

40. The Claimant appealed this decision in the letter dated 11 June 2018 [page 144-145] and again denied the allegation; he also complained that no full investigation had been carried by the school; that he had not been invited to an investigation meeting and the lack of investigation meeting meant that he was not been invited to an investigation and to give his account of events until the disciplinary meeting. He also appealed on the basis that his dismissal for gross misconduct was very harsh and unfair, a lesser sanction such as a final written warning would be a fairer outcome.

41. The appeal was heard by a panel chaired by Ms Ploussard who was the Local Authority appointed Governor. Two other governors where on the panel Ms Commons who was a Foundation Governor and Mr Morton, a governor co-opted from St Anne's school. The appeal was heard on 11 July 2018. Also in attendance were Mr Bailey, Ms McDaid, Mr Upton who advised Ms McDaid, Mr Mike Pittendregh, who is the Assistant Director of the Westminster Diocese- and was the advisor to the panel, and Jenny Millar the clerk who took the notes.

42. The Claimant's notes that he used for the appeal were also in the bundle[149-150] ".

43. The Claimant presented his case to the panel and was followed by Ms McDaid representing the case for the school. The panel asked questions from Mr Bailey and Ms McDaid and then Mr Bailey and Ms McDaid had an opportunity to sum up.

44. Mr Pittendreigh in summing up the basis for the decision to dismiss cited the following reasons:

(1) violence to any persons;
(2) unlawfully restraining a pupil; and
(3) a breakdown of confidence

45. Mr Bailey and Ms McDaid then left the room whilst the panel deliberated. Ms Ploussard gave evidence that there was some discussion as to the sanction and consideration was given by the panel to whether it could apply a lesser sanction. The panel were satisfied on the balance of probabilities that an incident of unreasonable force had occurred, that the Claimant had failed to report the incident and further that there was a breakdown in trust and confidence between the Claimant and the Head Teacher.

46. The appeal panel decided that as Ms McDaid did not have trust in the Claimant

they could not impose any lesser sanction and they upheld the decision. There then followed a discussion as to whether the Claimant should be referred to the Disclosure and Barring Service. The panel concluded that there was no malicious intent in his actions and that they would not be referring him to the DBS. On being told that this was their decision Ms McDaid agreed that the incident did not warrant a report to the DBS.

47. Ms Ploussard gave evidence that she had no experience in dealing with an appeal like this before nor had any of the other panel members. She was not aware of the contents or the existence of the ACAS Code and she had no doubt that the Claimant had not had any malicious intent against the pupil. However, the Head told them that she could not have trust in him any longer and could not have him back in school so therefore in their view there was no alternative but to dismiss the Claimant.

48. We are satisfied that Ms McDaid had a genuine belief in the conduct which she alleged against the Claimant. In considering whether Ms McDaid had reasonable grounds for her belief in the claimant's guilt the Tribunal took into account Ms McDaid's view that the accounts given by the children and their parents were consistent, she also believed that as the school's safeguarding officer she was obliged to act upon the children's accounts; she also used her own assessment of her knowledge of those children, she concluded that she believed those accounts. Her explanation to the Tribunal was largely based on the consistency of the children's accounts and the consistency of the accounts given by the adults. However, she accepted that the adults were simply repeating what the children had said to them so their accounts were necessarily likely to be consistent with those of the children.

49. It is not for the Tribunal to substitute our own view as to the Claimant's conduct, his guilt or innocence, or what would we have done in the same circumstances in terms of the investigations and the sanction but rather to apply the standard of the range of reasonable responses open to a reasonable employer throughout.

Wrongful dismissal

50. For the purposes of deciding the wrongful dismissal claim the Tribunal does have to make findings as to whether the Claimant was guilty of the misconduct alleged. There are conflicting accounts of what happened in the lesson. The school received accounts from children who were present in the lesson and from adults who had spoken to those children in the days that followed the incident. The Tribunal has seen the records of those accounts in the bundle at pages 110-114 and has carefully considered those accounts and that of the Claimant. The Tribunal has weighed up the different accounts for the purpose of deciding the wrongful dismissal claim and we are satisfied that the Claimant was truthful in his evidence given to the Tribunal and he has given an honest account.

51. We find that MD was not paying attention and had his back to the Claimant. The Claimant went over and put his hands on MD's shoulders and that he moved MD to where he should be. That this contact came from behind and MD was not expecting it and most probably was a surprise to MD. The Tribunal does not find that the (c) Claimant moved or touched MD violently expect that MD was told off for not listening

and was upset and that his friends told him there were red marks. MD's mother did not see any red marks nor were they noticed by any adult who saw the child immediately after the incident.

52. The Tribunal finds that the Claimant did not see MD crying or upset, that he did speak to the whole class after the lesson about their behaviour. The Tribunal also finds that after the lesson the Claimant went to try to speak to the Head Teacher about the behaviour of the class as a whole, but she was unavailable.

53. The Deputy Head, Mrs Anna Kemp, took an account from the child in question and an account from L who described himself as M's best friend on 1 March 2018. Also in the bundle [at page 113] is a second-hand account from a parent of a Year 3, Ms Duffy, who states that on the evening of 26 February 2018 she received a call from L's mum who told her that L had told her about an incident that happened in P.E between Charles and L. She said that "L was in a group with M and K and they were chatty so Charles pulled M back into a circle. M sat and cried to them and told them not to tell anyone".

54. Maricel Flores's account is at page 111 the Year 3 class teaching assistant who was covering the class after the P.E lesson. She noted that the children came back into the class at precisely at 2.30pm. She prompted the children to quickly change into their school uniform as the Spanish lesson would be starting soon. The children were rushing to get changed. Others were fussing because they did not have time to get a drink. "while the children were changing Charles stood by the door, reminding the children that their behaviour during the P.E lesson was awful. He said that Year 3 class need to listen more and do less talking. Half off the lesson was wasted because of the chattering, then he said, "see you next week Year 3". The children did not notice that he left. The Spanish lesson started and we had hymn practice afterwards."

55. On the way home Ms Flores's child reported to her what had happened during the P.E lesson. She reports that her child was quiet upset. She told her that she saw Charles roughly put his two hands on M's shoulders, close to his neck, pulled M to where he should be. The child said there were red marks on M. Her child said that it was noisy because everyone was talking and chattering. They didn't hear Charles say to form a circle, that's why he pulled M because M didn't hear him.. My child said, "I was shocked", I gasped in horror, everyone else gasped but same time because they were shocked as well. M starting crying so I went and some others went to him and M said don't tell anyone. They noticed the marks as well. She said she felt very upset and scared for M.

56. The Tribunal is satisfied that the accounts are consistent in that they all refer to MD not paying attention and to see him being moved physically into the place he should be. They differ as to whether he was taken by shoulder or by the neck or by the shoulder close to the neck. The accounts from the children refer to seeing red marks at time, although no adult reports actually seeing red marks. In MD's mother's email received by Ms McDaid on 1 March 2018 the account had become more dramatic and more violent using the words "violently", "intimidated", "grabbing violently", "chatting in an aggressive manner", "grabbing violently by the neck", "dragging him while holding him by the neck" and "having left red marks all over M's neck". The children don't refer

to dragging at all.

57. On the day of the incident the Claimant recalled the class as a whole was very excited. It had just started snowing and this made the lesson very challenging. During the lesson he had to ask several of the boys to sit out for a few minutes before joining back into the activity as they were causing disruption to the class which would have led to health and safety concerns. The Claimant was being very cautious because in the lesson immediately before with the Year 6 students one of the children had not listened to his instructions and had managed to break a light fitting as a result.

58. The Year 3 class were standing in a circle around the Claimant whilst the Claimant was demonstrating how to send and receive the ball and to be in position for the next move. One child MD was talking to another child and had his back to the Claimant. The Claimant considered MD to be someone who was normally really well behaved and he had no desire to get him in trouble. He told the class and MD to stop talking several times before going over to MD and placing his hand on his shoulder and moving him into the next position where he would be ready to receive the ball. According to the Claimant he placed his hands on the child's shoulders, turned him around and moved him into position as he continued to talk to the class explaining the lesson. The Claimant believed some children were sniggering at the time which caused the child to feel some embarrassment, perhaps slightly ashamed. The Claimant did not notice anything other than that and nothing untoward in respect of that child or any other children during the rest of the lesson or immediately after it.

59. For the reasons already given, we accept the claimant's account.

The Relevant Law

60. Section 98(4) Employments Law Act 1996:

> (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."

61. It is for the employer to show the reason for the dismissal and that it is a potentially fair one that falls within the scope of section 98(1) and (2) of the Employment Rights Act 1996 capable of justifying the dismissal of the employee. The reason for the dismissal is the set of facts known to the employer or the beliefs held by him which caused him to dismiss the employee (*Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA)*.

62. It is sufficient that the employer genuinely believed on reasonable grounds the employee was incompetent or guilty of misconduct depending on which reason they rely upon. Once the employer has shown a potentially fair reason for dismissal the Tribunal then has to decide whether the dismissal for that reason was fair or unfair within the meaning of section 98(4) of the Employment Rights Act and whether the employee acted reasonably or unreasonably in all the circumstances in treating it as sufficient reason for dismissing the employee.

63. The Tribunal must not substitute its own view for that of the employer in deciding whether the employer acted reasonably but consider whether the employer's actions fell within the band or range of reasonable responses open to an employer (*Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, EAT. The case of *Polkey v AE Dayton Services Ltd* [1988] ICR 142 HL established that procedural fairness is an integral part of reasonableness under section 98(4). In a case of misconduct the steps that would usually be necessary in order for the employer to be considered to have acted reasonably in dismissing or investigating fully and fairly and hearing what the employee wants to say in explanation or mitigation. This is reinforced in the case of *BHS v Burchell*. The employer must show that its believed the employee was guilty of the misconduct, it had in mind reasonable grounds upon which to sustain that belief and at the stage at which the belief was formed on those grounds that it carried out as much investigation as was reasonable in the circumstances. The test of reasonableness applies throughout the procedure, *Sainsbury's Supermarkets v Hit*. [2002] EWCA Civ 1588.

64. The Tribunal also had in mind the guidance in the case of *A v B [2003] IRLR 405 EAT* considering the fairness of the investigation and *Salford at Royal NHS Foundation v Roldan[2010] IRLR 721* where serious allegations were made that may have career changing consequences they must be subject to the most careful investigation a careful and conscientious investigation of that facts necessary and the investigator in charging with carrying out the enquiry should focus no less on the any potential evidence that my expiate or at least point at the innocence of the employee as he should on the evidence directed towards proving the charges against him. This is particularly the case where frequent as the position was indeed here, the employee himself is suspended and denied the opportunity to contact potential relevant witnesses. It is not suggested that it would be appropriate for the Claimant to have contacted the children but he did suggest that other children in the class could have been interviewed by Mrs Kemp.

65. Employees found to have committed serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an even-handed approach the process of the investigation would not reasonable in all the circumstances.

66. Both representatives made reference to *A v B* in their closing submissions. Mr Upton handed up a copy of *Hargreaves v Governing Body of Manchester Grammar School UKEAT/0048/18/DA* directly quotes as set out above from *A v B.*

67. ACAS Code of Practice on Disciplinary and Grievance Procedures (2015).

Paragraph 23 of the ACAS Code states:

''Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.''

Polkey

68. Having found that the dismissal was unfair due to the failure to follow a proper procedure, the Tribunal had to consider whether it is just and equitable to make a Polkey reduction (*Polkey v A E Dayton Services Ltd [1988] ICR 142*) under section 123(1) of the 1996 Act to reflect the likelihood that the Claimant would have been dismissed in any event had a proper procedure been followed. Elias J (as he hen was) provided guidance on making a Polkey reduction in *Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT w*here he set out the principles:

> '(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
> (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to reply. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).
> (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
> (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
> (5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.
> (6) ... It follows that even if a tribunal considers some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.'

Contributory fault

69. Section 122(2) of the 1996 Act deals with contribution in respect of the basic award:

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

70. Section 123(6) is concerned with a reduction in the compensatory award and provides:

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

71. Both the wrongful dismissal question and the contribution question involve the Tribunal making findings as to what the Claimant actually did or did not do. We have set out those findings under the heading wrongful dismissal above.

Uplift for failure to follow ACAS Code

72. Section 207A (2) TULR(C) A provides that :

> "If, in any proceedings to which this section applies, it appear to the employment tribunal that –
> (a) the claim to which the proceedings related concerns a matter to which a relevant Code of Practice applies,
> (b) the employer has failed to comply with that Code in relation to that matter, and
> (c) the failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%"

<u>Conclusions</u>

Less favourable treatment as a Part-time Worker

73. The Tribunal is satisfied from the evidence given that Ms McDaid considered the Claimant to be a full-time employee. She did not conceive of him as being a part-time employee. He worked the 35 hours normally worked by the full-time support staff and the number of hours he worked had no bearing on how she conducted or dealt with the allegations or the disciplinary proceedings that followed or indeed in the outcome nor did they have any influence on how she dealt with his grievance. The Tribunal is

satisfied that she would have dealt with anybody else in the same way in the similar circumstances regardless of whether they were full time or part-time.

Unfair dismissal

74. The Tribunal having found that Ms McDaid had a genuine belief in the Claimant's misconduct the Tribunal went on to consider whether that belief was based on reasonable grounds following a reasonable investigation. The Tribunal was conscious not to substitute its own view. The Tribunal was acutely aware Ms McDaid's position as a headteacher faced with allegations from the children and in consideration of the importance of the safe guarding policy that a child making an allegation should be believed and the difficult position Ms McDaid was therefore placed in, in assessing the Claimant's protestation of innocence.

75. However, the Tribunal is not satisfied that the safeguarding policy itself can completely overrule the Claimant's entitlement to be allowed an opportunity to put forward his own account before a decision is made against him. He must be given an opportunity to have a fair hearing. The Tribunal notes that the school did not have before it an account from the Claimant before proceeding to a disciplinary hearing. He did not have an opportunity to put his account to the school, or the LADO, or to suggest witnesses to support this account. The LADO involvement suspended the school's investigation. Rather than complete or recommence its own proceedings once the LADO report had been concluded the school simply relied on the LADO's report. Instead of arranging for Ms Kemp or someone else to speak to Mr Bailey to get his account Ms McDaid proceeded straight to a disciplinary meeting. The first time the Claimant had the opportunity to put forward his explanation to the school was in the disciplinary meeting. The Tribunal is satisfied from her evidence that Ms McDaid had already decided by that time that she believed the children. She told us that she felt she had no option other than to believe them; she decided that their account was consistent even where we find that there were inconsistencies; and supported by the adults although they simply report what the children were telling them.

76. The Respondent's policy states that the Claimant is entitled to a disciplinary hearing by a member of the Governing Body but it was decided by the Ms McDaid and the Chair of the Governors in a conversation between the two of them that the Head would deal with the disciplinary meeting.

77. The Tribunal accepts that this may have been a decision reached with the best of intentions, to reduce the possibility of gossip within the school. However, the Tribunal is satisfied this decision effectively denied the Claimant the opportunity of an independent and therefore a fair hearing. Whatever the Claimant said to Ms McDaid she felt duty bound to believe the children. She did not think they would lie, but accepted in her evidence that children were not always precise.

78. The Tribunal find that Ms McDaid had a closed mind by the time the matter reached the disciplinary hearing; there was no attempt to look to evidence that might expiate or show the Claimant's innocence of the charges as well as his guilt, nor to look at the evidence in a balanced and in a considered way. An example of this being the finding that the Claimant was guilty of misconduct in failing to report the incident when his clear account was that there had been firstly nothing to report as there was nothing

unwarranted or undue to bring his attention to M's upset; that the teaching assistant who immediately took over the class, Ms Flores, did not notice or any of the children expressing upset or crying in the immediate aftermath of the class either; and ignored the Claimant's evidence that he attempted on at least three occasions to find her in her office to discuss the behaviour of the class that afternoon but that she was unavailable. Ms McDaid gives no explanation for having failed to take this into account and no attempt to balance that against the fact that there was nothing to report in the Claimant's mind.

79. The Tribunal is satisfied that at the appeal the Head Teacher's concluded view and her statement that Mr Bailey's failure to report the incident to her meant she no longer had any trust or confidence in him, carried such weight with the appeal panel that whatever the Claimant had to say the decision was bound to go against him and he could not return to the school.

80. The Tribunal is satisfied in the circumstances that the investigation was short of what is a required of a reasonable employer. There was procedural unfairness in failing to provide the Claimant with an opportunity to put his case and to have a fair hearing and that his led to substantive unfairness. The decision to dismiss was unfair within the meaning of s98(4).

Polkey

81. In the circumstances we are not able to say that there should be a Polkey reduction; there is no evidence on which we can be satisfied that had he had a fair hearing the outcome would be the same.

Contribution

82. The question for us is of whether the Claimant was guilty of conduct such that it contributed to his dismissal. As we set out in our findings of fact we do not find that the Claimant grabbed the child by the neck, or dragged him by the neck, nor did he violently grab the child. On the basis of our findings as to the claimant's conduct we do not find his conduct to be culpable or blameworthy such as to justify a reduction in his compensation.

Failure to follow the ACAS Code

83. The Claimant's submission in respect of failure to follow the ACAS Code was based on the failure to deal with the grievance and the failure to hold an investigatory meeting with the Claimant. We are satisfied that grievance was not considered as such but was re-labelled an appeal. Ms McDaid's assessment that the grievance was in fact in entirely related to the disciplinary was not unreasonable. In respect of the failure to hold an investigatory meeting we have found that this did deny the Claimant the opportunity to put his case. While the Code provides that it is not necessary in every case to provide an investigatory meeting with the employee, we do find that there was a failure to follow to the ACAS code in this case. We will consider the amount of any uplift at the remedy hearing once we have heard submissions from both sides.

Wrongful dismissal

84. The Tribunal does not find on the evidence before us that the Claimant was guilty of the misconduct as alleged. His conduct in relation to the incident of 26 February 2019, did not amount to gross misconduct and does not warrant summary dismissal. The claim for wrongful dismissal therefore succeeds.

Remedy

85. The remedy will be addressed at the hearing listed on **27 March 2019 at 10 am** listed for half a day.

Employment Judge Lewis

15th March 2019