Case No: 1600884/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Smith**

Respondent: **Cognita Schools Limited**

Heard at: **Cardiff Employment Tribunal** **On: 7-9 March 2022**

Before: **Judge of the First-Tier Lloyd-Lawrie acting as an Employment Judge**

Representation
Claimant: Mrs. Hilary Winstone (Counsel)
Respondent: Ms. Claire McCann (Counsel)

RESERVED JUDGMENT

1. The complaint of automatically unfair dismissal is not well-founded and is dismissed.
2. The complaint of unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

3. The Claimant brought claims of automatic unfair dismissal under s 100 (1) (e) Employment Rights Act 1996 and/or ordinary unfair dismissal under s98 of the same Act against her former employers, Cognita Schools Limited.

Preliminary Matters

4. At the start of the hearing, I heard a request by the Respondent to adduce late evidence. These were in essence, pupil J's special educational needs information and emails between staff, including the Claimant, about him. The Respondent advised that they were only disclosed as they were considered relevant evidence and therefore disclosable, following reading

the Claimant's witness statement. These were admitted with the agreement of Mrs. Winstone.

5. The Respondent's representative made a late application to have CCTV footage played to the Tribunal. It was advised that it was necessary to watch as points regarding compliance with Covid-19 protocols were to be put to the Claimant in evidence from that video. The Claimant's representative agreed that I required seeing the CCTV as the parties disagreed on what the video showed regarding pupil J's behaviour. I agreed to watch the CCTV. This was facilitated by a Human Resources Officer of the Respondent providing his laptop for my use which had the same start time on as the videos on the screens of both counsel. We then all watched simultaneously.

Evidence

6. I was provided with a hearing bundle of 1022 pages. I was then provided with late evidence that continued on that numbering, ending on page 1065. In addition, I was provided with a written opening statement by Ms. McCann and written closing submissions by Mrs. Winstone. An agreed list of issues, chronology and cast list was also submitted.

7. I heard oral evidence from the Claimant, Rachel Smart, pastoral Deputy Head of St Clare's School and disciplinary investigator, Rhian Ferriman, Headteacher of Oakleigh House School and dismissing officer and Nicola Lambros, Cognita Director of Education for Europe, appeal officer. In addition, the Respondent called Helen Hier, Headteacher of St Clare's School, Nicola McGinley, the School Business Manager and Emily Lofting-Kisayake, Human Resources Director for the Respondent.

The Claims and Issues

8. The parties agreed the issues in this case as set out below.

9. The Claimant claims automatic unfair dismissal under s 100 (1) (e) Employment Rights Act 1996. The issues in relation to this are:-

    i) What were the circumstances of danger which the Claimant believed to be serious and imminent?
    ii) Was the Claimant's belief reasonable?
    iii) What did she consider to be appropriate steps to protect herself and other persons from that danger?
    iv) Were those steps appropriate, having reference to all the circumstances, including the Claimant's knowledge and the facilities and advice available to be at the time (per s100 (2) ERA)?
    v) What was the reason, or principle reason for dismissal?

10. The Claimant claims unfair dismissal under section 98 Employment Rights Act 1996. The issues in relation to this are:-

    i) What was the reason or principle reason for the dismissal?

ii) Was a reasonable investigation carried out in all of the circumstances, including the size and administrative resources of the Respondent?
iii) Was dismissal within the range of reasonable responses?

11. If the Claimant is found to have been unfairly dismissed, the issues in relation to Polkey are:-

i) Was a fair procedure followed by the Respondent?
ii) If not, would the Claimant have been dismissed in any event, or is there a chance that she would have been dismissed in any event.

12. If the Claimant is found to have been unfairly dismissed, the issues in relation to contributory fault are:-

i) Was any conduct of the Claimant before the dismissal such that it would be just and equitable to reduce the amount of the basic award and, if so, by how much (per s122 (2) Employment Rights Act 1996)?
ii) Was the dismissal, to any extent, caused or contributed to by any action of the complainant and, if so, by what proportion is it just and equitable to reduce the amount of the compensatory award (per s123(6) Employment Rights Act 1996)

13. If the Claimant is unfairly dismissed, what quantum should be awarded. The issues in relation to that issue are:-

(i) What are the Claimant's losses, having regard to the Tribunal's power to award such amount as it considers just and equitable in all of the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal (in so far as that loss is attributable to action taken by the Respondent) (per s 123 (1) Employment Rights Act 1996)?
(ii) Has the Claimant acted reasonably in mitigating her losses?

The Facts

14. I make the following findings of fact in this case.

15. The Claimant was employed by the Respondent on 01/09/2013 as a teacher based at St. Clare's School in Porthcawl. This is an independent School owned and run by the Respondent.

16. The Respondent is a private schools company which owns and operates a number of schools throughout the United Kingdom and abroad.

17. The Claimant was promoted to Head of Key Stage 4 in September 2015. The Claimant then moved to Head of Key Stage 3 in February 2017.

18. The Respondent received 3 complaints from parents regarding the Claimant's behaviour towards their children between April-May 2018. During the summer term of 2018, the Claimant met with Helen Hier, who was due to take over as Head Teacher from September 2018 and advised

that she was struggling with her pastoral role as Head of Key Stage 3. Helen Hier suggested swopping her pastoral role for an academic middle management role and the Claimant agreed as she felt the pastoral role had too great a workload. This involved the Claimant swopping roles with Rachel Smart.

19. St Clare's School closed due to the Coronavirus pandemic on 20/03/2020. The Claimant's son received a shielding letter on 11/05/2020 advising him to stay at home until 15/06/2020 as he was vulnerable, having previously been treated for cancer. The Claimant delivered lessons remotely, as did other teachers at that time. The Claimant did not attend work at all during that the remainder of that term.

20. The school re-opened on 25/06/2020 for face-to-face learning but as the Claimants son, as a clinically vulnerable person, received a second letter to shield dated June 2020, telling him to remain shielding until 16 August 2020, the Claimant continued to teach remotely.

21. The second shielding letter gave different advice to the first and said "you can now leave your house and go outside, for exercise or to meet people. You can meet people from another household, as long as you meet with them outside. You must stay 2 metres or three steps away from them at all times. You must wash your hands regularly". It clarifies later on in the letter "The rest of my advice stays the same. You should not go anywhere indoors other than your own home. You should not go to the shops. If you are school age you should not leave home to go to school…"

22. The Claimant went, with her family, including her clinically vulnerable son, to Kefalonia for a holiday on 2/08/2020. They flew from Bristol airport and wore masks at all times. This was during the period when the advice in place for the Claimant's son was as set out in paragraph 21 above. The Claimant and her son could not and did not remain at 2 metres from all others during their time on the aircraft as it was not possible to do so.

23. The Respondent prepared a risk assessment which was approved on 27.08.2020. This followed Welsh Government guidance and I find that the Respondent consistently followed the Welsh Government guidance in relation to Covid-19.

24. The Respondent discussed the Covid risk assessments and the provisions in place to protect against the risk of Covid-19 on an inset day on 02/09/2020. A personal risk assessment was also carried out for the Claimant by Nicola McGinley on that day. It made provision for the Claimant to wear a mask and to ask students to wear a mask, if appropriate. Mask wearing was not being recommended by Welsh Government at that time. It also stated that she was to be given outside duties only and would use the "Boothy toilet" to prevent unnecessary movement around the school.

25. The Respondent ensured that the Claimant's desk was placed in a box which denoted that it was 2 metres apart from any students.

26. The Claimant's son, as did other students, return to school for face-to-face teaching on 04/09/2020. The Claimant's children were both students in the

school, her son being in a different part of the school. The Claimant's son did not wear a mask in school.

27. On 16/11/2020 the Claimant and Rachal Smart had an email exchange where the Claimant asked if it could become a sanction, namely a yellow card, if pupils forget a mask and she confirmed that she was insisting pupils wore masks in her lessons. Ms. Smart advised that she had discussed it in a Health and Safety meeting, that steps were being taken to look into getting cloth masks but that she felt strongly that nothing associated with basic health and safety be punitive in the current pandemic at that time.

28. The Claimant raised her concerns regarding compliance with covid rules during department meetings and had suggested a reminder email was sent to the parents. The Claimant was not the only staff member to raise concerns regarding mask wearing and the Claimant was not penalised for raising her concerns.

29. On 23/11/2020 Welsh Government required all secondary school children to wear masks in all outside and communal areas of schools. The Respondent communicated that to parents, pupils and staff.

30. On 04/12/2020 the Claimant saw Pupil J in the school grounds without a mask on. She told him to put on his mask and to go the correct way around the one way system which he did.

31. On 04/12/2020 Pupil J arrived in the classroom of the Claimant wearing a mask. Pupil J forgot to sanitise his hands on entry to the Claimant's classroom and was reminded to do so by the Claimant. He immediately did so. Pupil J then sat down at his desk and removed his mask for have a drink. The Claimant immediately sent Pupil J out of her classroom. Pupil J was only in the classroom for 38 seconds and left wearing his mask.

32. Pupil J as of 04/12/2020 was a 15 year old vulnerable child who had well-documented additional learning and behavioural needs. The Claimant was aware of this and had placed Pupil J to sit at the nearest desk to hers.

33. The Claimant did not supervise Pupil J during the time he was outside of her classroom. He was standing to the side of the open doorframe, not visible to her and she did not at any point, prior to being reminded he was outside by a pupil, go and check on him.

34. Pupil J was called over to the English block 19 minutes 43 seconds after he was sent outside. The Claimant did not observe Pupil J leave the wall outside her classroom and go to the English block.

35. Karen Bessell, a teaching assistant in English, called Rachel Smart and advised her that a pupil was outside a class and had been standing there for too long. She had sent an email which Rachel Smart had not seen as she was teaching. Rachel Smart acknowledge what she was told but did not give a direct instruction to carry out the action.

36. Karen Bessell and Kelly Burns to whom Pupil J was delivered to sit in the back of the class of, raised low level concerns regarding the Claimant's

conduct. Kelly Burns had previously been involved in a disagreement with the Claimant and did not like the Claimant or her methods of teaching. They did not attempt to tell the Claimant that Pupil J had been told to come to the English block and I find that it is more likely than not, they did this due to not agreeing with the Claimant's methods of discipline, including her shouting at pupils.

37. The Claimant did not remember that Pupil J was outside until reminded by another pupil and only went to check on him after 24 minutes had elapsed. When the Claimant went outside, she could not see Pupil J. She went back in her classroom then left her class unattended for 8 minutes to look for the Claimant. She did not send a whole school email or ask anyone to cover her class.

38. When the Claimant discovered where pupil J was on being told by a colleague, she went to get him and he chose to return with her to class. He returned to the class after 34 minutes.

39. A further low-level concern was raised by Michael Gatt (Special Educational Needs Co-Ordinator and Designated Safe-Guarding Lead) regarding a concern raised to him by Paula Williams about the Claimant. She considered that she was shouting more than normal at the pupils and asked if the Claimant could be given a break on cover as she was worried about her.

40. The low level concern from Karen Bessell also concerned the Claimant shouting excessively at pupils on another day that week.

41. On Sunday 6/12/2020 Helen Hier emailed Alison Barnett, the Respondent's Regional Safeguarding lead for Europe to discuss the low level concerns. She requested a meeting at 9am on the following Monday morning. Rachel Smart and Michael Gatt were copied into that email by virtue of their roles in the school structure. No detail was given in that email.

42. Alison Barnett then emailed the HR Director, Jo Fowler, Brad Wootten and Nicola Lambros, copying in Helen Hier regarding the allegations, detailing them and advising that they needed to have a call at 2.30 that day to discuss. It confirmed that her view was that the allegation of sending a pupil out in the cold could meet the harm test and LADO (the Local Authority safeguarding team) must be called.

43. Rachel Smart was not part of that meeting or call but was instructed to call LADO and report the concerns raised. She did this as instructed and reported what she said to Alison Barnett and Helen Hier.

44. The Claimant was suspended on 08/12/2020. During the suspension meeting she was not accompanied and that was not a right given in the Respondent's policy. She became aggressive, shouting and using the term "bitches" to describe Kelly Burns and Karen Bassell. Nicola McGinley was tasked with escorting the Claimant off the premises. The Claimant refused to do this straight away and insisted on going into Huw Davies's classroom who was the school union representative. He was with pupils

as it was registration time. Helen Hier arranged cover so that he could leave site to speak to the Claimant. The Claimant then left site.

45. Rachel Smart was tasked with undertaking an investigation. She was the Deputy Head of the School. She spoke to the Claimant, various members of staff but not any pupils. She undertook a reasonable investigation.

46. The Claimant initially disputed the facts of the case. After reviewing the CCTV, the Claimant agreed that the central facts of the case in relation to the issue with Pupil J was as set out above.

47. Rachel Smart did not consider that there was enough evidence to substantiate proceeding on the wider pattern of unprofessional behaviour allegation and that matter was closed after investigatory stage.

48. The investigation report, which included notes of the investigation meeting with the Claimant, was produced on 14/12/2020 and the Claimant was invited to a disciplinary hearing on 18/12/2020. This was postponed due to the involvement of the Claimant's union representative.

49. The Claimant raised a formal grievance against Kelly Burns on 06/01/2020. A grievance meeting was held on 13 January 2021 and on 19 January 2021 the decision was given that the grievance was partially upheld. A right of appeal was given.

50. On 03/02/2021 the Claimant attended a disciplinary hearing held by Rhian Ferriman, Headteacher of Oakleigh House School, another school in the Respondent's organisation. She had had no prior involvement in the case but had some knowledge of the school from training events. The decision she made was her own and she decided that the Appellant had committed an act of gross misconduct and the acts of others on that day did not detract from her own actions. She firstly had considered giving a final written warning but found, on considering the schools polices and trying to write the outcome letter, that in fact the act was serious enough to warrant dismissal. She found that it was a safeguarding and welfare issue and that the Claimant was not accepting responsibility for the potential risks in the situation and that she was seeking to blame others. She took into account the Claimant's personal circumstances and fears of covid-19.

51. The Claimant appealed her dismissal on 05/02/2022

52. The Claimant attended a grievance appeal meeting on 10/2/2021. The decision was taken to uphold the original decision. That decision was issued on 01/03/3021.

53. On 02/03/2021 the Claimant attended the appeal against dismissal meeting chaired by Nicola Lambros, one of two Directors of Education for Lambros. She had been aware of the original allegation raised as she was part of the people advised as it was deemed a potential safeguarding issue. She had had no other involvement and was an appropriate person to chair the appeal, being senior to the disciplinary chair. She upheld the decision and confirmed that she had considered all of the evidence., including the mitigation of the Claimant. The outcome letter was sent to the Claimant on 08/03/2021.

54. The Claimant lodged her appeal, in time, on 28/06/2021, with the ACAS certificate being issued on 31/05/2021.

The Law

55. There is no dispute between the parties regarding the application law in this case. Mrs. Winstone confirmed that she agreed that the law set out in the opening note of Ms. McCann was correct and I adopt the same.

56. For automatic unfair dismissal, section 100 (1) (e) Employment Rights gives protection to employees who, in circumstances of danger that they reasonably believe to be both serious and imminent, took appropriate steps to protect themselves or others from that danger. If the employee's actions in taking these steps is the reason, or principle reason, for the dismissal, then it will be automatically unfair.

57. The Employment Tribunal should adopt a two-stage approach as set out in **Ouadhar v Esporta Group Ltd [2011] IRLR 730 (EAT) at [25] and [26]**:

    i) Firstly, the Employment Tribunal should consider whether there were circumstances of danger which the Claimant reasonably believed to be serious and imminent and whether she took appropriate steps to protect herself from the danger? If these criteria are not satisfied, s100 (1) (e) is not engaged; and
    ii) Secondly, if the criteria are made out, the tribunal should then ask whether the Respondent's sole or principal reason for dismissal was that the Claimant took such steps. If it was, then the dismissal will be unfair.

58. The Employment Appeal Tribunal has been clear in the case of **Hamilton v Solomon and We Ltd UKEAT/0126/18/RN** that the first stage involves an objective test and that therefore, the question for the Employment Tribunal to consider at the outside was whether, objectively, there were circumstances of danger. The Court of Appeal have also made that clear in **Akintola v Capital Symonds Ltd [2010] EWCA Civ 405**.

59. The protection afforded by s100 (1) (e) depends on whether the employee honestly and "reasonably" regarded the circumstances of danger as being "serious and imminent". Accordingly, there is both a subjective element (the employees' belief) and an objective element (whether the belief was reasonable).

60. Where there were circumstances of danger which the employee reasonably believed were serious and imminent, they will only be protected by s100 (1) (e) Employment Rights Act where they took (or proposed to take) "appropriate" steps to protect themselves/others from that danger.

61. When considering whether the steps were "appropriate", the Employment Tribunal must have regard to all of the circumstances, including the

employee's knowledge, the facilities and the advice available to the employee at the time in line with s100 (2) Employment Rights Act.

62. Even if the employee reasonably believed there was serious and imminent danger and took appropriate steps to protect themselves and/or others, the reason for dismissal (or the principal reason) must be the fact that the employee was exercising their rights under s100 (1) Employment Rights Act.

63. In seeking to establish the reason (or principal reason) for dismissal, as with all unfair dismissal claims under Part X Employment Rights Act, the Employment Tribunal must ask itself why the employer acted as it did, recalling, per Cairnes LT in **Abernethy v Mott Hay and Anderson [1974] IRLR 213** that:

"a reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which case him to dismiss the employee".

64. Elias J, as he then was, made it clear in the case of Balfour Kilpatrick Ltd v Acheson [2003] IRLR 683 that a but for test is inappropriate.

65. Choudhury J in **Sinclair v Trackwork Ltd [2021] IRLR 557 (EAT)** explained that there may be circumstances in which it is legitimate to distinguish between the employee's health and safety activity and their conduct in carrying out such an activity. He concluded, at [13]:

    i) The scope of the protection afforded by s100 (1) Employment Rights Act is broad;
    ii) Activities carried out under s100 (1) (a) Employment Rights Act- the relevant sub-subsection in that case- will be protected and the manner in which such activities are undertaken will not readily provide grounds for removing that protection; but
    iii) Conduct that is, for example, wholly unreasonable, malicious or irrelevant could mean that the employee loses the protection.

66. The burden of proof for automatic unfair dismissal is different to that of ordinary unfair dismissal. It is still for the Respondent to show a potentially fair reason for dismissal but the Claimant bears an evidential burden.

67. As set out by the Court of Appeal in **Kuzwel v Roche Products Ltd [2008] ICR 799**, the approach to be adopted is as follows:

    i) Firstly, the tribunal should determine whether the Respondent has produced evidence which appears to show a potentially fair reason for dismissal;
    ii) If so, but the Claimant maintains that the real reason for her dismissal was her activity under s100 (1) (e) Employment Rights Act, then the tribunal must look at the Claimant to consider if she has pointed to any evidence which cases doubt on the Respondent's reason. This is an evidential burden of proof.

iii) Where the Claimant discharges that evidence burden, the ET must then look to the respondent to show that the s100 (1) (e) activity was not the reason or principal reason for dismissal.

iv) Although the Respondent retains a legal burden of proof throughout, failure to establish its asserted reason for dismissal does not mean that the reason must necessarily be as the Claimant contents.

68. For ordinary unfair dismissal under section 98 Employment Rights Act 1996, the law is well-settled.

69. First, the Respondent has the burden of proving that there was a potentially fair reason for dismissal.

70. In order to decide whether the Respondent has shown that conduct was the reason for the dismissal of the Claimant, the Tribunal is required to consider the evidence available to the Respondent at the time of the dismissal. It is not permitted to substitute its views as to whether it personally thinks that the Claimant's actions constituted gross misconduct or what it personally would have done in the circumstances if had been the employer.

71. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within s98 (4) Employment Rights Act, in the case of **British Home Stores Ltd v Burchell [1978] IRLR 379**:

    i) Did the Respondent genuinely believe in the misconduct of the Claimant?
    ii) Was that belief based on reasonable grounds?
    iii) Was a reasonable investigation carried out in the circumstances?
    iv) Was summary dismissal within the band of reasonable responses open to a reasonable employer in all the circumstances?

72. The Tribunal, when considering whether there was a reasonable investigation carried out, must consider whether procedure was fair, reasonable and complied with the ACAS Code of Practice for Disciplinary and Grievance Procedures or the relevant procedure operated by the Respondent. If it finds the Burchell test has been answered in the Claimant's favour or there is an issue with the procedure, the Tribunal is required to consider the percentage chance that the defect made no difference and the Claimant would have been dismissed anyway in accordance with the principles in **Polkey v AE Dayton Services Ltd [1978] UKHL 8**.

73. Whereas in considering whether or not the Claimant has been unfairly dismissed, it is the genuine belief of the Respondent that is important, if the claimant is found to have been unfairly dismissed, in assessing contributing action, the test is not the same. The leading case is **Nelson v BBC (No. 2) [1980] ICR 110 (CA)** which states that there are 3 factors that must be present to give a reduction to the compensatory award for contributory action:

i) The Claimant's conduct must be culpable or blameworthy (but need not be the sole or even the main cause of the dismissal)
ii) It must have actually cased or contributed to the dismissal;
iii) The reduction must be just and equitable.

Findings

74. I find that the reason for the Claimant's dismissal was conduct, a potentially fair reason. Whilst the Claimant assets that her conduct on the day in question was due to health and safety, Mrs. Winstone, in her closing submissions, states that "it was unquestionably this incident which caused her dismissal". I agree that the incident with pupil J was the reason for dismissal of the Claimant.

75. I then have to consider whether the Claimant satisfied the evidential burden in establishing that her actions in sending Pupil J out of the classroom constituted activity under s100 (1) (e).

76. The first question I must ask myself is whether the Claimant believed that there were circumstances of serious and imminent danger. I accept that the Claimant, like many other people, had serious concerns about the Covid-19 pandemic, in particular, the risk it posted to her son who was deemed clinically vulnerable by the Government and advised to shield.

77. This was not a situation, however, where the incident in question breached Government guidance at the time. Whilst I find that the Claimant's version of events did change, I will detail this more later in this judgment, I find that the reason that the Claimant sent Pupil J out of the classroom was that he did not ask before he removed his mask to have a drink of water. She alleges that it was that time, when his mask was removed to enable him to have a drink, that presented a serious and imminent risk of danger. With respect, I find that that was not the Claimant's belief. The Claimant was in a classroom, with a fully opened door and was at least 2 metres away from the pupil in question, as I find that he was at his desk when he did this. I do not accept that the Claimant would have moved away or taken evasive action should Pupil J have asked permission to have a drink as she was already socially distanced from her pupils. Further, I find that the fact that her son did not wear a mask from his return to school in September, to demonstrate that the Claimant did not hold a belief that someone not having a mask on, within a classroom, at a distance of 2 metres for a very short period to take a drink, would pose a serious and imminent danger. If that was her thought process, it would have meant that she would have considered her son to be at serious and imminent danger at all times in school from those pupils around him. In those circumstances I find that she would have instructed her son to wear a mask at all times.

78. I also find that the Claimant attempted to mislead the Respondent and indeed, the Tribunal, as to her level of fear of the pandemic. At paragraph 29 of her witness statement, she stated "In June 2020, the school returned to face-to-face learning, however, as my son continued to shield, I stayed at home and continued teaching a full timetable, online. During this continued period of shielding as a family, we continued to obtain food using a home delivery service and had absolutely no physical contact with

others". This, as we heard in cross examination of the Claimant, was not true. The Claimant in fact went with her family, including her clinically vulnerable son, to Kefalonia during the period he should have been shielding. Whilst I accept the evidence of the Claimant that everyone on the plane wore a mask, I do not accept that she and her family were 2 metres away from everyone at all times. Taking judicial knowledge of travel through an airport and being on an aeroplane, that is not plausible. I find that travel on an aircraft, where a door could not be open at all times and social distancing could not be maintained would be, in light of the guidance at that time, pose far more of a risk than being in the classroom at the time Pupil J took a drink of water. Other passengers on the plane obviously would not have asked the consent of the Claimant to remove their masks to eat or drink and she would not have been informed of the same to move further away.

79. I find that the Claimant knew that the school had put in place the recommendations of Welsh Government in relation to the covid-19 pandemic. I find that the Claimant had highlighted breaches by some children in the school environment, in terms of mask wearing, to the Respondent and that she had flagged up that she considered that mask wearing in her classroom was very important. I find that the Claimant was supported in being able to ask pupils to wear a mask in her class by virtue of the agreed risk assessment in place. I find that the Claimant did not believe that there were circumstances of serious and imminent danger when she ordered Pupil J out of her classroom as it was not in line with either the scientific advice at that time or indeed, her actions in relation to going on holiday with her son during the period he should have been shielding and allowing him to be in school, not wearing a mask.

80. Even if I had found that the Claimant had held such a belief, which I have not found, I would not have found that it was an objectively reasonable belief. I find that the Respondent followed all advice of Welsh Government and that the Claimant's classroom allowed for her to be 2 metres away from her students. I find that her door was open and that her room was therefore well ventilated. She had a hand santiser installed by her door and all students, Pupil J doing so on being reminded by the Claimant, sanitised their hands on entry. Whilst Covid-19 was indeed a risk to all at that time, the guidance was given to minimise risk and it was deemed safe to re-open schools in light of that. I therefore find that there was not an objective serious and imminent risk to the Claimant's health by a student not asking permission before removing a mask for a drink, particularly bearing in mind the clear acceptance of the Claimant that students could have a drink, removing their masks to do so, if they did ask permission.

81. The claim for automatic unfair dismissal therefore fails.

82. In considering ordinary unfair dismissal, the first question is did the Respondent genuinely believe in the misconduct of the Claimant. This was not a case where the central facts were disputed. To the contrary, at least once having viewed the CCTV evidence, the Claimant admitted that she sent pupil J out of the classroom, after 38 seconds, and that she did not supervise him and in fact forgot about him for 24 minutes. I both read and heard the evidence of the dismissing officer and the appeal officer and I find that they genuinely believed that the Claimant had committed this act

of misconduct. The safeguarding responsibilities in the Staff Code of Conduct and Part two Teaching Standards Personal and Professional Conduct, being cited in the dismissal letter. The Staff Code of Conduct, at paragraph 5.1 states: "children have a right to be treated with respect and dignity. It follows that trusted adults are expected to take reasonable steps to ensure the safety and wellbeing of pupils. Failure to do so many be regarded as professional neglect or misconduct. I find that the dismissing officer and appeal officer considered that this was a safeguarding issue and that the Staff Code of Conduct had been breached.

83. In considering whether the decision was l based on reasonable grounds, I have considered the investigation. Much was made by Mrs. Winstone of the fact that Rachel Smart had been contacted before Pupil J was taken into the English block and that she had been the person tasked with reporting the potential safeguarding breach. Whilst I accept that it may have been better to ask a staff member from a different school to undertake the investigation, I find that Rachel Smart, from this relatively limited involvement, was not precluded from carrying out the investigation. She was not the person who decided to report the matter to the HR Director, nor was she a decision maker in reporting this matter to the Council's safeguarding department. Nor was she the person who received the low level concerns. As Deputy Head I find that it was reasonable to entrust such a task to her and I find that she had not been a decision maker in how matters had been handled to that point. I find that she was therefore sufficiently removed from the substantive matters to undertake the investigation.

84. I find that she interviewed all relevant staff. Criticism was made of Mrs. Smart for not interviewing any pupils. However, particularly in light of the fact that allegation 2 was not pursued, I find that it was a reasonable decision. I accept the rationale of Mrs. Smart which was that she did not want to alert pupils to the process as the Claimant may well have come back and taught the students. Further, I find that the central facts of the incident were not disputed, post viewing CCTV. There was, therefore, simply not much to investigate regarding the allegation surrounding Pupil J.

85. I find that the suggestion that the investigation did not consider the alleged malice behind the low-level concerns and thus be flawed to miss the central issue in this case. The Appellant was taken to a disciplinary for her actions in sending Pupil J out of her classroom. Whilst I accept that it is clear that the Teaching Assistant who called Pupil J into the English block did not approve of the Claimant's actions that day, nor her general behaviour to students and that the English Teacher had similar negative views of the Claimant, their views were not relevant to the decision makers. The actions of those who raised the low level concerns about the Claimant had no bearing on her earlier decision to send Pupil J out of the classroom. I therefore find that there can be no fault on the part of the Respondent for failing to investigate the motivation of other staff in raising the concerns.

86. I lastly consider whether or not dismissal was in the band of reasonable responses open to the Employer. I remind myself in doing so, that my view of whether or not the Claimant committed an act of gross misconduct that

warranted dismissal is irrelevant. I must consider what other employers would have done.

87. I accept the evidence of both the dismissing officer and the appeal officer as honest and genuine. I find that they each, at the meeting they chaired, had full decision-making power. This was questioned and I find that they were straight forward in their answers. As the main fact was admitted, that being that the Claimant had sent pupil J outside and then left him there, without checking on him for 24 more minutes, I have no difficulty accepting that they believed that the misconduct was made out.

88. Miss Ferriman, I find, had considered the allegation in light of the schools policies, as highlighted above, and the school's disciplinary policy. I accept that she also directed her mind to the implications of dismissing a teacher for gross misconduct and therefore gave the case very careful consideration. She had discussed with the Claimant the circumstances of the events that day and had it confirmed to her that the Claimant knew that Pupil J had additional learning needs. Miss Ferriman clearly formed the view that the Claimant's actions in sending Pupil J out of the classroom, then leaving him outside, unsupervised for over 20 minutes was enough to give rise to a safeguarding risk. She took the view that the Claimant had breached section 5 of the Staff Code of Conduct which deals with conduct around safeguarding.

89. I am satisfied that Miss Ferriman took into account the Claimant's mitigation, her heighted stage of anxiety due to Covid-19. I find that a reasonable employer would have done this and that she did this. She made the finding that the responsibility to protect the welfare of pupils in their care to be a permanent one and that the Claimant ought not to have attended work if she felt unable to discharge that obligation. Miss Ferriman advised that she had thought of giving a final written warning but found, when trying to write the decision letter and justifying that, considering the policies on safeguarding, she could not justify anything less than dismissal in this case. She also based this decision on her perception of the attitude of the Claimant in dealing with this issue. She felt that the Claimant had been trying to blame others and not take responsibility for the seriousness of her actions.

90. In considering whether dismissal was in the band of reasonable responses, I find that the Respondent's finding that the Claimant had committed an act of gross misconduct was one many other schools would have made. I refer to the letter of Sonal Davda, Fitness to Practice HEO for the Education Workforce Council. Whilst the overall thrust of the letter is to allow the Appellant to be registered as a school teacher and school learning support worker, it says, in relation to the incident for which the Claimant was dismissed:

    "The Committee considered that the concerns that led to the disciplinary proceedings were potentially serious and posed a risk of harm. Mrs. Smith's actions involved a pupil and raised safeguarding concerns".

91. For balance, I point out that Committee did state that she had been "severely punished for her actions".

92. I find that as the Education Workforce Council highlight the safeguarding concerns of this incident, this is evidence that other educational professionals would deem it to be so, as did the Respondent's dismissing and appeal officer.

93. I accept, as per the finding of the Education Workforce Council, that dismissal was at the most severe end of the sanction scale. However, I note that Mrs. Smith was said to display significant contrition during the latter hearing. I find that this is very different to her behaviour in the disciplinary and appeal process where I find it that the Respondent, as would other schools faced with a similar incident, took the view that the Claimant's refusal to accept that her actions were entirely incorrect meant that her mitigation could not be relied upon to award a lower sanction. Further, I find that whilst some employers may, due to the pandemic and the acknowledgment that the Claimant was suffering some anxiety, have imposed a final written warning, others would find that the conduct was so serious that only dismissal could be justified to prevent the risk of the same issue happening again. Particularly where the Claimant did not accept full responsibility. I therefore find that dismissal was within the band of reasonable responses.

94. I find that the Claimant was given the opportunity of an appeal hearing with Nicola Lambros. I find that Nicola Lambros, whilst having been made aware of the initial safeguarding concern, was an appropriate person to hear the appeal as she was one of the two directors of education for the Respondent in Europe. Whilst it is important, where possible, to have a "separation of powers" in the investigation, disciplinary and appeal stage, I find that in schools where safeguarding is raised as an issue, notification of the senior management in an issue is quite standard. I am satisfied that Ms. Labros did not involve herself in any more than the joint decision to suspend the Claimant. I also accept that she only knew the content of the LLC, not whether or not they were true at that time. As one of the two directors of education, I find that she was appropriate to chair the appeal as she was senior to the dismissing officer. I find that this is important when considering if she felt able to make her own decision. Miss Lambros in fact decided to cause further matters to be investigated following the appeal meeting, before she formed her view. She also was clear that she had considered the various school policies, including the school's behaviour policy and the Safeguarding policy. She checked whether or not Pupil J was indeed vulnerable and found further information of his additional learning needs. She also found information that confirmed that the Claimant was aware that the pupil had additional learning needs.

95. Ms. Lambros also investigated whether or not there was malice in the actions of Kelly Burns and she obtained the grievance paperwork and noted that the Claimant's previous allegation of a false accusation made by Kelly Burns had been upheld. She made the finding that that, however did not excuse the Claimant's conduct on that day and I find that most employers would have come to the same conclusion. She found that the school, with its risk assessments and its meeting with the Claimant just 2 days prior to this incident, had been supportive of the Claimant and her fears and that she could not conclude that the Claimant had been working in an unsupportive environment.

96. Ms. Lambros concluded that the decision to dismiss was reasonable and proportionate and she based that decision on her finding that the Claimant had acted contrary to the schools behaviour policy, had not considered the pupils additional learning needs and had left the pupil outside, unsupervised, in the cold for over 20 minutes. She in addition, set out the failure of the Claimant, when finding Pupil J missing, to leave her class unsupervised when she went to find him. It was said to her that she added an allegation that had not been put to the Claimant. However, the issue of leaving the whole class for 8 minutes, unsupervised, is at page 7 of the investigation report. The Claimant also detailed her failure to follow the missing child procedure in her statement for disciplinary hearing document. I therefore find that this was not a new allegation but simply another part of the same allegation in that it resulted from the same incident. More importantly, I find that the Claimant and the Respondent considered the allegation to be part of the same incident. I find that the findings of Ms. Lambros are again on the more severe end but are in the range of reasonable responses open to an employer.

97. The Claim or ordinary unfair dismissal under s98 (4) Employment Rights Act therefore also fails.

Judge of the First-Tier Lloyd-Lawrie, acting as an Employment Judge

Date – 22 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 24 March 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche