



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: REGIONAL EMPLOYMENT JUDGE HILDEBRAND
(Sitting Alone)

BETWEEN:

Claimant Mr Mark Probert

and

Respondent The London Borough of Sutton

ON: Wednesday, 14th December and Thursday, 15th December 2016

APPEARANCES:

For the Claimant: Mr A Bousfield, Counsel

For the Respondent: Mrs H Winstone, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

- (1) The Claimant's claim of unfair dismissal fails and is dismissed
- (2) The Claimant's claim of wrongful dismissal fails and is dismissed

REASONS

The Claim

1. By a claim presented to the tribunal on 24 December 2017 the Claimant claimed that he had been unfairly dismissed from his role as a music teacher by the Respondent on 14 August 2016. Following an application to amend leave was granted to the Claimant to add a claim of wrongful dismissal. He stated he had been summarily dismissed for developing

inappropriate relationships with young people and having a relationship with a pupil or ex pupil.

The Response

2. The Respondent filed a response on 2 February 2016 to contend that the dismissal was procedurally and substantively fair. There had been an investigation and disciplinary process including appeal. The Respondent believed the Claimant guilty of gross misconduct and had reasonable grounds for that belief. The decision to dismiss was said to be within the range of reasonable responses. The claim was denied. The Respondent did not apply to amend the response following the amendment by the Claimant. It is clear the wrongful dismissal claim is resisted from the response filed.

The Issues

3. Both representatives produced lists of issues and had not agreed these at the start of the hearing. The parties accepted the tribunal should use the claimant's issues with the addition of issue 5 in relation to wrongful dismissal. The formulation used by the respondent was: "Did the Respondent breach the claimant's contract by dismissing him without notice?"

3.1. Wrongful dismissal

- 3.1.1. The Claimant's contract of employment includes a disciplinary and grievance procedure at clause 8 [Bundle 30c]. What terms were incorporated, expressly or by implication, into the contract, and what policies and procedures were so incorporated?
- 3.1.2. What is the contractual effect if any of the "Guidance for Safer Working Practices for Adults who work with Children and Young People in Education", prepared by the Department for Schools and Families in March 2009 [Bundle 68]. Is it submitted by the Respondent that this Guidance is somehow either expressly or by implication within the contract of employment?
- 3.1.3. What is the contractual effect of the London Borough of Sutton's "Code of Conduct Disciplinary Rules and Procedure", effective 1 September 2008 [Bundle 135]? In particular does the Respondent rely on the list of "Examples of Gross Misconduct" [Bundle 148] and to what effect?
- 3.1.4. Does the Respondent rely on any other contractual term, express or implied, for wrongful dismissal?
- 3.1.5. Did the Claimant commit the act of gross misconduct relied on by the Respondent?

3.2. Unfair Dismissal

3.2.1. Was the Claimant's dismissal unfair in all the circumstances?

- i. Has the Respondent shown on evidence the reason for dismissal?
- ii. Was that reason misconduct or capability or another reason?
- iii. Further to section 98(4) Employment Rights Act 1996, was the dismissal fair or unfair, considering the reason shown by the employer, and depending on the circumstances (including the size and administrative resources of the employer's undertaking)?
- iv. If the reason is capability, was the dismissal fair in all the circumstances?
- v. If the reason is misconduct, has the employer established the fact of its belief in misconduct? Did the employer have reasonable grounds on which to sustain that belief? Had the employer conducted as much investigation as was reasonable in the circumstances of the case?
- vi. Has the employer/ Respondent followed a fair procedure?

3.3. Polkey

3.3.1. Should there be a Polkey reduction?

3.4. Contributory Negligence

3.4.1. Should there be a reduction for contributory negligence?

The Hearing

4. The Tribunal heard evidence from the Claimant and Ms Dee, his partner. For the Respondent we heard from Mr C Brabbs, an independent consultant who conducted the investigation. We also heard from Mr Colin Stewart who was the Respondent's Presenting Officer, Mr Richard Nash, who took the decision to dismiss and Ms Marlene Heron, who chaired the Claimant's appeal.
5. Before dealing with the findings of fact it is appropriate to record two aspects of the hearing which were the most unusual. Both issues arose after the Respondent's case had closed in the course of cross-examination of the Claimant. The first involved questioning of the Claimant in relation to a child protection policy about which the Claimant was asked in his cross-examination. The evidence in chief and cross-examination of the Respondent's witnesses had made no reference to such a policy which was not in the bundle. Cross examination had focussed indeed on the absence of policies in this area. When this policy

was identified in cross-examination of the Claimant the Tribunal asked the Respondent to identify the document relied on. The Tribunal was informed that the document was not in the bundle. It had been discovered by the Respondent's counsel the previous evening, she stated, in the course of her search of the Respondent's Intranet.

6. It was pointed out that the document was clearly subject to discovery. The Respondent had failed to disclose the document to allow it to form part of the bundle and the questioning of the Respondent's witnesses. The questioning of the Claimant could not continue until all parties in the Tribunal had the document. The document was produced over the lunch time adjournment.
7. The other perhaps more surprising aspect was that after the conclusion of the Respondent's case the parties were asked to identify any potential pitfalls which might be encountered in the cross-examination of the Claimant. At this point the Respondent's representative mentioned that an individual who worked for the Respondent was under trial for the rape of a child. The Claimant's representative expressed surprise at this revelation and the manner in which it had been made. In supplemental questions the Claimant identified that the individual was the line manager of the Claimant while he was employed by the Respondent. The Claimant had not heard of any criminal charge against this individual. It had not been mentioned to the Claimant at any point. The Claimant was not aware of concerns about the individual's relationship with the student. After the luncheon adjournment the Respondent's representative apologised for misleading the Tribunal in relation to the suggestion that it was public knowledge that the Claimant's line manager was on trial for rape. The Claimant's representative said there was an element of ambush about this. He recalled that the representative said that it was "all over the papers" and the individual had been charged. The Claimant's representative said he had not been able to verify the information given and was not able to challenge it or check its veracity. He wished to receive a witness statement from the Respondent's representative as she had introduced an allegation of fact into the hearing. The Respondent's representative stated that she had told the Claimant's representative about this at the earlier hearing which did not proceed when the anonymity of the informants was discussed. The Claimant's representative said he had been told of the investigation of the Line Manager and the Claimant was unaware of this and unaware of the Line Manager being charged. Had he known of this material the Claimant's representative might have cross-examined the Respondent's witnesses on the basis that the Claimant was being tarred with the same brush as his manager and treated as a scapegoat. The Claimant's representative said after the closing submissions that his solicitor had indicated from the previous occasion that there was an investigation into some form of more serious paedophilia. He considered this was an attempt to tarnish the Claimant and the Claimant's Line Manager had also been tarnished. It

was speculation and conjecture without evidence.

8. It does therefore appear that the manner in which this information was introduced was to cause shock to the Claimant before he gave evidence. At the same time, the timing of the revelation prevented questioning of the Respondent's witnesses in relation to the effect the investigation on the Claimant's Line Manager had on their approach to the case of the Claimant.
9. A further difficulty caused by this revelation and the timing is that the issue of Rule 50 orders was not addressed in the case management phase of this case or at the hearing. There must in the circumstances be a rule 50 order to remove the name of the Claimant's line manager from the public documentation and that will be promulgated with this judgement.
10. Insofar as prejudice to the claimant is involved I have endeavoured to avoid any reference to these two aspects or reliance on them in the determination of the issues in the case.

The Findings of Fact

11. The Claimant whose date of birth is 6 April 1983 was employed on leaving college 20 April 2003 by the Respondent as a music tutor teaching one day a week at Sutton Grammar school. Although employed by the Respondent the service in which he worked was the Sutton Music Service ("SMS"). Over time his tutorship increased to 5.5 days across the Respondent's schools and in support of ensembles and orchestras.
12. On 27 March 2015 the Claimant was suspended at a meeting with the Executive Head of Education, Collin Stewart. A disciplinary investigation interview took place on 14 April 2015. An external investigator Chris Brabbs, a former Director of Social Services and external investigator was appointed. He prepared an independent investigation report dated 25 June 2015. Mr Brabbs' report contained an executive summary. At 5.4 on page 44 of the bundle he concluded:-

"Although there is prima facie evidence that Mark Probert has formed inappropriate relationships having regard to national guidance, the Council will need to decide if would (sic) be fair to bring a disciplinary charge of misconduct given the following mitigating factors:-

- (i) several other staff have engaged in the same behaviours, including his Head of Service;
- (ii) the absence of any policy or guidance framework within the SMS on ensuring safe working practice by adults working in an educational setting;

(iii) the lack of detail in the Council's Code of Conduct and other policies on:-

- what constitutes inappropriate relationships;
- guidance for staff on their personal use of social networking sites;
- the consumption of alcohol by staff and students in situations relating to his investigation."

13. The second allegation related to the relationship formed between the Claimant and Melissa Dee, a former student of the SMS. The conclusion was as follows (5.9 on page 45):-

"Mark and Melissa have now been together for over 5 years, and from the photos on FB the relationship would appear to be a mutually rewarding and happy relationship. However, even if it was borne out of mutual attraction and affection, the circumstances in which the relationship developed cannot be overlooked given Mark's position of trust, both at the time in relation to Melissa, and subsequently as a senior member of staff."

14. After some remarks about apparent absence of exploitative intent on the part of the Claimant and the fact that his behaviour went unchecked because of inadequate arrangements in place to ensure necessary safeguards for both students and staff at 5.12 on page 46 it was stated:-

"Given Mark's breach of the Council's Code of Conduct, and his superficial answers to issues around the maintenance of professional boundaries, and the responsibilities that are inherent with his position of trust, there has to be some doubts as to whether Mark can ensure, in his leadership role, that safe practices are applied effectively within the SMS.

5.13 It is also a concern that Mark compounded his error of judgment in embarking on an inappropriate relationship by seeking to present a misleading version of events to place himself in the best possible light."

15. The recommendation was that there was a potential case of misconduct for the Claimant to answer. Given that there was a genuine long term relationship Mr Brabbs stated that the Respondent would need to consider whether this provided any mitigation in deciding whether the actions amounted to serious or gross misconduct.

16. By letter dated 15 July 2015 the Claimant was invited to a disciplinary hearing on 24 July 2015. The allegations were as follows:-

- You have developed inappropriate relationships with young people through your work within the Music Service
 - You have, or have had, a relationship with an pupil or ex-pupil
 - If proven these allegations constitute a serious breach of mutual trust and confidence which potentially brings the Council into disrepute.
17. The letter warned that if the allegations were considered proven this could result in demotion or dismissal on the grounds of gross misconduct.

The Disciplinary Hearing

18. The Claimant was supplied with the investigation report prepared by Mr Brabbs before the disciplinary hearing.
19. At the disciplinary hearing the chair was Richard Nash, Executive Head Also present was Kate Enver, Joint Head of HR Business Partnership. The presenting officer was Mr Colin Stewart, Executive Head of Education and early intervention. Helen Gibbs, Head of HR was also present. The Claimant was represented by Mr David Abrahams, his Union representative. Mr Brabbs the Investigation Officer and Melissa Dee attended. Notes were taken by Nadine Douglas.
20. The disciplinary hearing took from 13.55 to 17.55. Following the hearing the Claimant put in further written submissions. In these he Claimant drew attention to a note of evidence from the staff members. It was said that the Claimant's manager recorded that the Claimant had come to see him and had given him assurance that his relationship with Melissa Dee had not started when she was a pupil. The Claimant took issue with Mr Brabbs suggestion that the Claimant's relationship with Melissa Dee changed from a professional one to one of friendship in July 2009. The Claimant pointed out that the earliest date alleged in evidence was the 18th birthday party of Melissa Dee in late August 2009. The Claimant accepted if his relationship with her changed in July 2009 that would be a very serious matter indeed.

Evidence from the Claimant's colleagues in the Disciplinary Hearing

21. In relation to the references to the evidence of other tutors in the investigation report staff 1 explained that there were clear professional standards and they need to maintain appropriate professional boundaries. In addition to the national guidance for teachers staff 1 referred to other ethical standards for psychologists, and therapists, which were covered within safeguarding training attended by all tutors. These set minimum periods of 2 to 5 years where therapists should avoid any sexual relationship with a client after the professional relationship had ended. Staff 1 indicated that his or her own stand was that one should never enter

into a relationship with a former client. Staff 1 had been a tutor for Melissa Dee. Melissa Dee had visited staff 1 to say that she had started a relationship with the Claimant who is now one of the senior staff. This commenced when Melissa Dee had started at university. Staff 1 had been disappointed that Melissa received no advice about relationships between professionals and students. He or she was surprised the relationship was considered OK and conducted so openly within the service. Staff 1 described a lack of planning in advance of annual trips to Europe. There was a lot of free time in the evenings when students were free to do whatever they wanted. There were supposed to be three staff on duty at the hotel and these were supposed not to drink. They were responsible for making sure students in the hotel were OK and later in the evening making sure they were in bed. They were allowed to go into town in groups without adult supervision although staff not on duty would help out by being in the town to keep an eye on things. Staff 1 said that throughout the trip there was a lot of alcohol consumed by students of all ages and a lot of the students including younger students were getting drunk and there were many occasions where vomiting had to be induced. Staff 1 said that the staff would drink in the hotel with mainly the eldest students. Younger students would get drunk in their bedrooms. An ambulance had to be called during one of the trips for a student aged 14 or 15. On the last night there was a fancy dress night and awards were given and a lot of alcohol was consumed. Staff 1 recorded that safeguarding training was provided and there was an expectation that it would be refreshed every three years. It did not appear to be training for safe working practices for adults.

22. Staff 3 confirmed that safeguarding training had been organised which was refreshed every three years. It was about how to spot the possible signs and symptoms of abuse and how to report concerns. It touched on safe working practice by adults working with children but this staff member was not familiar with the detailed national guidance issued in 2009. Staff 3 said that he or she had been on three foreign trips. They were very demanding on tutors because of the challenges of supervising such a large group of students. Alcohol has been a recurring issue. Prior to 2014 trip to Catalonia the manager had sent an e-mail saying that students were not allowed to drink and if students were found with alcohol the tutors would remove it from them. The students were told on the first day that they would be sent home if they breached the alcohol rules. On that tour in 2014 staff 3 and Mark Probert had taken alcohol away from some of the younger boys who had been trying to hide it in their room. Alcohol used by the under 18s was a big problem on most tours and sometimes students became quite ill through drink. Staff 3 considered there was significant peer pressure. Staff 3 recorded an incident on a tour in 2009 when one of the students was found on the beach and had to be sent to hospital with a member of staff.
23. Staff 3 said that he or she first thought there might be something going on

between the Claimant and Melissa Dee at the 18th birthday party for Melissa. This was not long after the 2009 Italian tour. Although they did not openly display a relationship their closeness during that occasion standing together and their body language led to staff through speculation. Staff 3 became more certain of this when staff 3 saw them together at other events after that and the Claimant told staff 3 that he and Melissa were in a relationship. Staff 3 said they came together as a couple to the 2009/2010 New Year party and to another birthday party in February 2010. Before being involved with Melissa Dee the Claimant was said by Staff 3 to have been very keen on another student and clearly fancied her. Staff 3 suggested that the Claimant had been quite put out and jealous at her birthday party when this particular student showed interest in someone else. She considered his emotions might have been somewhat influenced by alcohol.

24. Staff 4 said that all staff were required to attend safeguarding training provided by the Council's specialist child protection staff and were required to have refresher training every three years. This was about the identification of possible abuse and action that teacher should take if they suspected this. The training included some coverage of safe working practice by adults working with students. Staff 4 was not familiar with the national guidance. Staff 4 had described the different types of social activities including older students going for a curry to the pub after concerts and rehearsals. Staff 4 had worked in another music service and was quite shocked by the difference between the two services not just around alcohol issues but the nature of the friendships between staff and students and what he perceived as the lack of appropriate professional boundaries. Staff 4 first became suspicious of the Claimant's relationship with Melissa Dee when staff 4 attended Melissa's 18th birthday party and observed that the Claimant and Melissa spent most of the evening together and appeared very close. His suspicions were confirmed when staff 4 saw the Claimant and Melissa together at other SMS events and the Claimant told staff 4 they were having a relationship. Staff 4 said that at another birthday party the Claimant had made comments that he was very keen on another student. This was before Melissa. He was not happy that she was showing interest in someone else. This was before Melissa.
25. Staff 5 had also worked in other music services which were run quite differently. There were men and women in the senior management team as opposed to men only in the Respondent's senior management team. A more hands on approach was taken in the management of the service. Staff 5 had been on many music tours. Staff 5 found the tours stressful. They were problems in supervising a large number of students and excessive and recurring problems with under age students drinking alcohol. A student had drunk excessively in 2007 and had to go to hospital. Staff 5 thought that the relationship with Melissa began after she reached 18 but thought it was not appropriate because she was a student.

26. The Claimant's manager was also interviewed and he recorded that the Claimant had come to him. He said it was 4-5 years ago, in an interview on 15 April 2015. The Claimant told him that he had started a relationship with someone previously in the music service. He asked if it was an issue. The manager asked who it was and the Claimant said he was not her teacher. The Claimant said it had started recently. The manager asked for assurance it was not while she was a pupil. The Claimant said that was correct. The Claimant said that her parents knew and they were happy. The manager said he had seen the parents since and they were happy. The manager said "As long as did not start when she was a pupil. Everyone knew they were together, it is no secret. I cannot remember exactly when it was." This does suggest that the manager had some doubt about the start of the relationship.
27. Staff 2 is recorded in the report by Mr Brabbs at 7.3 as stating that the relationship was not appropriate because Melissa Dee was a student. Staff 2 did not provide any factual information or dates but said he believed the relationship started after Melissa was 18.

The Evidence of Miss Dee

28. The Claimant produced a statement for the disciplinary hearing as did Melissa Dee. Ms Dee said that she started working for the Respondent at the Saturday music school in September 2007. She would have been 16 at this point. She said this would have been the first time she had "really come across Mark". She said that they would say hello every week when making toasts or a cup of tea. He would often wear rugby shirts on a Saturday morning. She had recently started playing rugby and they would sometimes talk about this. She did not recall socialising with him other than post-concert curries where many other were present.
29. She went on tour in July 2009 to Italy and was on the coach for which the Claimant was responsible. A large group would go out including tutors who were not on duty to the same place every evening. The Claimant would have been "part of the group" when he was not on duty. She said she was starting to think about her birthday party at this time so would probably have mentioned it to Mark and to other tutors. She invited friends and staff from the Respondent to her 18th birthday party via Facebook. She said that during her birthday party people came and went at different times so it was natural to spend more time with those who were there for the duration. The Claimant was one of those. She said she met the Claimant at the beginning of September at St. Johns Church, Waterloo supporting a Mahler Orchestra concert. She said hello to him in the interval but left after the concert. A few days later she sent a text asking the Claimant if he fancied meeting up for lunch. She said she went out with a small group of tutors from the Respondent during the last week in September with former students to celebrate the 250 anniversary of the

establishment of the Guinness brewery. She and the Claimant remained in text contact after that period when she had come to university in Guildford. She joined the rugby team and university orchestra.

30. Ms Dee stated that in the October half term the Claimant invited her to go and see Gloucester Rugby club playing a match. They had a really enjoyable afternoon together and he invited her to Twickenham to watch England v Australia at the beginning of November. The Claimant told her that he was playing a concerto with the Symphony Orchestra and she went to the concert a couple of weeks later as she was home for the weekend anyway and wished to catch up with several other friends from the music service. She stated they went out for drinks and possibly dinner the day after.
31. In the last week of November she went to the youth orchestra Christmas concert. She could not recall if she played in the concert and she recalled going for curry with everyone afterwards. The following weekend she went to watch another Gloucester rugby match with the Claimant in London.
32. In the first week in December she went to another birthday party in London to which she and the Claimant were invited. This was attended by a similar group of tutors and former students to those who had been out together in September. She says she probably spoke to the Claimant more than others at this event since they had been to the rugby together and she did not know everyone who was at the party. She then attended Sutton Music Service busking events in Sutton followed by drinks and the Christmas Meal. At these events she spent more time with her friends in her year who were back from university. She stated that during the end of November or early December she started to develop feelings for the Claimant although she was not fully aware of this at the time.
33. She then went to a New Year's Eve party on 31 December 2009 with a group which included the Claimant. She shared a bus home with the Claimant and they kissed goodbye when he got off the bus before her. The Claimant went to visit her in Guildford soon after this and they talked about how they felt about each other. By this time she said she has developed strong feelings for him and wished to start seeing him regularly. They met up in Guildford a couple of weeks later and the Claimant spent a night at her flat after this. She told her parents of the relationship at about this time and the Claimant spoke to his manager. She said she came back to concerts at Sutton at Easter time and in the summer. Although people were aware of the relationship she was confident that the Claimant and she maintained appropriate boundaries at these events as would other couples among the tutors.
34. She had applied to tour to Prague in 2010 with the Respondent's music service long before she started her relationship with the Claimant. She

and the Claimant were on different coaches and spent the days mostly apart and she spent her time with friends in her year who had also returned from university to go on the tour. She said that there several evenings when they went out in big groups.

The Evidence of the Claimant in the Disciplinary Hearing

35. The Claimant in his response to the findings of the investigation report accepted that it was inappropriate to become Facebook friends with students and that he had ceased responding to requests in 2014. He did not consider it was appropriate to face disciplinary action for this and for socialising and drinking alcohol with students aged over 18 on tour even though this might have been a breach of appropriate professional boundaries. He said no clear boundaries had been given to SMS tutors about socialising with students aged 18 or over. He asserted his conduct was consistent with the conduct of other members of staff.
36. He further accepted that it would be wrong for a tutor to begin a sexual relationship with a student regardless of their age or to use their position as a tutor to prepare a student for a future sexual relationship. He said that Melissa Dee ceased to be a student in July 2009 after the Italian tour and the sexual relationship he had with her began in January 2010, six months after the Italian tour. He said he had done nothing in a period when the Miss Dee was a student with a view to develop any relationship. He gave a history of the relationship stating that he had first kissed Melissa Dee on 1 January 2010. Because of possible sensitivities around the relationship with a former student he sought advice with his manager in February 2010, shortly after Melissa and he had first slept together. His manager confirmed the Claimant's view that after Melissa ceased to be a student the relationship was not incompatible with his role as an SMS tutor. Had he been advised that the relationship was incompatible with his role as a tutor he would have followed the advice.
37. He gave a history of the relationship which accords with that given by Melisa Dee. He said in the October 2009 half term he was going to attend the rugby match with friends from university and asked Melissa if she wanted to join them. He said this was never intended to be anything other than an opportunity to go to a match together. The two friends pulled out due to other commitments shortly before the fixture and Melissa and he ended up going to the match alone. He said this was the first time they had spent a significant amount of time together apart from their brief lunch in September. He drove to the match and picked Melissa up from her parents' house and returned her there afterwards. He was aware that a colleague said they knew that Melissa was going to watch the match. He felt the staff member had misremembered the conversation. This particular member of staff is recorded in the investigation report as thinking when attending the 18 birthday party of Melissa that there was something going on between the Claimant and Melissa. The investigation

report states:-

“Although there were not openly displaying that they were in a relationship that night, their closeness was apparent from their body language and being next to each other for most of the party. Shortly afterwards Mark told Staff 3 that he and Melissa were in a relationship. Staff 4 also formed the same impression. Both witnesses, when shown the photograph of Mark and Melissa at the New Year Party of 2009/2010, confirmed that Mark and Melissa came as a couple.”

The Dismissal Letter

38. The decision was produced by Mr Nash on 14 August 2015. He concluded that it was inappropriate for the Claimant to behave in the way he did both on tours and in the UK as well as having Facebook friendship with students including some under the age of 16. The absence of clear policies or the fact that other staff behaved in similar ways did not mean that the Claimant should not be held responsible for the decisions and behavioural choices he made. A number of reasons for that conclusion were given.
39. In relation to the first charge Mr Nash said the Claimant could have used relevant national guidance and asked questions about social media contact with students and alcohol consumption while at work for example. In relation to the conduct of other staff it was clear that all staff chose to act as the Claimant did. Others made different choices about their conduct and did not behave in ways that could be seen to be inappropriate.
40. The dismissal letter made clear that employees were expected to understand and take responsibility for their own actions even when their own line manager condoned and took part in unacceptable behaviour. The Claimant's assertion that if he had been given clear guidance he would have followed it did not reflect the responsibility on the individual to keep themselves informed of the relevant national guidance and policy as well as the responsibility of the employer.
41. The fact that the Claimant had ceased to be Facebook friend with students in 2014 demonstrated that he did not require policy and guidance to do the right thing. Reference was made to the Claimant's statement that he did not know of any reason why his colleagues (termed staff 3, 4 and 5) would make the statements they had to the independent investigator. The dismissal letter referred to the national guidance for safer working practices for adults working with children and young people in education settings, that adults should always maintain appropriate professional boundaries and avoid behaviour which might have been misinterpreted by others. The letter concluded that the Claimant's

behaviour and conduct was inappropriate for his role as an experienced and long standing music tutor.

42. In relation to the second allegation that the Claimant had a relationship with a pupil or ex-pupil it was noted that this was not disputed. A sexual relationship had begun in January 2010, some six months after the last overseas tour when Melissa Dee was not a student at the time as the Claimant stated in his evidence to the disciplinary hearing. She was 18 years and 5 months old at this time. The Claimant had attended her 18 birthday party, had lunch alone with her in September 2009, attended a series of rugby matches with her some alone and some with friends in the autumn of 2009 and went to a New Year's Party on 31 December 2009 where the Claimant and Miss Dee first kissed. Just after his sexual relationship with Miss Dee started the Claimant informed the Line Manager who confirmed that everything was fine. Miss Dee had gone on a music tour in 2010 as a student after the relationship had started while the Claimant was there in his employed role on behalf of the London Borough of Sutton. The dismissal letter pointed out that the SMS literature described the service as being available to those aged 14 – 21. Students could be involved up to the age of 21 and a number of students attending university took part in the Sutton Music Service when they were home from university.
43. The dismissal letter quoted the Council's Code of Conduct with the national guidance relevant for this period. All adults were in the position of trust in relation to young people. Staff should demonstrate integrity, maturity and good judgment. Adults working with pupils have responsibility to maintain public confidence in their ability to safeguard welfare and the best interest of pupils. In addition to the case as accepted by the Claimant there were findings from the independent investigator and evidence of other staff members. There was a photograph of the Claimant with another student and Miss Dee on the Prague tour in 2010 about to embark on consumption of 3 pints of beer each. Although the Claimant said he had kept apart from Miss Dee when she was a student on this tour it was accepted that a sexual relationship was ongoing between them and the photograph demonstrated Miss Dee and the Claimant with 9 pints of beer on the table in front of them.
44. Four staff members had given their views from their observations and recollection of conversations that the relationship with Miss Dee started a lot earlier than the Claimant and Ms Dee had indicated it did. These accounts could not be dismissed out of hand. The Claimant became Facebook friends with Miss Dee when she was 16 years old and the weight of evidence suggested that the Claimant's evidence was not wholly reliable and was an attempt to minimise the extent to which the Claimant breached his position of trust and formed an inappropriate relationship with a student of SMS.

45. In his evidence Mr Nash stated that he found Mr Probert's claim hard to understand. He considered that adults working with children in a position of trust and power should not exploit their employment situation to meet their sexual and social needs. The Claimant had no connection with Miss Dee other than through SMS where she was a student. He had used his place of work and profession to build and develop a relationship that became sexual with a student. He had known her since before she was 16. He engaged in activities and behaviours that were inappropriate and encouraged a lack of professional boundaries. Within this context he was able to develop an inappropriate and sexual relationship with a student.
46. In relation to mitigation the dismissal letter considered the responsibility of the Head of SMS and his conduct in allowing a culture of inappropriate staff behaviour to go unchecked both on music tours and at other times. Although this allowed the Claimant the opportunity to behave in the way he did he did not explain why he chose to meet up with Miss Dee outside the SMS for lunch and to go to rugby matches with her. That was considered to be breaking a professional relationship to develop a friendship through his role as a tutor.
47. In relation to the criticism that there was no policy relating to the detail of the tutor's work and their conduct on trips abroad it was accepted that this was a gap which needed to be addressed. There was not however a total absence of guidance and relevant policy documents that cover issues such as forming relationships with those one has a duty of care over and there was a clear national narrative often defined by serious incidents of abuse. The local authority could expect staff to make sensible judgments and other members of staff had made the right decisions and adhered to reasonable boundaries.
48. In conclusion the letter signed by Mr Nash found that the Claimant had developed an inappropriate relationship with young pupil through his work in the music service. He actively contributed to a drinking culture on the overseas tours. Reference was made to an incident where drinking to excess occurred. The Claimant had been Facebook friends with students over a long period of time including three that were under 16 years of age. This blurred the professional boundaries between staff and students. It was inappropriate and impeded the Claimant's ability to keep children safe. The Claimant had engaged in the relationship with a student within the age range of the SMS namely 14-21 years. The allegations were found to be proven and this had brought Sutton Music Service and the London Borough Sutton into serious disrepute and constituted gross misconduct. The Claimant was summarily dismissed for a fundamental breach of contract. The letter offered him a right of appeal.

The Claimant's Appeal

49. The Claimant's grounds of appeal of 27 August 2015 complained that it

was unfair that the Claimant had been dismissed for Facebook friendships with SMS pupils. It contended that it was clear from the investigation report that other members of staff behaved in a similar way and had not been disciplined. There was no suggestion in the report there was any inappropriate communication via Facebook. The claimant had stopped accepting Facebook friends in 2014 long before the investigation was launched. The report identifies substantial mitigating factors in relation to this issue namely that the policies of the Council did not include guidance for staff on how to avoid compromising their professional role in their personal use of social networking sites.

50. Further the appeal stated there were serious errors in the reasoning of the dismissal officer in relation to the allegation that the claimant had socialised and drunk alcohol with students. The Claimant's evidence was that he did not at any time socialise or drink alcohol with students under the age of 18. The dismissal decision did not refer to the definition of students contained in the March 2009 Guidance for Safe Working Practice for Adults who Work with Children. Further although there was general evidence about socialising between students and staff both in UK and on tours none of the evidence referred specifically to the claimant. One of the witnesses had referred to the Claimant in 2014 taking alcohol away from some of the younger boys. He had thus acted in thoroughly professional and appropriate way.
51. It was said that the evidence in relation to the claimant's behaviour on tours was insubstantial. There was a very short video clip of him apparently dancing with students and a picture of him drinking beer with Melissa Dee and another on the Prague tour in 2010. Both the other parties in the "3 pints" photograph were over 18 at the time the photograph was taken. The photograph dated from a time when the management culture accepted drinking and socialising with students over 18. The investigation report had identified substantial mitigating factors that the respondent had not set firm rules on the circumstances in which it was acceptable for staff to consume alcohol nor in relation to the management of school trips.
52. The most serious allegation faced by the Claimant related to his relationship with a pupil or ex-pupil. The decision failed to engage with the key points of the claimant's defence namely that Miss Dee was a student up to and including July 2009. There was no evidence to suggest improper conduct while she was a student. The sexual relationship began in January 2010. She was no longer a student and the respondent had no duty of care towards her at that time. The Claimant was not in a relationship of trust in respect of her. The claimant had been entirely open and honest in response to his investigation. The evidence given by the other staff members was in the main consistent with the Claimant and Ms Dee's evidence. Where there was conflict this should have been resolved in favour of the Claimant since he and Miss Dee were available for

questioning and cross examination.

53. It was a serious misreading to suggest that the witnesses said that the relationship started a lot earlier than the Claimant said it did. There was no fair basis to reject the claimant's evidence. It was likely that the witnesses' evidence was coloured by the fact that a relationship began January 2010.
54. The conclusion that the Claimant's evidence was not wholly reliable and that he had attempted to minimise the extent to which he breached his position of trust was unsupported by the weight of the evidence. The fact that SMS services were available to those aged 14 to 21 was simply not relevant. What was relevant was that Ms Dee was not engaged as a student after July 2009 apart from the Prague tour in July 2010. The decision letter contained little reasoning on whether SMS owed a professional duty of care towards Miss D when her relationship with the Claimant began. The dismissal letter failed to deal with the substantial mitigating factors which were set out in the appeal letter.
55. Finally it was said that even if the claimant made an error of judgement in 2010 it was still necessary to consider whether it would be fair to dismiss him for gross misconduct given the passage of time, the fact that he sought advice from his line manager, the fact that he made no attempt to hide the relationship, no concerns were expressed to him at the time and there was no evidence of any harm to the reputation of the Respondent.
56. A "pre-directions" hearing took place on 19 October 2015. Arrangements were made for Mr Stewart and Mr Brabbs together with the Claimant and other witnesses to be heard. The appeal was fixed for 1 February 2016. The claimant did not attend on 1 February 2016 and was not represented. The decision was considered from 10 am until deliberation concluded at 13.15 pm. At that time the appeal had heard from the dismissing officer Mr Nash who presented the case for dismissal and the investigating officer Mr Brabbs. The appeal was heard by three councillors with Councillor Marlene Heron in the chair. Notes of the deliberations were produced. The decision was given by letter dated 16 February 2016. It was to uphold the decision to dismiss the appellant on the grounds of gross misconduct. The committee had considered a witness statement from Mr Lewis Gibbs and found no material evidence in it which would affect their decision. The committee did not accept there was any procedural deficiency. Despite the appellant's concerns about the lapse of time the committee agreed that the Respondent had the right to investigate all matters in full particularly those relating to safeguarding. Allegations of bias were not accepted. It was agreed that the appellant's behaviour was serious enough to warrant further investigation. The committee did not accept the sanction was unfair and noted a number of specific grounds. There was a lack of comprehension or acceptance of accountability by the appellant which led them to reject alternative sanctions and uphold the decision to summarily dismiss. The appellant's conduct was found to be serious enough to

constitute a fundamental breach of contract. His lack of duty of care for the young people aged 14 to 21 for whom he was responsible was of great concern to the committee. His conduct was not in accordance with Council policies and procedures due to his inappropriate relationship with a student of the SMS. The appellant's conduct was a breach of council policy and standards including the staff code of conduct and the Department of children schools and families guidance on safer working practice or adults who work with children and young people education settings of March 2009.

Submissions

57. The Claimant's representative provided a bundle of authorities. The Tribunal was provided with ***Park Cakes Ltd v Shumba & Ors [2013] EWCA Civ 974***. In that case it is observed in head note that the focus must be on what the employer has communicated to the employees in a consideration of the operative contractual terms. That was the case of enhanced redundancy benefits.
58. The Claimant's representative also provided a copy of ***Keeley v Fosroc international Ltd 2006 EWCA Civ 1277***. This was the case where the contract of employment incorporated by reference the employers' staff handbook. The Court of Appeal held that where a contract of employment expressly incorporates a document such as a collective agreement or staff handbook, it does not necessarily follow that all the provisions in that document are apt to be the terms of the contract. Some may be declarations of an aspiration or policy falling short of a contractual undertaking. The fact that it is presented as a collection of policies does not preclude it having contractual effect if, by their nature and language, the policies are apt to be contractual terms.
59. The Claimant's representative provided a copy of ***Vodafone Ltd v Nicholson UK EAT/0605/12***. The conduct for which the Claimant was dismissed did not feature in nor was it closely related to the examples of gross misconduct specified in the employer's disciplinary policy. The employer promulgated no policy in relation to the way in which stock controls were to be exercised. No warning was given to the Claimant that a failure of the sort found could lead to dismissal. The Employment Tribunal held the dismissal outside the range of reasonable responses and that finding was upheld by the EAT.
60. The case of ***Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677*** was provided. The Court of Appeal considered that an Employment Tribunal was entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer. The Tribunal was entitled to attach significance to the lack of training. Although new forms in relation to safe working had

been introduced it had not been made clear to the Claimant either by a formal training course or one to one discussion that failure to wear breathing apparatus in sewers on any occasion would have been treated as an offence justifying dismissal. The Claimant in that case had been an employee for 34 years with a clean disciplinary record and the judge was entitled to take that factor into account. It would have been extraordinary if he had not done so.

61. The Tribunal was further provided with a copy of the authority of ***Salford Royal NHS Foundation Trust v Roldan*, 2010 EWCA Civ 522** a Court of Appeal case. In that case reference was made to ***A v B*** in the EAT which held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. It was therefore particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. In that case there was a real risk that the Claimant's career would be blighted by the dismissal which would lead to her deportation and destroy her opportunity for building a career in this country. It was also said that where the evidence consists of diametrically conflicting accounts of an alleged incident with no or very little other evidence to provide corroboration one way or the other employers should remember that they must form a genuine belief on reasonable grounds that that misconduct has occurred.
62. The Claimant's representative also supplied a copy of ***Linfood Cash & Carry Ltd v Thompson [1989] IRLR 235***. Information given by the informant in a misconduct case should be reduced to writing in one or more statements. It may subsequently be necessary to preserve anonymity. If an issue is raised which should be put to an informant it may be desirable to adjourn for the chairman to make further enquires of the informant. In assessing credibility of witnesses the relevant question is whether the employer acting reasonably and fairly could probably accept the facts and opinions which they did.
63. In ***Ramsey v Walkers Snack Foods Ltd 2004 IRLR 754*** the EAT held that in assessing the fairness of the employers' approach it was necessary to look at the reasons given for granting anonymity in the first place, the terms of the anonymity and whether it should extend to being interviewed by other managers and the subsequent preparation of statements.
64. In the ***British Waterways Board t/a Scottish Canals v Mr David Smith UKEATS/0004/15*** the Employment Tribunal was found to have substituted its own views for those of the employer. The employee had made Facebook entries about drinking when on standby and offensive views of colleagues. The employer lost confidence in the employee and their fair procedure was followed. The comments made were found to be highly offensive and inflammatory. The claimant apologised. His comments

regarding alcohol were considered to be specific and elaborate, and a matter of public record which could be seen by members of the public.

65. In *Williams v Leeds United Football Club [2015] EWHC 376 (QB)* pornographic and obscene images were sent by the claimant some five years before termination of his employment on grounds of redundancy. During his lengthy notice period this gross misconduct came to light. He was found to be serious breach of the implied duty of trust and confidence. While the claimant had not been provided with the Club's e-mail policy which had prohibited the transmission of pornographic images it should have been obvious at the time, certainly to a person in a senior management position, that the e-mail system should not have been used to send the images.

The Claimant's Submission

66. The Claimant produced an opening note. It focussed on the loving relationship between the Claimant and Miss Dee. It also referred to inappropriate use of informant evidence. It contended the lack of policies at the Respondent meant that the real reason for the dismissal was capacity or competence. It was said the dismissal was outwith the range of reasonable responses. The delay meant the respondent could not rehear allegations that were five years old. The claimant's social media activities could not justify dismissal.
67. It was submitted orally that Mr Brabbs had changed his position from the time he had produced his report to the disciplinary hearing when he said the Claimant was predatory. This change of position was unfair. It was potentially unfair to embellish the charges. When pressed in relation to his comment about the potency of music and the vulnerability of music students he was unable to produce any research. This was another example of embellishment and inferences should be drawn about his credibility.
68. Mr Stewart was responsible for the Council's policies. Failures by the Respondent to have the requisite policies were identified. That failure was being visited on the Claimant when it should have been a mitigating factor for him. The Presenting Officer and Chair had their own reputations to protect at the time of the hearing. Mr Stewart admitted he thought grooming was going on. Mr Brabbs was not clear. This was not a criminal context. Social workers and teachers should not make allegations without evidence. The case was expanded during the disciplinary hearing.
69. Mr Nash said it was recorded that the Claimant's integrity was "on the floor." Mr Nash was responsible for safeguarding. He had not been able to find a reference to such a quote. He said he was not embellishing. This was inappropriate behaviour by the chair who in truth was not independent. Mrs Heron finally attempted to approach the case fairly, but some of her evidence boarded on the fanciful. Wearing a rugby shirt and

making tea did not equate to grooming. There was very little evidence on the basis which she had found that the Claimant was grooming. Whatever the Claimant did was not gross misconduct since the guidance on which the Respondent relied was not incorporated into his contract. It was not self executing. The appendix was not a circular with the force of law. Again, the credibility of Mr Brabbs was an issue.

70. The **Burchell** test should be applied. There were no reasonable grounds for the Respondent's belief. They had the belief but they had no grounds for it. The alleged victim was disbelieved and anonymous evidence taken against the Claimant was believed. This was well below the test for a reasonable employer. The investigation was deficient and charges had been added to during the hearing. The Claimant was now allowed to reply. There may be a wider context in the criminal investigation going on. The Claimant had been tarred with the same brush.
71. Any deduction other than minimal would be an inappropriate under **Polkey** and contributory fault. Nothing was known about the Respondent's policies and **Polkey** depends on findings on procedure.

The Respondent's Submission

72. This was not a case about criminal behaviour. The Claimant was a senior member of the music service operating outside the Borough and in a bubble which was out of control. Much of what was alleged had been admitted. Most of the conduct was admitted. The Claimant accepted that it was not appropriate to be Facebook friends with the students. The duty was accepted regardless of age. It should include returning students. The Claimant had created a third category which the Respondent did not accept existed. Socialising and drinking may have been a breach of appropriate boundaries. The Claimant attempted to exclude those over 18 from the service. If Ms Dee did not pay to attend activities the Respondent still took a different view of her position. The Claimant admits that it was wrong to begin or prepare a relationship with a student. The Claimant had no knowledge of Ms Dee outside the service. The Claimant accepted that it would have been wrong to start a relationship the day after Miss Dee's 18th birthday. The Claimant could not say how the 2009 guidance did not apply to him.
73. The events described in the statements of other members of staff appear inappropriate and are viewed as such by the Respondent. The Claimant accepted national guidance was mostly common sense. It is difficult to see how there could be normal social contact between the Claimant and Miss Dee. The Respondent relied on what the other tutors had observed. The lucky guess was that something was going on between the Claimant and Miss Dee. There was more to this than the evidence of staff 3 that it was not long after the Italian tour. A social relationship had been developed. It is more certain that they were in a relationship. Evidence of

attraction between the Claimant and Miss Dee was clear between July and October 2009. The Claimant was not credible when saying that these interactions were something different. This corroborated what members of staff said to the investigation. It was not credible that the Claimant would say his father dropped out of attending a rugby match and Miss Dee was invited and a couple of weeks later he announced a relationship with her. Clear admissions had been made by the Claimant and there had been one-to-one contact with Miss Dee despite the fact that he had no relationship with her outside the service. This was a thorough report by Mr Brabbs after extensive investigation in relation to Facebook reports. The absence of a policy is irrelevant as the Claimant knew he should not have a relationship. This case was about the reputation of the service.

74. The Claimant had an obligation to safeguard SMS students. He had blurred the boundary. He had a duty to keep students safe. The personal relationship is what Mrs Heron spoke about. It grew out of contact between the Claimant and Miss Dee. Any bystander could see the beginning of a romantic attachment. She was a returning student of SMS. Criticism of opinions expressed in the disciplinary hearing was a red herring. The allegations were not added to. They were clear and opinion was expressed about them.
75. No differential burden of proof applied in a case where the allegations were more serious. It remained the balance of probabilities. There had been no attempts to tarnish the Claimant. He had asked his line manager and the line manager had wished him the best of luck. All the line manager was worried about was that Miss Dee was over 18. Other members of staff did not hold this view and would say this was the beginning of an inappropriate relationship. Under the **Burchell** test the Respondent has to show the reason for dismissal. They were two allegations, of inappropriate relationships with students and the relationship with Miss Dee. It was found by the Respondent on the balance of probabilities that the charges were proved.
76. Even if there was no policy as Mr Nash observed a copy of the high way code is not issued to those driving for work. Clear examples of misconduct were set out in the Respondent's code of conduct including bringing the Respondent into disrepute. The Claimant accepted his behaviour and acknowledged an understanding a relation to his reputation when he approached his line manager in January 2010. The Claimant accepted he had a full opportunity to say if all had been put to him in the disciplinary hearing. This was a breach of trust and confidence on his part. The range of reasonable responses was very wide. The Claimant was not remorseful. There was no confidence that he would not repeat these actions in the future. The Claimant admitted breach of professional boundaries. Was dismissal within the range? The Respondent said it was. The Claimant could not plead lack of training. If the conduct was not gross misconduct the Respondent would argue that the starting point was

that the Claimant contributed to a large degree. It was foolhardy behaviour. He entered a relationship which led to a personal relationship with Miss Dee and the contribution should be 85%. There was no argument that the dismissal was procedurally unfair. If there was such a finding with a fair procedure the chances of dismissal were in any event high.

77. The Tribunal raised the argument of embellishment. The Respondent submitted the dismissal letter did not change the allegation in any sense. Although the word predator had been used it was not said that this influenced the decision maker.

Claimant's Response

78. The Claimant's representative responded. His solicitor had indicated that he had been informed there was an investigation into some form of more serious paedophilia. This was an attempt to tarnish the Claimant. The line manager had been tarnished now. This was speculation and conjecture without evidence.

The Law

79. Misconduct is a potentially fair reason for dismissal under section 98(2) (b) of the Employment Rights Act 1996. Section 98 provides that it is for the Employer to show a potentially fair reason for dismissal. In the present case there has been no suggestion of any other reason for dismissal and accordingly I proceed on the basis that conduct is the accepted reason.
80. It is then for the Tribunal to determine in accordance with section 98(4) whether the dismissal is fair or unfair and this 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 the reason as a sufficient reason for dismissing the employee and this shall be determined in accordance with equity and the substantial merits of the case.
81. We know from the Employment Appeal Tribunal in **British Home Stores Ltd v Burchell 1980 ICR 303** a threefold test applies. The employer must show that it believed the employee guilty of misconduct, it had in mind reasonable grounds upon which to sustain that belief and that at the stage at which the belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances. The employer need only have a genuine and reasonable belief, reasonably tested. This test was approved by the Court of Appeal in **W Weddell & Co Ltd v Tepper 1980 ICR 286**. At the time the case was decided the burden was on the employer to show not just the reason for dismissal but also that it acted reasonably in treating that reason as a

sufficient ground to dismiss the employee. Since 1980 the burden of proof to be applied to the reasonableness aspect is neutral. This was made clear in ***Boys and Girls Welfare Society v McDonald [1997] ICR 693***. It is clear that the employer must only show that it believed the employee guilty of misconduct. The burden of proof in respect of the other two elements of the Burchell test is neutral. When assessing whether the Burchell test has been met the Tribunal must ask itself whether what occurred falls within the range of reasonable responses of a reasonable employer. This has been held to apply in conduct cases both to the decision to dismiss and to the procedure by which that decision was reached. It is not for the Tribunal to substitute its own decision as to whether or not the investigation into the alleged misconduct was reasonable, see ***J Sainsbury PLC v Hitt [2003] ICR 111***. The Tribunal is reminded that there may be a range of reasonable responses.

82. In relation to the wrongful dismissal claim this jurisdiction has recently been considered in the Court of Appeal, in the case of ***Adesokan V Sainsbury's Supermarkets Ltd 2017 EWCA Civ 22***. While this decision was produced after the hearing in this case it does not offer any novel proposition on which submissions would have been required by the parties. The appellant in that case was a Regional Operations Manager of Sainsbury, one of the more senior posts in the company, and was responsible for twenty stores. He was summarily dismissed after the Respondent found that he had undermined what Sainsbury's call the Talkback Procedure (TP), the philosophy behind which is the desire to ensure that staff should be engaged, motivated, and take pride in their work. His HR partner had communicated to stores by email in a way that deliberately set out to manipulate the Talkback scores on his region and the Appellant had failed to take any adequate steps to rectify this serious situation. The Respondent regarded this as gross negligence which was tantamount to gross misconduct.
83. The appellant sued for wrongful dismissal but lost, the judge finding that although he was not dishonest and had not made a conscious decision not to take steps to eliminate the effects of the partner's email, nonetheless his failure to take active steps to remedy the situation amounted to gross misconduct. The Appellant appealed on the basis that the conduct of the appellant was not capable, as a matter of law, of amounting to gross misconduct. For someone with such long and unblemished service who was not even responsible for sending the email, it was too harsh to dismiss the appellant without notice for a single act of negligent wrongdoing. The neglect was not so egregious as to warrant the epithet "gross". Moreover, in practice the appellant's failure to remedy the problem did not cause the company harm because, as the company accepted, the results from the stores were sufficiently robust.
84. The Court of Appeal dismissed the appeal. Given the significance placed by the company on the TP, the judge was entitled to find that this was a

serious dereliction of his duty. He found that this failing constituted gross misconduct because it had the effect of undermining the trust and confidence in the employment relationship. The Appellant seemed to have been indifferent to what in the company's eyes was a very serious breach of an important procedure.

85. In that case Lord Justice Elias considered the question at paragraph 21 whether the misconduct was gross. He reviewed the authorities, restating the starting point that this is a question of fact. Gross misconduct is not limited to dishonesty or intentional wrongdoing. The issue is whether the conduct is seriously inconsistent with the duty of the employee. At paragraph 23 Elias LJ made clear that the focus is on the damage to the relationship between the parties.
86. Consequently I have to decide in this case whether the conduct of the claimant was so grave and weighty as to amount to a justification for summary dismissal.

The Decision

87. I consider to begin a number of points made by the Claimant's representative. He relies on the comments made in the investigation report in relation to the mitigation which might be considered on the Claimant's behalf in relation to the passage of time and also in relation to the approval the Claimant received from his line manager when he disclosed his relationship with Miss Dee to him. In the context of the subject matter which is raised in the charges it is difficult to see how the respondent can on discovery of misconduct in the past be prevented from taking a serious view when it eventually comes to light. The true nature of what passed between the claimant and Miss Dee is something that was not known to the higher levels of management within the Respondent at the time it occurred. I do not accept that the respondent is thereby prevented from reviewing what took place albeit at some distance in time from the events of 2009 and 2010.
88. The other significant aspect is the disclosure made by the Claimant to his line manager. It appears that the claimant made this disclosure after a sexual relationship had begun. If what was done by the Claimant amounted to gross misconduct I do not see how anything said by his line manager could remove from the Respondent as an organisation the possibility of a disciplinary process at a later date. Further there is no written record of what the Claimant disclosed to his manager. It does not appear to be the case that the Claimant gave his manager a full history of the relationship which had taken place over the period from the Italian concert tour in July 2009 to the time in January 2010 when a full relationship existed between her and the Claimant.
89. Reliance is placed by the Claimant, and apparently by his line manager,

on the approval of Ms Dee's parents to the relationship. That appears in my opinion to be irrelevant to the relations between the Claimant and the Respondent. The issue is not whether the relationship which took place is approved by those with Miss Dee's interests at heart, or arguments that a good relationship is not abusive in some wider sense. The issue is the position of trust that the Claimant was in at the time the relationship began.

90. An interesting aspect in the case is that the Claimant focused on issues of mitigation in reliance on the report of Mr Brabbs, suggesting that in the disciplinary process Mr Brabbs had moved his position and taken a more serious view. I read his report as taking a serious view of the Claimant's conduct. He remained consistently of that view.
91. In relation to the unfair dismissal jurisdiction there can be no dispute that conduct was the reason for dismissal. The claimant does not challenge the belief of the decision makers. The Claimant challenges the adequacy of the investigation which was undertaken. It is difficult to see how that challenge can succeed. A number of colleagues gave evidence. They did not give evidence anonymously. Their identities were not disclosed but it was clear to the Claimant which individuals were giving the evidence. The factual challenge was not to the substance of the evidence given but to the suspicions aroused in the minds of the witnesses. In fact there was little dispute in relation to the circumstances outlined in the relationship between the Claimant and Miss Dee. The Respondent acted reasonably in the evidence accepted from the informants. The Claimant did not request an opportunity to put specific points to the informants. In the circumstances of this case there was little dispute about what took place. On any view is a history of regular and intensifying social contact between the claimant and Miss Dee in a period very shortly after she left school and was on vacation prior to going to university. During this period she reached the age of 18, not long after leaving school. Within less than six months a sexual relationship had been established. The Respondent believed that the relationship arose out of an abuse of position by the claimant in relation to Ms Dee. They did not accuse him of criminal conduct. They believed that they no longer could trust him. It is hard to see how on the basis of the material supplied in the investigation that conclusion was not within the range of reasonable responses to the circumstances.
92. Much has been made by the Claimant of the lack of policies in relation to safeguarding issues in the Respondent. The Respondent produced a Guidance note ER 100 page 114 and again at page 135 of the bundle setting out the code of conduct and the disciplinary rules and procedure applicable to the claimant's employment. It was not disputed that the Claimant was subject to this document. It is dated September 2008 and was therefore in force at the time the Claimant established his relationship with Miss Dee. It provides at Appendix A number of examples of gross

misconduct. While the document as a whole may not have been imported to the contract it was the disciplinary basis for the employment.

93. In the invitation to the disciplinary hearing dated 15th of July 2015 the allegations were of inappropriate conduct and behaviour at work. The two specific allegations were of inappropriate relationships with young people and a relationship with a pupil or ex-pupil. The document stated that if proven these allegations constituted a serious breach of mutual trust and confidence which potentially brought the council into disrepute. Bringing the organisation into serious disrepute is one aspect of the examples of gross misconduct set out at Appendix A.
94. The claimant accepted that he had become Facebook friends with students. He also accepted that he had been actively involved in the consumption of alcohol with students over the age of 18 on school trips. He further accepted that he had engaged in, on the most favourable analysis, a social relationship with a student who had recently left school and with whom he was socially involved from her 18th birthday until beginning a sexual relationship with her approximately five months later. The Claimant readily accepted it would have been inappropriate to form a relationship with Miss Dee on her 18th birthday and yet contends that it was appropriate a very few months later. The analysis of the social interactions between Miss Dee and the claimant reveals 14 or 15 occasions upon which they accept that they met in the short period from her 18th birthday until the sexual relationship began. Miss Dee remained a student of the SMS and went on its summer tour to Prague in July 2010.
95. On those facts about which there is no dispute the Respondent concluded that the trust which it reposed in the Claimant was breached and that, although it did not become known until some time later, this breach was a serious one justifying dismissal. There was consequently a belief in the misconduct of the claimant. That belief was formed upon reasonable grounds. An investigation and disciplinary process revealed material undisputed by the claimant as to the extent of his contact with Miss Dee over a relatively short period of time culminating in a sexual relationship.
96. In those circumstances there is no basis for a challenge to the extent of the investigation. The procedure involved offered a full opportunity to the claimant to raise challenge and to appeal against the decision to dismiss. The sanction of dismissal fell well within the range of reasonable responses of a reasonable employer to the circumstances which became known to them in 2015.
97. I accordingly find that the dismissal of the Claimant was fair.
98. In relation to the claim of wrongful dismissal there is no dispute in this case as to the primary facts. The Claimant accepted what had passed between him and the under age students in relation to his becoming

Facebook friends with them. He withdrew from these contacts in 2014, presumably in recognition of the inappropriateness of this contact. He also accepted the Respondent's view of the way in which his relationship with Ms Dee had been consummated and the proximity in time to her period as a student of the SMS. These matters when they came to light had a terminal effect on his relationship with his employer. I therefore find that the claimant committed gross misconduct in the breach of trust and confidence resulting in damage to the reputation of the respondent which amply justifies summary dismissal.

99. Turning to the list of issues provided by the Claimant's representative at the beginning of the hearing the following points arise:-

Wrongful dismissal

1. What terms were incorporated expressly or by implication into the contract and what policies and procedures were so incorporated?

The Code of Conduct effective from 1 September 2008 is headed "Guidance Note ER1" it does not therefore appear to have been the intention of the employer to include it as a contractual provision. It does not set out contractual obligations. It is a guidance note. It is a clear statement of the expectations of the Respondent.

The instances of gross misconduct given are implied into the contract of employment as are the terms implied by law which are too extensive to be set out here. Those terms include the implied duty of trust and confidence.

The Guidance for Safe Working Practice for Adults who Work with Children and Young People in Education Settings found at page 68 at the bundle and produced by the Department for Children Schools and Families in March 2009 is again not a contractual document. It is a guidance document.

The Sutton Music Service Child Protection Policy produced in May 2007 is again not a contractual obligation but a policy statement.

2. See above.
3. See above.
4. The Respondent does not rely on any other contractual term which is expressly stated. The Respondent has relied on the Code of Conduct, Disciplinary Rules and Procedure and examples of gross misconduct. In particular the Respondent relies on bringing the organisation into serious disrepute, and the implied duty of trust and confidence.

This is the basis of the charge set out in the invitation to the disciplinary hearing in the letter dated 15 July 2015 at page 132.

5. I find that the Claimant committed the act of gross misconduct relied on by the Respondent by his conduct in developing an inappropriate relationship with young people though his work with the music service and in the relationship he formed with a pupil or ex-pupil.

Unfair Dismissal

1. The Respondent has shown the reason for the dismissal.
2. The reason for the dismissal was misconduct.
3. The dismissal was fair considering the reason shown by the employer. Facts were adduced which were substantially admitted by the Claimant that in the period immediately after a pupil left school with the Respondent he formed a social relationship with her which may have begun while she was a pupil of the Respondent and under the age of 18 and within a relatively short period of time that relationship developed into a sexual relationship.
4. Capability is not relied on as a reason.
5. The Respondent established that it believed misconduct had occurred. Both the disciplinary and appeal officer were clear in this contention. A thorough and detailed investigation was undertaken which formed the basis of the belief. The investigation undertaken was reasonable in the circumstances of the case. In the circumstances the sanction of dismissal was within the band of reasonable responses.
6. A fair procedure was followed.
7. Should have be a Polkey reduction? Not applicable
8. Should have be a reduction for a contributory negligence? Not applicable.

Regional Employment Judge Hildebrand
Date: 7 March 2017