Case Number: 2501328/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Ms J Flett	**AND**	**The Council of The Borough of Redcar and Cleveland (First respondent)** **The Management Committee of EOTAS (Second respondent)** **Interim Executive Board of Pathways Special School (Third respondent)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Middlesbrough **On 1, 2 and 5 February 2018**

Before: Employment Judge Shepherd

Appearances

For the Claimant: Mr Welch
For the First Respondent: Mr Anderson

JUDGMENT

The judgment of the Tribunal is that:

1. The claims against the second and third respondents are dismissed.

2. The claim of unfair dismissal against the first respondent is not well-founded and is dismissed.

REASONS

1. The claimant was represented Mr Welch and the respondent was represented by Mr Anderson.

2. I heard evidence from:

Georgiana Sale, External Consultant;
Melanie Walkington, Senior Human Resources Advisor;
Andy Brown, Chair of the Interim Executive Board of Pathways Special School;
Andrew Wappat, member of the Interim Executive Board of Pathways Special School;
Jacklynn Flett, the claimant.

3. I had sight of a bundle of documents which, together with documents added during the course of the hearing, consisted of 597 pages. I considered the documents to which I was referred by the parties.

4. The issues to be determined were discussed and agreed at the start of the hearing and were as follows:

4.1. Was the claimant dismissed for a potentially fair reason, namely conduct?

4.2. Did the respondent carry out such investigation as was reasonable in all the circumstances of the case l?

4.3. Did the respondent form a belief in the guilt of the claimant based upon reasonable grounds?

Further issues were identified in respect of remedy. However, it was agreed that this hearing would be limited to issues of liability although, if appropriate, I would address issues in respect of any Polkey reduction or a reduction in respect of contributory fault. As I have found that the claim against the first respondent was not well-founded it was not necessary for me to deal with the issues of Polkey or contributory fault. I was informed that there is a professional conduct hearing before the National College for Teaching and Leadership to be heard, in those circumstances, I do not consider it is appropriate for me to comment on these issues.

It was agreed that, as this is a claim of unfair dismissal, it should be against the employer alone and that employer was the first respondent and, in those circumstances, the claims against the second and third respondents should be dismissed. The claimant agreed that those claims should be dismissed upon withdrawal.

5. Having considered all the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities. These findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings I made from which I drew my conclusions.

5.1. The claimant was employed by the first respondent as a Food Technology teacher. She had approximately 39 years' experience as a teacher in various schools.

5.2. The claimant started working for EOTAS (Education Other Than At School) in October 2014. This is a pupil referral unit. At approximately the same time the claimant also worked at Pathways Special School. She worked across both establishments.

5.3. In October 2016 Georgiana Sale was instructed by the first respondent to conduct an investigation into the management practices at Pathways and EOTAS. She was a consultant employed by Northern Education and a retired headteacher and OFSTED inspector. The headteacher and both deputy headteachers had been suspended.

5.4. Georgiana Sale interviewed over 50 members of staff. The claimant was interviewed by Ms Sale on 14 October 2016. During that interview the claimant was asked about the management style and she referred to members of staff being bullied by the headteacher but said that he had been positive with her, never pushed her:

> "..he wanted a good food technology teacher and he is happy with me. He praised me for stuff and I went on the SLT…"

5.5. On 11 November 2016 Georgiana Sale interviewed Emily Hughes. Within that interview, Emily Hughes referred to the claimant and said :

> "… She was doing the kids coursework, fiddling it and she asked me to do that…
> I went over to start the practical and she said to me 'don't worry, we will get bits of work from the other kids folders'…
> It was done on the computer. It was handwritten by the students then Jackie would type it up at the end of the year to make it look better…
> She made up coursework, where there were bits missing, she fills in the gaps and asked me to do it and for me not to repeat it. She would do the kids coursework at home on the laptop and pretend it was the kids work."

5.6. Emily Hughes also said that there was one boy who didn't do the exam.

> "… He kicked off and didn't do the exam at all. The Food Technology exams were put into Miss Flett's desk drawer at Pathways …
> The day after the exam, Allen phoned to ask Jackie if she could come to Pathways to unlock her desk drawer…

He asked her to unlock her desk drawer and he filled in the exam paper for that kid, and that boy wasn't even in school that day. It is what Jackie told me"

5.7. Georgiana Sale carried out a further interview with the claimant on 2 December 2016. The claimant indicated that she and Emily Hughes both typed up work for the students from their notes. There was discussion with regard to work being shifted from one child to another and the claimant indicated that she thought that did happen with some of the development work.

5.8. With regard to the exam paper the claimant said that a Teaching Assistant, Graham, whose surname she could not recall had asked her for a spare paper and said he was taking it to the pupil's house. The claimant also said:

> "I begged Graham not to take the paper out to (J), I offered to go with him to see AT to say don't do it. He was adamant that he had to do it."

5.9. When asked if she had been AT (Alan Tipling, the Examinations Officer) the claimant said

> "No I didn't because Graham didn't want me to. He implied his job was at risk if he didn't do it."

The claimant was asked "why a mature, confident woman like you didn't say anything? "She replied:

> "Because of Graham, he has a teenage family, low wages and I didn't say anything more."

5.10. Georgiana Case interviewed Graeme Lewis who repeatedly said that he could not remember asking for or taking a paper to a pupil after the examination. She also spoke to another member of staff, Steve Hugill who had also been named by Emily Hughes but he was off work so Ms Case spoke to him over the telephone and he said that he did not recall the claimant telling him about a blank exam paper being given to someone to be taken out to a student. Steve Hugill then sent an email to Georgiana Case saying that, having thought about it a bit more, he could vaguely remember the claimant mentioning something along the lines of - I have a blank one in my drawer I will get it sent out to him - or words to that effect.

5.11 Georgiana Case contacted AQA, the examination board who provided a copy of the examination paper from the pupil in question which had been completed in handwriting. The pupil had received a GCSE grade.

5.12 Georgiana Case prepared an investigation report and concluded that there was a case to answer concerning the claimant giving an

unacceptable level of help to her pupils with their cookery coursework and not conducting examinations in accordance with AQA rules.

"This is because:

- Ms Flett typed up coursework for pupils.
- She ordered her TA to do the same.
- She did not ensure that all coursework put into individual folders was from a particular pupil.
- She gave a blank exam paper to a TA to take out to a pupil the day after the official exam.

Ms Flett, a mature and experienced teacher, has gone against the professional conduct expectations of all teachers, the Teaching Standards and the expected conduct of teachers under the rules of the examination board for the cookery examination. The trust put in her to teach and carry out appropriate examination conditions has been completely misplaced and there is doubt concerning her worthiness, in the future, to be entrusted these responsibilities again."

5.14. On 17 February 2017 Andy Brown wrote to the claimant inviting the claimant to a disciplinary hearing and setting out the allegations which had been investigated and were:

"1. You have completed documents on behalf of pupils which have then been passed off as their own coursework;

2. You have attributed coursework to pupils knowing that this work was carried out by other pupils;

3. You have instructed a junior member of staff to complete coursework on behalf of pupils and, also, to attribute coursework to pupils knowing that this work was carried out by other pupils.

4. You supplied a blank examination paper to another member of staff, Graeme Lewis, to be supplied to a pupil in breach of examination regulations."

5.13. The claimant attended a disciplinary hearing on 14 March 2017. The hearing was before a panel consisting of Andy Brown, Chair of the Interim Executive Board together with Linda Halbert, the Chair of the EOTAS Management Committee, Linda Stabler, member of the Pathways IEB, also in attendance was Tim Smith supporting the panel, Georgiana Sale, Joe Eason, HR adviser,

the claimant and Richard Matkin, her union representative and the minutes were taken by Laura Brook.

5.14. The claimant provided a statement in relation to the spare/blank AQA written GCSE food technology exam paper. In this statement the claimant referred to being surprised that the pupil had not taken the exam as he had been at her revision session before the exam.

> "When Graeme asked me for the paper to take it out to (J) I told him he could not take a paper out to (J) the day after the exam we talked about it and I offered to go to the office with him to tell Alan Tipling (as exam officer) he would not do it. Graeme said he had to do it saying 'you know what they are like'I took this to mean Steve and Rachel. Graeme was adamant he had to take the paper and he did not want me to go to SLT about it.
>
> Graeme left the room with one of the spare papers, I don't know what happened to the paper after that. I did not tell anyone about this as Graeme had implied his job would be at risk."

5.15. At the disciplinary hearing the claimant was asked questions with regard to the allegations. The management case was put, the claimant was allowed to ask questions and was asked questions. Alan Tipling was called as a witness for the claimant. He denied asking anyone to ask for an examination paper. There was summing up from both the management and the claimant.

5.16. On 16 May 2017 Andy Brown wrote to the claimant setting out the findings of the disciplinary panel and setting out the decision as follows:

> "In reaching our decision we have had regard to the totality of the evidence.
>
> We have reminded ourselves that Ms Hughes was not called to give evidence whereas you were present to give evidence and answered questions. We therefore have to look carefully, at the weight of the evidence given to Ms Hughes' statement, unless there were admissions from yourself or corroboration.
>
> We have also taken into account the vagueness of the evidence of Mr Hugill. We did not need to place any reliance upon the same as you accepted you handed over an exam paper.
>
> We find allegation one proven on the balance of probabilities. You accepted you typed up work for students either from their own notes or from what they said. Course work formed part of

the exam assessment. None of the pupils had special consideration for a scribe. At no stage did you make it clear that you had produced the typed documents and not the pupils. In addition we do not accept that you typed up exactly what the pupils said but in fact perfected the information. We reach this finding on your own evidence when you said: –

> "The communication SPG (spelling punctuation grammar) mark of 5 took into account the literacy level from the draft work not the word processed work…"

In other words the typed document was not an identical copy of any notes.

Turning to the second allegation, we find on the balance of probabilities the allegation proven. You did permit coursework of one pupil to appear in different pupils' assessment folders. You accepted one pupil's work was apparently missing from their file to be sent to AQA. You used another pupils work. Whilst we accept that with development work pupils may work together they then have to write up their own assessment and description of the work done. This work is marked and can vary from pupil to pupil. It is not right to pass one pupil's work off as that of another.

The third allegation, that you instructed Ms Hughes to submit coursework on behalf of pupils and to attribute coursework to pupils knowing the work was carried out by others, is not proven as to all elements. We have taken into account the evidential dispute between yourself and Ms Hughes. We have had the opportunity of hearing your evidence but not Ms Hughes. Credibility was central on this particular allegation. We are only satisfied that you told Ms Hughes to type up the pupils' coursework even though that had no special considerations. We consider this likely given that you have admitted doing it yourself. The Investigating Officer has not shown to us on the balance of probabilities that Ms Hughes was told by you to attributed coursework done by one pupil to another.

On the fourth allegation, namely that you supplied a blank examination paper to another member of staff, we find proven. You knew that JT had been entered for an exam. The following day you had been asked for a spare exam paper and were told that it was to be taken to "J" ("J" and "JT are one and the same person). You must therefore have known JT did not complete the exam. More importantly you knew what you were doing was wrong as your evidence was that you "begged Graham not to take the paper out to J…" You therefore well knew that the paper would be used to mislead the exam board into thinking JT had completed the exam on the correct date and time under exam conditions.

This was a clear breach of exam protocols. We note there is an evidential dispute, as to whether you gave the paper to Graeme Lewis or not. We resolve that in your favour. We can see no reason for you to lie and every reason for Mr Lewis.

We have to consider the issue of penalty. We indicated at the start of the proceedings that given the number of staff we had to see, and given that members of the Senior Leadership Team faced allegations of amongst other things, bullying and intimidation; it was appropriate that all the evidence was heard so that we could reach a rounded view of the culture within the school. This was an approach that your trade union representative, Mr Matkin, wholly accepted.

We have only looked at the proven allegations.

We have taken into account that you are a teacher of some 39 years' standing and have a clean disciplinary record. Whilst you were critical of the school leadership, you indicated in your first interview that you did not feel intimidated or frightened by the Senior Leadership Team. Whilst we noted that that view changed when you gave oral evidence before us we regard the original statement you gave to the investigating officer was more likely to be credible.

We have come to the conclusion that given the very severe interference with what should be a transparent examination system, that the appropriate entry penalties gross misconduct. We have considered lesser penalties but have rejected them due to the seriousness of the proven allegations.

We then looked at whether there were any exceptional circumstances which were such that would justify a lower penalty.

We are not satisfied that you showed any genuine insight into what had occurred.

We are not satisfied that you fully appreciated the enormity of your behaviour.

You did not volunteer information in this particular case. It was only after a second interview that you answered specific questions involving the exam irregularities when they were put to you as a result of evidence obtained from Ms Hughes. You would have known the exam irregularities prior to your first interview but did not volunteer that information to the Investigating Officer.

> We have taken into account your experience and resilience to the behaviour by the Senior Management Team.
>
> Having taken all these matters into account, we are not persuaded that any penalty other than dismissal for gross misconduct is appropriate in all the circumstances and have instructed Redcar and Cleveland Borough Council to terminate your contract with immediate effect."

5.17. On 23 May 2017 the claimant appealed against her dismissal. Her trade union representative Richard Matkin set out the grounds of appeal as follows:

> "1. The information presented to the hearing has not been fully considered.
>
> 2. The level of sanction imposed is unfair and disproportionate.
>
> 3. That unfair procedures were used during the investigation and hearing, outwith the disciplinary policy."

The notice of appeal then provided 14 more detailed points of appeal.

5.18. An appeal hearing took place on 4 July 2017. The panel was chaired by Andrew Wappatt and included Helen Hall, a member of the management committee of EOTAS and Dave Jennings, a member of the Interim Executive Board of Pathways School. The claimant attended and was represented by Richard Matkin. Bernard Hodgson, solicitor attended as legal adviser to the panel. The management case was presented by Andy Brown and he was accompanied by Linda Halbert who had been on the disciplinary hearing panel.

5.19. Two witnesses attended at the request of Mr Matkin on behalf of the claimant. These were Emily Hughes and Lisa Young.

5.20. On 13 July 2017 Andrew Wappatt wrote to the claimant setting out the outcome of the appeal. The latter went through the detailed grounds of appeal and set out the findings. The conclusion was then set out as follows:

> "You, including your representative, effectively conceded that the allegations were factually made out and that the main thrust of his appeal on your behalf was towards the appropriateness of the sanction, namely summary dismissal. We have reviewed what has been said by the disciplinary panel in this regard. We find nothing within that rationale which leads us to a conclusion that their decision was unreasonable in any way.
>
> You have clearly and knowingly taken actions which bring the examination system into disrepute. You have failed to

whistleblow in circumstances which, without question, should have led you to take that step (as accepted by you). You appear genuinely not to understand the seriousness with which this has been treated and we believe this is consistent with the disciplinary panel's view that you fail to show "any genuine insight" into what had occurred or the "enormity of your behaviour". We conclude that it was perfectly reasonable of the disciplinary panel to reach a decision that you were guilty of gross misconduct and, having taken full account of all matters in mitigation put forward by you or on your behalf, that summary dismissal was an appropriate sanction.

5.21. The claimant presented a claim of unfair dismissal to the Employment Tribunal on 12 October 2017.

The Law

6. Where an employee brings an unfair dismissal claim before an Employment tribunal, it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons in section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason the Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with section 98(4) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Conduct is a potentially fair reason for dismissal under section 98(2).

7. In determining the reasonableness of the dismissal with regard to section 98(4) the Tribunal should have regard to the threepart test set out by the Employment Appeals Tribunal in British Home Stores Limited v Burchell [1978] IRLR379. That provides that an employer, before dismissing an employee, by reason of misconduct, should hold a genuine belief in the employee's guilt, held on reasonable grounds after a reasonable investigation. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in Iceland Foods Limited v Jones [1982] IRLR439. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for that of the employer, but should rather consider whether the dismissal had been within "the band of reasonable responses" available to the employer. In the case of Sainsbury's Supermarkets Limited v Hitt [2003] IRLR23 the Court of Appeal confirmed that the "band of reasonable responses" approach applies to the conduct of investigations as much as to other procedural and substantive decisions to dismiss. Providing an employer carries out an appropriate investigation and gives the employee a fair opportunity to explain his conduct, it would be wrong for the Employment Tribunal to suggest that further investigation should have been carried out. For, by doing so, they are substituting their own standards as to what was an adequate investigation for the standard that could be objectively expected from a reasonable employer. In Ucatt v Brain [1981] IRLR225 Sir John Donaldson stated:

> "Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment,

imagining themselves in that position and then asking the question, 'Would a reasonable employer in those circumstances dismiss', seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question 'Would we dismiss', because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, 'Well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing', because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances".

8. Stephenson L J stated in Weddel v Tepper [1980] IRLR 96:

"Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, 'carried out as much investigation into the matter as was reasonable in all the circumstances of the case'. That means that they must act reasonably in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably".

9. In the case of A v B [2003] IRLR 405 the EAT stated:

"In determining whether an employer carried out such investigations as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee".

10. In the employment context "gross misconduct" is used as convenient shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Exactly what type of conduct amounts to gross misconduct will depend on the facts of the individual case. Generally to be gross misconduct, the misconduct should so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment. Thus in the context of section 98(4) of the 1996 Act it is for the Tribunal to consider:

(a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct and

(b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

11. The question of disparate treatment was considered by the EAT in the case of MBNA Ltd v Jones, EAT, 1.9.15 (0120/15).The EAT pointed out that, when considering a claim of unfair dismissal based on disparity, the Tribunal must focus on the treatment of the employee bringing the claim. if it was reasonable for the employer to dismiss this employee, the mere fact that the employer was unduly lenient to another employee is neither here nor there. The EAT referred to the case of Hadjioannou v Coral Casinos Ltd 1981 IRLR 352, EAT, in which it was held that an employer's decision made in a truly parallel case may support the argument that it was not reasonable to dismiss the employee, but it will be rare for the facts to be sufficiently similar. The Tribunal had erred by considering whether the respondent was unreasonably lenient in the other the case of another employee. It should have focused on its treatment of the claimant, since it was he who was claiming unfair dismissal.

12. The Hadjioannou test provides scope for a dismissal to be taken outside the range of reasonable responses by a lack of consistency in truly parallel circumstances, however, the Tribunal should be aware of the risk of the adopting a substitutionary mindset when addressing the question of whether the circumstances were in fact parallel.

13. One of the factors that a Tribunal has to consider when assessing compensation in a case where there is a substantively fair reason for the dismissal but where there had been procedural failings in the dismissal process, is whether the employee would still have been dismissed if a proper procedure had been followed. If the Tribunal concludes that even if a fair procedure had been followed, dismissal would still have occurred then that can sound in the compensation that is awarded. In Polkey v. AE Dayton Services Limited [1988] ICR 142 the House of Lords approved the remarks of Browne-Wilkinson J in Siliphant's case [1983] IRLR 91:

> "There is no need for an 'all or nothing' decision; if the Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the nominal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."

14. If the Tribunal finds that the claimant caused or contributed to her dismissal, then the basic award may be, and the compensatory award must b,e reduced by such proportion as it considers just and equitable. If the employee substantially contributed to his own dismissal then this will mean a substantial percentage reduction in the award, even of 100%, leaving the employee with a finding of unfair dismissal but no compensation. This is usually relevant in respect of misconduct dismissals.

15. I had the benefit of written submissions from Mr Welch and Mr Anderson together with further oral submissions provided by each of the representatives. These submissions were helpful. They are not set out in detail but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

16. It was submitted by Mr Welch that the respondent failed to carry out a reasonable investigation. The allegations were such as to amount to allegations of fraud and dishonesty and the consequence of the dismissal was likely to result in the loss of the claimant's professional reputation and prevent her from securing future employment in teaching. This meant that a careful conscientious and full investigation was required in accordance with A v B.

17. Mr Anderson submitted that the case was essentially about admissions, whether full or partial, and the effect of those admissions. The Tribunal's scrutiny of the investigation must be seen in the context of the admissions made by the claimant. He referred to the case of CRO Ports London Ltd v Wiltshire UKEAT/0344/14/DM in this regard in which a Tribunal's conclusions were said to have been derived from its own findings, on the evidence before it, not that before the respondent and by adopting that approach, Eady J said the Tribunal failed to see the significance of the admissions made by the claimant from the respondent's perspective at the time.

18. In this case, there were some flaws in the investigation. It was pointed out that both Andy Brown and Andrew Wappatt criticised the investigation and it is clear that it could have been improved. However, I have considered the total process including the appeal. I am satisfied that the respondent carried out a detailed and thorough investigation.

19. There were four allegations against the claimant, three of these were upheld and one was partially upheld. These were serious allegations. The claimant did make significant admissions.

20. The claimant criticised the investigations in respect of allegation 1. These criticisms were with regard to a failure to identify or examine the coursework or the identity of the pupils involved. It was unclear which examination regulations applied.

21. The claimant admitted typing up the pupils' work. The disciplinary panel and appeals panel were made up of experienced teachers who were not acquainted with the claimant. The question of which examination regulations applied was still an issue at the Tribunal hearing. It is stated in the appeal outcome letter "We note that we are not talking terms of technicalities here but matters that are so basic as to be clearly not permitted."

22. I am satisfied that there was a reasonable investigation. The question of which were the applicable regulations does not take the investigation outside the band of reasonable responses, even taking into account the severe consequences for the claimant. The claimant admitted that the pupils' work had been typed up for them and

that when questioned at the appeal hearing as to whether she thought it would have been malpractice she had replied “possibly, yes”.

23. With regard to allegation 2, the question was with regard to substitution of another pupil’s work for a missing element of one student’s coursework. It was submitted on behalf of the claimant, that no effort was made to understand the coursework and identify the plagiarism. The coursework was purely group work and, therefore, attracted no individual mark.

24. In the summing up on behalf of the claimant at the appeal hearing, her trade union representative stated that there was a single occasion on which coursework was changed and it was said “we do accept that it was an error of judgment but you do not dismiss on that”. At that stage the question appeared to be one of the level of the sanction that should be imposed. The claimant’s trade union representative had said that the sanction of gross misconduct was grossly disproportionate and should be reviewed.

25. In respect of allegation 3, this was partially found not proven against the claimant. The claimant admitted instructing the teaching assistant to type up the pupils’ work.

26. It was agreed by both parties that allegation 4 was the most important issue, central to and the ‘nub’ of the case.

27. The claimant was in possession of the examination papers on the day after the examination had taken place. Mr Anderson referred to the summing up on behalf of the claimant at the appeal hearing in which it was stated that the claimant “expressed her desire for GL not to do it. It is the level of sanction that is disproportionate in the school that is chaotic”. The claimant told the respondent that she had begged Graeme Lewis not to take the exam paper to the pupil but she could not stop him leaving with it.

28. Mr Welch, on behalf of the claimant submitted that, following the appeal, the claimant had been found guilty of a lesser offence in that she had not deliberately engaged in exam malpractice and there was no evidence of her motive in this regard. The respondent should have analysed how this might affect the sanction but no adjustment had been made. There was a culture of bullying and intimidation to facilitate the respondent’s aim of achieving better exam results by illegitimate means. He submitted that to report wrongdoing, knowing it will almost certainly result in the loss of employment, is akin to an instruction to jump and sit at the same time. It cannot possibly be within the range of reasonable responses to dismiss for failing to comply with contradictory instructions.

29. Mr Anderson did not accept the label of lesser charge. He submitted that the charge was just as serious and the integrity of the exam system depends on it. To worry that Graeme Lewis might lose his job was not mitigation for failing to uphold her own professional standards. The claimant could have approached the governing body, the Council, the examinations board or her own trade union. The claimant was an experienced teacher she was on the senior leadership team and she had experience of management.

30. I am satisfied that the reason for the claimant's dismissal was that of conduct. This did not appear to be in dispute.

31. I am satisfied that the respondent held a genuine belief in the claimant's guilt. The evidence was clear in this regard and there had been a detailed investigation. If there were any flaws in the investigation, these were corrected at the appeal stage and I have taken the whole disciplinary and appeals procedure into account. I am satisfied that there was a reasonable investigation and the respondent had reasonable grounds for reaching its belief in the claimant's guilt. With regard to the central issue of allegation 4, the claimant's admission that the Teaching Assistant asked her for an examination paper to take to the pupil who had not sat the exam and that she did not tell anyone provides reasonable grounds for the respondent's belief in the claimant's guilt.

32. I have considerable sympathy with the claimant. It was clear that there was a culture of bullying and intimidation in this school. The Headteacher and Assistant Head remain in employment and are now teaching at other schools. The Teaching Assistant who took the examination paper to the pupil who had not attended the exam was not disciplined. However, I do not consider this to be a case in which I can consider inconsistent treatment. I have not been provided with any evidence that was considered in relation to the cases in respect of the other employees. I have to concentrate on the respondent's treatment of the claimant.

33. Whatever sympathy I may have for the claimant does not take the decision to dismiss outside the range of reasonable responses. I must not simply consider whether I think the dismissal was fair or substitute my decision as to what was the right course to adopt for that of the respondent. I must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to any of my own subjective views, whether the employer has acted within a band of reasonable responses. The focus should be on the fairness of the conduct of the respondent at the time of the investigation, dismissal and appeal and not on whether the claimant has suffered an injustice.

34. The respondent had reasonable grounds on which to conclude that the claimant was guilty of misconduct and should be dismissed. The claimant was an experienced teacher and it was reasonable for the respondent to conclude that she should have been aware of the seriousness of her actions and the potential consequences in respect of the integrity of the exam system.

35. In all the circumstances, the claim of unfair dismissal is not well founded and is dismissed.

Employment Judge Shepherd
12 February 2018